



October 1, 2021

The Honorable Ron Wyden
Chairman
U.S. Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard Neal
Chairman
U.S. House Committee on Ways and Means
1102 Longworth House Office Building
Washington, DC 20515

The Honorable Mike Crapo
Ranking Member
U.S. Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Kevin Brady
Ranking Member
U.S. House Committee on Ways and Means
1139 Longworth House Office Building
Washington, DC 20515

Re: Tax Provisions in House Reconciliation Legislation or Being Considered

Dear Chairmen Wyden and Neal, and Ranking Members Crapo and Brady:

The American Institute of CPAs (AICPA) provides comments on various tax issues important to the accounting profession that are in the [language reported out by the House Ways and Means Committee](#) under its jurisdiction for the reconciliation bill (“House reconciliation legislation”), or that might be considered as legislation is further considered.

The AICPA is a long-time advocate for a tax system based on principles of good tax policy.¹ We look forward to working with Congress as the reconciliation package moves forward to ensure that the proposed changes are administrable, equitable, and meet the needs of both taxpayers and tax practitioners. In this regard, we highlight some of the key issues we have identified for your consideration. We note that the items listed are not in any priority order, and we likely will have additional comments and insights as we further analyze the reconciliation legislation. In addition, as Congress moves forward with a reconciliation bill, it is important that special care is given to transition rules and to provide sufficient time and flexibility to implement the transition rules and offer penalty relief as needed.

Specifically, the AICPA provides comments on the following tax issues:

- I. AICPA Supported Provisions in the House Reconciliation Legislation
 1. Individual Tax Provisions
 2. Employer-Provided Dependent Care Assistance Exclusion

¹ See [AICPA Principles of Good Tax Policy](#).

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3. Temporary Rule to Allow Certain S Corporations to Reorganize as Partnerships Tax-Free
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 6. Certain Losses under IRC Section 165(g)
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1. IRS Regulation of Paid Tax Return Preparers
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The AICPA is the world's largest member association representing the accounting profession, with more than 428,000 members in the United States and worldwide, 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 welcome the opportunity to discuss these comments on the reconciliation legislation or to answer any questions that you may have. If you have any questions, please contact; Edward Karl, AICPA VP Taxation, at (202) 355-4892, or edward.karl@aicpa-cima.com; Lauren Pfingstag, Director – AICPA Congressional or Political Affairs, at (407) 257-0607, or lauren.pfingstag@aicpa-cima.com; or me at (601) 326-7119 or JanLewis@HaddoxReid.com.

Sincerely,



Jan Lewis, CPA
Chair, AICPA Tax Executive Committee

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The Honorable Richard Neal
The Honorable Mike Crapo
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cc: Members of the Senate Committee on Finance
Members of the House Committee on Ways and Means
Mr. Thomas Barthold, Chief of Staff, Joint Committee on Taxation
The Honorable Janet Yellen, Secretary of the Treasury
The Honorable Lily Batchelder, Assistant Secretary for Tax Policy, Department of the Treasury
Mr. Mark Mazur, Deputy Assistant Secretary for Tax Policy, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
The Honorable William M. Paul, Chief Counsel, Internal Revenue Service

AMERICAN INSTITUTE OF CPAs

Tax Provisions in Reconciliation Legislation or Being Considered

October 1, 2021

I. AICPA SUPPORTED PROVISIONS IN THE HOUSE RECONCILIATION LEGISLATION

The AICPA generally supports the following provisions in the House reconciliation legislation and in certain instances provides suggestions for improvement.

1. Individual Tax Provisions

Child Tax Credit

The AICPA supports the administrability enhancements and safe harbor exception to the child tax credit made by Sections 137101, 137102 and 137103 and realize that if not all the rules are followed correctly for the advance payments, there could be under withholding and a tax liability when the income tax return is filed. These provisions relate to the extension and modification of the child tax credit and advance payments for 2022, and the establishment of a monthly child tax credit with advance payments through 2025.

We also support the addition of Internal Revenue Code (IRC or “Code”) section² 24(j)(2)(B)(v) to disallow the safe harbor exception for taxpayers who obtained the advance child credit based upon fraud or the intentional disregard of the rules and regulations. Furthermore, we also support the addition of IRC section 24(i)(5), which allows the taxpayer’s prior year modified adjusted gross income (AGI) to be used for the current year modified AGI in calculating the credit if the prior year modified AGI is lower. This provision allows taxpayers the certainty of knowing the minimum amount of credit to which they are entitled and for which they are potentially receiving an advance payment. Finally, the addition of IRC section 24(i)(6), which provides for inflation adjustments, enhances the consistency and reliability of tax policy and should be considered for all fixed dollar amounts in the Code.

We do note regarding administrability of the previously enacted monthly advance child tax credit provision has caused taxpayer confusion, challenges with the Internal Revenue Service (IRS) portal, and problems with children who are claimed in different years by different taxpayers. We are concerned about the many taxpayers who will be receiving advance child tax credit payments for the full amount in future years but who also have Forms W-4, *Employee’s Withholding Certificate*, with their employers indicating the number of dependents that qualify for the credit, and the Forms W-4 take into account the child tax credit in calculating the tax withholding amount for employees. We note that this is likely to be a problem in 2021 when half of the credit was paid out in 2021, and more of a concern in 2022 if the full credit is paid out in advance payments beginning in 2022, if there is no revision to the Form W-4 or the withholding tables that both employers and employees comply with, resulting in many employees likely owing tax when the

² All references to “section” (unless referencing the House reconciliation legislation) are to the Internal Revenue Code of 1986, as amended, and all references to “Reg. §”, “Prop. Reg. §”, and “regulations” are to U.S. Treasury regulations promulgated thereunder, unless otherwise specified.

income tax return is filed. Although Congress is trying to advance the child tax credit payments to taxpayers to provide the funds quicker, the advance child tax credit payments are likely to cause surprise balances owed when they file their tax return, a result likely not intended. We remind Congress how the credit works in conjunction with withholding, and we suggest Congress include instructions regarding changes to withholding forms, calculations, and withholding tables in light of the continuation of advance payments.

Child and Dependent Care Tax Credit

The AICPA supports the enhancements to the child and dependent care tax credit in Section 137201, which would increase the base credit which has not been adjusted since the introduction of the credit in 1986, increase the maximum credit amount, raise the AGI threshold, and provide inflation adjustments.

The AICPA recommends considering inflation adjustments for all fixed dollar amounts in the Code to provide increased consistency and reliability of tax policy.

2. Employer-Provided Dependent Care Assistance Exclusion

The AICPA supports Section 137202 that makes permanent an increase in the exclusion for employer-provided dependent care and provides inflation adjustments that allow consistency and reliability of tax policy.

3. Temporary Rule to Allow Certain S Corporations to Reorganize as Partnerships Tax-Free

The AICPA supports the temporary rule in Section 138509 providing for an electable tax-free conversion of certain eligible S corporations to partnerships. Changing the temporary rule will allow for continued flow-through taxation and provide more flexibility to S corporation shareholders. Generally, an S corporation cannot convert to a partnership without a taxable event. The proposal would permit S corporations that have continually maintained an S election since May 14, 1996, to make a tax-free conversion to a partnership during 2022 or 2023.

The AICPA recommends expanding this provision to all S corporations formed after 1986 regardless of whether the entity: (i) has always been an S corporation; or (ii) elected to be an S corporation after operating as a C corporation as long as there is no built-in gain (BIG) liability at the time of the conversion into a partnership. In addition, we recommend excluding from the provision S corporations with accumulated earnings and profits (AE&P). An S Corporation with AE&P should not be permitted to convert tax-free into a partnership or, if permitted, the conversion should be taxable to the extent of the AE&P.

4. IRC Section 174 Amortization Deferral

The AICPA supports Section 138516 regarding the research and experimental expenditures provision that allows for the deferral of IRC section 174 amortization. The provision would delay the effective date of amended IRC section 174³ to amounts paid or incurred until tax years

³ P.L. 115-97 (commonly referred to as the Tax Cuts and Jobs Act (TCJA)).

beginning after December 31, 2025. The TCJA requires amounts defined as specified research or experimental expenditures, including any software development costs, to be capitalized and amortized ratably over a five-year period. Those expenditures that are attributable to research that is conducted outside of the United States (U.S.) are required to be capitalized and amortized ratably over a period of 15 years. The delay in the effective date will allow businesses to continue expensing research and development costs for an additional four years, thus allowing for simplicity in tax compliance and the minimization of confusion related to identifying costs that should be capitalized versus expensed.

We further recommend permanent extension of deductions for IRC section 174 expenditures in furtherance of simplicity and to avoid conflict and litigation. Requiring capitalization will decrease the administrability of the Code.

5. International Tax Provisions

Restoration of Former IRC Section 958(b)(4) Deduction of Foreign Source Portion of Dividends Limited to Controlled Foreign Corporations

The AICPA supports Section 138128, which restores former IRC section 958(b)(4) related to the deduction of the foreign source portion of dividends limited to controlled foreign corporations (CFCs). The repeal of this provision in the TCJA was concerning and resulted in a reduced investment by foreign-owned companies in the U.S. labor market. In addition, multinational companies are actively avoiding the U.S. market because they would become subject to phantom income due to “reverse attribution,” which is a direct result of the repeal of IRC section 958(b)(4). The AICPA’s support of this provision is based on an understanding that taxpayers, including those indirectly affected, have the ability to statutorily elect to opt out of the repeal. The purpose of such election is to protect taxpayers who conducted their affairs based upon the repeal of IRC section 958(b)(4) pursuant to the TCJA.

Base Erosion and Anti-Abuse Tax

The AICPA supports Section 138131 related to the modification of base erosion and anti-abuse tax (BEAT). Specifically, a safe harbor is put forth in the provision where a taxpayer may elect to treat as an indirect cost which is not a base erosion payment, 20% of the amount paid or incurred to such related foreign party for the acquisition of inventory, which will ease the administrative burden associated with the look-through rules. Congress could also consider increasing the percentage above 20%, as requiring U.S. taxpayers to understand the inventoriable costs of a foreign related party, particularly in the tiered transaction fact pattern, could require a significant amount of work. The treatment of costs of goods sold (COGS) under BEAT will significantly impact the scope of the provision. Congress should give thorough consideration to the policy consequences of revisiting the COGS provision. Also, the overall exceptions for payments subject to sufficient foreign tax and payments on which U.S. tax is imposed are helpful, as well as the allowance of IRC section 38 credits to offset modified taxable income (MTI).

GILTI Carryforward Losses

The AICPA supports Section 138126 that incorporates changes to Global Intangible Low Taxed Income (GILTI) and allows for the ability to carryforward losses.

Foreign Tax Credits

The AICPA supports Sections 138124 and 138127 regarding modifications to the determination of the deemed paid credit for taxes properly attributable to tested income and modifications to foreign tax credit carryforwards; particularly, the replacement of the 20% haircut with a 5% haircut, the inclusion of taxes properly attributable to tested loss and the allowance for the carryforward of foreign taxes in the GILTI basket. However, the AICPA suggests Congress not include the Section 138124 reduction in the term of the foreign tax credit adjustment statute of limitations from 10 years to 5 years. United States foreign tax credit adjustment claims are often made due to audits by foreign tax authorities, and such audits frequently take numerous years to complete. The current 10-year statute of limitations should be retained due to the length of time needed to complete these foreign audits. If the statute was shortened to 5 years, U.S. taxpayers would be subject to double taxation if the foreign tax authorities take longer than 5 years to complete their audit, adjust the foreign return and assess additional foreign tax, and the U.S. statute of limitations has expired due to the shortened period. As a general observation, the shift to a country-by-country calculation would bring significant complexity for tax administration and taxpayer compliance.

IRC Section 78 Gross-up

The AICPA supports Section 138129 that amends IRC section 78 and removes its reference to IRC section 960(b) (deemed paid taxes related to previously taxed earnings and profits (PTEP) distributions). As the AICPA previously suggested,⁴ there is no policy justification for applying IRC section 78 to IRC section 960(b) foreign taxes. Specifically, PTEP distributions are excluded from the gross income of a U.S. shareholder. Consequently, there is no deduction available to a U.S. shareholder for U.S. tax purposes with respect to taxes deemed paid under IRC section 960(b) that would need to be grossed-up by IRC section 78.

II. AICPA CONCERNS WITH CERTAIN TAX PROVISIONS IN THE HOUSE RECONCILIATION LEGISLATION

The AICPA has concerns with the following provisions in the House reconciliation legislation.

1. IRC Section 199A – Deduction for Qualified Business Income

The AICPA has demonstrated a long-standing commitment in providing decision makers with comments regarding various statutory and administrative aspects of the qualified business income (QBI) deduction, as included in Section 138204. Most recently, we commented⁵ on [S. 2387](#), the Small Business Tax Fairness Act, introduced on July 20, 2021, to eliminate the distinction between Specified Service Trade or Business (SSTB) and Non-SSTB, remove the marriage penalty, and simplify the section 199A deduction, among other recommendations.

The AICPA urges Congress to permit all non-corporate business owners to avail themselves of the QBI deduction. Professional services firms, such as accounting firms, are an important sector in

⁴ See AICPA letter, "[AICPA International Tax Legislative Proposals – Simplification and Technical Proposals](#)" (May 5, 2021).

⁵ See AICPA letter, "[The Small Business Tax Fairness Act – Improving the Deduction for Qualified Business Income Under Section 199A](#)" (August 24, 2021).

our economy and heavily contribute to the nation's goals of creating jobs and better wages. They are an integral part of the voluntary tax compliance process. In today's economy, professional service pass-throughs are increasingly competing on an international level with businesses organized as corporations, require a significant investment in tangible and intangible assets, and rely on the contribution of salaried, non-equity professionals to generate a significant portion of the revenue. Restricting the IRC section 199A deduction to individual business owners of SSTBs above specified income thresholds creates inequity and ignores the reality that these businesses hire employees and operate in a global business environment. In the interest of equity, the AICPA recommends the elimination of the SSTB distinction.

Further, the AICPA does not support the inclusion of a marriage penalty, as taxpayers should not face higher taxes solely because they are married. Tax policy should be equitable and simple. Having no distinction in the QBI deduction among married filing jointly, single, and head of household taxpayers creates a marriage tax penalty for certain individuals. Tax laws and policy should not penalize marriage.

We recommend a simplified approach that: (i) allows taxpayers to compute their IRC section 199A deduction on an aggregated basis; (ii) reduces the administrative burdens of triple net leases and royalties; and (iii) provides no carryforward loss to a succeeding taxable year to the extent a taxpayer incurs a current overall loss from qualified trade or business income.

2. IRC Section 461(l) – Excess Business Losses

The AICPA suggests making further changes to Section 138205 regarding IRC section 461(l) excess business losses.

Section 138205 amends IRC section 461(l) to make permanent the limitation on excess business losses to \$250,000 per year (\$500,000 MFJ) indexed for inflation. Additionally, it alters the treatment of the amount that exceeds the threshold. Under current law, the unallowed loss is treated as a net operating loss (NOL) that is carried forward to the following year and is then subject to the NOL limitations. Under the House reconciliation legislation, instead of treatment as an NOL in the following year, it is treated as an additional business loss and is again subject to the threshold (we will refer to this as “retesting”).

If this provision is ultimately adopted, there are several collateral matters that must be addressed in the legislation to make the provision fair and administrable:

- The statute must classify gain and loss from the disposition of a partnership or S corporation as business gain or loss so that such items are included in the retesting calculation. IRC section 1411(c)(4) and Reg. § 1.469-2T(e)(3) should be used as the model for this purpose.
- Any current or previous loss associated with a business that is completely disposed of in a fully taxable transaction should no longer be considered within IRC section 461(l) because this loss represents an actual economic loss to the taxpayer that should be allowed to offset nonbusiness income. In many cases, after the disposition of a business, the taxpayer will no longer have any business income to use against the loss. The economic loss would only be allowed \$500,000 per year, inappropriately delaying the loss recognition. We suggest using IRC section 469(g)(1) as the model for this purpose.

- The current and proposed statute results in unutilized losses at death, which is inequitable. One solution is to provide that IRC section 461(l) does not apply in the year of a taxpayer's death. Another solution is to allow any disallowed IRC section 461(l) losses to be carried over to the taxpayer's estate.
- The proposed change in the statute reclassifies the disallowed loss from an NOL to an IRC section 461(l) loss creating its own tax attribute. In the case of the termination of a trust or estate, these losses will disappear. We recommend amending IRC section 642(h) to include these losses in the short list of attributes that will pass to the beneficiary that succeeds to the property upon termination.

3. IRC Section 162(m) – Limitation on Deduction of Excess Employee Remuneration

The AICPA has concerns with the effective date as provided in Section 138501 due to the negative effect of the provision on audited financial statements. Legislation with effective dates near the date of enactment create significant confusion and administrative complexity.

4. Employee Benefits Tax Provisions

Contribution Limit for Individual Retirement Plans of High-Income Taxpayers with Large Account Balances

The AICPA has concerns with the ability to efficiently implement Sections 138301 and 138302. There are many elements (e.g., how to determine the timing of AGI and account balances, the timing of distribution and contribution limits, and the inclusion of qualified plan balances) required for compliance that must be obtained from different sources, some of which are not readily available, and most are not available at the same time.

AGI can only be determined after the taxpayer files Form 1040, *U.S. Individual Income Tax Return*. Therefore, taxpayers may not know, until as late as October of the following year, that they are subject to these rules after making a contribution to their individual retirement account (IRA) or defined contribution plan earlier in the year, only to be required to make a distribution under these rules. In addition, if an individual has both an IRA and a participant account in a defined contribution plan maintained by a former employer, the taxpayer is dependent on the plan administrator to provide the account balance. Many taxpayers have defined contribution plan account balances in plans maintained by former employers for which they do not receive participant account statements due to various reasons (ex. loss of contact). Therefore, these taxpayers will not have the information necessary to comply with the requirements of Sections 138301 and 138302.

Rollovers to Roth IRAs and Accounts

Section 138311, regarding the tax treatment of rollovers to Roth IRAs and plan accounts ("Accounts"), will have unintended negative consequences for many IRA owners. Many individuals have made nondeductible contributions to their IRAs or Accounts over the years without converting to a Roth IRA or Account. Under this provision, these individuals will only be permitted to convert taxable and not after-tax amounts to a Roth IRA or Account. The after-tax

amounts contributed over time to traditional IRAs or Accounts will be “stranded,” preventing the IRA owner from fully consolidating his or her retirement plan balances.⁶

Prohibition on Certain IRA Investments

Sections 138312 and 138314 provide for a 2-year transition period; however, because many of these assets are closely held businesses or have limited markets, it is unlikely that the 2-year transition period is sufficient for account holders to remove the assets from the IRA. In addition, any transfer of assets out of the IRA to a disqualified person to comply with this rule should not be considered a prohibited transaction.

Statute of Limitations with Respect to IRA Noncompliance

The AICPA opposes a longer statute of limitation that would apply retroactively, creating systemic unfairness to taxpayers. Section 138313 provides for a six-year statute of limitations applicable to the reporting of information related to the valuation of an IRA’s investment assets that would lead to an imposition of a tax, or for the assessment of any prohibited transaction excise tax imposed by IRC section 4975. AICPA also notes that this six-year statute of limitations also applies to reporting and prohibited transaction issues that arise prior to December 31, 2021 for which the current, three-year, statute of limitations is still open as of December 31, 2021. This has the effect of making the six-year statute of limitations retroactively effective.

5. Trust and Estate Tax Provisions

Valuation Concerns

The AICPA reminds Congress of its recently submitted concerns⁷ with the proposal in the Department of the Treasury’s (“Treasury”) *General Explanations of the Administration’s Fiscal Year 2022 Revenue Proposals* (“Green Book”), issued May 2021, as part of the American Families Plan (AFP) to reform the taxation of capital income and treat transfers of appreciated property by gift or on death as realization events. The AICPA is concerned that some of the provisions both within the Green Book proposal and in Section 138210 regarding valuation rules for certain transfers of nonbusiness assets are inconsistent with well-established valuation principles and could result in valuations that do not reflect the true economic value of transferred assets. These inconsistencies could, in turn, negatively affect taxpayers.

Our valuation-related issues with Section 138210 are from business appraisers’ perspectives, including our concerns with how Section 138210 will create two different regimes for valuation and assumes taxpayers have a level of access to information that may not exist.

The AICPA is concerned that the legislation precludes the application of a discount when nonbusiness assets are transferred by the taxpayer. This treatment will result in two different regimes for valuation: one for transfers of these nonbusiness assets for income tax purposes (e.g., on normal business transactions, income tax reporting, and charitable gifts, etc.), and a second for

⁶ Any investment may not be converted, even if the individual is not circumventing annual contribution limits by making after-tax contributions just prior to Roth conversion (aka a backdoor Roth).

⁷ See AICPA letter, “[Green Book American Families Plan Proposal - Reform the Taxation of Capital Income and Treat Transfers of Appreciated Property by Gift or on Death as Realization Events](#)” (August 24, 2021).

gift and estate tax purposes, which creates confusion regarding post-transfer basis and perhaps an opportunity for taxpayers to create artificial transactions in order to “game” the basis rules to exploit the lowest tax result.

Another concern with the legislation is the requirement that a 10% partial interest owner provide a value that represents a proportional share of the value of the entire entity, which assumes that every interest holder, including those lacking control over the property, has equal access to adequate information to determine the fair market value of the entire property. This assumption is contrary to reality for many minority interest holders, who often are not privy to the same scope of data available to controlling shareholders. Although the issues regarding access to information by holders of partial interests, especially minority interests, has been and continues to be a valuation issue, we are concerned that the legislation requires that the valuation *must* be based on the full value of the whole asset. This would be a new requirement, and in light of difficulties obtaining information to value the whole asset, it is not reasonable. Whether the valuation is of an individual property with multiple owners or of an entity with multiple members, partners, or shareholders, this difficulty in accessing data needs to be considered in any legislation.

Grantor Trusts

Section 138209 regarding certain tax rules applicable to grantor trusts is drafted too broadly and may affect more trusts than intended. In addition to affecting defective grantor trusts, the provision appears to affect statutorily sanctioned grantor retained annuity trusts (GRATs), qualified subchapter S trusts (QSSTs), and qualified personal residence trusts (QPRTs). For instance, if GRATs and QPRTs convert to non-grantor trusts (or the trust assets are distributed) when the term expires, a deemed taxable gift may occur at that time. A deemed taxable gift nullifies the taxpayer benefit of having a statutorily sanctioned GRAT or QPRT. Clarifying the scope of the Section 138209 would be helpful.

Additionally, Section 138209 could harm a beneficiary of a QSST⁸ with estate tax inclusion, leaving electing small business trusts (ESBTs) as the only permissible trust to be an S corporation shareholder without estate tax inclusion. Section 138209 could also potentially pull back into an estate: irrevocable life insurance trusts (ILITs), grantor charitable lead annuity trusts (CLATs) and IRC section 679 (foreign grantor) trusts. For a beneficiary defective trust, clarity is needed regarding whether additional contributions by the grantor would result in estate inclusion for the beneficiary.

Gift tax consequences of creating a defective grantor trust are also unmodified, continuing to treat gifts to these types of trusts as reportable on a gift tax return and utilizing the exemption (or triggering gift tax). The legislation provides proper adjustments if these same assets are later included in an estate or if a taxable gift occurs due to a distribution or a conversion, but this increases administrative complexity. Additionally, a trust that is partially exempt and partially non-exempt (due to contributions made after the date of enactment) further creates administrative complexity.

⁸ Under current law, QSSTs elect to be treated as grantor trusts for the purpose of being an eligible S corporation shareholder.

In addition, Congress should clarify the term “contribution.” The legislation indicates that they are applicable to any portion of a trust established before enactment which is attributable to a contribution to the trust made on or after such date. Clarification should include whether “contribution” includes new sales to existing grantor trusts, an exercise of an IRC section 675(4) swap power and modifications to existing intentionally defective irrevocable trust (IDIT) notes to extend maturity, or if a reduced interest rate, is construed as a “contribution.” “Contributions” should not include existing sales and loans with pre-enactment grantor trusts where in-kind distributions may be required to make the loan payments as well as the use of in-kind distributions for GRAT payments for a pre-enactment GRAT. Treating such payments otherwise would be fundamentally unfair for existing transactions. For example, for a GRAT or grantor CLAT, the gift is in year one so when the assets pass to the remainder beneficiaries, it should not be a further gift or trigger transaction. Another example of our concern is existing GRATs that may need to satisfy annuity payments with in-kind distributions, such as a 2-year GRAT created in December 2019 when the final payment is made December 2021 as it is likely the final annuity payment would need to be satisfied in kind and would be subject to the higher 25% capital gains rate under the legislation.

Estates

Taxing estates the same as trusts for many of the provisions in the legislation is problematic.⁹ The AICPA recommends¹⁰ that Congress treat estates similar to married filing separately taxpayers for these provisions in the House reconciliation legislation, as well as existing law (such as income tax and net investment income tax). This recommendation would restore estates to their federal tax position from 1954-1986. In addition, qualified disability trusts established for the benefit of disabled individuals should be taxed in the same manner as a married person filing a separate tax return for income and net investment income tax purposes.

For purposes of these tax rates, Congress should treat estates as if they were a continuation of the deceased individual and tax them as such. An estate serves a unique role as being the successor to an individual for a limited period of time during which it winds up the affairs of the deceased individual before distributing the assets to the individual’s heirs. Unlike trusts, estates are only created due to a death - one individual cannot create multiple estates.

Trusts may exist in perpetuity in some states, while an estate is time limited. Most probate courts strive to expedite the collection and disposition of assets, frequently requiring explanations for any delay in distributing the assets and closing the estate. The executor cannot unduly prolong the period of administration of an estate.¹¹ If the administration of the estate is unreasonably prolonged, the estate is considered terminated for federal income tax purposes after the expiration of a reasonable period for the performance by the executor of all the duties of administration.¹²

⁹ See, e.g., Section 138150 regarding IRC section 1202 gains and qualified small business stock, Section 138203 regarding the net investment income tax, Section 138204 regarding the IRC section 199A deduction, and Section 138206 regarding the 3% surcharge (and present law).

¹⁰ See AICPA letter, “[2017 AICPA Compendium of Tax Legislative Proposals – Simplification and Technical Proposals](#)” (December 14, 2016).

¹¹ Reg. § 1.641(b)-3.

¹² For qualified revocable trusts that the trustee elects to treat and tax as part of the estate under IRC section 645, the statute itself provides a termination date for such treatment.

Surcharge on Trusts and Estates

The AICPA suggests exclusion of certain trusts, such as charitable remainder trusts that are generally tax-exempt, from the 3% surcharge under Section 138206. As the legislation is currently drafted, it would only exclude wholly charitable trusts. Congress should specifically exclude grantor trusts as they are disregarded for income tax purposes as a separate trust. This may already be the implication, but a specific reference would make it clear and helpful. We suggest mirroring the trusts excluded from the net investment income tax as provided in Treas. Reg. § 1.1411-3.

6. Certain Losses under IRC Section 165(g)

The AICPA recommends that Congress reconsider Section 138142, which modifies the treatment of certain losses under IRC section 165(g). Section 138142 amends IRC section 165(g) by providing that losses with respect to securities are realized on the day that the event establishing a worthlessness occurs (rather than on the last day of the tax year, as is current law). However, the AICPA cautions that determining the precise date of an event leading to worthlessness may not be administratively possible (e.g., where worthlessness is established based on hopeless insolvency, and not a particular identifiable event or where there are multiple events during the year that could be viewed as identifiable events or that collectively comprise an identifiable event). The provision may add unforeseen complexity and compliance burden.

7. Limitation on Certain Special Rules for IRC Section 1202 Gains

The AICPA opposes Section 138150 related to the limitation on certain special rules for IRC section 1202 gains. The provision eliminates the 75% and 100% exclusion rates for gains realized from qualified IRC section 1202 stock for taxpayers with AGI equal or exceeding \$400,000 (determined without the IRC section 1202 exclusion) for gains recognized after September 13, 2021. This constitutes a retroactive tax increase. For years, these taxpayers have relied on the existing statute to make investment decisions. This proposal injects significant uncertainty as to future investment decisions with the threat of continual IRC changes. If such a limitation is imposed, it should apply to issuances, rather than sales, of stock after September 13, 2021.

8. Modification of Procedural Requirements Relating to Assessment of Penalties

The AICPA opposes Section 138404 relating to the modification of procedural requirements for the assessment of penalties. The check and balance of current IRC section 6751(b)¹³ is necessary to protect taxpayers and provide a fair and just tax system. IRC section 6751(b) also requires at least one level of review of the IRS's most punitive tool. The procedural protection in the current law also ensures that penalties are never used as bargaining chips or to induce a taxpayer into settling a case. Section 138404 would repeal the requirement of prior supervisory approval of assertion of penalties, effective retroactively to 1998. IRS supervisors would, instead, only be

¹³ Under IRC section 6751(b), "No penalty... shall be assessed unless the initial determination of such assessment is personally approved (in writing) by the immediate supervisor of the individual making such determination or such higher-level official as the Secretary may designate." One exception includes penalties "automatically calculated through electronic means." This provision requires, for example, first-level managerial approval before a revenue agent may determine or propose a penalty against a taxpayer during an exam.

required to certify on a quarterly basis that they are in compliance with the requirements of IRC section 6571(a) and related IRS policies.

Efforts should be focused not in reducing taxpayer protections when it comes to penalty assertion, but in preserving and expanding taxpayer protections. The IRS should focus efforts on ensuring consistency in determining whether the penalties should be imposed (abated) for similarly situated taxpayers. This consistency would mitigate, for example, perceived disparate treatment in the abatement consideration of international penalties, such as for Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, or Form 3520, *Annual Return to Report Transactions with Foreign Trusts and Receipt of Certain Foreign Gifts*. Moreover, penalty abatement determinations will be more efficient if the IRS expands abatement authority to telephone customer service personnel, which would eliminate the need for many taxpayers to correspond with the IRS on a notice, thus bolstering taxpayer service and reducing the IRS paper workload.

III. ADDITIONAL COMMENTS

The AICPA has concerns and suggestions regarding other provisions that were not included in the House reconciliation legislation.

1. IRS Regulation of Paid Tax Return Preparers

The AICPA is a steadfast supporter¹⁴ of the goals of enhancing compliance and elevating ethical conduct for all tax preparers. For these reasons, the AICPA strongly supports the regulation of paid tax return preparers outlined in the H.R. 4184, [Taxpayer Protection and Preparer Proficiency Act](#), modeled after the 116th Congress S. 1192, [Taxpayer Protection and Preparer Proficiency Act of 2019](#).¹⁵ Key measures in H.R. 4184 include the following:

- Provides Treasury authority to regulate paid tax return preparers.
- Clarifies that the authority being provided is to reinstitute the IRS's 2011 paid preparer regulatory program.
- Provides the IRS authority to revoke an incompetent or fraudulent preparer's Preparer Tax Identification Number (PTIN).
- Clarifies that certain non-signing preparers – those persons who prepare returns under the supervision of an attorney, CPA or enrolled agent – are not required to obtain a PTIN.
- Requires a U.S. Government Accountability Office (GAO) study on the sharing of information between Treasury and State authorities regarding PTINs issued to paid return preparers and preparer minimum standards.

Additionally, the AICPA supports another element not included in H.R. 4184: mitigation of marketplace confusion. This additional element will further protect taxpayers from misleading marketing tactics by unlicensed tax preparers and ensure truth in advertising. To protect taxpayers, mitigate marketplace confusion, and ensure truth in advertising, it is important that unlicensed

¹⁴ See AICPA letter, "[American Families Plan Proposal – IRS Regulation of Paid Tax Return Preparers](#)" (May 11, 2021).

¹⁵ Introduced by Senate Finance Committee Chairman Wyden on April 4, 2019.

PTIN holders using any paid advertising involving print, television, radio, or other medium – *in which the individual represents themselves as a registered tax return preparer* – should display or broadcast a statement directing the taxpaying public to the IRS website where the differences between the various types of preparers (e.g., qualifications) are explained, and informing the public that the IRS does not endorse any particular tax return preparer.

Ensuring that tax preparers are competent and ethical, and that the IRS has the tools it needs to conduct appropriate oversight, is critical to maintaining taxpayer confidence in our tax system and protecting the interests of the American taxpayer.

2. Financial Account Reporting to Improve Tax Compliance

The AICPA has been monitoring the proposal to create a financial account information reporting regime for reporting gross inflows and outflows. Treasury and Congressional members have assured us that the reporting regime will not require any additional tax reporting from taxpayers. Therefore, we do not express concerns at this moment.

Looking forward, we will continue to monitor this proposal as it possibly moves into legislation and eventually implementation. As issues arise, we will continue to have appropriate discussions regarding administrability and on any impact to the accounting profession.

3. IRS Funding

We understand that enforcement is an important aspect of what the IRS does, however, enforcement actions need to be in balance with the services the IRS provides taxpayers. In order to meet the needs of taxpayers, we encourage the IRS to strive to be a [Modern-Functioning IRS for the 21st Century](#). Aspects of a Modern-Functioning IRS prioritizes customer satisfaction, including from enforcement actions, a modernized technological infrastructure, and provides IRS employees with the experience and training to understand and address taxpayer needs.

The legislative and executive branches should determine the appropriate level of service and compliance they want the IRS accountable to provide and then dedicate adequate resources for the agency to meet those goals.

4. Structural Changes to Subchapter-K (Partnership Taxation)

The AICPA has significant concerns with the [Pass-through Changes Discussion Draft](#),¹⁶ and the AICPA urges the Senate to follow the House and not include Subchapter K changes in the reconciliation legislation. The AICPA is pleased that the House did not include this overhaul.

The AICPA encourages Congress to comprehensively address any Subchapter K policy in proportion to its inherent complexity and macro-economic effects. In that vein, AICPA recommends a long-term view of Subchapter K to minimize the effect on small businesses, new business formation, and the legal arrangements of partners, which generally are business-driven decisions.

¹⁶ Released by Senate Finance Committee Chairman Wyden on September 10, 2021.

Several of the proposals, including the proposed changes to IRC subsections 704(b) and (c), would upend the business climate and economic arrangements to which partners have agreed. These proposed changes in turn will invalidate many partnership agreements, which are legal contracts between those partners. This introduces significant complexity and unfairness to the tax system where partners have relied on the cohesive structure of Subchapter K to efficiently operate their businesses and minimize the “touch points” of the tax system. Several of the proposals inherently create uncertainty in business operations. The cascading legal and economic effects on partnerships due to structural changes in their taxation do not simply target perceived abuses within Subchapter K; they would create unknowable macro-economic effects that may not be apparent for years. The intricacy of Subchapter K requires comprehensive study and many ancillary changes to Title 26 to properly effect a certain policy to minimize a mechanical breakdown of the tax system – in essence, “allow the policy to work.”

The AICPA plans to further analyze and provide additional comments on the discussion draft.

5. Corporate Minimum Tax at 15% of Book Income

The AICPA is pleased that the House reconciliation legislation did not contain a legislative proposal that has been suggested to establish a minimum corporate tax at 15% of a corporation’s book income (determined under income tax principles), while continuing to allow certain net operating loss carryforwards and business tax credits.

If Congress further considers the proposal, the AICPA recommends that Congress clarify the rules associated with implementing a minimum tax on corporate book income as this will likely be complex and have many potentially negative implications. Imposing tax according to financial statement income takes the definition of taxable income out of Congress’s hands and puts it into the hands of industry regulators and foreign countries. A book minimum tax could cut the nation’s economic competitiveness overseas and shift a level of tax decision-making to foreign countries. There are many key conceptual differences in financial income and taxable income, including the idea of materiality. Congress tried a similar book approach in 1986 with the Business Untaxed Reported Profits (BURP). This approach was quickly repealed because many firms and businesses adjusted their financial accounting choices to reduce their income. These types of distortions could potentially hurt the value of companies and harm shareholders and creditors who depend on financial statements for important information. Accounting standards overall (GAAP), should focus exclusively on investors and creditors needs. Public policy taxation goals should not have a role in influencing accounting standards. Independence and objectivity of accounting standards are the backbone of our capital markets system.

Lawmakers have also purposely created differences in book and tax income for specific policy reasons, such as the treatment of depreciation. The AICPA recommends that instead of creating a new tax regime, lawmakers should identify the specific book and tax differences driving their policy concerns and target those with direct legislation.

6. Nonqualified Deferred Compensation

Prior to the passage of the TCJA, the bill introduced in the Senate on November 28, 2017, contained a provision (Title III, Subtitle I, Section 3801), which was ultimately removed, related

to nonqualified deferred compensation (NQDC). The provision, which was strongly opposed¹⁷ by the AICPA, would have accelerated income to the service provider when there is no substantial risk of forfeiture of the compensation. We are pleased that it was not included in the House reconciliation bill. It has come to our attention, however, that this same or similar provision is in discussion for possible inclusion in the Senate reconciliation bill and urge Congress not to include it in the reconciliation legislation.

At a minimum, if Congress decides to include it in legislation, Congress should provide an exception to the rules for partners and employees of partnerships. We also recommend a minimum two-year delay of the effective date to all other individuals to which the proposal would apply.

If this NQDC provision were enacted, it would result in severe negative effects to businesses and their service providers, including entire workforces of employees. It would: (i) limit the natural growth of businesses, including partnerships; (ii) place U.S. businesses at a competitive disadvantage compared to foreign businesses that utilize NQDC arrangements; and (iii) interrupt millions of employees' personal financial plans by taxing vested existing balances. In addition, it would severely hamper a business' ability to manage liquidity and cash flow through deferred compensation in depressed economic conditions, which was highlighted by the effect of COVID-19 on businesses in 2020.

Partnerships, generally unable to access public capital markets, must derive working capital from sources such as the unfunded, unsecured promise to pay retirement income to partners and employees. Partnerships utilize these arrangements as mandatory components of their partners' and employees' compensation packages to fulfill this need.

Additionally, retired individuals would include in income an amount attributable to future NQDC payments without having received the corresponding amount of cash, which would create a cash flow deficit and financial burden. In order for individuals to have the ability to pay the tax on the NQDC includable in their income upon vesting (or at some future date if there is transition relief for previously vested amounts), partnerships would need to advance cash to them, an obligation not considered by the partnership when the arrangement was established. A significant decrease of a partnership's working capital would occur.

Such a proposal places an inappropriate restriction on a business's use of NQDC arrangements as part of a service provider's retirement package. NQDC arrangements are often used as a retirement vehicle in partnerships when there is a mandatory retirement age. Mandatory retirement age requirements are important for partnerships to provide smooth management transitions and paths of advancement at all levels throughout the partnerships. In order to ensure that their partners have an adequate income stream to accommodate their retirement, they provide them with NQDC arrangements. This technique is prevalent throughout various industries, regardless of the size of a partnership.

¹⁷ See AICPA letter, "[Portman Amendment #3 to the TCJA](#)" (November 14, 2017).