New York State Law Elder Update

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Elder Law and Special Needs Update

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Annual Meeting 2018

Social Security

Cost of Living Adjustment 2018

2018 COLA increase of 2%

Press release October 13, 2017 - https://www.ssa.gov/news/press/releases/2017/#10-2017-1

Wages subject to Social Security taxation

In October of each year, the Social Security Administration announces adjustments that take effect the following January that are based on the increase in average wages. Based on the wage data Social Security had at the time of the October 13, 2017, announcement, the maximum amount of earnings subject to the Social Security tax (taxable maximum) was to increase to $128,700 in 2018, from $127,200 in 2017. The new amount for 2018, based on updated wage data reported to Social Security, is $128,400.

Press release of November 2017, 2017

https://www.ssa.gov/news/press/releases/2017/#11-2017-1

Medicare

"Medicare and You" for 2018 - https://www.medicare.gov/pubs/pdf/10050-Medicare-and-You.pdf

Medicare issuing new cards beginning April 2018 that omit Social Security numbers

> You're getting a new Medicare card! Cards will be mailed between April 2018 – April 2019. You asked, and we listened. You're getting a new Medicare card! Between April 2018 and April 2019, we'll be removing Social Security numbers from Medicare cards and mailing each person a new card. This will help keep

your information more secure and help protect your identity. You'll get a new Medicare Number that's unique to you, and it will only be used for your Medicare coverage. The new card won't change your coverage or benefits. You'll get more information from Medicare when your new card is mailed.

Part A

Hospital inpatient:

$1,316 deductible for each benefit period ($1,340 in 2018)

Days 1-60: $0 coinsurance for each benefit period ($0 in 2018)

Days 61-90: $329 coinsurance per day of each benefit period ($335 in 2018)

Days 91 and beyond: $658 coinsurance per each "lifetime reserve day" after day 90 for each benefit period (up to 60 days over your lifetime) ($670 in 2018)

Beyond lifetime reserve days: all costs (all costs in 2018)

Co-insurance for skilled nursing rehabilitation = $0 for days 1-20, from days 21-100, $167.50 (up from $167.50)

Hospital stay co insurance = $335/day for days 61-90

High-income beneficiaries will see no change

Mental health inpatient stay:

$1,316 deductible for each benefit period ($1,340 in 2018).

Days 1–60: $0 coinsurance per day of each benefit period ($0 in 2018).

Days 61–90: $329 coinsurance per day of each benefit period ($335 in 2018).

Days 91 and beyond: $658 coinsurance per each "lifetime reserve day" after day 90 for each benefit period (up to 60 days over your lifetime) ($670 in 2018).

Beyond lifetime reserve days: all costs (all costs in 2018).

20% of the Medicare-approved amount for mental health services you get from doctors and other providers while you're a hospital inpatient.

Part B

Standard Medicare Part B premium remains at $134, as it was in 2017.

Remember, there were beneficiaries who paid less than the $134 in 2017. This was due to the "hold harmless" protections that were afforded to them.

> The hold harmless provision protects Social Security recipients from paying higher Part B premium costs so long as:

1. You were entitled to Social Security benefits for November and December of the previous year (2016);
2. The Medicare Part B premium will be or was deducted from your Social Security benefits in November 2016 through January 2017;
3. You don't already pay higher Part B premiums because of Income-Related Monthly Adjustment Amount (IRMAA) eligibility; and
4. You do not receive a Cost of Living Adjustment (COLA) large enough to cover the increased premium. COLA is additional income given to Social Security recipients to protect against inflation decreasing the benefit's purchasing power. The COLA in 2017 will be 0.3% of your Social Security benefit.

In 2017, the COLA was 0.3%, and as a result, the COLA did not cover the increased premium. However, in 2018, the COLA will be 2%, and, as a result, the COLA will cover the increased premium for many beneficiaries, so those who have, in the past, been protected by the hold harmless provisions will see an increase. Those who have not been protected will see the premium remaining stagnant.

Examples: consider two figures: (1) $134 minus your current Part B premium and (2) 2% of current Social Security benefit. Whichever of these two figures is smaller will be your new Medicare Part B premium.

> Example A:
>
> $134 - $109.40 = $24.60 difference
>
> Social Security benefit of $1,900 = $38 therefore you'll see Part B premiums go up by $24.60 ($109.40 + $24.60 = $134

Example B:

Social Security Benefit of $1,500 = $30 COLA means new Part B premium will be $134

Example C:

Social Security Benefit of $1,000 = $20 COLA, means new premium for Part B will be $129.40

Part B deductible = $183 (same as 2017)

SSA uses income reported two years ago to determine Part B premiums (so, for 2018 premiums, look to 2016 tax returns); MAGI (modified adjusted gross income) is used in this calculation; if your income has decreased, you may request different tax year information be used

Part D

Deductible for 2018 - $405

Donut Hole begins at $3,750

Medicare Buy-In (Medicare Savings Programs)

Qualified Individuals may have $1,377 per month of gross income (single) and $1,847 (married)

Specified Low-Income Medicare Beneficiaries may have $1,226 (single) or $1,644 (married)

Qualified Medicare Beneficiaries may have $1,025 (single) or $1,374 (married)

*** enrollment in any of the three entitles participant to get Extra Help (Medicare Part D costs)*

Hospice Compare Website

https://www.medicare.gov/hospicecompare/

Excerpt from Medicare.gov website:

Hospice care under Medicare = $0 for hospice care.

You may need to pay a copayment of no more than $5 for each prescription drug and other similar products for pain relief and symptom control while you're at home. In the rare case your drug isn't covered by the hospice benefit, your hospice provider should contact your Medicare drug plan to see if it's covered under Part D. You may need to pay 5% of the Medicare-approved amount for inpatient respite care.

Medicare doesn't cover room and board when you get hospice care in your home or another facility where you live (like a nursing home). (emphasis added)

** NOTATION on hospice care: there are people out in the community who tell people that you can't be in a nursing home, on Medicaid, and receiving hospice care – that by choosing hospice, you are forgoing your right to be in a nursing home OR that if you choose to stay in the nursing home, you must privately pay for all care; not true. Medicaid can continue to pay room and board portion.

Gift Tax

.42 Notice of Large Gifts Received from Foreign Persons. For taxable years beginning in 2018, § 6039F authorizes the Treasury Department and the Internal Revenue Service to require recipients of gifts from certain foreign persons to report these gifts if the aggregate value of gifts received in the taxable year exceeds $16,111.

Gift Tax Annual Exclusion Increase

For 2018, the annual exclusion increases from $14,000 (where it has been for several years) to $15,000.

.37 Annual Exclusion for Gifts. (1) For calendar year 2018, the first $15,000 of gifts to any person (other than gifts of future interests in property) are not included in the total amount of taxable gifts under § 2503 made during that year. (2) For calendar year 2018, the first $152,000 of gifts to a spouse who is not a citizen of the United States (other than gifts of future interests in property) are not included in the total amount of taxable gifts under §§ 2503 and 2523(i)(2) made during that year.

https://www.irs.gov/businesses/small-businesses-self-employed/frequently-asked-questions-on-gift-taxes#3

https://www.irs.gov/pub/irs-drop/rp-17-58.pdf

Deductibility of Long Term Care premiums

https://www.irs.gov/pub/irs-drop/rp-17-58.pdf

26 Eligible Long-Term Care Premiums. For taxable years beginning in 2018, the limitations under § 213(d)(10), regarding eligible long-term care premiums includible in the term "medical care," are as follows:

Attained Age Before the Close of the Taxable Year Limitation on Premiums

40 or less $420

More than 40 but not more than 50 $780

More than 50 but not more than 60 $1,560

More than 60 but not more than 70 $4,160

More than 70 $5,200

New York's ABLE Act

CMS Letter Dated September 7, 2017

https://www.medicaid.gov/federal-policy-guidance/downloads/smd17002.pdf

Letter is to State Medicaid Directors from Brian Neale, Director of the Department of Health and Human Services

- Participation must be in a qualified ABLE program
- Act does not define "qualified"
- Confirms that the contents of these accounts are disregarded for eligibility determinations and income earned off the accounts are similarly disregarded
- Third party contributions are disregarded
- Transfers by a third party to an ABLE account will be considered transfer of assets for purposes of that third party's future Medicaid eligibility (example was grandfather contributing to grandchild's ABLE account and then the grandfather applying for long term care – grandfather may have a transfer of assets penalty as a result)

https://www.mynyable.org/

The Stephen Beck, Jr. Achieving a Better Life Experience (ABLE) Act of 2014 allows those with disabilities to save for qualified disability expenses without the risk of losing their benefits from assistance programs like SSI and Medicaid.

1.855.5NY.ABLE - Monday – Friday from 8 a.m. – 8 p.m. ET

A NY ABLE account can be opened by: an eligible individual; a parent or legal guardian of the eligible individual or a person granted power of attorney on behalf of the eligible individual

New York State Department of Health: Library of Official Documents

https://www.health.ny.gov/health_care/medicaid/reference/index.htm

Regional Rates:

GIS 17 MA/019: Medicaid Regional Rates for Calculating Transfer Penalty Periods for 2018

Northeastern $10,719 (covers Albany, Clinton, Columbia, Essex, Delaware, Fulton, Greene, Hamilton, Montgomery, Otsego, Saratoga, Schenectady, Schoharie, Warren, Washington

Western $10,239 (covers Allegany, Cattaraugus, Chautauqua, Erie, Genesee, Niagara, Orleans, Wyoming)

Rochester $11,692 (covers Chemung, Livingston, Monroe, Ontario, Schuyler, Seneca, Steuben, Wayne, Yates

Central $9,722 (covers Broome, Cayuga, Chenango, Cortland, Herkimer, Madison, Jefferson, Lewis, Oneida, Onondaga, Oswego, Tioga, St. Lawrence, Tompkins)

New York City $12,319 (cover Bronx, Kings, New York, Richmond, Queens)

Long Island $13,053 (covers Nassau, Suffolk)

Northern Metropolitan $12,428 (covers Dutchess, Orange, Putnam, Rockland, Sullivan, Ulster, Westchester)

	2015	**increase**	**2016**	**increase**	**2017**	**increase**	**2018**
Northeast	$9,414	$392.00	$9,806.00	$436.00	$10,242.00	$477.00	$10,719.00
Western	$9,442	$188.00	$9,630.00	$448.00	$10,078.00	$161.00	$10,239.00
Rochester	$10,660	$485.00	$11,145.00	$92.00	$11,237.00	$455.00	$11,692.00
Central	$8,768	$484.00	$9,252.00	$259.00	$9,511.00	$211.00	$9,722.00
NYC	$11,843	$186.00	$12,029.00	$128.00	$12,157.00	$162.00	$12,319.00
Long Island	$12,390	$243.00	$12,633.00	$178.00	$12,811.00	$242.00	$13,053.00
Northern Metro	$11,445	$323.00	$11,768.00	$430.00	$12,198.00	$230.00	$12,428.00

GIS 17 MA/018: Fair Hearing Language Informing Consumers of the Availability of Specific Policy Materials Needed to Prepare for Fair Hearings

- The purpose of this General Information System (GIS) message is to notify local departments of social services (LDSS) of the addition of new language to the Fair Hearing section of Medicaid notices issued through the Client Notice System (CNS) and to manual eligibility notices posted to the DOH, Office of Health Insurance Programs website: http://health.state.nyenet/revldssforms.htm.

- The new language informs applicants/recipients (A/Rs) of their right to review their case file and to receive, without charge, copies of documents from their file and specific policy materials needed to prepare for a fair hearing. Policy materials include documents such as: Administrative Directives; General Information System messages; Informational Letters; sections of the Medicaid Reference Guide; Department of Health Medicaid Update newsletters and Local Commissioner Memorandums.

GIS 17 MA/017: Introduction to Form DOH-5247 - Medicaid Authorized Representative Designation/Change Request

- The purpose of this General Information System message is to introduce a new form entitled, "Medicaid Authorized Representative Designation/Change Request" (DOH-5247). The DOH-5247 (see Attachment) may be used when a consumer wishes to assign, change or discontinue an authorized representative at renewal or at any time following application.
- In accordance with federal regulations at 42 CFR 435.923, consumers must be permitted to assign an authorized representative at the time of application and at other times. When a consumer contacts a district stating he or she wishes to appoint an authorized representative or change a current authorized representative, the local district may print a copy of the DOH-5247 from the electronic Library of Official Documents (http://health.state.nyenet/revldssforms.htm). The district would then mail the DOH-5247 to the consumer to complete and return. As a reminder, the district must maintain a copy of all authorized representative forms in the case record.

GIS 17 MA/016: 2017 Update to the Actuarial Life Expectancy Table

- Updated life expectancy table issued by the Office of the Chief Actuary of the Social Security Administration (SSA).
- The life expectancy table issued by SSA is required to be used in evaluating whether an annuity purchased by or on behalf of an applicant/recipient on or after February 8, 2006 is ***actuarially sound***. The table is also used in determining whether the repayment term for a promissory note, loan or mortgage is actuarially sound.

- The life expectancy table that was attached to 06 OMM/ADM-5 as Attachment VIII, is being updated to reflect the current information obtained from the Office of the Chief Actuary of the Social Security Administration.

GIS 17 MA/011: Treatment of Federal Income Tax Refunds and Advanced Payments

- American Taxpayer Relief Act of 2012 made permanent the disregard of federal income tax refunds and earned income tax credit payments (advance payments) for all Medicaid categories of assistance
- GIS 11 MA/004 embodied the temporary disregard rules, which were valid from December 31, 2009 through January 1, 2013
- For eligibility and for post-eligibility budgeting, funds are not countable income and are also exempt as a resource for 12 months following the month in which the payment is received
- If retained beyond 12 months, it becomes an asset
- As an exempt asset, transfers (outright or to trusts) **are not** subject to penalty period or lookback

GIS 17 MA/010: Approval of 1915(c) Home and Community Based Services Care at Home (CAH) I/II Waiver Program Process and Enrollment

and

GIS 17 MA/009: Approval of 1915(c) Home and Community Based Services Care at Home (CAH) I/II Waiver Program and Application

- This waiver provides services to children 0-17 years old, who have physical disabilities and require either a skilled nursing facility or hospital level of care. The waiver will continue to serve children living at home with parents or legal guardians.
- the request to renew the Care at Home (CAH) I/II Waiver Program has been approved by CMS effective April 01, 2017
- waiver will transition into managed care via the 1115 authority on January 1, 2018

GIS 17 MA/008: Policy Change for Trusts Established for Disabled Individuals Under Age 65

- Section 5007 of the 21st Century Cures Act amended Section 1917(d)(4)(A) of the Social Security Act to allow "exception trusts" created for the benefit of disabled individuals under age 65 to be established by the disabled individual. Previously, such trusts were required to be established by a parent, grandparent, legal guardian, or court of competent jurisdiction.

- A bill has been introduced in the Legislature to make a conforming change to Section 366(2)(b)(2)(iii) of the Social Services Law (SSL), and allow certified disabled individuals

who are under age 65 to establish their own special needs trust and qualify for the exceptions to Medicaid income and resource counting rules as outlined in Section 366 of the SSL and Department regulations at 18 NYCRR 360-4.5(b)(1)(5)(i)(a).

- Effective immediately, in the case of a certified disabled Medicaid applicant/recipient, districts must not consider as available income or resources the corpus or income of a trust established by such disabled individual when he or she was under 65 years of age, provided the trust otherwise complies with the "exception trust" provisions set forth in Administrative Directive 96 ADM-8, "OBRA '93 Provisions on Transfers and Trusts."

17ADM-01 - Medicare Enrollment at Age 65 October 24, 2017

- Receipt of Medicare, for those who are eligible, is a condition of Medicaid eligibility
- "Background" section of the ADM is a broad overview of the Medicare program and good reading if you're not familiar with it
- Predominantly applies to younger persons with disabilities and low income individuals, but good to know and in keeping with the policy that Medicaid is the payor of last resort.

17ADM-02 - Asset Verification System November 29, 2017

- This ADM advises LCDSS of the implementation of Asset Verification System (AVS) for purposes of determining Medicaid eligibility for SSI-related applicants/recipients.
- Federal law at 42 U.S.C. § 1396w requires states to implement a program for verifying assets for purposes of determining and re-determining Medicaid eligibility for aged (age 65 or over), certified blind and certified disabled A/Rs.
- Although the State has a system for verifying assets held in banking institutions through the Financial Institution Recipient Match (FIRM) in the Resource File Integration Subsystem (RFI), the RFI/FIRM process does not meet the requirements specified in 42 U.S.C. § 1396w.
- An SSI-related A/R and his/her spouse must authorize the electronic verification of their assets as a condition of Medicaid eligibility. This requirement applies regardless of whether an applicant is attesting to the value of resources for community coverage without long-term care or seeking Medicaid coverage of community-based long-term care or nursing home care.
- The A/R's signature on the Medicaid application and renewal form is sufficient authorization to verify assets through AVS. Supplement A (DOH-4495A) to the Access NY Health Care Application (DOH-4220) and several renewal forms have been revised to obtain a non-applying spouse's authorization to verify assets through AVS. In addition, new forms were created for use in situations where the A/R and/or the A/R's spouse do not sign the Medicaid application or the renewal form.

- Generally, the AVS will electronically verify accounts held in banking institutions, and conduct searches on real property, owned by the A/R and/or the A/R's spouse during the month of application and the three-month retroactive period.

HEAP – Home Energy Assistance Program

- Federally funded program to assist low income households
- HEAP begin November 13, 2017 and emergency HEAP opened on January 2, 2018
- Household of 1 = $2,318 monthly income
- Household of 2 = $3,031 monthly income
- Household of 3 = $3,744 monthly income

Cases

Scotti v Barrett, 149 AD3d 998, App Div 2d Dep't., April 19, 2017

Brother #1 was Executor of Mom's estate. Brother #2 was former agent under Power of Attorney. Brother #1 brought claim alleging Brother #2, by and through his authority as Agent under the Power of Attorney, divested the estate of (1) $301,277.16 by diverting it into an annuity of which Brother #1 was not named as a beneficiary; (2) $69,500 by making direct gifts to himself and his family absent authority to do so in the Power of Attorney; (3) a $50,000 loan that Mom had made to Brother #2 during Mom's lifetime; and (4) seven pieces of jewelry that Brother #2 had possession of.

The jewelry…Brother #2 admitted he had possession of it, but argued that the Will left it to his infant daughter so he had a claim to it. Court indicated that summary judgment in favor of Brother #1 (estate) was proper because "the jewelry nevertheless remains an asset of the estate until such time as it is distributed" by the Executor

The loan…Brother #2 argued that while the loan started out that way, Mom forgave it during life and therefore it was not a gift and not a loan and not due to the estate. Summary judgment was appropriate declaring that the $50,000 was a debt due to the estate because Brother #2's testimony that Mom's forgave it/converted it to a gift was insufficient to prove that point. "[A] debt owing from one party to another will not, by mere oral declaration subsequently made, be transformed from a debt to a gift" [internal citations omitted].

The $69,500…Brother #2 admitted that the Power of Attorney did not authorize him to make gifts. Summary judgment granted; this asset belongs to the Estate.

The $301,277.16…Summary judgment is not appropriate on this issue. Brother #1 alleged that Brother #2 breached his fiduciary duty under the Power of Attorney but failed in his motion for summary judgment to "eliminate all material issues of fact as to whether the account transfers by [Brother #2] were effected without the decedent's knowledge and were not for her benefit."

Bonin v Wells, Jaworski & Liebman, LLP, _____, Supreme Court, NY County, October 4, 2017

Wife and now-deceased husband retained defendant counsel to "prepare an irrevocable trust to avoid having their assets, consisting primarily of the process of [the sale of inherited real property], affect their future eligibility for the nursing home Medicaid program, in the event that either of them should require nursing home care in the future, and to prepare powers of attorney and living wills." Defendant lawyer and law firm executed an "Irrevocable Supplemental Benefits Trust" in December 2007. Funding occurred in December 2007 and July 2008.

In February 2013, Plaintiff consulted with an experienced and qualified Elder Law attorney Marty Hersh (the "consulting attorney") who advised Plaintiff that the assets were not protected because the trust was not structured properly.

Plaintiff had been paying out funds for her deceased husband's home care, and alleges that defendant attorney did not advise her that community Medicaid benefits might be available. Defendant attorney was provided with the legal opinion of the consulting attorney and denied the opinion, holding firm to its position that it drafting an appropriate trust because "the Trust was a 'gifting trust' pursuant to which the [plaintiff] gave up total control of the Trust assets."

Plaintiff hired consulting attorney, who got her husband on Medicaid, and then Plaintiff commenced an action against defendant attorney and law firm, alleging malpractice, breach of contract, fraud, and violations of three provisions of the General Obligations law.

All causes of action were dismissed.

We are reminded that (1) malpractice accrues is governed by CPLR 214(6) and is three years, accruing when the malpractice occurs, regardless of when it is discovered. "The continuous representation doctrine tolls the accrual of the malpractice claim until the completion of the professionals ongoing representation concerning the matter out of which the malpractice claim arises" (emphasis added). To demonstrate continuous representation, "the plaintiff must establish that there existed a mutual understanding between the attorney and client of the need for further representation on the specific subject matter underlying the malpractice alleged; a clear indication of tan ongoing, continuous, developing and dependent relationship between them pertaining specifically to the representation from which the alleged malpractice stems, that is not sporadic or intermittent; and a continuing relationship of trust and confidence between the attorney and the client." [internal citations omitted]. Five years passed between the last trust funding and the next contact. "Repeated assurances by

attorneys that they provided accurate advice and that they did nothing wrong do not constitute continuous representation." "[F]ailure to advise in writing that the attorney/client relationship has ended is not dispositive. The continuous representation doctrine does not provide that an attorney/client relationship continues indefinitely unless formally terminated in writing by either party."

Breach of contract and fraud also dismissed. Contract breaches are 6 years SOL and that occurred no later than last trust funding (July 2008) and claim brought 8 years after that. Fraud is either 6 years or 2 years from the time the fraud could have been discovered. Plaintiff discovered the fraud in April 2013, when consulting attorney told her what was wrong; she didn't sue until after the 2 years from discovery occurred.

Fraud and malpractice are duplicative. In addition, fraud was not sufficiently particularized. A misrepresentation of legal expertise in estate and trust planning are not sufficient to sustain a fraud claim.

General Business Law 349 claims were based on allegations of "deceptive acts and practices unlawful" while General Business Law 350 claims were based on allegations of "false advertising." The Court indicates that these would be governed by a three year statute of limitations, which would have accrued when the Plaintiff sustained the injury as a result of deceptive act or practice. However, these GBL claims are consumer oriented and the Plaintiff cannot prove that the actions were "consumer oriented" as defined in the GBL. Further, the 22 NYCRR 1200.0 Rules 7.1 governing attorney advertising and the prohibition on false advertising by attorneys do not give rise to a private cause of action.

Jopal v Scalzo, _____, Supreme Court, Suffolk County, August 23, 2017

Motion to vacate a default judgment against a defendant daughter in a case brought by plaintiff nursing home for outstanding nursing home debt.

Plaintiff Nursing Home sued defendant Scalzo for payment of Scalzo's Mother's care at plaintiff nursing home, pursuant to a nursing home admissions contract. Scalzo was Mom's "designated representative." NH claimed Scalzo breached her duty under the admissions agreement.

NH took additional step as required under CPLR to personally serve and then mail via US mail the claim.

A default judgment was entered against Scalzo, and she moved to vacate the default, which required a showing of both a reasonable excuse for failing to appear/answer, and a potentially meritorious defense to the cause of action. Scalzo said she couldn't afford a lawyer to defend herself, and didn't receive notice, and that she was unaware that the admissions contract made her financially responsible for her Mother's admission in any way.

Court summarized that "a litigant may not rely upon her alleged inability to read the operative contractual agreement implicated in litigation." Cites cases that says the Second Department has held that even being liberate in the English language is not an excuse.

Leadingage NY, Inc. v Shah, _____

Cuomo signed Executive Order 38 in January 2012. It imposed requirements that taxpayer funds allocated for services to needy New Yorkers went, primarily, to serve needy New Yorkers and not to cushy executive pay and administrative costs. DOH promulgated regulations governing two groups: facilities who receive state financial assistance or state-authorized funds, and providers that received funding from all sources. Leadingage is trade group representing health care facilities, who challenged the regulations alleging violation of the separation of powers doctrine. Third Department held that the regulations were valid as pertaining to the facilities who receive state financial assistance, but were not valid as to facilities receiving funding from all sources.

East End HealthCare v Gegenheimer, _____, Supreme Court, Suffolk County, May 30, 2017

Niece named as joint owner on account with Aunt. Aunt admitted to the hospital with cancer. Power of Attorney prepared and executed, so that Niece could withdraw money off of the Aunt's line of credit on Aunt's reverse mortgage. Money then went into joint account. Money was withdrawn from joint account. Aunt then went to nursing home and applied for Medicaid. Suffolk County imposed 5.24 month penalty period for withdrawal from bank account. Aunt died. Nursing home sued Niece, claiming 11 causes of action: 8 against Niece as Executor and 3 against her individually.

Breach of contract claims against Niece as Executrix were dismissed on summary judgment. Judgment against Aunt's estate was entered, but estate was insolvent so the nursing home knew it wasn't getting paid. It continued to pursue Niece, individually.

Niece claimed that she withdrew the money and gave it to her Aunt. The court notes that there is no evidence of diminished capacity on the part of the Aunt. Niece presented evidence that Aunt owed significant sums of money to various family members.

Debtor Creditor Law claims against Niece individually were dismissed because Niece was not a creditor of the nursing home.

Matter of Pescatore, 57 Misc 3d 569, Supreme Court, Kings County, April 25, 2017

Case began in 1996, when a woman with mental health issues had co-guardians of her property appointed for her. Ms. Pescatore has remained "a ward of the Court since…1997" although no guardian of the person was ever appointed. Once co-guardian of the property, an uncle, served unofficially as guardian of the person until his death in 2007. At that time, a proceeding was brought and a "successor personal needs guardian" was appointed, despite the fact that a personal needs guardian had never initially been appointed. In 2007, one sole property guardian (and trustee of an SNT established for Ms. Pescatore's first party SNT assets) was appointed, and Mr. Emma was appointed as the successor personal needs guardian.

In 2011, Mr. Emma secured a Court order permitting him to consent to surgery for cancer, despite Ms. Pescatore's statements that she did not wish to treat the cancer. In September 2016, Ms. Pescatore's condition worsened and she is now undergoing dialysis three times a week. She had expressed a desire to stop the dialysis, and Mr. Emma petitioned the court to have an attorney appointed for her to aid her in decision making regarding dialysis. Our own Fern Finkel was appointed; Fern moved to restrain Mr. Emma from consenting to dialysis; and to remove him as successor personal needs guardian.

The Court concluded that that Ms. Pescatore while Mr. Emma was not properly appointed as personal needs guardian through the procedures, the relationship he formed with her over the years when he served as the de facto personal needs guardian has resulted in him being a person Ms. Pescatore's only and closest friend, which, under the Family Health Care Decision Act, would permit him to make decisions in the absence of anyone else.

The Court then turned to the issue of whether the nasogastric tube and dialysis should continue. The attorney for Ms. Pescatore argued that Mr. Emma was making decisions based upon his own beliefs, rather than Ms. Pescatore's wishes. The court opined that because there was a lack of information regarding Ms. Pescatore's desires as to life sustaining procedures, it had to look to other factors. The Court reviewed the two prong test in PHL 2994-d(5)(a)(i) that are required before life sustaining treatment can be declined or discontinue: death within six months or permanent unconsciousness, and the treatment must be considered an extraordinary burden to the patient. Despite Ms. Pescatore's attorney's arguments that Ms. Pescatore's medical condition prohibited her from having pain medication during dialysis, and therefore continuing the dialysis would result in continued and extensive pain, the Court disagreed. "While [Ms. Pescatore] complained of the pain of dialysis [to her doctor, she] never complained that dialysis was painful or that it hurt…]"

The Court concluded that Ms. Pescatore lacks capacity; Mr. Emma was the most appropriate surrogate decision maker; that he had acted reasonably in continuing the medical treatment; and that his decision to subject Ms. Pescatore to ongoing dialysis was supported by the statutory requirements.

Matter of Linda E. (Justin B.), _____

Mother commenced Article 81 over her son, who was under felony indictment for Murder in the 2nd Degree and Menacing a Police Officer. The son was found unfit to stand criminal trial. District Attorney indicated his intention to attend the Article 81. Son's appointed attorney in the Article 81 was MHLS, 3d Department, who brought an OTSC to seal the proceedings/close the court room.

"MHL Article 81 proceedings are presumptively open to the public and may only be sealed by the Court upon a written finding for good cause. In making this determination, the Court must consider "the interest of the public, the orderly and sound administration of justice, the nature of the proceedings, and the privacy the person alleged to be incapacitated." MHL §81.14(b) & (c)."

In order for the Court to fully and fairly adjudicate this Article 81 proceeding, both petitioner and [son] need to be able to speak fully and freely and present relevant evidence without fear of adverse impact on [son's] pending criminal proceedings. "Since [son]'s liberty interests are at stake in the Article 81 proceeding, his Fifth Amendment rights are implicated." citing Matter A. G., 6 Misc 3d 447 (Broome County Supreme Court, 2004).

Son may still assert patient-physician privilege in the Article 81, notwithstanding any finding in the criminal proceeding that he is unfit to stand trial (meaning the psychiatric evaluation concluding he is unfit to stand criminal trial can be precluded from the Article 81) Citing Matter of John Z., 128 AD3d 1249 (3rd Dept., 2015). The District Attorney was attempting to gather information through the Article 81 to use against him in the criminal trial. The Court noted that the burdens and standards are different in a criminal matter than an Article 81 and that there was good cause for closing the courtroom and sealing the record.

Matter of Gluckman, _____, Surrogate's Court, NY County, July 11, 2017

Son is Trustee of Trust created under Will of Mom for primary benefit of Sister. Trustee seeks to reform the disposition of the Trust remainder so as to avoid Generation Skipping Tax. Trust, as written, gave Sister limited testamentary power of appointment over $50,000 of the $2 million trust. Sister died, and had she had a general power of appointment over the entirety, Son's two children, who were remainder beneficiaries of Sister's Trust upon her death, would receive more assets because GST would be minimized. Proceeding brought after Sister's death. In early 2017, the Surrogate's Court denied the Petition. Petitioner brought another motion, claiming it was one to reargue. Surrogate's Court says it is more like one to renew. Petitioner alleged that his counsel failed to present all the appropriate and relevant facts. Surrogate's Court upheld its prior decision, indicating the negative tax implications arise not because of a change in law, which might have given leeway for reformation, but because of the specific circumstances of the investments and market which resulted in the imposition of tax.

Matter of Spanos/Bax, ___ AD3d_____, Supreme Court, Queens County, November 30, 2017

Court-appointed guardian of Jack Bax petitioned for final fees as Guardian. The Court in this case calculated what would have been the commissions under SCPA 2307(1) and then deducted from that sum the annual commissions that the Guardian received over the course of the multiple years he served. The requested award of $37,428 for final commissions plus the final year's commission of $4,029 was reduced to $16,150.50 as a final commissions.

Matter of Goldstein v Zabel, 146 AD3d 625, App. Div., First Department, January 24, 2017

Article 81 case in which temporary guardian was appointed and then became permanent guardian. Incapacitated person had assets in excess of $33 million. Provisions of various orders never indicated method or formula for compensating Temporary Guardian, but did specify that the guardian "shall" be compensated in accordance with the guidelines set forth in SCPA 2307.

Temporary Guardian served for a little over one month. "The record reflects that [Temporary Guardian] took his appointment seriously, and swiftly performed tasks that safeguarded [Incapacitated Person]'s assets. [The Temporary Guardian] served as… temporary guardian from February 13, 2014 until March 20, 2014, a period of a little over one month. The Temporary Guardian was then bonded to the tune of $21 million in order to be come Guardian.

Temporary Guardian asked for $92,900 in fees and disbursements based upon quantum meriut (and having kept records) and was awarded slightly over $64,000. The Guardian served as Guardian for three weeks before the incapacitated person died, and the Guardian asked for $694,000+ based upon SCPA 2307.

Upon motion for final fee, the trial court drastically reduced the fee that would have been awarded under SCPA 2307. The Guardian did not keep contemporaneous time records and provided a narrative as to what he had done while Guardian. The Executor of the Estate objected to the fee request. The trial court, however, found that the $695,106.58 Goldstein was seeking would be an "extraordinary commission . . . which in the context of a permanent Guardianship which lasted less than three weeks is neither reasonable nor justifiable."

The appellate division held that "We find that when the motion court awarded a final fee, it appropriately considered whether application of those guidelines would result in compensation that was not reasonable, given the very short duration of the guardianship and notwithstanding that the guardian satisfactorily performed his services. We hold that, regardless of the plan initially established for an article 81 guardian's compensation in the order and judgment of appointment, under Mental Hygiene Law § 81.28 the court has and retains the authority to modify its plan to insure that the guardian's compensation is reasonable under the circumstances of a particular case. The motion court, in judicially settling the guardian's account

by awarding him compensation of $100,000, instead of the almost $700,000 fee that would have resulted from the strict application of SCPA 2307, providently exercised its discretion."

Fair Hearings

FH #7504414M, Fulton County, requested March 29, 2017, decided July 26, 2017

Mom transferred house reserving a life estate on November 1, 2011. Mom goes on community Medicaid as of November 1, 2016. Mom enters Nursing Home on November 10, 2016. On November 14, 2016, Fulton County DSS receives LCDSS Notice 3559, "Residential Health Care Facility Report of Medicaid Recipient Admission/Discharge/Readmission/Change in Status." Via notice dated March 15, 2017, LCDSS imposes 9.10 month Penalty Period because it saw the transfer of the house within the 60 month look back.

Agency contends that because Mom was in receipt of Medical Assistance (a/k/a Medicaid in the form of community based Medicaid) when she entered the nursing home, the look-back period started October 2016, and therefore goes back 60 months and includes November 2011 (when house was transferred). Mom's representative argued that she had excessive assets and therefore requested pickup of December 1, 2016.

Hearing officer held that Fulton County DSS determined Mom eligible for community based Medicaid in November 2016, and therefore Mom could not have had excess resources.

The Agency argued that GIS 15 MA/07 rendered their calculation of the penalty period correct.

The ALJ reviews the provisions of GIS 15 MA/07 and indicates that it applies to persons who are already in receipt of Medical Assistance (a/k/a Community Medicaid), and indicates that the plain language of the GIS is that the look back begins "60 months from the date of institutionalization," not the date the increase in coverage is made/the request for nursing home coverage. The ALJ determines that under a strict reading of that GIS, Fulton County DSS is correct and the decision is upheld.

FH # 7481175Q, Fulton County, requested February 24, 2017, decided July 3, 2017

June 15, 2015, Mom and Dad transferred house reserving a life Estate. Mom received community based Medicaid. November 3, 2016, she enters NH. Penalty period 2.01 imposes and on appeal, didn't contest the findings but instead argued undue hardship on Dad. Daughter argued that dad can't pay because he's on a fixed income.

Undue Hardship is governed by Social Services Law 366.5(d), and only applies to Medicaid Applicants and not spouses. There is no undue hardship provisions for spouses. Undue

hardship is granted if Applicant is denied appropriate medical care or services, which did not happen in this case. The ALJ affirms the Agency's decision.

FH #7429461N, Erie County, requested November 29, 2016, decided July 14, 2017

Dad (Appellant, Medicaid Applicant/Recipient) was in a nursing home. Dad was sole owner of property (not his homestead) and on June 22, 2015, transferred it to his Daughter. A deed reserving a life estate and discharge of mortgage on the property was recorded. September 3, 2015, a Medicaid application was submitted for Dad. Erie County LCDSS calculated an uncompensated transfer and imposed a penalty via a Notice of Decision. A revised Notice of Decision was issued. Daughter appealed, not challenging the math but claiming that the transfer was done for purposes other than to qualify for Medicaid, in that Dad was merely transferring property to her that she already owned via an unwritten agreement between her and Dad that occurred in 1983 when she had bad credit and couldn't qualify for a mortgage. Daughter showed records showing she was paying a varying sum to Dad each month, and had her brother offer evidence as to the existence of this agreement. However, Dad and Mom declared on their individual tax returns rental income for the property, thereby contradicting Daughter's contention that it was her house. She did not have any evidence overcoming the presumption, and the imposition of the penalty period was upheld.

FH # 7399514Z, Suffolk County, Requested October 11, 2016, decided January 30, 2017

April 14, 2014, the 103 year old Applicant was admitted to a nursing home.
The residential health care facility requested a pick up date of January 1, 2016.
July 25, 2016, Medicaid application for nursing home benefits submitted.
Review of the record reveals $105,000 in transfers, with $30,000 returned, with a net transfer of approximately $73,000.

Daughter attempts to prove transfers were for purposes other than to qualify for Medicaid benefits.

This hearing decision identifies and distinguishes other Fair Hearings that Appellant relied upon in attempting to argue that transfers were for purposes other than to qualify. The Appellant daughter could not establish the health of the Applicant at the time the gifts were made (the first gifts within the look back were in 2011, the Daughter showed handwritten bank logs showing checks for 2010 and 2011, but not 2009). The Appellant sought to show that other funds were expended for renovations to both Applicant's house and Daughter's house but could only document approximately $5,000 of expenditures. Further, there was no evidence that the Applicant needed the repairs done to accommodate any medical condition. There was no sudden onset of illness; no evidence that Appellant was in good health at the time of gifts; no evidence that renovations were needed for her care. The record establishes that the Agency

correctly calculated the penalty period. The Appellant failed to rebut the presumption that transfers made within the look back were done for purposes of qualifying for Medicaid.

FH # 7378581Z, Madison County, Requested September 8, 2016, Decided January 11, 2017

Early Alzheimer's diagnosis in 2011 for Applicant. In January 2016, a Medicaid application was submitted, following a hospitalization in August 2015 and continuing until his death in January 2016. A transfer penalty was imposed for 2.34 months. Applicant's estate Administrator appealed the decision, arguing the transfers were for purposes other than to qualify for Medicaid.

Testimony was given that the payments were made were directly to grandchildren's college landlord or college itself. Three payments to grandchildren's mother (Applicant's daughter) were made in 2014, but were returned. When daughter testified, she indicated that the funds were returned because the child for whom those payments were going to be used withdrew from college. Applicant's Wife testified, credibly, about the reasons for the transfers. Evidence was presented that the Applicant and his Wife were not rendered insolvent by the transfers; medical evidence was presented showing that even though a diagnosis was made of early Alzheimer's, the Applicant was still driving until late 2014. Looking at all the facts and evidence presented, the Administrative Law Judge overturned the decision of the Agency and determined the transfers were made for purposes other than to qualify for Medicaid.

FH #74825454 – Matter of _____, _____ County, May 2017

Reprinted with permission of Judie Grimaldi, from her Summer Meeting July 13, 2017 update
Fair Hearing requested to appeal ElderServe MLTC's denial of 24 hour home care on a continuous split shift basis to a 93 year old member. The plan's determination was based upon a mere presumption that split-shift service would not be appropriate for the Appellant. The UAS assessment performed by the plan was found insufficient to support this determination. Therefore, the Agency's denial of the Appellant's request for 24-hour continuous care, 7 days weekly (split-shift) could not be sustained and ElderServe's proposal that member accept live in care first, to see if it would be sufficient, was found not to be correct and reversed. ElderServe MLTC was directed to authorize 24-hour continuous care, 7 days a week (split-shift) for Appellant, and to notify Appellant as required by 18 NYCRR 358-6.4. The Agency was ordered [to] comply immediately with the directives set forth. Any requirement that live-in be tried first was found improper.

National Update

PRESENTED BY:
Michael J. Amoruso, Esq.

Federal and State Legislative Developments Impacting Elder and Special Needs Law

Presented by

Michael J. Amoruso, President Elect of NAELA

January 23, 2018

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Health Reform 2017

- AHCA/BCRA/Graham-Cassidy:
  - Major Medicaid reform
  - Repeal and Replace of ACA
  - Ultimately failed in the Senate

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NAELA Advocacy on Health Reform

I. Limitations to Annuities
II. Limits to Home Equity
III. Repeal of Retroactive Coverage

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H.R. 181, CALM Act

- Half of income from a community spouse's annuity available to the institutionalized spouse
  - Except for IRA annuities.

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HR 181, CALM Act

- Concerns raised
  - Includes non-IRA retirement accounts;
  - Incentivizes divorce;
  - Hurts elderly women in the most; and
  - Current draft hurts working class not just errant high dollar value annuities.

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American Health Care Act

- Annuities bill dropped, but included:
  - repeal of three-month retroactive coverage
  - limitations to home equity.
- Medicaid Per-Capita Caps!
- Repeal of Community First Choice.

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H.R. 1082, Medicaid Home Improvement Act.

- Ends option for state to expand home equity limit for "single individuals" above 560k up to 840k (inflation adj.)

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Home Equity Limits

- Concerns Raised:
  - No guarantee of reverse mtg/line of credit;
  - If institutionalized: in some states becomes an available resource or in others family must maintain and deal with potential estate recovery; and
  - Counteracts HCBS

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H.R. 180, End of 3 month retroactive coverage

- Moved three month retroactive eligibility only to month of application.

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End of Three Month Retroactive Coverage

- Lose-Lose for Providers and Families:
  - Providers don't get paid.
  - Families could get sued or not admit family member at appropriate time without Medicaid guarantee.

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Results in Senate

- Home equity limits out!
- Three month retroactive coverage modified to not apply to 65+ and persons with disabilities.

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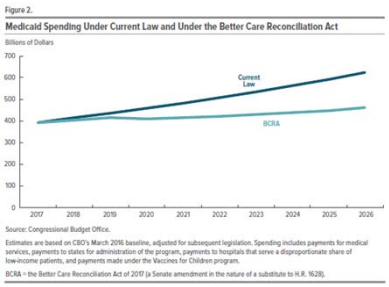
Medicaid Spending under BCRA



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Per-Capita Cap Basics

- **Federal Spending Limited Per Beneficiary**
  - By State
  - By Category
  - Grows by an inflator
  - Top/Bottom 25% adjusted up/down by up to 2%
  - Cannot keep excess funds

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Per Capita Caps Concerns

- Services and payment cuts.
- Future eligibility limits
- HCBS cut first because its optional
- Baselines unfair
- Easily “dial-able”

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1115 Waivers: Mar. 14 Price-Verma Letter and November CMS Directives

- “Ushering in new era” where states have more freedom to design plans
- State plan amendments- more fast-tracking and approval of demos done in another state

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1115 Waivers Basics

- **"Experimental, pilot, or demonstration project,"**
- **Likely to assist in promoting the objectives of the Medicaid program.**
- **Can waive Medicaid requirements under 42 U.S.C 1396a**
- **Budget neutral (HHS Policy Not Law)**

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How does this impact Elder Law?

- (a)(1) Statewideness
- (a)(3) Fair hearings
- (a)(7) Confidentiality
- (a)(8) Reasonable promptness for decisions
- (a)(10) (a) Categories of eligible individuals
- (a)(10)(B) Equality of amount, duration and scope
- (a)(10)(C) Comparability with SSI
- (a)(14) Fees, copayments, deductions only per 1396o
- (a)(17)(D) Responsibility of relatives & spend down of incurred medical expenses
- **(a)(18) Liens, recoveries, transfers & trusts only per 1396p**
- (a)(23) Freedom of choice
- (a)(25) Claims against third party payers
- **(a)(34) Three month retroactivity**
- (a)(43) Early & periodic screening, diagnosis & treatment for those under 21
- (a)(45) Mandatory assignment of support rights per 1396k
- (a)(50) Personal needs allowances

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42 USC §1396p (SSA §1917)

- Excluding Residence as a Resource but State Liens on Property
- Estate Recovery for LTSS recipients 55 and older
- Transfer Penalty Rules
  - Annuities.
  - Promissory Notes.
  - Transfers to Spouses
- Supplemental Needs Trusts (d4A and d4C) and Miller Trusts (d4B).

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Maine Waiver

- For Medicaid LTSS:
  - Repeal of three month retroactive eligibility
    - Some success: updated doesn't apply to LTSS
  - Limit annuity length to 80 percent life expectancy

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Iowa waiver

- Includes repeal of three month retroactive eligibility for all beneficiaries
- NAELA led a group of aging and disability advocates in opposing
- CMS approved; Congressional Democrats Raise Alarm

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Waivers Going Forward

- Maine could be the crack in the door to modifications to 1396p happen.
- Much of focus of new limits has been on the "able-bodied" population.
- End of Three month retroactive being asked for by many states.
- Kaiser Family Foundation tracking 1115s
- https://www.kff.org/medicaid/issue-brief/which-states-have-approved-and-pending-section-1115-medicaid-waivers/

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Recent CMS Policy Pronouncements

- 1/11/2018 – How to use 1115 waiver to require Medicaid adult beneficiaries to work or engage in community activities
  - Exempt elderly, pregnant, acute medical conditions and disabled
  - Must comply with ADA, ACA, Rehab Act of 1973, Civil Rights Act and Age Discrimination Act

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Recent CMS Policy Pronouncements

- 7/7/2017 and 10/27/2017 – significantly eased monetary penalties on NHs who violated CMS's requirements for Participation in Medicare/Medicaid under Obama Administration.
  - Gives regional offices discretion to not impose penalty if a "one time offense"
- 11/24/2017 – adds an 18 month moratorium on penalties imposed by new CMS rules that phased in 11/2017

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Key Cases and Impact on Planning

- Daley and Nadeau cases (consolidated), 477 Mass. 188, 74 N.E.3d 1269 (SJC 5/30/2017)
  - Both cases involved irrevocable trusts done prior to needing Medicaid
  - In each case, Medicaid held the home was a countable asset due to certain trust provisions

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Nadeau Trust

- Income payable to the grantors as the trustee determines
- Principal held in trust until the death of the grantors
- Lifetime power to appoint all or any part of the trust property to charitable beneficiaries
- Nadeau reserved the right to "use and occupy" any residence held by the trust

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Daley Trust

- Funded their irrevocable trust with a remainder interest in their home
- Reserved Life Estate
- Income payable to the grantors as the trustee determines
- Principal held in trust until the death of the grantors
- Trustee could reimburse them for their income tax liability

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Mass Health Arguments

- HCFA 64 states that use and occupancy of a home is a payment from the trust
- This payment equals access to the corpus, thus the home is countable
- Challenged trust terms to find "any circumstances"

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Supreme Judicial Court's Decision

- MassHealth has misinterpreted the meaning of "payment from the trust" in HCFA 64 and 42 USC 1396p(d)(3)
- HCFA 64, P. 8 - Where there is the right to use and occupy, the grantors have the right to receive income that may be generated from the rental of the home, as well as the right to that rental income by residing in the home themselves.

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Supreme Judicial Court Decision

- HCFA 64 accurately recognizes that, where a trust grants the use or occupancy of a home to the grantors, it is effectively making a payment of rent to the grantors in the amount of the fair market value of that property
  - Only a payment from income of the trust, not the corpus. Can only affect how much an applicant pays toward her share of cost, not eligibility

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Supreme Judicial Court Decision

- Regarding the Special Power of Appointment to charitable beneficiaries:
  - Court hypothesized a situation where Mr. Daley could have received care at a nonprofit nursing home, and that nursing home could have received trust property
  - Will this fall under the "any circumstances" test?

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Doris A. Mass. Fair Hearing 1615178 (11/30/17)

- Joint Irrevocable Trust
  - No distribution of principal to grantor
  - Mandates income to grantor
  - Reserved "use and occupancy"
- Mass Health denied MA due to excess resources focusing on Daley/Nadeau payment of imputed income from "use and occupancy" – fair rental value taken from HUD Fair Market Rent Tables for 2016

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Doris A. Mass. Fair Hearing 1615178 (11/30/17)

- $1,565 (Fair Rental Value) x 12 months x 7.76 years = $145,919.04 excess resources

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Doris A. Fair Hearing 1615178 (11/30/17)

- Hearing Officer's Decision:
  - Mass Health misinterprets Daley/Nadeau as they do not stand for availability of assets! Instead, a "income of the corpus" means the amount MA is required to contribute to care on a monthly basis.
  - Trust must be read as a whole so accumulated income is NOT available.
    - Under Regs: Income in month received then principal
    - Trust prohibits distribution of principal

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Doris A. Fair Hearing 1615178 (11/30/17)

- Proper calculation of monthly contribution would be:
  - Fair Market Value of Rent divided by 50% - since this is a JOINT Trust
    - $1,567/50% = $783.50
  - However, MA must be given opportunity to deduct business expenses since trust only can distribute NET income (depreciation, taxes, expenses and other liabilities)

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Key Cases and Impact on Planning

- Fagan v. Bremby, Civ. No. 3:16cv73 (USDC District of CT 3/21/2017)
  - Extent of spousal exempt transfer rules
  - Fagan severely injured in a motorcycle accident and moved into SNF
  - Approved for institutional Medicaid
  - Received a $2Million dollar settlement
  - All medical bills, Medicare liens, and repayment to Medicaid fully satisfied
  - Coverage discontinued

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Key Cases and Impact on Planning

- Fagan v. Bremby, Civ. No. 3:16cv73 (USDC District of CT 3/21/2017)
  - Transferred $879,000 to his spouse
  - Spouse used part of the transfer to purchase a SPIA
  - Reapplied for Medicaid and denied based on transfer of assets penalty
  - Since a continuous period of institutionalization, the spousal exempt transfer rules only apply to original snap shot date!

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Key Cases and Impact on Planning

- Fagan v. Bremby, Civ. No. 3:16cv73 (USDC District of CT 3/21/2017)
  - Since a continuous period of institutionalization, the spousal exempt transfer rules only apply to original snap shot date!
  - What if spouse removed from facility for 30 days prior to re-application?

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House Sought to End the Medical Expense Deduction

"Suzanne Hollack moved her husband, who has frontotemporal dementia, to a memory care facility 18 months ago. His long term care and medical expenses cost the couple $90,000 last year

New York Times
Ending Medical Tax Break Could Be a 'Gut Punch' to the Middle Class
November 8, 2017

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Medical Expense Deduction

- **Old law:**
  - Can itemize for expenses above 10% of AGI.
  - "Chronically ill" individuals can deduct "qualified long-term care expenses."
- **Impact on LTSS:**
  - Some private-pay residents EVICTED- can't pay tax and facility!
  - Medicaid medically needy with a pension: uncollectible tax!
  - Seniors w- 401k: the higher your health costs, the higher your taxes!
  - Hurts family caregivers!

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Medical Expense Deduction

- **Advocacy Outcome: Final legislation keeps and Lowers threshold to 7.5% AGI 2018/2019!**

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Item	Old Law	New Law (expires 2025)
Brackets	10%, 15%, 25%, 28%, 33%, 35%, 39.6%	10%, 12%, 22%, 24%, 32%, 35%, 37% T&E:10%,24%,35%,37%
AMT	Yes	Retains with increased exemption/exception thresholds $70,300/$500k (single) $109,400/$1M (joint)
Personal Exemption	$4,150	None
Standard Deduction	$6,500 (single); $13,000 (joint)	$12,000 (single); $24,000 (joint)
Child Tax Credit	$1,000	$2,000
Family Credits	None	$500 other dependents
State and Local Tax Deduction	Yes	10k cap (not indexed for inflation; joint or single)
Mtg Int.	Up to $1.1 million	$750k cap acquisition debt only
Inflator	CPI- Urban	Chained CPI-U
Estate Tax	$5.6 million	Doubled

ABLE Act Additions

- **529 Account rollovers to ABLE**
- **ABLE to Work.** Extra ABLE contribution allowed up to federal poverty level ($11,400) if working above Substantial Gainful Activity or up to their income amounts whichever is less
- **Access to Savers Credit. B**eneficiary of may claim the saver's credit for contributions made to ABLE account. Up to $2,000 (single) or $4,000 (joint). https://www.irs.gov/retirement-plans/plan-participant-employee/retirement-savings-contributions-savers-credit

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THANK YOU!

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Centers for Medicare & Medicaid Services
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Baltimore, MD 21244-1850

CENTERS FOR MEDICARE & MEDICAID SERVICES
CENTER FOR MEDICAID & CHIP SERVICES

SMD: 18-002

RE: Opportunities to Promote Work and Community Engagement Among Medicaid Beneficiaries

January 11, 2018

Dear State Medicaid Director:

The Centers for Medicare & Medicaid Services (CMS) is announcing a new policy designed to assist states in their efforts to improve Medicaid enrollee health and well-being through incentivizing work and community engagement among non-elderly, non-pregnant adult Medicaid beneficiaries who are eligible for Medicaid on a basis other than disability.[1] Subject to the full federal review process, CMS will support state efforts to test incentives that make participation in work or other community engagement a requirement for continued Medicaid eligibility or coverage for certain adult Medicaid beneficiaries in demonstration projects authorized under section 1115 of the Social Security Act (the Act). Such programs should be designed to promote better mental, physical, and emotional health in furtherance of Medicaid program objectives. Such programs may also, separately, be designed to help individuals and families rise out of poverty and attain independence, also in furtherance of Medicaid program objectives. [2]

This guidance describes considerations for states that may be interested in pursuing demonstration projects under section 1115(a) of the Act that have the goal of creating incentives for Medicaid beneficiaries to participate in work and community engagement activities. It addresses the application of CMS' monitoring and evaluation protocols for this type of demonstration and identifies other programmatic and policy considerations for states, to help them design programs that meet the objectives of the Medicaid program, consistent with federal statutory requirements.

[1] States will have the flexibility to identify activities, other than employment, which promote health and wellness, and which will meet the states' requirements for continued Medicaid eligibility. These activities include, but are not limited to, community service, caregiving, education, job training, and substance use disorder treatment.
[2] Section 1901 of the Social Security Act authorizes appropriations to support State Medicaid programs: "For the purpose of enabling each State, as far as practicable under the conditions in such State, to furnish (1) medical assistance on behalf of families with dependent children and of aged, blind, or disabled individuals, whose income and resources are insufficient to meet the costs of necessary medical services, and (2) rehabilitation and other services to help such families and individuals attain or retain capability for independence or self-care[.]"

Health Benefits of Community Engagement, including Work and Work Promotion

While high-quality health care is important for an individual's health and well-being, there are many other determinants of health. It is widely recognized that education, for example, can lead to improved health by increasing health knowledge and healthy behaviors.[3] CMS recognizes that a broad range of social, economic, and behavioral factors can have a major impact on an individual's health and wellness, and a growing body of evidence suggests that targeting certain health determinants, including productive work and community engagement, may improve health outcomes. For example, higher earnings are positively correlated with longer lifespan.[4] One comprehensive review of existing studies found strong evidence that unemployment is generally harmful to health, including higher mortality; poorer general health; poorer mental health; and higher medical consultation and hospital admission rates.[5] Another academic analysis found strong evidence for a protective effect of employment on depression and general mental health.[6] A 2013 Gallup poll found that unemployed Americans are more than twice as likely as those with full-time jobs to say they currently have or are being treated for depression.[7] Other community engagement activities such as volunteering are also associated with improved health outcomes[8,9], and it can lead to paid employment.

CMS, in accordance with principles supported by the Medicaid statute, has long assisted state efforts to promote work and community engagement and provide incentives to disabled beneficiaries to increase their sense of purpose, build a healthy lifestyle, and further the positive physical and mental health benefits associated with work. CMS supports state efforts to enable eligible individuals to gain and maintain employment. Optional Medicaid programs such as the Medicaid Buy-In, for example, allow workers with disabilities to have higher earnings and maintain their Medicaid coverage. For beneficiaries who are able to work but have been unable to find employment, some states encourage employment through concurrent enrollment in state-sponsored job training and work referral, either automatically or at the option of the Medicaid beneficiary. A number of states have also initiated programs to connect non-disabled Medicaid beneficiaries to existing state workforce programs.

States also provide a range of employment supports to individuals receiving home and community based services under section 1915(c) waivers or section 1915(i) state plan services. These include habilitation services designed to "assist individuals in acquiring, retaining and improving the self-help, socialization, and adaptive skills necessary to reside successfully in

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[3] Bartley, M and Plewis, I. (2002) Accumulated labor market disadvantage and limiting long term illness. International Journal of Epidemiology 31:336-41.

[4] Chetty R, Stepner M, Abraham S, et al. The association between income and life expectancy in the United States, 2001-2014. JAMA. 2016; 315(16):1750-1766.

[5] Waddell, G. and Burton, AK. Is Work Good For Your Health And Well-Being? (2006) EurErg Centre for Health and Social Care Research, University of Huddersfield, UK

[6] Van der Noordt, M, Jzelenberg, H, Droomers, M, and Proper,K. Health effects of employment: a systemic review of prospective studies. BMJournals. Occupational and Environmental Medicine. 2014: 71 (10).

[7] Crabtree, S. In U.S., Depression Rates Higher for Long-Term Unemployed. (2014). Gallup. http://news.gallup.com/poll/171044/depression-rates-higher-among-long-term-unemployed.aspx

[8] United Health Group. Doing good is good for you. 2013 Health and Volunteering Study.

[9] Jenkins, C. Dickens, A. Jones, K. Thompson-Coon, J. Taylor, R. and Rogers, M. Is volunteering a public health intervention? A systematic review and meta-analysis of the health and survival of volunteers BMC Public Health 2013. 13 (773)

home and community based settings."[10] These activities have been historically focused on services and programs for individuals with disabilities and receipt of these supports is not a condition of eligibility or coverage.
The successes of all these programs suggest that a spectrum of additional work incentives, including those discussed in this letter, could yield similar outcomes while promoting these same objectives.

New Opportunity for Promoting Work and Other Community Engagement for Non-Elderly, Non-Pregnant Adult Beneficiaries Who Are Eligible for Medicaid on a Basis Other than Disability

On March 14, 2017, the Department of Health and Human Services (HHS) and CMS issued a letter to the nation's governors affirming the continued commitment to partner with states in the administration of the Medicaid program. In the letter, we noted that CMS will empower states to develop innovative proposals to improve their Medicaid programs. Demonstration projects under section 1115 of the Act give states more freedom to test and evaluate approaches to improving quality, accessibility, and health outcomes in the most cost-effective manner. CMS is committed to allowing states to test their approaches, provided that the Secretary determines that the demonstrations are likely to assist in promoting the objectives of the Medicaid program.

Some states are interested in pursuing demonstration projects to test the hypothesis that requiring work or community engagement as a condition of eligibility, as a condition of coverage, as a condition of receiving additional or enhanced benefits, or as a condition of paying reduced premiums or cost sharing, will result in more beneficiaries being employed or engaging in other productive community engagement, thus producing improved health and well-being. To determine whether this approach works as expected, states will need to link these community engagement requirements to those outcomes and ultimately assess the effectiveness of the demonstration in furthering the health and wellness objectives of the Medicaid program.[11]

Today, CMS is committing to support state demonstrations that require eligible adult beneficiaries to engage in work or community engagement activities (e.g., skills training, education, job search, caregiving, volunteer service) in order to determine whether those requirements assist beneficiaries in obtaining sustainable employment or other productive community engagement and whether sustained employment or other productive community engagement leads to improved health outcomes. This is a shift from prior agency policy regarding work and other community engagement as a condition of Medicaid eligibility or coverage,[12] but it is anchored in historic CMS principles that emphasize work to promote health and well-being.

We look forward to working with states interested in testing innovative approaches to promote work and other community engagement, including approaches that make participation a condition of eligibility or coverage, among working-age, non-pregnant adult Medicaid beneficiaries who qualify for Medicaid on a basis other than a disability. Consistent with section

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[10] Social Security Act, section 1915(c)(5)(A)
[11] https://www.medicaid.gov/medicaid/section-1115-demo/about-1115/index.html
[12] https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/?entry=29927

1115(a) of the Act, demonstration applications will be reviewed on a case-by-case basis to determine whether the proposed approach is likely to promote the objectives of Medicaid. CMS is also committed to ensuring state accountability for the health outcomes produced by the program, and demonstration projects approved consistent with this guidance will be required to conduct outcomes-based evaluations, based on evaluation designs subject to CMS approval. We note that approved demonstration projects that promote positive health outcomes may also achieve the additional goal of the Medicaid program to promote independence.

State Flexibility in Program Design

In its work with states, CMS has identified a number of issues for states to consider as they develop programs to promote work and other forms of community engagement among Medicaid beneficiaries. Each state is different, and states are in the best position to determine which approaches are most likely to succeed, based on their specific populations and resources. In drafting demonstration project applications, states should articulate the reasoning behind their proposal. While CMS will evaluate each demonstration project application on its own merits, we believe the following considerations will facilitate states' work to develop proposals and allow them to focus their resources on permissible areas of innovation while allowing CMS to maintain its oversight and fiduciary responsibilities.

Alignment with Other Programs

Many states already have systems in place for implementing employment and community engagement programs. For instance, beginning in 1996, welfare reform provided states with more flexibility to manage their state welfare programs under the Temporary Assistance for Needy Families (TANF) program consistent with the four statutory purposes of TANF. Supplemental Nutrition Assistance Program (SNAP) rules require all recipients to meet work requirements unless they are exempt. Exemptions may include, but are not limited to age, disability, responsibility for a dependent, participation in a drug addiction or alcohol treatment and rehabilitation program, or another state-specified reason.

CMS supports states' efforts to align SNAP or TANF work or work-related requirements with the Medicaid program as part of a demonstration authorized under section 1115 of the Act, where such alignment is appropriate and consistent with the ultimate objective of improving health and well-being for Medicaid beneficiaries. Based on states' experiences with their TANF or SNAP employment programs, they may wish to consider aligning Medicaid requirements with certain aspects of the TANF or SNAP programs, such as:

- Excepted populations (e.g., pregnant women, primary caregivers of dependents, individuals with disabilities or health-related barriers to employment, individuals participating in tribal work programs, victims of domestic violence, other populations with extenuating circumstances, full time students);
- Protections and supports for individuals with disabilities and others who may be unable to meet the requirements;
- Allowable activities (e.g., subsidized and unsubsidized employment, educational and vocational programs, job search and job readiness, job training, community service, caregiving, and other allowable activities under TANF or SNAP) and required hours of participation (e.g., hours/week, including hours completed under TANF or SNAP);

- Changes to requirements or allowable activities due to economic or environmental factors (e.g., unemployment rate in affected areas);
- Enrollee reporting requirements (e.g., frequency and method for reporting work activities); or
- The availability of work support programs (e.g., transportation or child care) for individuals subject to work and community engagement requirements.

CMS will consider the extent to which proposed Medicaid community engagement or work requirements align with features of the TANF or SNAP programs and whether that alignment is consistent with Medicaid objectives. For example, aligning certain requirements across these programs would streamline eligibility and could reduce the burden on both states and beneficiaries and maximize opportunities for beneficiaries to meet the requirements. Many states have already developed or are developing integrated eligibility systems, and have taken advantage of the waiver of OMB Circular A-87 cost allocation rules (available through CY 2018) to support the integration of eligibility systems between health and human services programs. These integrated systems may be poised to allow for alignment of eligibility requirements for a segment of the Medicaid population, and to facilitate implementation of streamlined application and verification processes. Where additional information technology systems enhancements are required to support Medicaid demonstration activities, costs will be expected to be reasonable and comply with Medicaid statute and regulations. Federal Medicaid funding will be limited to allowable activities directly linked to Medicaid beneficiaries.

Individuals enrolled in and compliant with a TANF or SNAP work requirement, as well as individuals exempt from a TANF or SNAP work requirement, must automatically be considered to be complying with the Medicaid work requirements. To the degree that specific good cause exemptions exist in a state TANF or SNAP program, the state should make a reasonable effort to incorporate similar exemptions within a framework for a Medicaid community engagement and work requirement. States should also describe how they will communicate to beneficiaries any differences in program requirements that individuals will need to meet in the event they transition off of SNAP or TANF but remain subject to a Medicaid community engagement or work requirement.

Populations Subject to Work Promotion/Community Engagement Requirements
States should clearly identify the eligibility groups subject to the work and community engagement requirements and included in the demonstration. States may consider submitting for CMS consideration a proposal to tailor such requirements to adults within specific eligibility groups or sub-populations within the eligibility group. CMS recognizes that adults who are eligible for Medicaid on a basis other than disability (i.e. classified for Medicaid purposes as "non-disabled") will be subject to the work/community engagement requirements as described in this guidance. These individuals, however, may have an illness or disability as defined by other federal statutes that may interfere with their ability to meet the requirements. States must comply with federal civil rights laws, ensure that individuals with disabilities are not denied Medicaid for inability to meet these requirements, and have mechanisms in place to ensure that reasonable modifications are provided to people who need them. States must also create exemptions for individuals determined by the state to be medically frail and should also exempt

from the requirements any individuals with acute medical conditions validated by a medical professional that would prevent them from complying with the requirements.

States are required, in the design and administration of Medicaid demonstration projects, to comply with all applicable federal civil rights laws, including the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, Section 1557 of the Affordable Care Act, Title VI of the Civil Rights Act, the Age Discrimination Act, and other applicable statutes. The federal disability rights laws are of particular importance, given the broad scope of protection under these laws and the fact that disabilities can affect an individual's ability to participate in work and community engagement activities. States may not impose such requirements on individuals classified as "disabled" for Medicaid eligibility purposes.

CMS recognizes that individuals who are eligible for Medicaid on a basis other than disability (and are therefore classified for Medicaid purposes as "non-disabled") may have a disability under the definitions of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, or section 1557 of the Affordable Care Act. States should include, in their proposals, information regarding their plans for compliance with these requirements, including provision of reasonable modifications in work or community engagement requirements. The reasonable modifications must include exemptions from participation where an individual is unable to participate for disability-related reasons, modification in the number of hours of participation required where an individual is unable to participate for the required number of hours, and provision of support services necessary to participate, where participation is possible with supports. States may not receive Federal Medicaid match for such supportive services for individuals enrolled in these Medicaid demonstrations. In addition, States should evaluate individuals' ability to participate and the types of reasonable modifications and supports needed. CMS, in consultation and coordination with the HHS Office for Civil Rights, is available to assist states in designing projects that comply with the civil rights laws.

CMS also recognizes that many states currently face an epidemic of opioid addiction, which has been declared a national public health emergency by the Secretary. States will therefore be required to take certain steps to ensure that eligible individuals with opioid addiction and other substance use disorders (who may not be defined as disabled for Medicaid purposes but may be protected by disability laws) have access to appropriate Medicaid coverage and treatment services. States must make reasonable modifications for these individuals, consistent with states' obligations under civil rights laws described above, and specifically identify such modifications in their demonstration applications. Such modifications may include counting time spent in medical treatment towards an individual's work/community engagement requirements, or exempting individuals participating in intensive medical treatment (e.g. inpatient treatment or intensive outpatient treatment) for substance use disorder from the work/community engagements requirements. CMS will also consider other reasonable modifications that states may design and propose in furtherance of their obligations under disability laws. Finally, states should identify, in their demonstrations, other strategies to support such individuals in meeting the requirements, and in obtaining access to treatment when they are ready.

Range of community engagement activities
We encourage states to consider a range of activities that could satisfy work and community-engagement requirements. Career planning, job training, referral, and job support services offered should reflect each person's employability and potential contributions to the labor market. As many Medicaid beneficiaries live in areas of high unemployment, or are engaged as caregivers for young children or elderly family members, states should consider a variety of activities to meet the requirements for work and community engagement, including volunteer and tribal employment programs, in addition to the activities identified to meet the requirements under SNAP or TANF.

Beneficiary supports
States will be required to describe strategies to assist beneficiaries in meeting work and community engagement requirements and to link individuals to additional resources for job training or other employment services, child care assistance, transportation, or other work supports to help beneficiaries prepare for work or increase their earnings. However, this demonstration opportunity will not provide states with the authority to use Medicaid funding to finance these services for individuals. Nothing in this letter changes the types of services eligible for Federal match; states may only receive Federal Medicaid match for allowable services in accordance with statute.

CMS expects that states will design their programs consistent with statutory and regulatory procedural requirements, including through provisions to ensure Medicaid beneficiaries' due process rights are protected. States are encouraged to include procedures that allow for an assessment of individuals' disabilities, medical diagnosis, and other barriers to employment and self-sufficiency in order to identify appropriate work and community engagement activities and services, supports, and any reasonable modifications necessary for those individuals to participate in work and community engagement activities and attain long-term employment and self-sufficiency.

Attention to market forces and structural barriers
CMS recognizes that States will need flexibility to respond to the local employment market by phasing in and/or suspending program features, as necessary. A state may need time to establish supports for beneficiaries in regions with limited employment opportunities, for example, or localities facing particular economic stress or lack of viable transportation. The state should describe its plan for assessing and addressing these and related issues in its demonstration application. In addition, the state should consider whether other circumstances may arise that could prevent individuals from complying with a community engagement and work requirement. States should detail how they would support individuals in meeting program requirements during those periods, which may include incorporation of good cause exemptions similar to those used in SNAP and TANF.

Transparency
CMS remains committed to supporting reasonable public input processes that provide states an opportunity to consider the views of Medicaid beneficiaries, applicants, and other stakeholders and gather input that may support continuous improvement of the program. Demonstration projects under section 1115 of the Act intended to promote work and other community

engagement are subject to all relevant public notice and transparency requirements, including those described in 42 C.F.R. Part 431, subpart G. Where applicable, states will also be required to comply with tribal consultation requirements and describe how they are responding to comments received through the tribal consultation process.

Budget Neutrality

To promote long-term sustainability of the Medicaid program for states and the federal government, we will continue to require states to demonstrate that projects authorized under section 1115 of the Act are budget neutral. CMS will work with states to identify those components of the demonstration that will be included in budget neutrality calculations and provide technical assistance as needed in determining budget neutrality. States will not be permitted to accrue savings from a reduction in enrollment that may occur as a result of using this section 1115 authority. States will be required to document the financial performance of the demonstration and track expenditures to ensure the demonstration does not exceed established budget neutrality limits. States will provide updated budget neutrality workbooks with every required monitoring report, and the specific reporting requirements for monitoring budget neutrality will be set forth in the demonstration special terms and conditions (STCs).

Monitoring and Evaluation

CMS remains committed to ensuring state accountability for the health and well-being of Medicaid enrollees. Monitoring and evaluation are important for understanding these outcomes and the impacts of the state innovations being demonstrated. We are undertaking efforts to help states monitor the elements of their programs, while giving them the flexibility to adapt to changing conditions in their states. States will be required to develop monitoring plans and submit regular monitoring reports describing progress made in implementing their requirements for work and other community engagement activities. We will also undertake our own monitoring and technical assistance efforts through regular communications with states and will review written reports from states on a quarterly basis.

Monitoring

States approved to implement work and other community engagement requirements for Medicaid beneficiaries will submit to CMS a draft of proposed metrics for quarterly and annual monitoring reports, and CMS will work with the state to jointly identify metrics for these reports. Metrics will reflect the major elements of the demonstration, including but not limited to data that applies to the work and other community engagement initiatives. CMS will combine these programmatic metrics with general metrics aimed at monitoring beneficiary enrollment and termination for failure to meet program requirements, access to services for both beneficiaries and individuals terminated for failure to meet the requirements, and the overall functioning of the demonstration.

States will be subject to other monitoring and reporting requirements, consistent with regulations in 42 C.F.R. § 431.420 and § 431.428. State reports will be required to provide sufficient information to document key challenges, underlying causes of those challenges, and strategies for addressing those challenges, as well as key achievements and the conditions and efforts that lead to those successes. Specific details related to monitoring and reporting for each state's demonstration will be discussed with states and described in the demonstration STCs.

Evaluation

States will also be required to evaluate health and other outcomes of individuals that have been enrolled in and subject to the provisions of the demonstration, and will be required to conduct robust, independent program evaluations. Evaluations must be designed to determine whether the demonstration is meeting its objectives, as well as the impact of the demonstration on Medicaid beneficiaries and on individuals who experience a lapse in eligibility or coverage for failure to meet the program requirements or because they have gained employer-sponsored insurance. A draft evaluation design should be submitted with the application, and the final evaluation design will be submitted for CMS approval no more than 180 days after demonstration approval.

Evaluation designs will be expected to include a discussion of the evaluation questions and hypotheses that the state intends to test, including the hypothesis that requiring certain Medicaid beneficiaries to work or participate in other community engagement activities increases the likelihood that those Medicaid beneficiaries will achieve improved health, well-being, and (if the State designs its program to pursue this additional goal) independence as contemplated in the objectives of Medicaid. Evaluation designs will be expected to include analysis of how this requirement affects beneficiaries' ability to obtain sustainable employment, the extent to which individuals who transition from Medicaid obtain employer sponsored or other health insurance coverage, and how such transitions affect health and well-being.

The hypothesis testing should include, where possible, assessment of both process and outcome measures, and proposed measures should be selected from nationally-recognized sources and national measures sets, where possible. The evaluation design should use both quantitative and qualitative methods, and will need to identify comparison groups and appropriate statistical analyses to evaluate the impact of the demonstration. Evaluation designs should also include descriptions of multiple data sources to be used, including but not limited to multiple stakeholder perspectives, surveys of beneficiaries (both enrolled and those no longer enrolled as a result of the implementation of program requirements), claims data, and survey data (such as Consumer Assessment of Healthcare Providers and Systems (CAHPS)).

To the extent permitted by federal and state privacy laws, states should be prepared to track and evaluate health and community engagement outcomes both for those who remain enrolled in Medicaid, and those who are subject to the requirements but lose or experience a lapse in eligibility or coverage during the course of the demonstration, and provide details on how they will track these outcomes in their demonstration evaluation designs. Ongoing monitoring and evaluation efforts will help CMS learn more about the challenges and successes states experience while implementing innovative policies to increase productive community engagement, which we will then be able to share with other states looking to achieve similar goals related to their residents' well-being.

We hope this information is helpful, and we look forward to continuing to work with states to implement innovative solutions to improve their Medicaid programs. Questions and comments regarding this policy may be directed to Judith Cash, Acting Director, State Demonstrations Group, CMCS, at 410-786-9686.

Sincerely,

/s/

Brian Neale
Director

Cc:
National Association of Medicaid Directors
National Academy for State Health Policy
National Governors Association
American Public Human Services Association
Association of State and Territorial Health Officials
Council of State Governments
National Conference of State Legislatures
Academy Health
National Association of State Alcohol and Drug Abuse Directors

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CENTERS FOR MEDICARE & MEDICAID SERVICES

Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C 18-04-NH

DATE: **November 24, 2017**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Temporary Enforcement Delays for Certain Phase 2 F-Tags and Changes to *Nursing Home Compare*

Memorandum Summary

- **Temporary moratorium on imposing certain enforcement remedies for specific Phase 2 requirements:** CMS will provide an 18 month moratorium on the imposition of certain enforcement remedies for specific Phase 2 requirements. This 18 month period will be used to educate facilities about specific new Phase 2 standards.
- **Freeze Health Inspection Star Ratings:** Following the implementation of the new LTC survey process on November 28, 2017, CMS will hold constant the current health inspection star ratings on the *Nursing Home Compare* (NHC) website for any surveys occurring between November 28, 2017 and November 27, 2018.
- **Availability of Survey Findings:** The survey findings of facilities surveyed under the new LTC survey process will be published on NHC, but will not be incorporated into calculations for the *Five-Star Quality Rating System* for 12 months. CMS will add indicators to NHC that summarize survey findings.
- **Methodological Changes and Changes in Nursing Home Compare:** In early 2018, NHC health inspection star ratings will be based on the two most recent cycles of findings for standard health inspection surveys and the two most recent years of complaint inspections.

Background

On September 28, 2016, CMS revised the SNF and NF Requirements for Participation, which became effective on November 28, 2016, and have a three-part phase-in of implementation dates over three years. Phase 1 became effective on November 28, 2016. Implementation of the new regulations for nursing homes under Phase 2 will become effective on November 28, 2017 (see S&C memo: 17-36-NH, dated June 30, 2017).

We also published revised interpretive guidance for Appendix PP of the SOM with the June 30, 2017 memo reflecting the new regulatory changes, which includes renumbering the nursing home F-Tags to correspond with the new regulatory sections. Implementation of Phase 2 reforms is scheduled to occur simultaneously with a new, computer-based LTC survey process in which we are incorporating the new regulatory requirements as well as combining the Traditional and Quality Indicator Survey processes.

To address concerns about the implementation of the new requirements and new LTC survey process, CMS will be making specific policy and process adjustments to the enforcement system and results posted on Nursing Home Compare. These changes are described in more detail below.

Temporary Moratorium on Imposition of Certain Enforcement Remedies

To address concerns regarding the scope and timing of the revised requirements (42 CFR part 483, subpart B), there will be a 18-month moratorium on the imposition of civil money penalties (CMPs), discretionary denials of payment for new admissions (DPNAs) and discretionary termination where the remedy is based on a deficiency finding of one of the specified Phase 2 F-tags noted below. CMS is not extending the moratorium to F608 which addresses reporting reasonable suspicion of a crime due to the concerns about significant resident abuse going unreported. CMS will use this 18-month moratorium period to educate surveyors and the providers to ensure they understand the health and safety expectations that will be evaluated through the survey process since these Phase 2 requirements are associated with unique and separate tags where specialized efforts and technical assistance may be needed. Previous communication indicated that the moratorium would be in effect for 12 months; that has been extended to 18 months to ensure provider understanding and readiness. Deficiency findings for all other F-tags will follow the standard enforcement process which includes all available enforcement remedies. Please note, facilities cited for any noncompliance with Phase 1 or Phase 2 requirements (beginning November 28, 2017), or both, will continue to be subject to statutorily-required provisions (mandatory DPNA and termination for failure to achieve substantial compliance within the required timeframes). Further note that this 18 month moratorium on the imposition of remedies does not change the implementation date for the Phase 2 provisions and state survey agencies should cite these tags as appropriate and continue to forward their findings to the RO as normal.

The following F-Tags included in this moratorium are:

- F655 (Baseline Care Plan); ***§483.21(a)(1)-(a)(3)***
- F740 (Behavioral Health Services); ***§483.40***
- F741 (Sufficient/Competent Direct Care/Access Staff-Behavioral Health); ***§483.40(a)(1)-(a)(2)***
- F758 (Psychotropic Medications) related to PRN Limitations ***§483.45(e)(3)-(e)(5)***
- F838 (Facility Assessment); ***§483.70(e)***
- F881 (Antibiotic Stewardship Program); ***§483.80(a)(3)***
- F865 (QAPI Program and Plan) related to the development of the QAPI Plan; ***§483.75(a)(2)*** and,
- F926 (Smoking Policies). ***§483.90(i)(5)***

For surveys identifying noncompliance of both Phase 1 and the Phase 2 tags specified above, the CMS Regional Office (RO) will follow standard enforcement procedures related to the Phase 1 tag if the Phase 1 tag(s) necessitates the imposition of remedies. For example, if a survey conducted during the moratorium period cites deficiencies both for infection control practices at tag F880 and antibiotic stewardship at tag F881 and the RO determines enforcement remedies are warranted, the RO may impose appropriate remedies as it relates to F880; however, only a Directed Plan of Correction (DPOC) and/or Directed In-Service training (DIST) remedy could be imposed for the findings related to tag F881. Once the temporary moratorium period is over, enforcement for all cited tags will return to the normal enforcement policies. The following chart explains how the enforcement remedies will be applied during the 18month moratorium time period.

Application of Discretionary Enforcement Remedies During 18 Month Moratorium

Discretionary Enforcement Remedies	Phase 1 Tags Only	Both Phase 1 and Phase 2 Tags	Phase 2 Tags Only
Normal Enforcement Policies Apply Or 18 Month Moratorium Enforcement Policies Apply (DPOC/DIST)	Normal Enforcement Policies Apply	Normal Enforcement Policies Apply for the Phase 1 tag(s); and DPOC/DIST only may be imposed for Phase 2 tag(s)	18 Month Moratorium Enforcement Policies Apply (DPOC/DIST)

Directed Plan of Correction

A Directed Plan of Correction (as defined in 42 CFR §488.424) is an enforcement remedy developed by CMS, the State Survey Agency (or a temporary manager if applicable) requiring a facility to take action within specified timeframes to correct cited non-compliance. For these Phase 2 F-Tags identified above, we expect that the Directed Plan of Correction would address the structures, policies and processes needed by the facility to demonstrate and maintain substantial compliance.

A Directed Plan of Correction is completed when the facility has achieved substantial compliance, as determined by CMS or the State based upon a revisit or after an examination of credible written evidence that can be verified by CMS without an on-site visit. Surveyors are expected to go back on-site to review compliance when there is a credible allegation of compliance by the facility if any of the F-tags cited are Substandard Quality of Care (SQC), or when tags are at the actual harm or immediate jeopardy levels. See § 7317.2 of the CMS State Operations Manual (SOM) for information concerning on-site revisits and § 7500 for information concerning Directed Plans of Correction.

Directed In-Service Training

Directed In-Service Training is an enforcement remedy that may be used when CMS or the State, (or the temporary manager if applicable) believes that education is likely to correct the deficiencies and help the facility achieve and sustain substantial compliance. For this remedy to be used effectively and appropriately, the deficiency finding should demonstrate that a knowledge deficit significantly contributed to the deficiency. This remedy requires the relevant staff of the facility to attend an in-service training program that will address a demonstrated knowledge deficit. The purpose of directed in-service training is to provide the information necessary for the facility to achieve and maintain substantial compliance. Facilities should use programs developed by well-established centers of geriatric health services education such as schools of medicine or nursing, centers for
the aging, and area health education centers which have established programs in geriatrics and geriatric psychiatry. If it is willing and able, a State may provide special consultative services for obtaining this type of training. The State or CMS RO may also compile a list of resources that can provide directed in-service training and could make this list available to facilities and interested organizations. Facilities may also utilize their state's ombudsman program to provide training about residents' rights and quality of life issues.

After the directed in-service training has been completed, CMS RO or the State will assess whether substantial compliance has been achieved either through an on-site visit or by examining credible written evidence that it can be verified without an on-site visit. See § 7317.2 of the SOM for information concerning on-site revisits and § 7502 for information concerning Directed In-Service Training.

Statutorily Mandated Remedies not affected by Temporary Moratorium

The temporary moratorium described above does not include remedies that are required by federal law such as the Denial of Payment for New Admissions (DPNA) if the facility has not achieved compliance within 3 months of the finding under sections 1819(h)(2)(D) and 1919(h)(3)(C) of the Social Security Act (Act) and Termination after 23 days for immediate jeopardy under sections 1819(h)(4) and 1919(h)(5) of the Act or termination after 6 months for non-immediate jeopardy noncompliance under sections 1819(h)(2)(C) and 1919(h)(2)(D) of the Act.

CMS expects that the non-compliance for covered Phase 2 requirements would be corrected in advance of the statutorily-mandated timeframes as occurs with most cited deficiencies.

Temporary Freeze of Health Inspection Five-Star Ratings

Most facilities will be surveyed for compliance with Phase 2 requirements using the LTC revised survey process within one year after the November 28, 2017 Phase 2 implementation date. Due to the differing standards and process between those facilities surveyed under the new survey process compared to prior surveys, CMS will be holding constant, or "freezing," the health inspection star rating for health inspection surveys and complaint investigations conducted on or after November 28, 2017. We expect this freeze to begin in early 2018, and last approximately one year. Note that recent health surveys and complaint investigations conducted before November 28, 2017, will continue to be calculated in a facility's star rating, including any revisit

or changes based on informal dispute resolutions (IDR) or independent IDR. *Examples of when ratings can change include*:

1) A standard health inspection survey and revisit is conducted within the month of October 2017, and is closed after November 28, 2017. The survey results will be used in the nursing home's star rating as a survey conducted before the ratings freeze. Similar actions will take place for complaint investigations conducted prior to the ratings freeze.

2) A request for an IDR is received prior to the freeze and completed after November 28, 2017 with a change in scope/severity for at least one citation. The change will be reflected in the nursing home's star rating as a change prior to the ratings freeze.

Additionally, the health inspection star rating will no longer use information of the third (oldest) cycle of health inspection survey and complaint investigation data that is part of a nursing home's health inspection score. The weighted health inspection score and star rating for all nursing homes will then be based on the two most recent cycles of survey data. This change is to account for the fact that the data would have been dropped from the health inspection score because of its age, as part of the normal update process. This change will also occur in early 2018 for all facilities. At that time, the most recent cycle of data will be weighted at 60 percent and the prior cycle of data will receive a 40 percent weighting. We will be updating the *Five Star Quality Rating System* Technical User's Guide to reflect these changes.

CMS will continually monitor survey activity during the one year period to determine if any changes to the freezing methodology need to be made.

Other Changes to Nursing Home Compare

In addition to the items listed above, CMS is implementing other adjustments to ensure transparency. In addition to freezing the health inspection star rating on *Nursing Home Compare*, CMS plans to provide summaries of a facility's most recent survey findings, such as the total number of deficiencies cited, and the highest scope and severity level cited. This also includes identifying nursing homes with deficiency-free surveys. We also will post the full report of each survey (Form CMS-2567), which provides more details about the survey findings. We expect to implement these changes in early 2018, concurrent with the changes to the *Five Star Quality Rating System.*

CMS is aware that multiple programs (e.g., accountable care organizations (ACOs), bundled payment models, Medicare Advantage plans) use the *Five-Star Quality Rating System* as a component of their program. We have communicated information about changes to the rating system noted in this memorandum to these programs so they can evaluate any potential impact, and make any changes they feel warranted. The *Nursing Home Compare* website will also display information about the changes to the ratings system. For questions about how the *Five-Star Quality Rating System* is used or may impact one of these or other programs, we encourage individuals to communicate directly with the program's specific organizational or primary contact.

The changes explained in the memorandum serve a temporary need to accommodate the implementation of the first major regulatory change to the LTC requirements in over 25 years.

These types of changes are rare, and the *Five Star Quality Rating System* and *Nursing Home Compare* website remain an excellent source for information about nursing homes. In addition to survey findings, consumers can find information about quality measures and staffing to help support their decision making. We're also looking forward to future improvements, such as the inclusion of new staffing data from the Payroll-Based Journal program. That said, we believe the website and ratings system is one source of information about nursing homes, but consumers should seek other sources as well. For example, we encourage families to visit the facility and speak to the administrator, other staff, current residents, or the family or resident council. Also, speak with their physician or friends who have had similar situations.

Contact: For questions or concerns, please contact NHSurveyDevelopment@cms.hhs.gov

Effective Date: November 28, 2017. This policy should be immediately communicated to all survey and certification staff, their managers and the State/Regional Office training coordinators.

/s/
David R. Wright

cc: Survey and Certification Regional Office Management

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CENTERS FOR MEDICARE & MEDICAID SERVICES

Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 18-01-NH

DATE: **October 27, 2017**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Revised Policies regarding the Immediate Imposition of Federal Remedies- FOR ACTION

Memorandum Summary

- **This policy memo replaces S&C: 16-31-NH released July 22, 2016 and the revision on July 29, 2016.**
- **Revisions to Chapter 7 of the State Operations Manual (SOM) (Attachment):** The Centers for Medicare & Medicaid Services (CMS) has revised guidance relating to the Immediate Imposition of Federal Remedies. Other sections of Chapter 7 have been revised to ensure consistency with these revisions. Major revisions include:
  - We specify that when the current survey identifies Immediate Jeopardy (IJ) that does not result in serious injury, harm, impairment or death, the CMS Regions may determine the most appropriate remedy;
  - We clarified that Past Noncompliance deficiencies as described in §7510.1 of this chapter, are **not** included in the criteria for Immediate Imposition of Remedies;
  - For Special Focus Facilities (SFFs), we now exclude any S/S level "F" citations under tags F812, F813 or F814 from the tags that require immediate imposition of remedies.
- **This memo is being released in draft. We seek comment on this policy by December 1, 2017.**

Background

Skilled Nursing Facilities (SNFs), Nursing Facilities (NFs) and dually participating facilities (SNF/NFs) are required to be in substantial compliance with Medicare and Medicaid requirements at all times and are always responsible for the health and safety of its residents.

The purpose of federal remedies is to promote the initiative and responsibility of facilities to continuously monitor their performance and promptly achieve, sustain and maintain compliance with all federal requirements. To support this purpose, we are directing the immediate imposition of federal remedies in certain situations.

In addition to the required enforcement action(s), remedies should be selected that will bring about compliance quickly and to maintain continued compliance. Noncompliance may occur for a variety of reasons and can result in various levels of harm or likely harm to residents. The CMS Regional Offices (ROs) should consider the extent to which the noncompliance is a one-time mistake or accident, the result of larger systemic concerns, or a more intentional action or disregard for resident health and safety.

CMS is in the process of updating the SOM to reflect this revised guidance. The final version of this document when published in the on-line SOM may differ slightly from this interim advanced copy which is attached.

Contact: Please contact the CMS Regional Office or the dnh_triageteam@cms.hhs.gov to provide feedback on this draft by December 1, 2017.

Effective Date: CMS is seeking input on this draft and requests comments. CMS will review these comments before issuing a final version.

/s/
David R. Wright

Attachment: Advanced Guidance Revisions to SOM Chapter 7

cc: Survey and Certification Regional Office Management
State Medicaid Agencies

CMS Manual System

Pub. 100-07 State Operations Provider Certification

Department of Health & Human Services (DHHS)
Centers for Medicare & Medicaid Services (CMS)

Transmittal- ADVANCE COPY **Date: XXXX**

SUBJECT: Revisions to the State Operations manual (SOM 100-07) Chapter 7

I. SUMMARY OF CHANGES: Revisions to the State Operations manual (SOM 100-07) Chapter 7 – To provide revisions in sections 7304 through 7304.3, 7306, 7308.3, 7313.2, 7400.5, and 7400.5.1 regarding policies related to Immediate Imposition of Federal Remedies (previously referred to as Opportunity or No Opportunity to Correct). Sections 7304.2.1 and 7304.2.2 have been deleted and incorporated into other sections noted above.

NEW/REVISED MATERIAL - EFFECTIVE DATE*: Upon Issuance
IMPLEMENTATION DATE: Upon Issuance

Disclaimer for manual changes only: The revision date and transmittal number apply to the red italicized material only. Any other material was previously published and remains unchanged. However, if this revision contains a table of contents, you will receive the new/revised information only, and not the entire table of contents.

II. CHANGES IN MANUAL INSTRUCTIONS: (*N/A if manual not updated.*)
(R = REVISED, N = NEW, D = DELETED) – (*Only One Per Row.*)

R/N/D	CHAPTER/SECTION/SUBSECTION/TITLE
R	Chapter 7/7304/ Mandatory Immediate Imposition of Federal Remedies
R	Chapter 7/7304.1/ Criteria for Mandatory Immediate Imposition of Federal Remedies
R	Chapter 7/7304.2/ Effective Dates for Immediate Imposition of Federal Remedies
D	Chapter 7/7304.2.1/ Mandatory Criteria for Having No Opportunity to Correct
D	Chapter 7/7304.2.2/ Additional State Discretion
R	Chapter 7/7304.3/ Responsibilities of the State Survey Agency and the CMS Regional Office when there is an Immediate Imposition of Federal Remedies
R	Chapter 7/7306/ Timing of Civil Money Penalties *(CMPs) for Immediate Imposition*
D	Chapter 7/7306.1/ I Imposition of a Civil Money Penalty when a Facility is not allowed an Opportunity to
D	Chapter 7/7306.3 When State Recommends a Civil Money Penalty for Past Noncompliance
D	Chapter 7/7306.4/ Amount
R	Chapter 7/7308/ Enforcement Actions When Immediate Jeopardy *(IJ)*

	Exists
D	**Chapter 7/7308.1/ Action That Must Be Taken**
D	**Chapter 7/7308.2/ Enforcement Action That Must Be Taken**
D	**Chapter 7/7308.3/ Action That Must Be Taken**
R	**Chapter 7/7309/ Key Dates When Immediate Jeopardy *(IJ)* Exists**
R	**Chapter 7/7309.1/ 2nd *Business* Day**
R	**Chapter 7/7309.2/ 5th *Business* Day**
R	**Chapter 7/7309.3/ 5th - 21st Calendar Day**
R	**Chapter 7/7309.4/ No Later Than 10th *Calendar* Day**
R	**Chapter 7/7309.5/ By 23rd Calendar Day**
R	**Chapter 7/7313/ Procedures for Recommending Enforcement Remedies When Immediate Jeopardy Does Not Exist**
R	**Chapter 7/7313.1/ *Facilities Given an Opportunity to Correct Deficiencies prior to the Immediate Imposition of Federal Remedies***
D	**Chapter 7/7313.2/ Facilities Given an Opportunity to Correct Deficiencies prior to the Immediate Imposition of Federal Remedies**
R	**Chapter 7/7400/ *Enforcement Remedies for Skilled Nursing Facilities (SNFs), Nursing Facilities (NFs) and Dually Participating Facilities (SNFs/NFs)***
R	**Chapter 7/7400.1/ *Available Federal Enforcement Remedies***
R	**Chapter 7/7400.2/ *Enforcement Remedies for the State Medicaid Agency***
R	**Chapter 7/7400.3/ *Selection of Remedies***
R	**Chapter 7/7400.3.1/ Availability of State Medicaid Agency Remedies to the Regional Office in Dually Participating Facilities**
R	**Chapter 7/7400.5/ *Factors That Must Be Considered When Selecting Remedies***
D	**Chapter 7/7400.5.1/ *Matrix for Scope & Severity***

III. FUNDING: No additional funding will be provided by CMS.

IV. ATTACHMENTS:

	Business Requirements
X	**Manual Instruction**
	Confidential Requirements
	One-Time Notification
	Recurring Update Notification

***Unless otherwise specified, the effective date is the date of service.**

7304 - Mandatory Immediate Imposition of Federal Remedies
(Rev.)

Noncompliance may occur for a variety of reasons and can result in harm to residents or put residents at risk for harm. When facilities do not maintain substantial compliance, CMS may use various enforcement remedies to encourage prompt compliance. The purpose of federal remedies is to promote the initiative and responsibility of facilities to continuously monitor their performance and promptly achieve, sustain and maintain compliance with all federal requirements. To support this purpose, we are directing the immediate imposition of federal remedies in certain situations outlined in §7304.1 below, and we recommend using the type of remedy that best achieves the purpose based on the circumstances of each case.

This guidance does not apply to ***past noncompliance*** *deficiencies as described in §7510.1 of this chapter. The determination to impose federal remedies for past noncompliance is at the discretion of the CMS Regional Office (RO).*

7304.1 - Criteria for Mandatory Immediate Imposition of Federal Remedies Prior to the Facility's Correction of Deficiencies
(Rev.)

A facility *shall not be offered* an opportunity to correct deficiencies before federal remedies are imposed if the situation meets *any one or more of* the *following* criteria:

- Immediate Jeopardy (IJ) (scope and severity levels J, K, and L) is identified on the current survey; **OR**
- *Any d*eficiency *from the current survey at levels "G, H or I", that falls into any of the* Substandard Quality of Care (SQC) *regulatory sections* that are not IJ *but did result in injury, harm, or impairment*; **OR**
- *Any d*eficiency *at "*G*"* or above on the current survey ***AND*** *if there were any* deficiencies *at "G" or above* on the previous standard health or LSC survey **or** *if there was any* deficiency *at "G"* or above on any type of survey between the current survey and the last standard *health or LSC* survey. *These surveys (standard health or LSC, complaint, revisit) must be separated by a certification of compliance, i.e., be from different noncompliance cycles. In other words, level G or above deficiencies from multiple surveys within the same noncompliance cycle must not be combined to make this "double G or higher" determination*; **OR**
- A facility classified as a Special Focus Facility (SFF) **AND** has a deficiency citation at level "F," *(excluding any level "F" citations under tags F812, F813 or F814)* or higher for the current health survey or "G" or higher for the current Life Safety Code (LSC) survey.

*The remedies to be imposed by statute do not change, (e.g., 3-month automatic Denial of Payment for new admissions (DPNA), 23-day termination when IJ is present and 6-month termination). In addition to these statutory remedies, t*he CMS RO **must *also*** *immediately* impose *one or more additional* remedies *for any situation that* meets the criteria identified above. The State Survey and/or Medicaid Agencies **shall not** permit changes to this policy.

NOTE: "Current" survey is whatever Health and/or LSC survey is currently being performed, e.g., standard, revisit, or complaint. *"Standard" survey (which does not include complaint or revisit surveys) is a periodic, resident-centered inspection that gathers information about the quality of service furnished in a facility to determine compliance with the requirements of participation.*

While States are not required to recommend the types of remedies to be imposed, they are encouraged to do so, since States may be more familiar with a facility's history and the specific circumstances in the case at hand. The CMS RO may or may not accept these recommendations.

Regardless of a State's recommendation, the CMS RO must take the necessary actions to impose a remedy or multiple remedies, based on the seriousness of the deficiencies following the criteria set forth in *42 C.F.R.* §488.404. *Also refer to §§7400.5.1 and 7400.5.2 of this chapter. In addition to any statutorily imposed remedy, additional remedies should be selected that will bring about compliance quickly and achieve and maintain compliance. When making remedy choices, the CMS RO considers the extent to which the noncompliance is the result of a one-time mistake, larger systemic concerns, or an intentional action of disregard for resident health and safety.*

The State Survey Agency is authorized to both recommend and impose one or more Category 1 remedies, in accordance with §7314 of this Chapter. **CATEGORY 1** remedies include:

- Directed plan of correction,
- State monitoring, and
- Directed in-service training.

Use of Federal Remedies in Immediate Jeopardy (IJ) Citations *- When IJ is identified on the current survey that resulted in serious injury, harm, impairment or death a CMP* ***must*** *be imposed.*

For IJ citations where there is ***no resultant*** *serious injury, harm, impairment or death but the likelihood is present, the CMS RO must impose a remedy or remedies that will best achieve the purpose of attaining and sustaining compliance. CMPs may be imposed, but they are not required.*

Types of Remedies *- The choice of remedy is made that best achieves the purpose of attaining and sustaining compliance based on the circumstances of each case and recommendations from the State. Federal remedies are summarized below. Refer to §§7500 - 7556 of this chapter for more detail on these remedies.*

Civil Money Penalties (CMPs) *- Federal CMPs are only imposed by the CMS RO. If a CMP is imposed, it must be done in accordance with instructions in the CMP Analytic Tool and §§7510 through 7536 of this chapter.*

If a per instance CMP is imposed, the facility shall not be given an opportunity to correct any deficiency for which this CMP is imposed prior to the imposition of this remedy.

Directed In-Service Training *– Refer to §7502 of this chapter. Consider this remedy in cases where the facility has deficiencies where there are knowledge gaps in standards of practice, staff competencies or the minimum requirements of participation and where education is likely to correct the noncompliance. Depending on the topic(s) that need to be addressed and the level of training needed, facilities should consider using programs developed by well-established centers of geriatric health services such as schools of medicine or nursing, centers for the aging, and area health education centers which have established programs in geriatrics and geriatric psychiatry. If it is willing and able, a State may provide special consultative services for obtaining this type of training. The State or regional office may also compile a list of resources that can provide directed in-service training and could make this list available to facilities and interested organizations. Facilities may also utilize the ombudsman program to provide training about residents' rights and quality of life issues.*

Directed Plan of Correction *Refer to §7500 of this chapter. This remedy provides for directed action(s) from either the State or CMS RO that the facility must take to address the noncompliance or a directed process for the facility to more fully address the root cause(s) of the noncompliance. Achieving compliance is ultimately the facility's responsibility, whether or not a directed plan of correction is followed.*

Temporary Management *- Refer to §7550 of this chapter. This is the temporary appointment by CMS or the State of a substitute facility manager or administrator with authority to hire, terminate or reassign staff, obligate facility funds, alter facility procedures, and manage the facility to correct deficiencies identified in the facility's operation. A temporary manager may be imposed anytime a facility is not in substantial compliance, but must be imposed when a facility's deficiencies constitute IJ or widespread actual harm and a decision is made to impose an alternative remedy to termination. It is the temporary manager's responsibility to oversee correction of the deficiencies and assure the health and safety of the facility's residents while the corrections are being made. A temporary manager remedy may also be imposed to oversee orderly closure of a facility. The State will select the temporary manager when the State Medicaid Agency is imposing the remedy and will recommend a temporary manager to the regional office when CMS is imposing the remedy. Each State should compile a list of individuals who are eligible to serve as temporary managers. These individuals do not have to be located in the State where the facility is located.*

Denial of Payment for all <u>New</u> Medicare and Medicaid Admissions (DPNA) *– See §7506 of this chapter. This remedy may be imposed alone or in combination with other remedies to encourage quick compliance. Regardless of any other remedies that may be imposed, a mandatory denial of payment for new admissions* ***must*** *be imposed when the facility is not in substantial compliance three months after the last day of the survey identifying deficiencies, or when a facility has been found to have furnished substandard quality of care on the last three consecutive standard surveys (see 42 CFR 488.414).*

Denial of all Payment for all Medicare and Medicaid Residents (DPAA) (Discretionary). *See §7508 of this chapter. Only CMS has the authority to deny all payment for Medicare and/or Medicaid residents. This is in addition to the authority to deny payment for all new admissions*

(discretionary) noted above. This is a severe remedy. Factors to be considered in selecting this remedy include but are not limited to:

1. *Seriousness of current survey findings;*
2. *Noncompliance history of the facility; and*
3. *Use of other remedies that have failed to achieve or sustain compliance.*

***State Monitoring** - Refer to §7504 of this chapter. A State monitor oversees the correction of cited deficiencies in the facility as a safeguard against further harm to residents when harm or a situation with a potential for harm has occurred. Consider imposing this remedy when, for example, there are concerns that the situation in the facility has the potential to worsen or the facility seems unable or unwilling to take corrective action. A State monitor **must** be used when a facility has been cited with substandard quality of care (SQC) deficiencies on the last three consecutive **standard health** surveys.*

***Termination of Provider Agreement** - See §7556 of this chapter. While this remedy may be imposed at any time the circumstances warrant regardless of whether IJ is present; regardless of any other remedies that may be imposed, termination of a facility's provider agreement **must** be imposed when the facility is not in substantial compliance six months after the last day of the survey identifying deficiencies or within no more than 23 days if IJ is identified and not removed.*

7304.2 - Effective Dates for Immediate Imposition of Federal Remedies *(Rev.)*

The State Survey Agency must immediately inform its CMS RO when immediate imposition of remedies must be made so that the notice letter, from the State Survey Agency or the CMS RO, to the facility can promptly be sent out and meet the timelines for notice as outlined in §7305 of this chapter. *This will ensure that remedies are imposed as soon as possible.* Once a remedy is imposed, it *becomes* effect*ive* as of the date in the notice letter. All remedies remain in effect and continue until the facility *is determined to be* in substantial compliance *(which may occur before the revisit date)*. Substantial compliance must be verified in accordance with §7317 of this chapter.

For Immediate Jeopardy *(IJ)* Situations: *A facility's* removal of the conditions that *caused the* IJ may, at CMS's discretion, result in the rescission of the 23-day termination. *A per day CMP must be lowered when the survey agency has verified that the IJ has been removed but deficiencies at a lower level continue. Refer to the CMP Analytic Tool instructions for determining the dates of a per day CMP. H*owever, CMS **shall not** rescind any *other* remedies imposed *until the facility achieves substantial compliance or is terminated.* Remedies imposed must remain in effect, irrespective of when the IJ is removed, unless otherwise rescinded *or revised* as a result of legal proceedings. Remedies will be immediately imposed and effectuated whether or not the *IJ* was:

- removed during the survey, or,
- removed in a subsequent IJ removal revisit before the 23rd day.

7304.3 - Responsibilities of the State Survey Agency and the CMS Regional Office *(RO)* when there is an Immediate Imposition of Federal Remedies

(Rev.)

When federal remedies *are to be immediately imposed* as outlined in §7304.1, *within five (5) business days from when the initial notice was sent to the facility by the survey agency,* the State Survey Agency **MUST:**

- *C*opy the CMS RO on its initial notice to the facility. The State Survey Agency does not need prior approval from the CMS RO before sending this notice to the facility*; and*
- *A*ssure *all of* these cases are referred to the CMS RO for *their review and* action.

The survey agency (State or Federal) must enter all of these cases as a NO opportunity to correct into the *Automated System Processing Environment (ASPEN)/ASPEN Enforcement Manager (AEM)* system within five (5) business days of sending the initial notice to the facility. The State Survey Agency and the CMS RO must have systems in place to routinely check and monitor the ASPEN-AEM database to identify cases that may require enforcement action or additional follow-up, as needed.

7306 - Timing of Civil Money Penalties *(CMPs)*

(Rev.)

7306.1 - *Immediate* Imposition of a Civil Money Penalty *(CMP)*

(Rev)

If a per instance CMP is imposed, the facility shall not be given an opportunity to correct any deficiency for which this CMP is imposed prior to the imposition of this remedy.

*While t*he State *Survey Agency is not required to* recommend that a *CMP (or the amount of a CMP)* be imposed as a result of the noncompliance referenced in §7304*.1, they may do so. This recommendation must be sent to* the *CMS* regional office *(RO)* and *the* State Medicaid Agency.

The *CMS RO* and *the* State Medicaid Agency *must respond* to the State survey agency's recommendation and, if accepted, *the CMS RO* sends out the formal notice *of the immediate imposition of a CMP to the facility* in accordance with the requirements in §§7305, *7309* and 7520.

7308 - Enforcement Actions When Immediate Jeopardy *(IJ)* Exists

(Rev.)

When the State *Survey Agency* identifies *IJ, no later than two business days following the survey date which identified the IJ, it* must notify;

- The *CMS* Regional Office *(RO) and* the State Medicaid Agency *of its survey findings by telephone, e-mail, or other means acceptable to the CMS RO and the State Medicaid agency: and,*
- *The facility of the IJ findings in writing. A written notice or letter to the facility in lieu of a Form CMS 2567 would be acceptable.*

Waiting for the complete statement of deficiencies (Form CMS-2567) and the facility's plan

of correction for the *non-IJ* deficiencies can result in undue delay in determining removal of *IJ*. Therefore, *a Statement of Deficiencies (Form CMS-2567) and a facility's* plan of correction *for the non-IJ deficiencies may* be deferred until the *survey agency verifies the IJ* is removed.

In addition to the imposition of enforcement remedies, the *CMS RO* terminates the *Medicare* provider agreement within 23 calendar days of the last date of the survey, and/or appoints a temporary manager who must remove the *IJ* within *no more than* 23 calendar days of the last date of the survey. When the *CMS RO* imposes termination of a Medicare provider agreement, it *must* notify the State Medicaid Agency.

In order *to prevent* termination *from occurring within 23 days*, the *IJ* **must be removed, even if the underlying deficiencies have not been fully corrected.** When *IJ* is identified, the facility must submit an allegation that the *IJ* has been removed, *including* a *specific* plan detail*ing* how and when the *IJ* was removed.

Documentation must be completed indicating whether the *IJ* was removed and deficiencies corrected (Form CMS-2567B), or that the *IJ* was removed but compliance had not been achieved (Form CMS-2567).

If the facility alleges that the *IJ* is removed and *the survey agency* verifies *this* but the facility is still not in substantial compliance, *then complete a full Statement of Deficiencies (CMS Form 2567)*, which requires a plan of correction for all *remaining deficiencies*.

In addition, whenever a facility has deficiencies that constitute both IJ **and** substandard quality of care (SQC) *(as defined in 42 CFR §488.301),* the survey agency must notify the attending physician of each resident found to have received SQC as well as the State board responsible for licensing the facility's administrator. Notify physicians and the administrator licensing board in accordance with §7320.

7309 - Key Dates When Immediate Jeopardy *(IJ)* Exists
(Rev.)

NOTE: These timelines apply whether the survey was conducted by a State Survey Agency, CMS Regional Office (RO) or a CMS contractor.

7309.1 - 2nd *Business* Day
(Rev.)

When the State *Survey Agency* identifies *IJ, no later than two business days following the survey date which identified the IJ, it* must notify;

- The *CMS* Regional Office *(RO) and* the State Medicaid Agency *of its survey findings by telephone, e-mail, or other means acceptable to the CMS RO and the State Medicaid agency: and,*
- *The facility of the IJ findings in writing that the State is recommending to the CMS RO (for skilled nursing facilities and dually participating facilities) or to the State*

Medicaid Agency (for nursing facilities) that the provider agreement be terminated and that a Civil Money Penalty (CMP) or other remedies may be imposed, refer to §§7304 and 7304.1. A temporary manager may be imposed in lieu of or in addition to termination. Procedures pertaining to the imposition of CMPs and temporary management can be found in §§7510-7536 and §7550, respectively.

This letter *may also* serve as *the* formal notice *from the State Survey Agency* for imposition of any category 1 remedy or denial of payment for new admissions remedy when authorized by *the* CMS *RO* and/or the State Medicaid Agency. *This notice must also* include the facility's right to informal dispute resolution *(IDR) or an independent informal dispute resolution (IIDR)* and to a formal appeal of the noncompliance.

7309.2 - 5th *Business* Day
(Rev.)

Within five business days from when the initial notice was sent to the facility by the State *Survey Agency, they* must *assure these IJ cases are forwarded and referred to the CMS RO for their review and action,* including all documentation (e.g., notice letter, contact reports, Forms CMS-1539 *and CMS-2567*, if completed). *This information may be transmitted and referred to the CMS RO via the Automated System Processing Environment (ASPEN)/ASPEN Enforcement Manager (AEM) system.*

7309.3 - 5th - 21st Calendar Day
(Rev.)

Except when formal notice of remedies is provided by the State *Survey Agency*, as authorized by CMS and/or the State Medicaid Agency, the *CMS RO* and/or the State Medicaid Agency issues a formal notification of remedies to the facility (see §7305). In addition, the notice should include the facility's right to a formal appeal of the noncompliance which led to the temporary management remedy, termination, or any other enforcement actions (except State monitoring). For the temporary management remedy, the notice will advise the facility of the conditions of temporary management as specified in §7550, and that failure to relinquish control to the temporary manager will result in termination. The general public is also given notice of the impending termination.

7309.4 - No Later Than 10th *Calendar* Day
(Rev.)

If the survey entity verifies that the IJ has been removed, then the survey agency must *send the Statement of Deficiencies (Form CMS-2567)* to the facility, the *CMS RO*, and, if the facility participates in Medicaid, the State Medicaid Agency.

NOTE: The facility is not required to submit a *PoC* in order to verify the removal of the *IJ. T*he facility *should* submit *a written* allegation of removal of the *IJ* with sufficient *detailed* information to *demonstrate* how *and when* the *IJ w*as removed. If a *PoC* is to be submitted, it

must be received no later than 10 calendar days after the facility receives their *Statement of Deficiencies (Form CMS*-CMS-2567) *from the survey agency.*

The CMS RO must impose a Civil Money Penalty (CMP) if the IJ resulted in serious injury, harm, impairment or death on the current survey.

For IJ citations where there is no resultant serious injury, harm, impairment or death but the likelihood is present, a remedy must be imposed; however, the CMS RO may select whichever type of remedy best achieves the purpose of achieving and sustaining compliance and address various levels of noncompliance.

7309.5 - By 23rd Calendar Day
(Rev.)

Termination takes effect unless the *IJ* has been removed. If the *IJ* has been removed *and verified by the survey agency however additional deficiencies remain and* substantial compliance has not been achieved, the facility may be given up to 6 months from the last day of survey during which to achieve substantial compliance. (See §7316 for key dates when immediate jeopardy does not exist.)

7313 - Procedures for Recommending Enforcement Remedies When Immediate Jeopardy Does Not Exist
(Rev.)

Once noncompliance is identified, the surveying entity *must first* determine whether to *immediately* impose remedies *in accordance with the criteria in §7304.1* or give the facility an opportunity to correct its deficiencies before *remedies* are imposed.

7313.1 - Facilities Given an Opportunity to Correct Deficiencies prior to the Immediate Imposition of Federal Remedies
(Rev.)

A facility may be permitted to correct its deficiencies and *delay* the imposition of remedies only when the criteria outlined in §7304.1 of this chapter are not met. *Facilities must submit an acceptable plan of correction for its deficiencies.*

The State Survey Agency, or the CMS regional office (RO) for federal surveys, provides the initial notice to the facility that failure to correct cited deficiencies may result in the recommendation or imposition of remedies. The State Survey Agency may provide formal notice in its initial notice to the facility or in its notice letter related to the first revisit survey of the imposition of Category 1 remedies and the denial of payment for new admissions if authorized by its CMS RO.

If at the time of the first revisit the facility has not achieved substantial compliance, remedies may be imposed and will be effective once formal notice has been provided to the facility. In these circumstances, the State *Survey Agency* recommends *to the CMS RO and the State*

Medicaid Agency that remedies be imposed and/or *become* effective. The *CMS RO* and *the* State Medicaid Agency should establish procedures with the State *Survey Agency* as to when and how the documentation of noncompliance is to be communicated *and how and when responses regarding these recommendations will be made.*

7400 - Enforcement Remedies for Skilled Nursing Facilities *(SNFs)*, Nursing Facilities *(NFs)* and Dually Participating Facilities *(SNFs/NFs)*
(Rev.)

Sections 1819(h) and 1919(h) of the Act, as well as 42 CFR §§488.404, 488.406, and 488.408, provide that CMS or the State may impose one or more remedies in addition to, or instead of, termination of the provider agreement when the State or CMS finds that a facility is out of compliance with *federal* requirements. *E*nforcement protocols/procedures are based on the premise that all requirements must be met and take on greater or lesser significance depending on the specific circumstances and resident outcomes in each facility.

7400.1 - Available Federal Enforcement Remedies
(Rev.)

In accordance with 42 CFR §488.406, the following remedies are available:

- Termination of the provider agreement;
- Temporary management;
- Denial of payment for all Medicare and/or Medicaid residents by CMS;
- Denial of payment for all new Medicare and/or Medicaid admissions;
- Civil money penalties;
- State monitoring;
- Transfer of residents;
- Transfer of residents with closure of facility;
- Directed plan of correction;
- Directed in-service training; and
- Alternative or additional State remedies approved by CMS.

7400.2 - Enforcement Remedies for the State Medicaid Agency
(Rev.)

Regardless of what other remedies the State Medicaid Agency may want to establish in addition to the remedy of termination of the provider agreement, it must establish, at a minimum, the following statutorily-specified remedies or an approved alternative to these specified remedies:

- Temporary management;
- Denial of payment for all new admissions;
- Civil money penalties;
- Transfer of residents;
- Transfer of residents with closure of facility; and
- State monitoring.

The State Medicaid Agency may establish additional or alternative remedies as long as the State has been authorized by CMS to do so under its State plan. Guidance on the review and approval (or disapproval) of State Plan amendment requests for alternative or additional remedies can be found in §7805.

Whenever a State Medicaid Agency's remedy is unique to its State plan and has been approved by CMS, then that remedy may also be imposed by the regional office against the Medicare provider agreement of a dually participating facility in that State. For example, where CMS has approved a State's ban on admissions remedy as an alternative remedy under the State plan, CMS may impose this remedy but only against Medicare and Medicaid residents; only the State can ban the admission of private pay residents.

7400.3 - Selection of Remedies
(Rev.)

In order to select the appropriate remedy(ies) for a facility's noncompliance, the seriousness, *scope and severity* of the deficiencies must first be assessed. *The purpose of federal remedies is to encourage the provider to achieve and sustain substantial compliance. In addition to the required enforcement action(s), remedies should be selected that will bring about compliance quickly. While a facility is always responsible for all violations of the Medicare and Medicaid requirements, when making remedy choices, the CMS RO should consider the extent to which the noncompliance is the result of a one-time mistake, larger systemic concerns, or an intentional action of disregard for resident health and safety.*

7400.3.1 – Matrix for Scope & Severity
(Rev.)

Immediate jeopardy to resident health or safety	**J**	**K**	**L**
Actual harm that is not immediate	**G**	**H**	**I**
No actual harm with potential for more than minimal harm that is not immediate jeopardy	**D**	**E**	**F**
No actual harm with potential for minimal harm	**A** No PoC	**B**	**C**
	Isolated	**Pattern**	**Widespread**

Substandard Quality of Care (SQC) is defined in 42 C.F.R. §488.301 as one or more deficiencies which constitute either immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimal harm, but less than immediate jeopardy, with no actual harm, related to certain participation requirements.

Substantial compliance means a level of compliance with the requirements of participation such that any identified deficiencies pose no greater risk to resident health or safety than the potential for causing minimal harm. Substantial compliance constitutes compliance with participation requirements (42 C.F.R. §488.301).

DEPARTMENT OF HEALTH & HUMAN SERVICES
Centers for Medicare & Medicaid Services
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CENTERS FOR MEDICARE & MEDICAID SERVICES

Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 17-37-NH

DATE: **July 07, 2017**

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Revision of Civil Money Penalty (CMP) Policies and CMP Analytic Tool

Memorandum Summary

- **Revisions to CMP Tool:** When noncompliance exists, enforcement remedies, such as civil money penalties (CMPs), are intended to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance. To increase national consistency in imposing CMPs, the Centers for Medicare & Medicaid Services (CMS) is revising the CMP analytic tool in the following areas which are further explained within this policy memorandum:
  - Past Noncompliance;
  - Per Instance CMP is the Default for Noncompliance Existed Before the Survey;
  - Per Day CMP is the Default for Noncompliance Existing During the Survey and Beyond;
  - Revisit Timing; and
  - Review of High CMPs.

- **This policy memo replaces S&C Memo 15-16-NH:** The prior versions of the CMP Tool are obsolete, as of the effective date of this memo, July 17, 2017.

The Omnibus Budget Reconciliation Act of 1987 (OBRA '87) modernized the survey process for long term care facilities and provided a range of remedies that CMS could impose to encourage a swift return to substantial compliance and sustained compliance going forward, thus preventing harm to residents. Among the remedies authorized by OBRA '87 are civil money penalties (CMPs). CMS imposes two types of CMPs: Per Day and Per Instance. Per Day CMPs are divided into lower and upper level ranges. The upper level range CMPs must be used when facility noncompliance puts resident health and safety in immediate jeopardy. Lower level CMPs must be used for facility noncompliance that results in actual harm to residents or poses the potential for more than minimal harm to residents.

More information on CMP amounts and ranges can be found in 42 CFR 488.408, and on the CMS website at https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Civil-Monetary-Penalties-Annual-Adjustments.html.

When selecting an enforcement remedy, CMS Regional Offices (ROs) review the survey findings to determine which remedy is most appropriate to address the noncompliance. The statute and regulations (488.406) outline a variety of federal remedies (CMP, directed plan of correction, directed in-service training, etc). We encourage use of the remedy that will best achieve swift and sustained compliance with federal health and safety requirements. If the RO determines that imposition of a CMP will best achieve the goal, the ROs use an analytic tool to calculate the amount imposed based on the type of noncompliance. Notwithstanding the type of noncompliance, CMP amounts can vary based on factors such as the date of the noncompliance and the timing of the revisit survey to certify compliance. To reduce this variation, CMS is making several changes to the CMP analytic tool.

Revised CMP Policies and Analytic Tool

The revised CMP Analytic Tool instructs ROs how to use Per Day and Per Instance CMPs depending on the timing of the noncompliance in relation to the survey, whether residents were harmed or abused, whether the facility has a good compliance history, and whether the noncompliance was an isolated event or persistent deficient practices were identified.

When noncompliance exists, enforcement remedies, such as civil money penalties (CMPs), are intended to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance. To increase national consistency in imposing CMPs, CMS is revising the CMP analytic tool in the following manner:

- **Past Noncompliance:** ROs will impose a per-instance CMP for past noncompliance – something occurred before the current survey, but has been fully addressed and the facility is back in compliance with that area.

- **Per Instance CMP is the Default for Noncompliance that Existed before the Survey:** CMS ROs will generally impose a Per Instance CMP retroactively for non-compliance that still exists at the time of the survey, but began earlier. However, a Per Day will be used to address noncompliance that occurred where: (1) a resident suffers actual serious harm at the immediate jeopardy level; (2) a resident was abused; (3) or the facility had persistent deficient practices violating federal regulations.

- **Per Day CMP is the Default for Noncompliance Existing during the Survey and Beyond:** In contrast, Per Day CMPs will be the default CMPs for noncompliance identified during the survey and beyond, because there is an urgent need to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance. Exceptions allowing Per Instance CMPs will be made for facilities with good compliance histories, and where a single isolated incident causes harm to a resident, unless abuse has been cited.

- **Revisit Timing:** CMS ROs should consider the timing of the revisit survey to certify compliance when imposing the final CMP amount. CMS has added language specifying this consideration.

- **Review of High CMPs:** CMS Central Office will Review CMPs of $250,000 or greater.

Contact: For questions or concerns, please contact DNH_TriageTeam@cms.hhs.gov.

Effective Date: July 17, 2017 for all enforcement cases where the CMS RO determines that a CMP is an appropriate enforcement remedy. This guidance should be communicated to all RO and State Survey Agency survey, certification and enforcement staff, their managers and the State/RO training coordinators.

/s/
David R. Wright

Attachment- CMP Analytic Tool User's Guide Version 1.3

cc: Survey and Certification Regional Office Management
State Medicaid Agency

Centers for Medicare & Medicaid Services
Center for Clinical Standards & Quality
Survey & Certification Group
Division of Nursing Homes

CMP Analytic Tool

User's Guide

Version 1.3

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2 CMP Analytic Tool

2.1 Introduction Section

2.1.1 General Instructions

CMS Regional Offices have a variety of enforcement remedies to choose from in addressing non-compliance by a facility. These remedies include civil money penalties, denial of payment for all individuals, discretionary denial of payment for new admissions, mandatory denial of payment (new admissions 3-months), directed in-service training, directed plan of correction, discretionary termination, mandatory termination, state monitoring, temporary management, transfer of residents, and transfer of residents/closure of facility. Not all situations require the same remedies. The RO should use the enforcement remedy most appropriate in considering the level/severity of harm to the resident, the context behind the facility non-compliance, and the type of enforcement that has the best chance of the facility achieving future compliance.

All CMS Regional Offices (ROs) are required to use the following CMP Analytic Tool and Instructions: (1) to choose the appropriate type of CMP to be imposed; and (2) to calculate the CMP amount, when the RO determines that a CMP is an appropriate remedy to impose. The RO must complete all sections of the tool that apply to the type of CMP selected. Please refer to the CMP Analytic Tool User's Guide for information about using this tool. Though remedies are usually imposed on Level 3 and Level 4 deficiencies, depending upon the circumstances, Regional Offices may impose CMPs for level 2 deficiencies based on the factors listed in 42 CFR 488.404 and 488.438(f).

Note: Use a separate calculation for each Life Safety Code (LSC) CMP, Health Survey CMP, or any new or changed CMP within a noncompliance cycle. For factors that may result in an increase in the CMP (e.g., culpability, facility history of noncompliance, etc.), only calculate those factors one time for each survey. Apply the added dollar amounts to each CMP you impose per survey, unless otherwise instructed. Always use the tool and User's Guide at this link (save in your bookmarks/favorites) for the most current version. Required fields are marked with an asterisk.*

2.2 "Select the Calculation Type" Section

2.2.1 Input

Field	Input	Detailed Instructions
Calculation Type (Required)	• Preliminary • Final	Select "Final" if in compliance or terminated.

2.3 "Enter the Case Information" Section

2.3.1 Input

Field	Input	Detailed Instructions
CCN (Required)	Text	N/A
Confirm CCN (Required)	Text	N/A
Provider Name (Required)	Text	N/A
Analyst Name (Required)	Text	Enter full name (first and last name).
Cycle Start Date (Required)	Text	Enter the date in mm/dd/yyyy format.

2.4 "Select the CMP Type (Per Day or Per Instance)" Section

2.4.1 General Instructions

Section 1819(h)(2)(B)(ii) of the Social Security Act.

The factors to consider in this tool for each type of CMP are intended to determine amounts for each CMP to be imposed. Also, if a Life Safety Code (LSC) deficiency is the basis for the CMP, the whole Tool algorithm applies to the LSC deficiencies, not the health deficiencies.

Note: This tool is to be used to calculate an amount for each new or changed CMP imposed against a facility within a noncompliance cycle.

Note: This tool does not address noncompliance at level 2, S/S of "D" or "E." Depending on the circumstances, Regional Offices may impose CMPs for level 2 deficiencies based on the factors listed in 42 CFR 488.404 and 488.438(f).

2.4.2 Input

2.4.2.1 Past Noncompliance

Field	Input	Detailed Instructions
CMP Type (Required)	Per Instance CMP (PI) for Past Noncompliance	Select "Per Instance CMP (PI) for Past Noncompliance" for all past noncompliance in which a CMP would be recommended. Past noncompliance occurs when a facility was out of substantial compliance before the current survey began, but took specific action to fully address the issue and come back into compliance with a specific regulatory tag. See Chapter 7, Section 7510.1 for additional information.

2.4.2.2 Continuing Noncompliance Identified Before the Start Date of the Current Survey (Not Past Noncompliance)

Field	Input	Detailed Instructions
CMP Type (Required)	Per Instance CMP (PI) Before the Start of the Survey	Select "Per Instance CMP (PI) Before the Start of the Survey" if noncompliance that was not past noncompliance existed before the start date of the survey and none of the factors requiring a per day CMP are present. Do NOT select this CMP Type if you select a "Per Day CMP (PD) Before the Start of the Survey." Note: Multiple PIs may be imposed for different types or dates of noncompliance.
CMP Type (Required)	Per Day CMP (PD) Before the Start of the Survey	Select "Per Day CMP (PD) Before the Start of the Survey" if any of the noncompliance factors identified below existed prior to the start date of the survey (check the factors that apply) .
CMP Factors for **Per Day CMP (PD) Before the Start of the Survey**	• IJ (S/S of "J", "K", or "L") was cited with actual harm to a resident • Abuse was cited at a level 3 (S/S of "G", "H", "I"), or IJ (S/S of "J", "K", or "L") with actual harm to a resident • The same *tag* at a S/S of "G" or above was cited within the last year on any survey and the tag is cited at a S/S of "J", "K", or "L" on the current survey • Deficiencies at a S/S of "H" or "I"	N/A

2.4.2.3 Noncompliance Existing at the Time of the Survey

Field	Input	Detailed Instructions
CMP Type (Required)	Per Instance CMP (PI) During the Survey	Select "Per Instance CMP (PI) During the Survey" if any of the noncompliance factors identified below existed at the time of the survey (check the factors that apply). Do NOT select this CMP Type if a Per Day CMP is in effect at the time of the survey. Note: Multiple PIs may be imposed for different types or dates of noncompliance.
CMP Factors for **Per Instance CMP (PI) During the Survey**	• Findings of noncompliance that is a singular event of actual harm at a S/S of "G" or "J" • Findings of current/ongoing noncompliance at a S/S of "G" or above or SQC findings at a S/S of "F" but where a facility has a good compliance history	N/A
CMP Type (Required)	Per Day CMP (PD) During the Survey	Select "Per Day CMP (PD) During the Survey" for noncompliance existing at the time of the survey if none of the "Per Instance CMP (PI) During the Survey" factors is present.

2.5 "Select the CMP Start and End Dates (Only for Per Day CMPs)" Section

2.5.1 General Instructions

PD CMP Start Date - A PD CMP should begin on the first day noncompliance at the cited S/S level is documented, even if that date precedes the first day of the current survey unless the facility can demonstrate that it corrected the noncompliance prior to the current survey (past noncompliance). If the team cannot document the first day of noncompliance, then the CMP should start on the date the noncompliance was observed and documented at the time of the current survey.

PD CMP End Date - Except in cases when IJ is removed on the same date that it was identified, do not include the day on which IJ is removed, the day the S/S is lowered, thereby lowering the CMP amount to another level or substantial compliance is achieved when calculating the final PD CMP.

2.5.2 Input

Field	Input	Detailed Instructions
CMP Start Date	Text	Enter the date in mm/dd/yyyy format.
CMP End Date	Text	Enter the date in mm/dd/yyyy format.

2.6 "Select the CMP Base Amount" Section

2.6.1 General Instructions

Select the highest S/S level for the base Calculated CMP Amount.

2.6.2 Input

Field	Input	Detailed Instructions
CMP Base Amount (Required)	• Per Day - Regional Office Discretion - $105 • Per Day - Potential for More than Minimal - S/S Level F - $405 • Per Day - Actual Harm - S/S Level G - $505 • Per Day - Actual Harm - S/S Level H - $1255 • Per Day - Actual Harm - S/S Level I - $2055 • Per Day - Immediate Jeopardy - S/S Level J - $6394 • Per Day - Immediate Jeopardy - S/S Level K - $8444 • Per Day - Immediate Jeopardy - S/S Level L - $10494 • Per Instance - Potential for More than Minimal - S/S Level F - $5000 • Per Instance - Actual Harm - S/S Level G - $10000 • Per Instance - Actual Harm - S/S Level H - $12500 • Per Instance - Actual Harm - S/S Level I - $15000 • Per Instance - Immediate Jeopardy - S/S Level J - No Harm - $10000 • Per Instance - Immediate Jeopardy – S/S Level J - Harm - $17000 • Per Instance - Immediate Jeopardy - S/S Level K - No Harm - $12500 • Per Instance - Immediate Jeopardy - S/S Level K - Harm - $18000 • Per Instance - Immediate Jeopardy - S/S Level L - No Harm - $15000 • Per Instance - Immediate Jeopardy - S/S Level L - Harm - $20000	Select the highest S/S level for the base Calculated CMP Amount.
Abated IJ	Yes	N/A

2.7 "Is There a History of Facility Noncompliance?" Section

2.7.1 General Instructions

42 CFR §488.438(f)(1).

If a facility has a history and/or a pattern of noncompliance at a S/S of "G" or above for surveys (standard, complaint, or revisit) conducted in the past 3 calendar years, add an amount indicated below based on the S/S pattern/trend of a facility's noncompliance history.

2.7.2 Input

Field	Input	Detailed Instructions
Facility Noncompliance Amount Added	• Per Day - Add $205 • Per Day - Add $405 • Per Day - Add $605 • Per Day - Add $805 • Per Day - Add $1005 • Per Instance - Add $1000 • Per Instance - Add $2500 • Per Instance - Add $5000	Select the amount to add to the Calculated CMP Amount.

2.8 "Are There Repeated Deficiencies?" Section

2.8.1 General Instructions

42 CFR §488.438(d)(2)(3).

"Repeated Deficiencies" are deficiencies within the same regulatory grouping of requirements under which deficiencies were cited at the last survey, subsequently corrected, and cited again at the next survey.

2.8.2 Input

Field	Input	Detailed Instructions
Repeated Deficiencies Amount Added	• Per Day - S/S Level F - Add $105 • Per Day - S/S Level G, H, I - Add $205 • Per Day - S/S Level J, K, L - Add $305 • Per Instance - S/S Level F - Add $1000 • Per Instance - S/S Level G, H, I - Add $2500 • Per Instance - S/S Level J, K, L - Add $5000	Select the amount to add to the Calculated CMP Amount based on the highest S/S level of the repeat deficiencies.

2.9 "Are There Multiple Deficiencies?" Section

2.9.1 General Instructions

42 CFR §488.404(c)(1).

Survey findings that include multiple deficiencies can indicate a systemic problem relating to the noncompliance, as opposed to a survey that identifies a singular or a few incident(s) of noncompliance. For surveys with greater than ***five*** deficiencies, add an amount between the ranges indicated below. The scope and severity of the deficiencies should also be considered. As the number of increases, and/or the level of S/S increases, the amount added should increase.

2.9.2 Input

Field	Input	Detailed Instructions
Multiple Deficiencies Amount Added	• Per Day - Add $100 • Per Day - Add $300 • Per Day - Add $500 • Per Day - Add $700 • Per Day - Add $900 • Per Day - Add $1100 • Per Day - Add $1300 • Per Day - Add $1500 • Per Instance - Add $2500 • Per Instance - Add $3000 • Per Instance - Add $3500 • Per Instance - Add $4000 • Per Instance - Add $4500 • Per Instance - Add $5000 • Per Instance - Add $5500 • Per Instance - Add $6000 • Per Instance - Add $6500 • Per Instance - Add $7000 • Per Instance - Add $7500 • Per Instance - Add $8000 • Per Instance - Add $8500 • Per Instance - Add $9000 • Per Instance - Add $9500 • Per Instance - Add $10000	Select the amount to add to the Calculated CMP Amount based on the guidance above.

2.10 "Is Facility Culpability a Factor?" Section

2.10.1 General Instructions

42 CFR §488.438(f)(4).

Add an amount indicated below if culpability is a factor above the base level of non-compliance. Culpability as defined in the regulation refers to situations which include, but are not limited to, neglect, indifference, or disregard for resident care, comfort or safety.

2.10.2 Input

Field	Input	Detailed Instructions
Base Culpability Amount Added	• S/S Level F at SQC - Add $205 • S/S Level F at SQC - Add $405 • S/S Level G, H, or I - Add $605 • S/S Level G, H, or I - Add $805 • S/S Level G, H, or I - Add $1005 • S/S Level G, H, or I - Add $1205 • S/S Level G, H, or I - Add $1405 • S/S Level G, H, or I - Add $1605 • S/S Level G, H, or I - Add $1805 • S/S Level G, H, or I - Add $2005 • S/S Level J, K, or L - Add $2505 • S/S Level J, K, or L - Add $2705 • S/S Level J, K, or L - Add $2905 • S/S Level J, K, or L - Add $3105 • S/S Level J, K, or L - Add $3305 • S/S Level J, K, or L - Add $3505 • S/S Level J, K, or L - Add $3705 • S/S Level J, K, or L - Add $3905 • S/S Level J, K, or L - Add $4105 • S/S Level J, K, or L - Add $4305 • S/S Level J, K, or L - Add $4505	Select the amount to add to the Calculated CMP Amount based on the highest S/S level cited.

2.11 "Does the Calculated CMP Amount Exceed the Maximum Regulatory Amount?" Section

2.11.1 Input

Field	Input	Detailed Instructions
Reduced Calculated CMP Amount	• Per Day - Calculated CMP Amount for IJ Case > $20965 - Reduce Calculated CMP Amount to $20965 • Per Day - Calculated CMP Amount for Non-IJ Case > $6289 - Reduce Calculated CMP Amount to $6289 • Per Day - Calculated CMP Amount for Non-IJ Case > $6289 and a repeat deficiency - No change • Per Instance - Calculated CMP Amount Exceeds $20965 - Reduce Calculated CMP Amount to $20965	Select the highest permissible CMP amount.

2.12 "Determine the Final Calculated CMP Amount" Section

2.12.1 General Instructions

The Final Calculated CMP is determined according to CMP Type:

- The lowest Calculated CMP Amount is determined: lowest of Calculated CMP Amount and Reduced Calculated CMP Amount (adjusted for exceeding the maximum regulatory amount).
- Final Calculated CMP Amount, Per Day: The lowest Calculated CMP Amount multiplied by the Total CMP days, less any Discount.
- Final Calculated CMP Amount, Per Instance: The lowest Calculated CMP Amount, less any Discount.

2.12.2 Input

Field	Input	Detailed Instructions
Discounts Applied to Final Calculated CMP Amount	• No Discount • Discount for Waiving Appeal (35%) • Discount for Self-reporting and Waiving Appeal (50%)	N/A

2.12.3 Output

Field	Description
Final Calculated CMP Amount	N/A

2.13 "Is An Additional Adjustment to the Final Calculated CMP Amount Necessary?" Section

2.13.1 General Instructions

The Final Calculated CMP Amount may be adjusted by no more than 35%. If an Adjusted Final Calculated CMP Amount is entered, provide a rationale below. If the RO believes that the Final Calculated CMP Amount should be adjusted by more than 35%, they must consult with and obtain prior approval from the CO before making any further adjustment using this tool.

Note: Any CMP that is projected to exceed $250,000 must be sent to CO for review prior to sending the imposition letter.

2.13.2 Input

Field	Input	Detailed Instructions
Adjusted Final Calculated CMP Amount	Number	Enter a dollar amount (no cents). Adjust the Final Calculated CMP Amount (which is the total amount for Per Instance or Per Day) and enter above. Note: The amount entered should reflect the total amount (not a Per Day amount).
Adjusted Final Calculated CMP Amount Rationale	• The amount of time between the noncompliance and the survey (do not select this if the delay was caused by the facility's failure to timely report to the SA) • The amount of time for the revisit survey if it exceeded the amount of time required by the SOM • Other	N/A

2.14 "Is the Facility Financial Condition a Factor?" Section

2.14.1 General Instructions

42 CFR §488.438(f)(2).

A facility is responsible for notifying CMS of hardship and providing financial documentation.

2.14.2 Input

Field	Input	Detailed Instructions
Lower Final Calculated CMP Amount	Number	Enter a dollar amount (no cents) in multiples of $50. Note: The amount entered should reflect the total amount (not a Per Day amount).
Lower Final Calculated CMP Amount Rationale	CMS reviewed the financial information and determined that facility documentation proves (select one): • A reduction is necessary. • A reduction is not necessary.	Select an option.

2.15 "Enter Any Additional Case-Related Information (Optional)" Section

2.15.1 Input

Field	Input	Detailed Instructions
Additional Information	Text	N/A

2.16 "View Totals" Section

2.16.1 Output

Field	Description
Calculated CMP Amount	The **Calculated CMP Amount** is the sum of **CMP Base Amount** and **Facility Noncompliance Amount, Repeated Deficiencies Amount , Multiple Deficiencies Amount**, and **Base Culpability Amount,** if any.
Reduced Calculated CMP Amount	The **Reduced Calculated CMP Amount** is the amount after the adjustment for exceeding the maximum regulatory amount, if any.
Total CMP Days	The **Total CMP Days** for Per Day is the total number of days from the **CMP Start Date** to the **CMP End Date.**
Discounts Applied to Final Calculated CMP Amount	The **Discounts Applied to Final Calculated CMP Amount** include one of the following options: No discount, 35% discount if waiving appeal, or 50% discount for self-reporting and waiving appeal.
Final Calculated CMP Amount	The **Final Calculated CMP Amount** for Per Day is the lowest **Calculated CMP Amount** multiplied by the **Total CMP Days**, less any **Discount**. Note: This is a total amount, not a Per Day amount. The **Final Calculated CMP Amount** for Per Instance is the lowest **Calculated CMP Amount**, less any Discount.
Adjusted Final Calculated CMP Amount	The **Adjusted Final Calculated CMP Amount** is the amount after the adjustment to the **Final Calculated CMP Amount**. Note: This is a total amount, not a Per Day amount.
Lower Final Calculated CMP Amount	The **Lower Final Calculated CMP Amount** is the amount after the adjustment for facility financial condition, if any. Note: This is a total amount, not a Per Day amount.
Total Final CMP Amount	The **Total Final CMP Amount** is the **Adjusted Final Calculated CMP Amount or Lower Final Calculated CMP Amount** if an adjustment was made, otherwise the **Final Calculated CMP Amount.**

2.17 "View Summary" Section

2.17.1 Input

Field	Detailed Instructions
Display Summary	Note: If changes are made to any of the fields above, display Summary again.
Begin a New Case	N/A

2.17.2 Output

Field	Output
Calculation Type	final *or* preliminary
CCN	*Provider Number*
Provider Name	*Provider Name*
Analyst Name	*Analyst Name*
Cycle Start Date	mm/dd/yyyy
Current Date	mm/dd/yyyy
CMP Type	Per Day *or* Per Instance
CMP Type Description	*As Selected (include the exact wording of the selection)*
CMP Per Instance Factors	*As Selected (include the exact wording of the selection)*
CMP Start Date	mm/dd/yyyy
CMP End Date	mm/dd/yyyy
Abated IJ	yes *if checked*
CMP Base Amount	*As Selected (include the exact wording of the selection)*
Facility Noncompliance Amount Added	*As Selected (include the exact wording of the selection)*
Repeated Deficiencies Amount Added	*As Selected (include the exact wording of the selection)*
Multiple Deficiencies Amount Added	*As Selected (include the exact wording of the selection)*
Base Culpability Amount Added	*As Selected (include the exact wording of the selection)*
Calculated CMP Amount	*Dollar Amount*
Reduced Calculated CMP Amount - Maximum Exceeded	*As Selected (include the exact wording of the selection)*
Discounts Applied to Final Calculated CMP Amount	*As Selected (include the exact wording of the selection)*
Total CMP Days	*Number of Days*
Final Calculated CMP Amount	*Dollar Amount*
Adjusted Final Calculated CMP Amount	*Dollar Amount*
Adjusted Final Calculated CMP Rationale	*As Selected (include the exact wording of the selection)*
Lower Final Calculated CMP Amount - Financial Condition	*Dollar Amount*
Lower Final Calculated CMP Amount Rationale	*As Selected (include the exact wording of the selection)*
Total Final CMP Amount	*Dollar Amount*

Field	Output
Additional Information	*As Completed*

3 Instructions

3.1 Instructions for Use and Completion of the Civil Money Penalty (CMP) Analytic Tool

All CMS Regional Offices (ROs) are required to use the following instructions and CMP Analytic Tool: (1) to choose the appropriate type or types of CMPs to be imposed; and (2) to calculate the CMP amount, when the RO determines that a CMP is an appropriate remedy to impose. The RO must complete all sections of the tool that apply to the type of CMP selected.

Consistent with CMS policy on immediate imposition of remedies, ROs must evaluate each case and consider whether or not to impose a CMP in addition to or instead of other remedies for deficiencies with a Scope and Severity (S/S) of "G" or above, and for deficiencies with a S/S of "F" when Substandard Quality of Care (SQC) is cited. For deficiencies cited at other S/S levels, the RO should consider imposing alternative remedies other than a CMP as appropriate.

For cases in which the State Survey Agency fails to recommend a CMP, the RO must evaluate whether or not a CMP remedy is warranted. In such cases, the RO must review the survey findings and impose the appropriate remedy(ies) regardless of a State's recommendation or lack thereof.

ROs must use this tool in the calculation of each new or changed[1] CMP imposed on a facility within a noncompliance cycle[2]. Each time a survey is conducted within an already running noncompliance cycle and a CMP is imposed, the facility is given appeal rights and may exercise its waiver of right to a hearing (refer to section 7526 of the State Operations Manual (SOM), Chapter 7).

This tool is not dispositive, and does not replace professional judgment or the application of other pertinent information in arriving at a final CMP amount. However, it does provide logic, structure, and defined factors for mandatory consideration in the determination of CMPs. The tool should be used with this protocol, which more fully explains factors that lead to final CMP amounts.

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[1] A CMP is changed when the circumstances initiating the original CMP imposed have changed and an increase or decrease to the original CMP may be warranted. For example, a facility has corrected some but not all of the original deficiencies and is still within its noncompliance cycle and the remaining deficiencies warrant an increase or decrease in the original CMP imposed. See section 7516.3 of the SOM.

[2] A noncompliance cycle begins with a recertification, complaint or temporary waiver revisit survey that finds noncompliance and ends when substantial compliance is achieved or the facility is terminated (or voluntarily terminates) from the Medicare and Medicaid programs. The noncompliance cycle cannot exceed 6 months. Once a remedy is imposed, it continues until the facility is in substantial compliance (and in some cases, until it can demonstrate that it can remain in substantial compliance), or is terminated from the programs.

Instructions

3.2 Choosing the Type of CMP to be Imposed

After making a determination that a CMP will be imposed, ROs must use the Tool and the guidance provided in the tool to decide whether to impose a Per Instance (PI) CMP versus a Per Day (PD) CMP, or both, regardless of the State Survey Agency's recommendation. Note: Multiple PIs may be imposed for different types or dates of noncompliance.

Factors to consider when determining "a good compliance history" include but are not limited to:

- The facility is not a Special Focus Facility;
- The facility has not had findings at a S/S of "G" or above within the past three (3) calendar years, unless they were cited as past noncompliance;
- The facility has a history/pattern of achieving compliance prior to or at the time of the first revisit; and/or
- The facility has a history/pattern of sustaining compliance with previously cited deficiencies (i.e., no repeat deficiencies).

3.3 Choosing the PD CMP Start Date

A PD CMP should begin either on the first day noncompliance at the cited S/S level is documented, or on the first day of the survey that noncompliance was identified. Per day CMPs should not begin before the start date of the survey unless:

- IJ (S/S of "J", "K", or "L") was cited with actual harm to a resident; or
- Abuse was cited at a level 3 (S/S of "G", H", "I"), or IJ (S/S of "J", "K", or "L") with actual harm to a resident
- The same tag at a S/S of "G" or above was cited within the last year on any survey and the tag is cited at a S/S of "J", "K", or "L" on the current survey; or
- Deficiencies at a S/S of "H" or "I" were cited.

If the facility can demonstrate that it corrected the noncompliance prior to the current survey, that is past noncompliance, and a per instance CMP should be used. If the team cannot document the first day of noncompliance, then the CMP should start on the date the noncompliance was observed and documented at the time of the current survey.

For example, a survey begins on May 1 and on that date the survey team finds evidence of immediate jeopardy, that resulted in a resident suffering a fractured hip. If the survey team is able to document that the immediate jeopardy began on April 1, the PD CMP start date is April 1. However, if the survey team is unable to document the first day of noncompliance at the immediate jeopardy level, the CMP would start on May 1.

3.4 Guidance on Determining the Dates of a PD CMP

PD CMP Start Date[3] - In all cases where this tool requires a PD CMP be imposed before the start date of the survey, the RO analyst shall calculate the start date for the proposed CMP with the first supportable date of noncompliance, as determined by the evidence documented by surveyors in the Statement of Deficiencies (CMS form 2567).

Therefore, in performing the survey and when making a recommendation for a PD CMP to CMS, the State Survey Agency must determine the earliest date for which supportable evidence shows that the noncompliant practice began.

If this start date is not clearly identified and supportable, then the RO should contact the State Survey Agency to see if such a date can be determined and should document this discussion and conclusion. If the start date cannot be determined, the PD CMP would begin on the first day during the survey on which the survey team identified the noncompliant practice.

PD CMP End Date - Except in cases when IJ is removed on the same date that it was identified, do not include the day on which IJ is removed, the day the S/S is lowered, thereby lowering the CMP amount to another level or substantial compliance is achieved when calculating the final PD CMP. See 42 C.F.R. §488.440(h), penalties accrue until the date of correction. The RO analyst will input the resulting number of days into the CMP Analytic Tool.

3.5 CMPs for Past Noncompliance

Past noncompliance identified during the current survey means a deficiency citation at a specific survey data tag (F-tag or K-tag) (with a S/S at "G" or above, or SQC findings at a S/S at "F") that meets **all** of the following three criteria:

1. The facility was not in compliance with the specific regulatory requirement(s) (as referenced by the specific F-tag or K-tag) at the time the situation occurred;
2. The noncompliance occurred after the exit date of the last standard (recertification) survey and before the survey (standard, complaint, or revisit) currently being conducted; and
3. There is sufficient evidence to determine that the facility corrected the noncompliance and is in substantial compliance at the time of the current survey for the specific regulatory requirement(s), as referenced by the specific F-tag or K-tag.

See the State Operations Manual, Chapter 7, Section 7510.1 for additional information.

[3] A CMP may not include days prior to the date of the last standard survey.

3.6 Required Central Office Prior Approval for Any Adjustment to Final Calculated CMP Amount of More than Thirty-five Percent (35%)

If the RO believes that the circumstances involved in the specific case require an adjustment to the CMP amount which was calculated using this Tool, the RO may increase or reduce the CMP by NO MORE THAN 35 percent**. If the RO makes such an adjustment, in each instance, it must provide a rationale for that adjustment when completing the tool.** An adjustment to the CMP is not the same thing as imposing a different CMP based on different or new deficiencies. Whenever such an adjustment is made, the analyst will annotate the tool when calculating the original CMP to explain why an adjustment was made. For a newly imposed or revised CMP within the same noncompliance cycle, a separate tool is to be completed.

NOTE: If the RO believes that a calculated CMP should be adjusted by **more** than 35 percent, it must consult with and obtain prior approval from CMS Central Office before making the adjustment. Requests for prior approval should be sent to the CMS Central Office. Any CMP of $250K must be sent to CMS Central Office for review prior to sending the imposition letter.

A 35 percent adjustment that the RO may make is not the same as, and does not affect, the 35 or 50 percent reductions made to the total CMP amount based on §§488.436 and 488.438. The facility will receive a 35 percent reduction if it timely waives its right to an Administrative Hearing. The facility should be notified that it will receive a 50 percent reduction if **all** of the following conditions are met:

- The facility must have self-reported the noncompliance to CMS or the State before it was identified by CMS or the State and before it was reported to CMS or the State by means of a complaint lodged by a person other than an official representative of the nursing home;
- Correction of the noncompliance must have occurred on the earlier of either 15 calendar days from the date of the self-reported circumstance or incident that later resulted in a finding of noncompliance or 10 calendar days from the date (of CMS' notice to the facility) that a CMP was imposed;
- The facility waives its right to a hearing;
- The noncompliance that was self-reported and corrected did not constitute a pattern of harm, widespread harm, immediate jeopardy, or result in the death of a resident;
- The CMP was not imposed for a repeated deficiency that was the basis of a CMP that previously received a reduction; and
- The facility has met mandatory reporting requirements for the incident or circumstance upon which the CMP is based as required by Federal and State law.

If you have any questions regarding the memorandum, Tool or guidance, please contact the CMS Central Office.

Effective Date: Immediately for all enforcement cases when the CMS RO determines that a CMP is an appropriate enforcement remedy. This guidance should be communicated to all RO and State Survey Agency survey, certification and enforcement staff, their managers and the State/RO training coordinators within 30 days of this memorandum.

3.7 For Training and General Examples ONLY[4]

The following information provides some examples of situations in which the Departmental Appeals Board (DAB)[5] and/or the DAB Administrative Law Judges (ALJs) determined that there was **facility culpability**. The DAB and ALJ decisions cited below were issued before the 2016 update to the federal regulations, so the regulatory references listed below are those that existed at the time those decisions were issued.

Physical Environment: 42 C.F.R. §483.70

1. Life Safety Code (LSC) and/or maintenance issues considered detrimental to the health, safety and welfare of the residents. DAB CR3000

Quality of Care: 42 C.F.R. §483.25

1. Repeated failure to timely follow or clarify doctor's treatment orders (including for pressure sores). DAB 2390 and 2299
2. Repeated failure to notify doctor of significant changes. DAB 2479 and 2304
3. Repeated failure to notify physician of change which exposed resident to high likelihood of suffering grave harm. DAB 2304 and 2300
4. Repeated failure to properly assess pressure sores. DAB 2426
5. Multiple residents with severe weight loss (> 5% in a month) not detected or addressed despite care plan. DAB 2511
6. Repeated failure to timely provide testing, care, treatment & services for residents receiving anticoagulant therapy. DAB 2411
7. Repeated failure to closely monitor resident with compromised respiratory status, or failure to have necessary oxygen equipment. DAB, 2511, 2344, 2327, and 2299
8. Failure to administer CPR to "full code" resident. DAB 2396 and 2336
9. Repeated failure to implement interventions and supervise to prevent falls for resident with history of falls. DAB 2470, 2380, and 2357
10. Repeated failure to adequately supervise resident with known choking problems to provide prompt intervention. DAB 2520 and 2192
11. Repeated failure to provide blood sugar monitoring and care as ordered as ordered by physician. DAB 2375
12. Repeated failure to supervise residents with known history of elopement. DAB 2450, 2446, 2434, and 2288
13. Repeated transfer of residents by one aide despite care plan requiring two aides for transfer. DAB CR1863

[4] Note this information is provided only by way of providing some examples in which the DAB found culpability in the past.
[5] DAB website

Instructions

Resident Behavior and Facility Practices: 42 C.F.R. §483.13

1. Staff failure to promptly report physical, verbal or sexual abuse. DAB 2256

Quality of Life: 42 C.F.R. §483.15

1. Egregious dignity issues. DAB 2513

Analysis
As of: Jun 29, 2017

MARY E. DALEY, personal representative,[1] *vs.* SECRETARY OF THE EXECUTIVE OFFICE OF HEALTH AND HUMAN SERVICES & another.[2] LIONEL C. NADEAU *vs.* DIRECTOR OF THE OFFICE OF MEDICAID.

1 Of the estate of James Daley.
2 Director of the Office of Medicaid.

SJC-12200, SJC-12205.

SUPREME JUDICIAL COURT OF MASSACHUSETTS

477 Mass. 188*; *74 N.E.3d 1269*; *2017 Mass. LEXIS 365

January 5, 2017, Argued
May 30, 2017, Decided

NOTICE:

Corrected June 8, 2017.

PRIOR-HISTORY: Worcester. CIVIL ACTION commenced in the Superior Court Department on February 11, 2015.

The case was heard by *Dennis J. Curran*, J., on a motion for judgment on the pleadings.

The Supreme Judicial Court granted an application for direct appellate review.

Civil action commenced in the Superior Court Department on December 23, 2014.

The case was heard by *Shannon Frison*, J., on a motion for judgment on the pleadings.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.
Daley v. Sudders, 2015 Mass. Super. LEXIS 125 (Mass. Super. Ct., Dec. 23, 2015)

HEADNOTES-1 *Medicaid. Trust*, Irrevocable trust. *Real Property*, Life estate, Ownership.

This court concluded that neither the grant in an irrevocable trust of a right of use and occupancy in a primary residence deeded to that trust, nor the retention of a life estate in a primary residence after deeding it to such a trust, makes the equity in the home owned by the trust a countable asset for the purpose of determining an applicant's eligibility for long-term care benefits under the Federal Medicaid Act; therefore, this court vacated the judgments in two cases that relied on a finding that the home was a countable asset but remanded each matter for further findings regarding other possible sources of countable assets contained in the trust at issue in each matter.

COUNSEL: *Lisa Neeley* (*Patrick Tinsley* also present) for Lionel C. Nadeau.

Brian E. Barreira (*Nicholas G. Kaltsas* also present) for Mary E. Daley.

Ronald M. Landsman, of Maryland, for National Academy of Elder Law Attorneys, Inc.

Elizabeth Kaplan & Julie E. Green, Assistant Attorneys General, for Director of the Office of Medicaid & another.

Patricia Keane Martin, for National Academy of Elder Law Attorneys (Massachusetts Chapter), was present but did not argue.

Leo J. Cushing & Thomas J. McIntyre, for Real Estate Bar Association for Massachusetts, Inc., amicus curiae, submitted a brief.

JUDGES: Present: GANTS, C.J., LENK, HINES, GAZIANO, LOWY, & BUDD, JJ.

OPINION BY: GANTS

OPINION

GANTS, C.J. These two cases require this court to navigate the labyrinth of controlling statutes and regulations to determine whether applicants are eligible for long-term care benefits under the Federal Medicaid Act (act) where they created an irrevocable trust and deeded their primary asset -- their home -- to that trust but retained the right to reside in and enjoy the use of the home for the rest of their life. The Director of the Massachusetts Office of Medicaid (MassHealth) determined that the applicants in these two cases were not eligible for long-term care benefits because their retention of a right to continue to live in their homes made the equity in their homes a "countable" asset whose value exceeded the asset eligibility limitation under the act. The applicants unsuccessfully challenged MassHealth's determinations in the Superior Court pursuant to *G. L. c. 30A, § 14*. We granted Mary E. Daley's application for direct appellate review and transferred Lionel C. Nadeau's appeal to this court on our own motion. We conclude that neither the grant in an irrevocable trust of a right of use and occupancy in a primary residence to an applicant nor the retention by an applicant of a life estate in his or her primary residence makes the equity in the home owned by the trust a countable asset for the purpose of determining Medicaid eligibility for long-term care benefits. We therefore vacate the judgments that rely on such a finding and remand the matters to MassHealth for findings regarding two other possible sources of countable assets contained in the trusts.[3]

3 We acknowledge the amicus brief submitted by the National Academy of Elder Law Attorneys, Inc., in both cases; the amicus brief submitted by the Real Estate Bar Association for Massachusetts, Inc., in Mary E. Daley's case; and the amicus brief submitted by the National Academy of Elder Law Attorneys (Massachusetts Chapter) in Lionel C. Nadeau's case.

Background. The act, enacted in 1965 as Title XIX of the Social Security Act, *42 U.S.C. §§ 1396 et seq.*, created a cooperative State and Federal program to provide medical assistance to individuals who cannot afford to pay for their own medical costs. See *Arkansas Dep't of Health & Human Servs. v. Ahlborn, 547 U.S. 268, 275, 126 S. Ct. 1752, 164 L. Ed. 2d 459 (2006)*. The general administration of Medic- aid is entrusted to the United States Secretary of Health and Human Services, who in turn exercises authority through the Centers for Medicare and Medicaid Services (CMS). *Id.*[4] Although the Medicaid program is voluntary for States, participating States must comply with certain requirements imposed by the act and regulations promulgated by the Secretary through CMS. See *Wilder v. Virginia Hosp. Ass'n, 496 U.S. 498, 502, 110 S. Ct. 2510, 110 L. Ed. 2d 455 (1990)*. Massachusetts has opted to participate in Medicaid via the establishment of a State Medicaid program known as MassHealth. See *G. L. c. 118E, § 9* (establishing program of medical assistance "pursuant to and in conformity with the provisions of Title XIX").

4 Until 2001, the Centers for Medicare and Medicaid Services were known as the Health Care Financing Administration. See *Centers for Medicare & Medicaid Services Statement of Organization, Functions and Delegations of Authority, and Reorganization Order, 66 Fed. Reg. 35,437-03 (2001)*.

Participating States are required to cover the costs of care for the "categorically needy," which the act defines as those individuals who are unable to cover the costs of

their basic needs and who already receive or are eligible for certain forms of public assistance. See *Roach v. Morse, 440 F.3d 53, 59 (2d Cir. 2006)*. States have the option to cover the costs of care for the "medically needy," *Haley v. Commissioner of Pub. Welfare, 394 Mass. 466, 467-468, 476 N.E.2d 572 (1985)*, which the act defines as people who have income and resources to cover the costs of their basic needs but not their necessary medical care. See *42 U.S.C. § 1396a(a)(10)(C)*.

Medicaid has become one of the largest programs in the Federal budget as well as a major expenditure for State governments, which must finance a significant portion of Medicaid benefits on their own. See R. Rudowitz, Kaiser Commission on Medicaid and the Uninsured, Medicaid Financing: The Basics (Dec. 2016) (Medicaid is third largest domestic program in Federal budget, exceeded only by Medicare and Social Security); Massachusetts Medicaid Policy Institute & Massachusetts Budget and Policy Center, Understanding the Actual Cost of MassHealth to the State (Nov. 2014) (reporting net cost of MassHealth and health reform programs as twenty-three per cent of State budget). As of 2015, the Medicaid program provided health and long-term care coverage to nearly 70 million low-income Americans, including, among many others, poor senior citizens who are also covered by Medicare. See Kaiser Family Foundation, Medicaid at 50 (2015), http://kff.org/medicaid/report/medicaid- at-50 [https://perma.cc/TK7Q-72KR].

The demand for Medicaid long-term care benefits, which cover nursing home care as well as other forms of personal long-term care services, has grown steadily as a result of our country's aging population and the expense of paying privately for nursing homes or other long-term care. See *Cohen v. Commissioner of the Div. of Med. Assistance, 423 Mass. 399, 402, 668 N.E.2d 769 (1996)*, cert. denied sub nom. *Kokoska v. Bullen, 519 U.S. 1057, 117 S. Ct. 687, 136 L. Ed. 2d 611 (1997)*. See also Bernstein, With Medicaid, Long-Term Care of Elderly Looms as a Rising Cost, N.Y. Times, Sep. 6, 2012, http://www.nytimes.com/2012/09/07/health /policy/long-term-care-looms-as-rising-m edicaid-cost.html [https://perma.cc/2JB6-L6NM] (describing Medicaid as "the only safety net for millions of middle-class people whose needs for long-term care, at home or in a nursing home, outlast their resources"). A recent survey estimated that the median annual cost of nursing home care for a senior in a semiprivate room in Massachusetts was more than $128,000. See Genworth 2015 Cost of Care Survey, Massachusetts, https://www.genworth.com/dam/Americas/US /PDFs/Consumer/corporate/cost-of-care/11 8928MA_040115_gnw.pdf [https://perma.cc/2RNC-6P5G]. Private long-term care insurance can cost more than $3,000 annually. See AARP, Understanding Long-Term Care Insurance (May 2016), http://www.aarp.org/health/health-insura nce/info-06-2012/understanding-long-term -care-insurance.html [https://perma.cc/56MK-DYZ2]. Because many individuals cannot afford these expenses, Medicaid pays for the care of two-thirds of people in nursing homes in the United States. See Zernike, Goodnough, & Belluck, In Health Bill's Defeat, Medicaid Comes of Age, N.Y. Times, Mar. 27, 2017. See also E.L. Reaves & M. Musumeci, Kaiser Commission on Medicaid and the Uninsured, Medicaid and Long-Term Services and Supports: A Primer (Dec. 2015), http://kff.org/medicaid/report/medicaid- and-long-term-services-and-supports-a-pr imer [https://perma.cc/KJZ5-5WJR]. The cost of Medicaid's long-term care benefit is expected to rise by fifty per cent over the next decade, and State and Federal officials are reportedly "scrambling to control spending." Gorman & Feder Ostrov, Long-Term Care Is an Immediate Problem -- For the Government, Kaiser Health News, Aug. 1, 2016, http://khn.org/news/long-term-care-is-an -immediate-problem-for-the-government [https://perma.cc/N9V9-5QKE].

In order to qualify for Medicaid in Massachusetts, MassHealth requires that "[t]he total value of countable assets owned by or available to" an individual applicant not exceed $2,000. *130 Code Mass. Regs. § 520.003(A)(1)* (2014).[5] For a couple living together, the limit is $3,000. *130 Code Mass. Regs. § 520.003(A)(2)* (2014). This asset limit often requires applicants to "spend down" or otherwise deplete their resources to qualify for Medicaid long-term care benefits when they enter a nursing home. See *Lebow v. Commissioner of the Div. of Med. Assistance, 433 Mass. 171, 172, 740 N.E.2d 978 (2001)*.[6]

5 This asset limit is not codified in Title XIX of the Social Security Act, *42 U.S.C. §§ 1396 et seq.* Instead, Federal law and guidance from Federal regulators generally instruct the State Medicaid programs that their treatment of applicants' resources in determining eligibility may not be

more restrictive than the methodology that would be employed under the Federal supplemental security income (SSI) program. See *42 U.S.C. § 1396a(a)(10)(C)(i)*; State Medicaid Manual, Health Care Financing Administration Pub. No. 45-3, Transmittal 64 § 3257.B.4 (Nov. 1994). But see *Mistrick v. Division of Med. Assistance & Health Servs., 154 N.J. 158, 174-175, 712 A.2d 188 (1998)* (specific Congressional legislation regarding Medicaid eligibility supersedes general rule that State Medicaid eligibility rules may be "no more restrictive" than SSI). The asset limit for SSI beneficiaries is $2,000. See *42 U.S.C. § 1382(a)*.

6 As we discuss later in this opinion, an applicant's principal residence is generally not considered to be a countable asset in the eligibility determination and thus an applicant does not have to sell his or her home in order to qualify for Medicaid long-term care benefits. See *20 C.F.R. § 416.1212(b)*; *130 Code Mass. Regs. §§ 520.007(G)(3), 520.008(A)* (2014).

Through "Medicaid planning," individuals attempt to transfer or otherwise dispose of their assets long before they need long-term care so that, when the need arises, they may satisfy the asset limit and qualify for Medicaid benefits. In essence, the purpose of Medicaid planning is to enable persons whose assets would otherwise render them ineligible for long-term care benefits to become eligible for Medicaid benefits by transferring to their children or other loved ones the assets they would otherwise use to pay for long-term care, shifting to the taxpayers the burden of paying for that care. See generally *Cohen, 423 Mass. at 402-403*. As a report of the House of Representatives's committee on energy and commerce declared in 1985, "When affluent individuals use Medicaid qualifying trusts and similar 'techniques' to qualify for the program, they are diverting scarce Federal and State resources from low-income elderly and disabled individuals, and poor women and children." H.R. Rep. No. 265, 99th Cong., 1st Sess., pt. 1, at 72 (1985), quoted in *Cohen, supra at 404*.

Congress has imposed two substantial constraints on such Medicaid planning. The first is the so-called "look-back" rule, which imposes a penalty for any asset transfer for less than fair market value made by an individual within five years of the individual's application for Medicaid benefits. See *42 U.S.C. § 1396p(c)(1)(B)(i)*. See generally D. Westfall, G.P. Mair, J.R. Buckles, N.M. Oliveira, & W. Murieko, Estate Planning Law & Taxation § 13.05 (2017) (Westfall). In its present form, the "look-back" rule provides that, if such a transfer occurs, the applicant is ineligible for Medicaid benefits for a period of time determined by dividing the value of the transfer by the average monthly cost of the nursing home facility. See *42 U.S.C. § 1396p(c)(1)(E)*. Thus, if an applicant transfers $100,000 in assets during the look-back period, in a State where the average monthly cost of a nursing home is $10,000, the applicant will be ineligible for Medicaid benefits for ten months. See Westfall, *supra*.

Second, where an applicant has created an irrevocable trust and transferred assets to that trust, "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income (I) to or for the benefit of the individual, shall be considered income of the individual, and (II) for any other purpose, shall be considered a transfer of assets by the individual." *42 U.S.C. § 1396p(d)(3)(B)(i)*. This is commonly referred to as the "any circumstances" test. See *Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 315, 48 N.E.3d 480 & n.7 (2016)*.[7] The effect of the test is that if the trustee is afforded even a "peppercorn of discretion" to make payment of principal to the applicant, or if the trust allows such payment based on certain conditions, then the entire amount that the applicant could receive under "any state of affairs" is the amount counted for Medicaid eligibility. See *Cohen, 423 Mass. at 413*.[8]

7 The cognate Massachusetts regulation states: "Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset." *130 Code Mass. Regs. § 520.023(C)(1)(a)* (2014).

8 To illustrate the operation of this rule, Federal regulators provide the example of a trust containing $50,000 in principal under which payment of principal may be made to the Medicaid applicant only in the event that the applicant requires a heart transplant. Because it is

possible the applicant could require a heart transplant, "this full amount is considered as payment that could be made under *some* circumstances, even though the likelihood of payment is remote." See State Medicaid Manual, Health Care Financing Administration Pub. No. 45-3, Transmittal 64 § 3259.6(E) (Nov. 1994).

Under the "any circumstances" test, where the grantor of the irrevocable trust gives the trustee any "leeway to respond to emergency and unexpected circumstances," the total amount available to be paid to address such circumstances is counted as fully available to the grantor, even if the trust provisions otherwise limit the trustee's discretion to pay for long-term care. See *id. at 418-420*. Consequently, where the terms of an irrevocable trust give the trustee discretion to pay both income and principal to the grantor for various purposes, but limit that discretion in an attempt to assure the grantor's eligibility for public assistance despite the considerable resources otherwise available to the grantor, the full amount of the trust, both principal and income, is the amount deemed available for purposes of determining Medicaid eligibility. *Id. at 421-422*.

The "any circumstances" test is qualified by an important caveat: if the amounts that may be paid to the Medicaid applicant come only from the income of the trust, those income payments do not render the principal of the trust available as an asset; rather, they are treated as income that may affect the *amount* of Medicaid benefits to be received but not the applicant's *eligibility* for such benefits. See *Guerriero v. Commissioner of the Div. of Med. Assistance, 433 Mass. 628, 632 n.6, 745 N.E.2d 324 (2001)*; *130 Code Mass. Regs. § 520.026* (2013). See also J.A. Bloom & S.M. Cohen, Nursing Home MassHealth Eligibility, in Estate Planning for the Aging or Incapacitated Client in Massachusetts § 26.3.2 (Mass. Cont. Legal Educ. 4th ed. 2012 & Supp. 2015) (explaining general rule that anyone whose income is less than monthly cost of his or her nursing home may be eligible for MassHealth).

The application of this labyrinth of statutes and regulations is best understood by examples. If a married couple without any savings forgoes Medicaid planning and continues jointly to own in fee simple a single family home, then when one spouse needs long-term care and applies for MassHealth benefits, the applicant's primary residence is *not* a countable asset for MassHealth eligibility purposes, so long as its value does not exceed an annually adjusted limit (currently $828,000). See *130 Code Mass. Regs. § 520.008(A)* (2013); *130 Code Mass. Regs. § 520.007(G)(3)* (2014). See also *20 C.F.R. § 416.1212(b)* (SSI regulation).[9] Thus, the spouse may be admitted to a nursing home and be covered by MassHealth without having to sell the home. However, Federal law requires that MassHealth must attempt to reclaim the costs of long-term care benefits provided to such an applicant from the applicant's estate after his or her death. *42 U.S.C. § 1396p(a), (b)*. See *130 Code Mass. Regs. § 515.011(A)* (2014). As a result, where the house is the only asset in the applicant's estate and is sold by the estate after both spouses have died, the children will be able to inherit only the proceeds of the sale that exceed the amount of the MassHealth recovery claim.

9 If the applicant's spouse, child under the age of twenty-one, disabled child, or caretaker child, among others, remains living in the home, the value of the home will not be counted even if it exceeds the limit. *130 Code Mass. Regs. § 520.007(G)(8)(b)* (2013).

If a married couple who owns no primary residence but has substantial liquid assets engages in Medicaid planning, they could create an irrevocable trust and transfer all of their assets to that trust. If, under the terms of the trust, the trustee were authorized to pay them only income from the trust and could not under any circumstance pay them a penny of principal, and if the transfer to the trust complied with the "look-back" rule because it occurred more than five years before either spouse applied to MassHealth for long-term care benefits, the applicant would be eligible for such benefits because the assets of the trust would not be countable as his or her assets. See *Cohen, 423 Mass. at 419-420* (where trust is written to deprive trustee of any discretion to pay principal and allows payment only of income, principal will not be counted as assets for Medicaid purposes); *Heyn, 89 Mass. App. Ct. at 314* (where properly structured, irrevocable trust may be used to place assets beyond grantor's reach and permit grantor to be eligible for Medicaid benefits).

In essence, a wealthy person may decide five years in advance of applying for Medicaid to either give away all of his or her assets to the children or transfer them to an irrevocable trust with the children as beneficiaries, reserving only the receipt of income, and therefore

become someone with less than $2,000 in assets who is eligible for Medicaid benefits. The inclusion of the primary residence among the assets transferred to the irrevocable trust allows the grantor to avoid the estate recovery claim against his or her primary residence that would occur had the grantor obtained Medicaid long-term care benefits and continued to own the home until it was transferred to his or her heirs as part of the probate estate.

Although the transfer of assets to an irrevocable trust through Medicaid planning offers substantial benefits to the grantor, it also poses considerable risks. Having been stripped of all assets, the grantor may be unable to pay unforeseen nonmedical expenses, and may need to look to children or other relatives for payment. If the grantor were to require nursing home care sooner than expected, he or she would face a significant penalty under the look-back rule. See A.K. Dayton, J.A. Garber, R.A. Mead, & M.M. Wood, Advising the Elderly Client § 29.82 (2016) ("planning only for Medicaid eligibility severely restricts planning options for other goals, and often the adverse impact of Medicaid planning outweighs the benefit if the client is advised thoroughly ... [and] consideration should be given to ... possible loss of autonomy, pride, and dignity" involved in process). If the grantor of the irrevocable trust leaves open even a "peppercorn" of discretion for the trustee to pay the grantor from the principal of the trust under any circumstance, the entire principal of the trust will be deemed available to the applicant and therefore will be treated as a "countable asset," making the applicant ineligible for Medicaid benefits. Where the grantor transfers his or her primary residence to the irrevocable trust, the value of the home, which would not be a countable asset if he or she were to continue to own it (provided its value does not exceed $828,000), would become a countable asset if it were found to be among the "resources available to the individual" under *42 U.S.C. § 1396p(d)(3)*. And if the terms of the trust were to bar the trustee from paying the grantor's nursing home expenses, the grantor might have no ability to pay for long-term care.

The risks of Medicaid planning are highlighted by these two cases, where the plaintiffs challenge the determinations by MassHealth that their primary residence was a countable asset that rendered them ineligible to receive Medicaid long-term care benefits because they had transferred ownership of the home to an irrevocable trust but retained the ability to reside in their home for the balance of their life. A key difference between these two cases is the property interest that was transferred to the irrevocable trust: in one, the home was transferred in fee simple but the terms of the trust granted the settlors the right of use and occupancy for their lifetimes; in the other, the settlors retained a life estate in the home and transferred only the remainder interest to the irrevocable trust. We look now to the terms of the irrevocable trust at issue in each case and to the MassHealth determinations.

Nadeau Trust. On March 27, 2001, plaintiff Lionel C. Nadeau and his wife (collectively, Nadeaus) deeded their primary resi- dence in Webster to an irrevocable trust (Nadeau Trust) in return for nominal consideration, naming their daughter as sole trustee. Under the terms of the trust, the trustee may pay to the Nadeaus, or on their behalf, whatever income she determines in her sole discretion to be necessary for their "care and well-being." The trustee, apart from two exceptions, must hold the principal until the termination of the trust, which shall occur upon the death of the Nadeaus or when the trustee, in her sole discretion, determines that the trust should be terminated. The first exception is that the Nadeaus may appoint "all or any part of the trust property then on hand to any one or more charitable or non-profit organizations over which [they] have no controlling interest." The second is that the trustee may distribute principal to the Nadeaus "to the extent that the income of the trust generates a tax liability" so that they may pay that tax liability. As earlier mentioned, the terms of the trust grant the Nadeaus "the right to use and occupy any residence that may from time to time be held" by the trust. Upon termination of the trust, the "trustee shall ... [p]ay the remaining principal and undistributed income in equal shares to [the Nadeaus'] children."

Thirteen years later, and after the passing of his wife, Nadeau was admitted to a skilled nursing facility and applied for MassHealth long-term care benefits. At the time, the assessed value of the residence held by the Nadeau Trust was $173,700, and Nadeau, then eighty-nine years old, had only $168.15 in cash assets. MassHealth denied Nadeau's application based on its finding that the home remained a "countable asset," placing Nadeau above the $2,000 asset limit for long-term care eligibility. MassHealth determined that he needed to spend down $171,868.15 of his assets in order to qualify for the requested benefits.

Daley Trust. On December 19, 2007, Mary E. Daley and her husband (collectively, Daleys) deeded their primary residence in Worcester to their children as trustees of an irrevocable trust (Daley Trust) in return for consideration of less than one hundred dollars, but retained a life estate in the property. Under the terms of the trust, the trustees are to pay to Daley or her husband "so much of the net income of the Trust as either Donor shall request in writing," but "[t]he Trustee[s] shall have no authority or discretion to distribute principal of the Trust to or for the benefit of either Donor." However, as with the Nadeau Trust, the trustee may pay principal as needed to satisfy any tax obligation arising from the payment of income to the Daleys.

Six years later, Daley's husband was admitted to a skilled nursing home; he applied for MassHealth long-term care benefits on February 21, 2014. At the time, he was eighty-seven years old, he had $18,176 in a bank account, and the principal of the Daley Trust had a value of $150,943. Daley was still living in the home. MassHealth denied her husband's application because it found that the trust principal was countable. While Daley was permitted a spousal resource allowance of $117,240, the value of the residence still placed her husband about $50,000 over the $2,000 eligibility limit.

In both cases, the MassHealth determination was appealed to a MassHealth hearing officer, who upheld the determination by finding that, because the applicant retained the ability to reside in the home, the home is "available" to the applicant and must be deemed a countable asset under *130 Code Mass. Regs. § 520.023(C)(1)(d)*, which provides:

> "The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of *130 [Code Mass. Regs. §] 520.007(G)(2)* or *(G)(8)*."[10]

The hearing officers also found that the provision in the trusts that permit the trustee to pay the grantors' tax obligations arising from the payment of trust income does not render the *entirety* of the trust principal available under the "any circumstances" test. They specifically did not reach the issue of *how much* of the principal could be paid in that circumstance and therefore become countable, declaring that, if eligibility were to rest on that determina- tion, the matter would have to be remanded to MassHealth to make such findings.

> 10 The exemptions in these two provisions apply only to "real estate owned by the individual and the spouse." *130 Code Mass. Regs. § 520.007(G)(1)*. Under *130 Code Mass. Regs. § 520.007(G)(2)*, the value of real estate is exempt as a countable asset for nine months after the date of notice by MassHealth provided that the applicant executes an agreement within thirty days of the date of notice to sell the property at fair market value. Under *130 Code Mass. Regs. § 520.007(G)(8)*, where an applicant moves out of his or her home with no intent to return in order to enter a medical institution where placement is expected to continue for at least thirty days, the home becomes a countable asset unless a spouse, a child who is less than twenty-one years of age, a child who is blind or permanently and totally disabled, or other designated relatives reside in the home.

Discussion. The Medicaid program in Massachusetts was established "pursuant to and in conformity with the provisions of" the act. *G. L. c. 118E, § 9.* If a person meets the Federal financial eligibility requirements for Medicaid, MassHealth may not deny the person long-term care benefits. *Id.* ("[P]rovided that such persons meet the financial eligibility requirements of [the act], ... long-term care services shall be available to otherwise eligible persons whose income and resources are insufficient to meet the costs of their medical care as determined by the financial eligibility requirements of the program"). See *Cruz v. Commissioner of Pub. Welfare, 395 Mass. 107, 113, 478 N.E.2d 1262 (1985)* ("The language of this section clearly indicates that the Legislature intended the [Medicaid] benefits program to comply with the Federal statutory and regulatory scheme" [citation omitted]). "When there is a conflict between State and Federal regulations, the Legislature intended that [MassHealth] comply with the Federal rule." *Cruz, supra.*

Under Federal law, "[f]or purposes of determining an individual's eligibility for, or amount of, benefits under a State plan under [the act] ... , the rules specified in

paragraph (3) shall apply to a trust established by such an individual." *42 U.S.C. § 1396p(d)(1)*. "[T]he rules specified in paragraph (3)" provide that "if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual." *42 U.S.C. § 1396p(d)(3)*. Therefore, the issue we must decide is whether *130 Code Mass. Regs. § 520.023(C)(1)(d)*, which MassHealth interprets to mean that the equity in a home that is part of the corpus of an irrevocable trust is a countable asset where the grantor of the trust retains the authority to reside in or otherwise enjoy the use of the home, is consistent with *42 U.S.C. § 1396p(d)(3)*.

The plaintiffs contend that *§ 1396p(d)(3)* makes an asset in the corpus of an irrevocable trust countable only where there are circumstances in which principal from the trust might be paid to them or for their benefit. They contend that, because they can only reside in the home but not reach any of the equity in the home under the trust, the equity should not be countable as an asset because it may not be paid to them. MassHealth argues that interpretive guidance from the Health Care Financing Adminis- tration (HCFA)[11] in its State Medicaid Manual (Manual), which provides instruction to State officials in applying the provisions of Federal Medicaid law, indicates that a right to use and occupancy can be a form of "payment" to a Medicaid applicant. Transmittal 64, issued in November, 1994, includes a section entitled "Treatment of Trusts," which states:

> "For purposes of this section a payment from a trust is a disbursal from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property."

State Medicaid Manual, HCFA Pub. No. 45-3, Transmittal 64 § 3259.1.A.8 (Nov. 1994).

11 See note 4, *supra*.

The Manual is comprised of the various transmittals issued by HCFA and, later, by CMS. The transmittals contained in the Manual do not carry the force of regulations and are not entitled to the deference that we give to regulations that reflect an agency's interpretation of a statute it is obliged to enforce. See *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 845 (1984)*; *Springfield v. Department of Telecomm. & Cable, 457 Mass. 562, 567-568, 931 N.E.2d 942 (2010)*. However, we consider such guidance carefully for its persuasive power. See *Wos v. E.M.A. ex rel. Johnson, 568 U.S. 627, 133 S. Ct. 1391, 1402, 185 L. Ed. 2d 471 (2013)* (interpretations contained in policy statements, agency manuals, and enforcement guidelines lack force of regulations and "do not warrant *Chevron*-style deference," but are "'entitled to respect' in proportion to their 'power to persuade'" [citations omitted]); *Atlanticare Med. Ctr. v. Commissioner of the Div. of Med. Assistance, 439 Mass. 1, 9, 785 N.E.2d 346 & n.12 (2003)*.

We conclude that HCFA Transmittal 64 accurately interprets the meaning of "payment from the trust" in *42 U.S.C. § 1396p(d)(3)*. We also conclude that MassHealth has misinterpreted the meaning of these words in both the statute and the transmittal. *Section 1396p(d)(3)* recognizes that a "payment from the trust" may be made from the "corpus" of the trust or from "income on the corpus." Where a home is transferred to a trust, the home becomes another asset of the trust. Like any other asset, a home adds to the corpus of the trust, in that it may be sold for its fair market value; a home also increases the trust's capacity to generate income, in that rent may be collected for its use and occupancy. Where the trustee retains the discretion to pay income produced from the corpus to the grantors, as in the Nadeau and Daley Trusts, the trustee may pay any rental income earned from any real estate in the corpus of the trust to the grantors. Where the terms of the trust, as in the Nadeau Trust, grant a right of use and occupancy to the grantors for their lifetime, the grantors receive from the trust the right to receive any income that may be generated from the rental of the home, as well as the right to forgo that rental income by residing in the home themselves. See *Hinckley v. Clarkson, 331 Mass. 453, 454-455, 120 N.E.2d 285 (1954)* (right of use and occupancy grants "right to the income of the property [for] life," but not right to "alienate or consume" property). See also *Langlois v. Langlois, 326 Mass. 85, 87-88, 93 N.E.2d 264 (1950)*. HCFA Transmittal 64 accurately recognizes that, where a trust grants the use or occupancy of a home to the grantors, it is effectively making a payment to the

grantors in the amount of the fair rental value of that property.

To illustrate with an example, if a grantor transfers to an irrevocable trust ownership of a condominium unit and the trustee decides to rent the unit to a third person and pay the rental income to the grantor, there is a payment of rental income from the trust to the grantor. If the grantor instead exercises his or her right of use and occupancy under the terms of the trust, and decides to reside in the unit or permit a family member to reside there without the payment of rent, the fair market value of the rent that otherwise would have been earned and treated as actual trust income is deemed paid to the grantor under Transmittal 64.

This payment, however, is not a payment from the corpus of the trust; the grantors do not have the power through their right of use and occupancy to sell the property under any circumstances. It is instead a payment from the "income on the corpus." Such payments, whether actually received as rental income or imputed as the fair market rental value of the grantors' occupancy of the home, may be countable as income of the grantors, but the value of the home is not thereby countable as their asset.[12] Such payments, therefore, do not affect an applicant's eligibility for Medicaid long-term care benefits, but they may affect how much the applicant is required to contribute to the payment for that care. Just as the payment of income from the liquid assets of an irrevocable trust does not make those assets "available to the individual" under *§ 1396p(d)(3)* and therefore countable assets for purposes of Medicaid eligibility, the payment of what is essentially rental income from real estate owned by the trust does not make the equity in that real estate a countable asset.

> 12 Under the Massachusetts regulations implementing the Federal Medicaid act, countable income includes income to which an applicant, a person already receiving Medicaid benefits, or a spouse "would be entitled whether or not actually received when failure to receive such income results from [their] action or inaction." See *130 Code Mass. Regs. § 520.009(A)(4)* (2014). "In determining whether or not failure to receive such income is reasonably considered to result from such action or inaction, the MassHealth agency will consider the specific circumstances involved." *Id.*

The MassHealth regulation, *130 Code Mass. Regs. § 520.023(C)(1)(d)*, accurately interprets *§ 1396p(d)(3)* in providing, "The home or former home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset." There is no doubt that, where the terms of the trust grant the trustee the discretion in any circumstance to sell the grantors' home and distribute to them the proceeds, the home is a countable asset for Medicaid eligibility. Where MassHealth errs is in interpreting its regulation to mean that a home "is available according to the terms of the trust" simply because the terms of the trust give the grantors the right of use and occupancy of the home. Such a right is not a circumstance that would give the trustee the discretion to sell the home and distribute the proceeds to the applicant, and therefore is not a circumstance that may render the home a countable asset.

As the United States Supreme Court has declared, "the principle of actual availability ... has served primarily to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes nonexistent resources to recipients." *Heckler v. Turner, 470 U.S. 184, 200, 105 S. Ct. 1138, 84 L. Ed. 2d 138 (1985)*. The "any circumstances" test for trusts requires an additional layer of analysis, but it does not depart from this fundamental purpose. See *Guerriero, 433 Mass. at 634* (trust assets not available to applicant where trustee did not have "any legal discretion" to pay any part of trust principal to her). By declaring the equity in a home owned by an irrevocable trust to be actually available to an applicant where the trustee has no power to sell the home and distribute the proceeds to the applicant under any circumstance, Massachusetts is effectively "conjuring [a] fictional" resource (the applicant's home) by "imputing financial support" from a person who has no authority to furnish it (the trustee).

Because the MassHealth determination that Nadeau was ineligible to receive Medicaid long-term care benefits rests solely on the availability of his home as a resource, we vacate the judgment affirming this finding and remand the matter to MassHealth to evaluate two other possible sources of countable assets. As earlier discussed, the terms of the Nadeau Trust permit the equity in the Nadeau home to be paid at the Nadeaus' direction or for their benefit during their lifetimes in two

circumstances.

First, the Nadeaus may "appoint ... all or any part of the trust property ... to any one or more charitable or non-profit organizations" over which they have no controlling interest. Had Nadeau received care at a nursing home operated by a nonprofit organization, he could have used the assets of the trust, including his home, to pay the nonprofit organization for his care. Because approximately one-fourth of the nursing homes in Massachusetts are operated by nonprofit organizations,[13] albeit not the nursing home where he received care, it is appropriate for MassHealth to consider whether this possibility fits within the "any circumstances" test.

13 See MatchNursingHomes.org, Massachusetts Nursing Homes and Resources, http://matchnursinghomes.org/state/ma-nu rsing-homes [https://perma.cc/G7CS-2G3B] (citing 2011 data).

Second, because the trust is intended to be construed as a "grantors trust" under the Internal Revenue Code, *26 U.S.C. § 677(a)*, with all income distributed to the grantors taxable to them, the trustee may pay any tax liability arising from such distributions from the corpus of the trust. MassHealth may determine that this portion of the corpus is a countable asset under the "any circumstances" test and may ascertain, under *§ 1396p(d)(3)*, the size of the "portion of the corpus from which ... payment to the individual could be made" in this circumstance.

Our analysis is different for the Daley Trust because, in contrast with the Nadeau Trust, the Daley Trust did not own the home in fee simple; the Daleys retained a life estate and deeded only the remainder interest in their home to the trust. Their continued residence in the home, therefore, cannot be deemed putative income received from the trust through a right of use and occupancy, because the trust has no property interest in the home during the Daleys' lifetime. Instead, the life estate is an asset of the Daleys that can be sold, mortgaged, or leased. See *Hershman- Tcherepnin v. Tcherepnin, 452 Mass. 77, 88 n.20, 891 N.E.2d 194 (2008)*, quoting H.J. Alperin & L.D. Shubow, Summary of Basic Law § 17.5, at 586 (3d ed. 1996) ("[a] life estate is alienable by the life tenant, and he can accordingly convey his estate to a third person, or mortgage it, or lease it for a term of years"). Moreover, when the underlying property itself is sold, the life tenant has a right to a portion of the sale proceeds, pursuant to an actuarial evaluation of the life estate. See J.A. Bloom & H.S. Margolis, Elder Law § 12:3 (2016). Although we do not decide the question, it appears that MassHealth does not consider a life estate in an applicant's primary residence to be a countable asset for Medicaid eligibility purposes.[14,15] Where the irrevocable trust does not own the life estate in the applicant's primary residence, the continued use of the home by the applicant pursuant to his or her life estate interest does not make the remainder interest in the property owned by the trust available to the applicant. Therefore, we vacate the judgment affirming the finding that the equity in the Daleys' home is available to them and is accordingly a countable asset for purposes of Medicaid eligibility. Because the Daley Trust, like the Nadeau Trust, is intended to be construed as a "grantors trust" and the trustee may pay any tax liability arising from income distributions to the grantors from the corpus of the trust, we remand the matter to MassHealth to determine whether this portion of the corpus is a countable asset under the "any circumstances" test and to ascertain under *§ 1396p(d)(3)(B)(i)* the size of the "portion of the corpus from which ... payment to the individual could be made" in this circumstance.

14 In *Heyn v. Director of the Office of Medicaid, 89 Mass. App. Ct. 312, 313 n.3, 48 N.E.3d 480 (2016)*, MassHealth declared in its brief that it is "a correct statement of law" that retention of a life estate in a primary residence does not make an individual ineligible for Medicaid benefits.

15 We note that *42 U.S.C. § 1396p(b)(4)(B)* gives States the *option* to expand their estate-recovery procedures for Medicaid expenses to include assets beyond those within the individual's probate estate, including "any other real and personal property and other assets in which the individual had any legal title or interest at the time of death ... , including such assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." Massachusetts has not chosen to expand its estate recovery provisions in this fashion. See *G. L. c. 118E, § 31 (c)*. In States that have exercised this option under *§ 1396p(b)(4)(B)* and increased the scope of estate recovery, the remainder interest in life estates retained by Medicaid beneficiaries are ultimately

subject to recovery after the beneficiary's death. See, e.g., *Matter of the Estate of Peterson v. Peterson, 340 P.3d 1143, 157 Idaho 827, 836 (2014)* ("When assets of a Medicaid recipient are conveyed to a survivor, heir or assign by the termination of a 'life estate,' the assets remain part of the recipient's 'estate' pursuant to *42 U.S.C. § 1396*p[b][4][B] and *Idaho Code section 56-218[4][b]*").

Conclusion. We reverse the judgments in both cases, and remand to MassHealth for further proceedings consistent with this opinion.

So ordered.

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, ss.

SUPERIOR COURT
NO. 14-CV-02278C

LIONEL NADEAU,
Plaintiff,

vs.

KRISTIN THORN, Director of the Office of Medicaid, Executive Office of Health and Human Services, Defendant.

MEMORANDUM OF DECISION AND ORDER ON PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS

This case arises out of the Office of Medicaid's denial of Lionel Nadeau's application for long-term Medicaid benefits. The Office of Medicaid, also known as MassHealth for the Massachusetts Medicaid program it administers, see G. L. c. 118E, § 9A, falls under the authority of the Secretary of the Executive Office of Health and Human Services. See G. L. c. 6A, §§ 16, 16B. Mr. Nadeau brings this action for judicial review of MassHealth's decision under G. L. c. 30A, § 14. Mr. Nadeau now moves for judgment on the pleadings to vacate MassHealth's decision. A hearing has been held on that motion.

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For the following reasons, Mr. Nadeau's Motion for Judgment on the Pleadings is DENIED.

BACKGROUND

Judicial review of an agency decision is confined to the administrative record. G. L. c. 30A, § 14(4),(5). The record before MassHealth contained the following facts. On

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March 27, 2001, Mr. and Mrs. Nadeau created the "Lionel C. Nadeau and Jacqueline T. Nadeau Irrevocable Trust" (the "Trust"). Relevant provisions of the Trust are discussed below. That same day, the Nadeaus deeded to the Trust their interest in the real estate located at 1075 School Street in Webster. The assessed value of the property is $173,700. The Nadeaus continued to live at the property until, on April 1, 2014, health reasons required that Mr. Nadeau be admitted to the Webster Manor Healthcare Center.

On February 24, 2014, Mr. Nadeau applied for long-term care Medicaid benefits effective March 13, 2014. On June 27, 2014, MassHealth denied Mr. Nadeau's application after concluding that his assets exceeded Medicaid's $2,000 eligibility limit. MassHealth determined that he was financially ineligible for benefits because his assets included the Trust's principal, valued at $173,700. Mr. Nadeau appealed the decision to the Office of Medicaid Board of Hearings (the "Board").

Following a hearing, in a decision dated November 28, 2014, the Board affirmed MassHealth's decision and denied Mr. Nadeau's appeal. The Board counted the Trust's principal as an asset because:

> By its plain and clear language subsection (d) of [130 Code Mass. Regs. 520.023(C)(1)] treats an applicant's former home deeded into an irrevocable trust differently from all other asset[s] that could fund a trust. Subsection (d) does not require, as subsections (a), (b), and (c) require, a finding that the Trustee has discretion under any set of circumstances under the trust to pay or distribute the principal to the donor/applicant. As MassHealth correctly asserts, the regulation makes no distinction between the "availability" of either income or principal stating only that the home or former home has to be "available" pursuant to the terms of the trust. Here, the applicant may use the property during his lifetime either to occupy as his residence or to rent and derive income payable to [him] as an income beneficiary of the Trust; therefore, his former home, sitting in an irrevocable Trust, is available to him and countable for MassHealth Long-Term Care eligibility purposes.

Mr. Nadeau sought judicial review of the Board's decision under G. L. c. 30A, § 14. On July 31, 2015, Mr. Nadeau filed his instant motion for judgment on the pleadings arguing that his use and occupancy of his home does not make the Trust principal "available" to him.

DISCUSSION

I. Standard of Review

A motion for judgment on the pleadings is governed by G. L. c. 30A §14 and Superior Court Standing Order 1-96. This Court may affirm, remand, set aside, or modify the agency decision if it determines that the rights of any party may have been prejudiced because the agency decision is unconstitutional, in excess of the agency's authority, based upon an error of law or unlawful procedure, unsupported by substantial evidence, or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law. G. L. c. 30A, §14 (7). This court must also "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." G. L. c. 30A, §14(7). The party appealing an administrative decision bears the burden of demonstrating the decision's invalidity. *Merisme* v. *Bd. of Appeals of Motor Vehicle Liab. Policies & Bonds*, 27 Mass.App.Ct. 470, 474 (1989).

This court "must apply all rational presumptions in favor of the validity of the administrative action and not declare it void unless its provisions cannot by any reasonable construction be interpreted in harmony with the legislative mandate." *Thomas* v. *Commissioner of the Div. of Med. Assistance*, 425 Mass. 738, 746 (1997), citation omitted. Moreover, this "court will not substitute its own judgment concerning the

penalty the [agency] imposes." *Kobrin* v. *Bd. of Registration in Med.*, 444 Mass. 837, 842 (2005), citation omitted. Consequently, as the party appealing MassHealth's decision, Mr. Nadeau bears the heavy burden of demonstrating the decision's invalidity. *See Ten Local Citizen Group* v. *New Eng. Wind, LLC*, 457 Mass. 222, 228 (2010), internal quotation and citation omitted.

This Court gives substantial deference to an agency's interpretation of those statutes with which it is charged with enforcing. "Especially is this so when the case involves interpretation of a complex statutory and regulatory framework such as Medicaid." *Shelales* v. *Dir. of the Office of Medicaid*, 75 Mass. App. Ct. 636, 640 (2009), citation omitted. Deference is particularly appropriate when the statute in question explicitly grants broad-rule making authority to the agency, contains an ambiguity or gap, or broadly sets out a legislative policy that must be interpreted by the agency." *Souza* v. *Registrar of Motor Vehicles*, 462 Mass. 227, 229 (2012) (citations omitted).

II. Analysis

The Massachusetts Medicaid program, MassHealth, "is a joint State and Federal program designed to pay the cost of medical care for those who are otherwise unable to afford it." *Normand* v. *Dir. of the Office of Medicaid*, 77 Mass. App. Ct. 634, 636 (2010), citations omitted. See also 130 Code Mass. Regs. 515.002(A).[1] "Because MassHealth is a joint Federal and State program, the Massachusetts statutes and regulations governing the program must be consistent with the requirements of Federal [Medicaid] law." *Normand*, 77 Mass. App. Ct. at 637 n.8. Consequently, as required by Federal law, MassHealth applicants must meet certain financial eligibility requirements

[1] "The MassHealth agency is responsible for the administration and delivery of health-care services to low- and moderate-income individuals and couples." 130 Code Mass. Regs. 515.002(A).

to qualify for benefits. *Tarin* v. *Commissioner of Div. of Med. Assistance*, 424 Mass. 743, 747 (1997).

MassHealth provides nursing home benefits in the form of long-term care coverage for individuals who have $2,000 or less in "countable assets." 130 Code Mass. Regs. § 519.006(A)(2); 130 Code Mass. Regs. §520.003(A)(1).[2] "Countable assets are all assets that must be included in a determination of [Medicaid] eligibility." 130 Code Mass. Regs. §520.007. Here, if the Trust is considered a countable asset, then Mr. Nadeau would be financially ineligible for MassHealth benefits because the assessed value of his home exceeds $2,000. This Court concludes that the Office of Medicaid Board of Hearings correctly determined that Mr. Nadeau's Trust was a countable asset because Mr. Nadeau's home remained available for his use after he deeded it to the Trust.

A. Availability of Property

Property held in an irrevocable trust is a countable asset where it is "available according to the terms of the trust[.]" 130 Code Mass. Regs. 520.023 (C)(1)(d).[3] If a Medicaid applicant can use and occupy her home as a life tenant, then her home is "available." See *Doherty* v. *Dir. of the Office of Medicaid*, 74 Mass. App. Ct. 439, 441 (2009) (home was available because applicant retained the right to reside there during her lifetime).

Deferring to MassHealth's reasonable construction of its regulations, the Court concludes that Mr. Nadeau's home is "[t]he home or former home of a nursing-facility

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[2] State regulations require that "the total value of countable assets owned by or available to individuals applying for or receiving MassHealth [benefits] . . . may not exceed . . . $2,000." 130 Code Mass. Regs. 519.006(A)(2).

[3] The circular definition for the word "available" contained in the introductory statement to 130 Code Mass. Regs. §520.023 provides as follows: "Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual." 130 Code Mass. Regs. §520.023.

resident . . . held in an irrevocable trust that is available according to the terms of the trust," and is therefore a "countable asset" under 130 Code Mass. Regs. 520.023 (C)(1)(d). Mr. Nadeau's home is "available" because the Trust's express terms preserve his right to live there: Subsection 2.3 of Article 2 of the Trust, Entitled "Payment of Income and Principal," provides that" the Nadeaus "shall also have the right to use and occupy any residence that may from time to time be held in trust hereunder."

B. Any Circumstances Test

Mr. Nadeau argues that his home cannot be considered "available" or countable unless there are some circumstances under the Trust that give him the ability to receive some form of payment, such as the proceeds of the sale of the property. Mr. Nadeau observes that the entire subsection in the regulation at 130 Code Mass. Regs. 520.023 (C)(1) is entitled "Portion Payable." His argument proceeds under the "any circumstances" test described in 42 U.S.C. §1396p(d)(3)(B)(i);[4] 130 Code Mass. Regs. 520.023(C)(1)(a).[5] The Supreme Judicial Court has described the test as follows:

> [I]f there is *any* state of affairs, at *any* time during the operation of the trust, that would permit the trustee to distribute trust assets to the grantor, those assets will count in calculating the grantor's Medicaid eligibility.

Lebow v. *Commissioner of the Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2001), emphasis in original. Even assuming, arguendo, that Mr. Nadeau's property must be both

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[4] If there are any circumstances under which payment from an irrevocable trust "could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual[.]" 42 U.S.C. §1396p(d)(3)(B)(i).

[5] Under 130 Code Mass. Regs. 520.023(C)(1)(a), "[a]ny portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset." See *Lebow* v. *Commissioner of the Div. of Med. Assistance*, 433 Mass. 171, 177-178 (2001) (discussing regulation).

available to him and payable to him for it to be countable, the Court, deferring to federal Medicaid policy guidelines, concludes the trust principal is payable to Mr. Nadeau.[6]

The Health Care Financing Administration (HCFA) is the agency charged with the interpretation and enforcement of the Medicare and Medicaid statutes. The HCFA issues policy guidelines called transmittals to states participating in the Medicaid program. See generally *Massachusetts Hosp. Ass'n* v. *Department of Pub. Welfare*, 419 Mass. 644, 646 (1995) (describing interplay between MassHealth and HCFA). Transmittal 64 defines "payment" broadly as: "any disbursal from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property." Medicaid Manual HCFA Transmittal 64, Section 3259.1(A)(8). Massachusetts courts have applied Transmittal 64 when interpreting Medicaid statutes and regulations. See, e.g., *Atlanticare Med. Ctr.* v. *Comm'r of the Div. of Med. Assistance*, 439 Mass. 1, 9 (2003); *Andrews* v. *Div. of Med. Assistance*, 68 Mass. App. Ct. 228, 231 (2007). Transmittal 64 "is entitled to deference by the courts as long as it is consistent with the plain language and purposes of the statute and if [it is]

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[6] This court notes the Board correctly concluded additional income was countable under Article 6.1 of the Trust, entitled "Payments for our estate." Article 6.1 provides that "Our trustee may in its sole discretion pay to our estate or to the tax authorities any taxes payable by reason of my death chargeable against the residue of my estate and any other debts of our estate or expenses of its administration and legacies under by will that, if paid by our executor would reduce the residue of my estate. This paragraph shall not be construed to require any such payments by our trustee." Where, as here, the trustee has "a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility." See *Cohen* v. *Commissioner of the Div. of Med. Assistance*, 423 Mass. 399, 413 (1996).

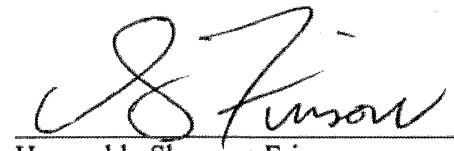
This court concludes that, because there are circumstances under which the trustee may exercise his discretion to pay these taxes, they are countable for purposes of Medicaid eligibility. See *Lebow*, 433 Mass. at 177-178; 130 Code Mass. Regs. 520.023(C)(1)(a). However, MassHealth has failed to demonstrate that the potential income accessible under this provision exceeds the $2,000 Medicaid eligibility threshold. As noted by the Board, MassHealth did not introduce evidence "articula[ing] just how much of the principal could be paid to the donor[.]"

consistent with prior administrative views." *Gillmore* v. *Ill. Dep't of Human Servs.*, 354 Ill. App. 3d 497, 501 (2004), citation and quotation omitted.

In this case, Subsection 2.3 of Article 2 of the Trust preserved Mr. Nadeau's right to use and occupy his home, which is a form of payment under Transmittal 64's broad definition. Consequently, Mr. Nadeau's property is a countable asset even if the applicable regulations require it to be both available and payable to him.

ORDER

For the foregoing reasons, the plaintiff's Motion for Judgment on the Pleadings is DENIED.



Honorable Shannon Frison
Justice of the Superior Court

December 29, 2015

Office of Medicaid
BOARD OF HEARINGS

Appellant Name and Address:

Robert [redacted]
c/o Doris A. [redacted]
[redacted] Street, Unit 208
Saugus, MA 01906

Appeal Decision:	Approved	**Appeal Number:**	1615178
Decision Date:	Nov 3 0 2017	**Hearing Date:**	01/20/2017
Hearing Officer:	Samantha Kurkjy	**Record Open:**	08/09/2017

Appellant Representative:
Robert Ford, Esq.

MassHealth Representative:
Andrea Pelczar

The Commonwealth of Massachusetts
Executive Office of Health and Human Services
Office of Medicaid
Board of Hearings
100 Hancock Street, Quincy, Massachusetts 02171

APPEAL DECISION

Appeal Decision:	Approved	Issue:	Long-term care eligibility
Decision Date:	NOV 3 0 **2017**	**Hearing Date:**	01/20/2017
MassHealth Rep.:	Andrea Pelczar	**Appellant Rep.:**	Robert Ford, Esq.
Hearing Location:	Tewksbury MassHealth Enrollment Center	**Aid Pending:**	No

Authority

This hearing was conducted pursuant to Massachusetts General Laws Chapter 118E, Chapter 30A, and the rules and regulations promulgated thereunder.

Jurisdiction

Through a notice dated November 28, 2016, MassHealth denied the appellant's application for MassHealth long-term care benefits because MassHealth determined that the appellant's countable assets exceed the limit of the MassHealth program. (Exhibit 1.) The appellant filed this appeal with the Board of Hearings on December 5, 2016. (130 CMR 610.015(B); Exhibit 2.) The record was held open until February 21, 2017 for the appellant to submit a response to MassHealth's memorandum of law. (Exhibit 6.) MassHealth was given until March 14, 2017 to file a response memo. (Exhibit 6.) The appellant was given until April 4, 2017 to file a final response. (Exhibit 6.) On April 4, 2017, the appellant was granted an extension of the record open period until April 5, 2017. (Exhibit 9.) On June 28, 2017, the record was re-opened to allow both parties to comment upon recent Supreme Judicial Court decisions. (Exhibit 9.) MassHealth was given until July 19, . 2017 to submit a memo and the appellant was given until August 9, 2017 to submit a response. (Exhibit 9.) Denial of assistance is a valid ground for appeal. (130 CMR 610.032.)

Action Taken by MassHealth

MassHealth denied the appellant's application for MassHealth long-term care benefits because it determined that he has more countable assets than are allowable under MassHealth regulations.

Issue

Whether MassHealth was correct in determining that the appellant was over assets and therefore ineligible, pursuant to 130 CMR 520.003, for MassHealth long-term care benefits.

Summary of Evidence

The MassHealth representative appeared in person and testified that the appellant, who is over 65-years-old and has a community spouse, was admitted to a nursing facility on July 29, 2016. He submitted a long-term care application on September 36, 2016 and requested a benefit start date of October **1,** 2016. MassHealth denied the application on November 28, 2016 for excess countable assets. The appellant appealed the denial to the Board of Hearings on December 5, 2016.

The November 28, 2016 denial notice indicates that the appellant has countable assets totaling $380,141. The assets consist of bank account balances ($102,541) and a trust ($277,600) called The [redacted] Street Realty Trust (hereinafter "the Trust"), which MassHealth found to be countable. The Trust contains real property located in Saugus, MA. The appellant may keep $2,000 and his community spouse may keep $119,220 in assets. Therefore, the appellant has $258,921 in excess assets. At hearing, the trust instrument was submitted into evidence as part of Exhibit 5.

The Trust was established on January 14, 2010 and is irrevocable. The real property held in trust was located at 73-73A [redacted] Street, Everett, MA. On January 30, 2012, this property was sold and was replaced with property located at 48 [redacted] Street, Saugus, MA on February 6, 2012. The Settlors of the Trust are the appellant and his spouse. They are also the Trustees. The beneficiaries of the Trust are the Settlors' children. The relevant portions of the trust instrument are as follows:

> **ARTICLE II**
> **Irrevocability**
>
> The Seniors shall have NO right to alter, amend, revoke or terminate this Trust. **THIS TRUST IS IRREVOCABLE.**
> ••.
>
> **ARTICLE III**
> **Dispositive Provisions During Settlors' Lifetime**
>
> During the lifetime of the Settlors, the Trustees shall pay to the Settlors or apply for the Benefit of the Settlors all of the net income of the Trust not less often than quarterly. The Settlors shall also have the right to occupy, enjoy, and possess any real estate that may constitute part or all of the corpus of this Trust during their lifetime. The Settlors shall not have the right to any principal distributions under any circumstances.

ARTICLE VI
Provisions after Settlors' Death

I. A. Upon the death of the survivor of the two Settlors, the Trustee shall distribute the remaining Trust property as the surviving Settlor may appoint, by means of his or her Last Will and Testament, to any beneficiary, other than the powerholder, the powerholder's estate or creditors, or the creditors of the powerholder's estate, by reference to this special power of appointment....

ARTICLE XI
Trustee's Powers.

I. The Trustee shall have, in addition to those powers conferred by law or otherwise, the following discretionary powers, (excepts as otherwise provided in this instrument) *[sic]* whether or not personally interested in the exercise of any such powers.

A. To administer, retain, invest, and reinvest in any property[ ].. .

C. To manage real property in such manner as the Trustee shall deem best including authority to erect, alter or demolish buildings, to improve, repair, insure, subdivide, and vacate any of said property; to adjust boundaries, to dedicate streets or other ways for public use without compensation; to impose such easements, restrictions, conditions, stipulations and covenants as the Trustee may see fit; to lease (with or without option to purchase) for such times and on such terms as it deems advisable and whether or not the lease may extend beyond the terms of the trust.

D. To sell, lease, pledge, mortgage, transfer, exchange, convert, or otherwise dispose of, or grant options with respect to, any and all real or personal property at any time forming a part of the Trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions as are deemed advisable.

E. To borrow money from itself individually or from others, upon such terms and conditions as it deems advisable and to mortgage or pledge trust property as security for the repayment thereof.

• • •

I. To retain such reserves out of income as the Trustee deems proper for expenses, taxes, depreciation and other liabilities of the trust.

L. The Principal and Income Act shall not apply to the provisions of this Trust.

M. To purchase assets from, or lend money to, the Settlors' estate at a fair value. Any such purchased assets shall be treated as part of this trust as if originally made a part hereof. The propriety of the purchase, the amount of the assets purchased, and the ascertainment of fair value shall be solely within the discretion of the Trustee, and the Trustee shall incur no liability as a result of any such purchase or the retention of such assets whether or not such assets constitute investments which may be legally made by Trustees.

0. To purchase and/or maintain any real estate as a residence for any one or more of the then current income beneficiaries and the spouse, issue, and/or guardian of any such beneficiary (or other person residing with, and caring for, the beneficiary) without charging rent to any one or more of such occupants.

. . .

Q. By unanimous agreement of all the members serving as Trustee, to add to, or subtract from, the number of members comprising the Trustee, provided that in the event the number of Trustees is increased, there shall be deemed to be a vacancy in the membership of the Trustee, and such vacancy shall be filled in accordance with the proper procedures otherwise applicable to this trust.

. . .

ARTICLE XIII
Resignation and Appointment of Trustee

I. Any Trustee may resign as Trustee from the trusts hereby created at any time by giving thirty (30) days written notice delivered personally or by certified or registered mail to the then legally competent current income beneficiaries and to the legal guardians of any current income beneficiaries who are not legally competent. In such event the resigning Trustee may appoint a Successor Trustee, and shall do so in the instrument of resignation, if able....

II....Nothing contained in this Article shall be construed to limit the power of the Senior to substitute a new Trustee.

• •

ARTICLE XVIII
Tax Liability

It is the intent of the Settlors that this Trust be construed as a

"Grantor Trust" under Internal Revenue Code Section 677(a). All income distributed, held, or accumulated by this Trust shall be taxable to the Settlors. The Trustee may, to the extent that the income of the Trust generates a tax liability for the Settlors, distribute, *[sic]* to the Settlors such amounts of income of the Trust as the Trustee deems necessary to satisfy such tax obligation.

ARTICLE XX
Right of Substitution

The Settlors retains *[sic]* the right to reacquire the principal of this Trust by substituting property of an equivalent value therefor.

ARTICLE XXI
Income

"Income" means net income and accumulated income not added to principal and does not include capital gain....

(Exhibit 5.) (Emphasis in original.)

The parties each submitted a legal memorandum of law. Their respective arguments are summarized below.[1]

MassHealth's Argument

MassHealth contends that the Trust is countable for Medicaid eligibility purposes in the amount of $145,919.04. As support for its argument, MassHealth cites to 130 CMR 520.023, as well as federal trust law:

> **(B)** In the case of an irrevocable trust—
>
> (i) if there are any circumstances under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources

[1] The parties were given an opportunity to submit written arguments through record open periods. On June 28, 2017, the record was re-opened to allow both parties to comment upon a recent Supreme Judicial Court decision, Daley v. EOHHS, SJC 12200, slip op., May 30, 2017. MassHealth was given until July 19, 2017 to submit a memo and the appellant was given until August 9, 2017 to submit a response. Both parties submitted a substitute memorandum of law. Their previous submissions are marked as exhibits but those arguments are not necessarily included above.

> available to the individual, and payments from that portion of the corpus or income—
>
> > (I) to or for the benefit of the individual, shall be considered income of the individual...

(42 USC 1396p(d)(3)(B).)

MassHealth states that the Trust provisions allow the appellant the right to occupy, possess, and enjoy the real estate held in Trust. He is also entitled to the Trust's net income in at least quarterly distributions. MassHealth argues that the right to use and occupancy entitles the appellant to the fair market value rental income from the Trust property. MassHealth cites to Daley in support of its contention:

> HCFA[2] Transmittal 64 accurately recognizes that, where a trust grants the use or occupancy of a home to the grantors, it is effectively making a payment to the grantors in the amount of the fair rental value of that property. To illustrate with an example, if a grantor transfers to an irrevocable trust ownership of a condominium unit and the trustee decides to rent the unit to a third person and pay the rental income to the grantor, there is a payment of rental income from the trust to the grantor. If the grantor instead exercises his or her right of use and occupancy under the terms of the trust, and decides to reside in the unit or permit a family member to reside there without the payment of rent, the fair market value of the rent that otherwise would have been earned and treated as actual trust income is deemed paid to the grantor under Transmittal 64.

(Exhibit 11) (quoting Daley v. EOHHS, SJC 12200, slip op., May 30, 2017 at 24).

Since the Massachusetts Supreme Judicial Court ("SJC") determined that this payment comes not from the trust corpus but from the "income on the corpus," MassHealth will calculate and then count rental income. (Exhibit 5) (quoting Daley v. EOHHS, SJC 12200, slip op., May 30, 2017 at 24). Further, federal Medicaid law dictates that a payment from "income on the corpus" is considered a "resource." While this requirement was not specifically mentioned in Daley, MassHealth must follow federal Medicaid law. MassHealth cites to Atkins v. Rivera, 106 S.Ct. 2456 (1986) for its holding that the plain language of the federal Medicaid statute controls over the Massachusetts Supreme Court.

MassHealth used the Housing and Urban Development ("HUD") Fair Market Rent tables for 2016 to determine the appropriate monthly rental value for the property in Trust. The appellant's Saugus, MA home is a condominium with two bedrooms and two bathrooms. Under the tables, the fair market monthly rental value is $1,567. Therefore, this amount is the monthly income incurred by

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[2] Health Care Financing Administration

the appellant. MassHealth then calculated the resource value by determining the appellant's life expectancy using the Social Security Administration Actuarial Life Table. According to the table, the life expectancy for a male aged 81 is 7.76 years. The appellant's countable resource amount is $1,567 x 12 months x 7.76 years, for a total of $145,919.04 in rental value of the Saugus, MA property over his lifetime.

MassHealth also states that the Trustee can pay accumulated income to the appellant, as "accumulated income" is included in the definition of "income" under Article XXI. Therefore, the Trustee may retain rental incomes before making any quarterly distributions to the appellant. Pursuant to 42 USC 1382b(e)(3)(6)(B), income that is added to a trust is corpus in the month after. receipt. Accumulated income, then, would be corpus in the month after it is received. The entire Saugus, MA property could be invested or rented and the income could then be accumulated and distributed to the appellant as accumulated income (corpus). When accumulated each quarter, the $1,567 monthly rent would exceed MassHealth's $2,000 asset limit. Since the Trustee can pay accumulated income to the appellant, there is a circumstance in which the Trust corpus could be distributed to the appellant in an amount over $2,000.

The Appellant's Argument

The appellant argues that the right to use and occupancy of a property in trust is not a countable asset, and cites to Daley in support of this contention:

> We conclude that neither the grant in an irrevocable trust of a right to use and occupancy in a primary residence to an applicant nor the retention by an applicant of a life estate in his or her primary residence makes the equity in the home owned by the trust a countable asset for the purpose of determining Medicaid eligibility for long-term care benefits.

(Exhibit 12) (quoting Daley v. EOHHS, SJC 12200, slip op., May 30, 2017 at

3). Instead, the right to use and occupancy is an income interest:

> Where the terms of the trust, as in the Nadeau Trust, grant a right of use and occupancy to the grantors for their lifetime, the grantors receive from the trust the right to receive any income that may be generated from the rental of the home, as well as the right to forgo that rental income by residing in the home themselves....HCFA Transmittal 64 accurately recognizes that, where a trust grants the use or occupancy of a home to the grantors, it is effectively making a payment to the grantors in the amount of the fair rental value of that property....This payment, however, is not a payment from the corpus of the trust; the grantors do not have the power through their right of use and occupancy to sell the property under any circumstances. It is

> instead a payment from the 'income on the corpus.' Such payments, whether actually received as rental income or imputed as the fair market rental value of the grantors' occupancy of the home, may be countable as income of the grantors, but the value of the home is not thereby countable as their asset... Such payments, therefore, do not affect an applicant's eligibility for Medicaid long-term care benefits, but they may affect how much the applicant is required to contribute to the payment for that care. Just as the payment of income from the liquid assets of an irrevocable trust does not make those assets `available to the individual' under [42 USC] § 1396p(d)(3) and therefore countable assets for purposes of Medicaid eligibility, the payment of what is essentially rental income from real estate owned by the trust does not make the equity in that real estate a countable asset.

Id. (quoting Daley v. EOHHS, SJC 12200, slip op., May 30, 2017 at 23-25) (internal citations • omitted).

Under the right to use and occupancy, payment from the Trust is not from the Trust corpus but from "income on the corpus," which is Trust income. Even if the income is held and accumulates over a period of time, the value is still characterized as income. The federal Medicaid definition of "corpus" found in 42 USC § 1382b(e)(6)(B) references "accumulated earnings," which is income.

- Federal Medicaid law acknowledges that income retains its characterization even when held after the month of receipt. If such income converted to principal on the day following the calendar month of receipt, there would not be a need to refer to "accumulated earnings." Further, any accumulated earnings converted to principal could not be distributed to the appellant as Article III of the Trust forecloses distributions of principal to the appellant.

Under 42 USC § 1396p(d)(3)(B),[3] only the portion of principal or income that can be paid to the appellant is a resource available to the appellant. If income is retained after the month the Trust

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[3] 42 USC § 1396p(d)(3)(B) reads as follows:

> (6) For purposes of this subsection—
> (A) the term "trust" includes any legal instrument or device that is similar to a trust;
> (B) the term "corpus" means, with respect to a trust, all property and other interests held by the trust, including accumulated earnings and any other addition to the trust after its establishment (except that such term does not include any such earnings or addition in the month in which the earnings or addition is credited or otherwise transferred to the trust); and
> (C) the term "asset" includes any income or resource of the individual (or of the individual's spouse), including—
> (i) any income excluded by section 1382a(b) of this title;

receives it and is available to be paid to the appellant, that income is a resource that must be spent down in an eligibility determination. However, the appellant is not entitled to that income, as he is only entitled to the net income from the Trust under Article III. Regulation 130 CMR 520.009 is in accord with this principle, as the countable-income amount is gross income minus income deductions and business expenses. If the appellant is given the fair rental value from the Trust property, business expenses must be deducted in order to arrive at countable income. Such expenses include condominium fees, real estate taxes, casualty and property insurance, and repair and maintenance costs. Repair and maintenance issues lack the predictability of the other expenses and vary in cost. Some repairs require budgeting due to their high costs. These expenses must be subtracted from gross income. Article XI of the Trust allows the trustee to retain reserves from income as he or she determines is proper for depreciation, taxes, expenses, and other liabilities. Net income is the amount left over after these reserves are deducted from gross income.. The Trust instrument recognizes that it can take time to assess and adjust the amounts to hold from income as a reserve. As a result, the Trust allows for the trustee to hold income for up to three months but such an action is not compulsory. The trustee may hold the income to determine expenses before the net income is distributed to the appellant. Only accumulated income or income that can be paid to the appellant is countable. Income cannot be paid out as soon as it is received. "If income is retained for a short while consistent with sound trust management and fiduciary duties, then, at best, that income is accumulated income, and not principal." (Exhibit 12.) The appellant further argues that use and occupancy is not an asset (Massachusetts) or resource (federal), but is income on the corpus, however long it is retained. Since "corpus" includes accumulated income, income remains income even though it is retained after the month of its receipt by the Trust. Only the net income can be paid to the appellant and it is that income that is considered available in an eligibility determination.

Resources are not countable to the appellant until and unless they can be paid to the appellant. MassHealth argues that since the trustee may accumulate income for up to three months, the accumulated income is a resource to be calculated using the appellant's life expectancy. MassHealth then considers the result the appellant's spenddown amount prior to any benefits being payable. Resources from a trust are countable only when the resources may be distributed out of the trust.

In its calculation of fair rental value, MassHealth uses the HUD statistical analysis instead of determining the actual fair market rental value. The HUD analysis is used for several purposes, but there is no indication that MassHealth or the Center for Medicare and Medicaid Services ("CMS") has used this analysis for an applicant who has a fixed spenddown figure. Using this calculation, the fair market rent in Lynn is equal to the fair market rent in Weston, when the two values in reality are not equal. MassHealth's procedure is speculative and should not be accepted. Medicaid requires values based on properties of similar type, quality, size, and neighborhood, otherwise an applicant can be charged with a spenddown amount that is greater than what he or she has available. MassHealth has not demonstrated rental value.

(ii) any resource otherwise excluded by this section[ ]...

Further, the actuarial tables MassHealth uses to multiply its monthly rental amount to determine the life expectancy of the appellant represent a life expectancy for the appellant that is conjecture, resulting in a conjectural calculation of income. The calculation attributes resources to the appellant that do not exist.[4] The income to be received over the appellant's actuarial life expectancy has neither been received by the appellant at this point nor does it exist, but MassHealth still requires him to spend down the actuarial lifetime value before he is deemed eligible for MassHealth benefits. If the monthly value of Trust income that is available to the appellant does not cover one month in a nursing facility, the appellant will still not be deemed eligible for MassHealth because he will be subject to the lifetime spenddown value. The net income[5] will be received by the appellant periodically for his actual lifetime. Therefore, the income should be applied to a patient-paid amount.

MassHealth takes its conjectural rental value, which is less than the asset limit of $2,000, and cites to the provision of the Trust which allows accumulated income in order to argue that the Trust can contain distributable income which exceeds the $2,000 limit, which MassHealth then claims is principal. MassHealth then argues that there are circumstances in which the appellant could receive over $2,000 in Trust principal. However, if the trustee distributes the income monthly, MassHealth's argument fails. The trustee has a fiduciary duty to act in the beneficiary's best interest, which means there is a duty to make distributions from the Trust that would allow the appellant to obtain MassHealth eligibility. "[T]herefore, the trustee would not have the authority, under any circumstances, to accumulate income." (Exhibit 12.) MassHealth's argument relies on the trustee's breach of fiduciary duty, and "Mlle Commonwealth is advocating violation of the law." (Exhibit 12.) In addition, as income accumulates the appellant is not receiving a distribution and would be eligible for benefits during that time. This scenario would lead to the appellant being eligible for benefits, then not eligible, and then eligible again. The law would favor a legal construction which would avoid such absurd results. Therefore, the appellant's interest is without value.

Because the appellant's spouse also has the right to use and occupy the property in Trust, the appellant's income is one-half of the net income, at best. The appellant cites to 20 CFR § 416.1201

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[4] The appellant cites to Heckler v. Turner, 470 US 184, 200 (1985) ("[T]he principle of actual availability...has served primarily to prevent the States from conjuring fictional sources of income and resources by imputing financial support from persons who have no obligation to furnish it or by overvaluing assets in a manner that attributes nonexistent resources to recipients.")

[5] The appellant argues that "resource" should not always be viewed in light of its statutory definition; it is sometimes subject to its dictionary definition:

> Income is a resource for payment of the care of an income beneficiary of the trust. However, that language does not render the income a part of the principal of the trust. It becomes part of the corpus, the body of property interests held in trust, but not the principal as that is distinguished from income for accounting, tax and Medicaid purposes.

(Exhibit 12.)

and states that under federal law, the appellant's use and occupancy interest cannot be liquidated within a period of 20 business days and has no value. MassHealth's use of the HUD survey assumes that the property is available for a set term and clear of all tenants, when in fact the interest is the value someone would pay "for the shared use and occupancy of the property with an elderly woman for the life of an elderly man[.]" (Exhibit 12.) The Hearing Officer must take judicial notice of the fact that no one would rent a shared interest in a property for an unknown term which is subject to ending at any moment. Since the appellant's right to use and• occupancy is not marketable, it has no value and is not an issue in his Medicaid eligibility determination.

Findings of Fact

Based on a preponderance of the evidence, I find the following:

1. The appellant, who is over 65-years-old and has a community spouse, was admitted to a nursing facility on July 29, 2016. (Exhibit 5; Testimony.)

2. He submitted a long-term care application to MassHealth on September 30, 2016 and requested a benefit start date of October 1, 2016. (Exhibit 5; Testimony.)

3. MassHealth denied the application on November 28, 2016 for excess countable assets. (Exhibit 1; Exhibit 5; Testimony.)

4. The appellant submitted a timely appeal to the Board of Hearings on December 5, 2016. (Exhibit 2.)

5. The appellant has countable assets totaling $380,141, consisting of bank account balances ($102,541) and a trust ($277,600), which MassHealth found to be countable. The Trust contains real property located in Saugus, MA. (Exhibit 1; Exhibit 5; Testimony.)

6. According to MassHealth, the appellant has $258,921 in excess countable assets. (Testimony.) •

7. The Trust was established on January 14, 2010 and is irrevocable. The real property held in trust was located at 73-73A [redacted] Street, Everett, MA. On January 30, 2012, this property was sold and was replaced with property located at 48 [redacted] Street, Saugus, MA on February 6, 2012. The Settlors of the Trust are the appellant and his spouse. They are also the Trustees. The beneficiaries of the Trust are the Settlors' children. (Exhibit 5; Exhibit 11; Exhibit 12; Testimony.)

8. The relevant portions of the trust instrument are as follows:

   ARTICLE II
   Irrevocability

The Settlors shall have NO right to alter, amend, revoke or terminate this Trust. **THIS TRUST IS IRREVOCABLE.**

...

ARTICLE III
Dispositive Provisions During Settlors' Lifetime

During the lifetime of the Settlors, the Trustees shall pay to the Settlors or apply for the Benefit of the Settlors all of the net income of the Trust not less often than quarterly. The Settlors shall also have the right to occupy, enjoy, and possess any real estate that may constitute part or all of the corpus of this Trust during their lifetime. The Settlors shall not have the right to any principal distributions under any circumstances.

. . .

ARTICLE VI
Provisions after Settlors' Death

I. A. Upon the death of the survivor of the two Settlors, the Trustee shall distribute the remaining Trust property as the surviving Settlor may appoint, by means of his or her Last Will and Testament, to any beneficiary, other than the powerholder, the powerholder's estate or creditors, or the creditors of the powerholder's estate, by reference to this special power of appointment....

ARTICLE XI
Trustee's Powers

I. The Trustee shall have, in addition to those powers conferred by law or otherwise, the following discretionary powers, (excepts as otherwise provided in this instrument) *[sic]* whether or not personally interested in the exercise of any such powers.

A. To administer, retain, invest, and reinvest in any property[ ]. • .

C. To manage real property in such manner as the Trustee shall deem best including authority to erect, alter or demolish buildings, to improve, repair, insure, subdivide, and vacate any of said property; to adjust boundaries, to dedicate streets or other ways for public use without compensation; to impose such easements, restrictions, conditions, stipulations and covenants as the Trustee may see fit; to lease (with or without option to purchase) for such times and on such terms as it deems advisable and whether or not the lease may extend

beyond the terms of the trust.

D. To sell, lease, pledge, mortgage, transfer, exchange, convert, or otherwise dispose of, or grant options with respect to, any and all real or personal property at any time forming a part of the Trust estate, in any manner, at any time or times, for any purpose, for any price and upon any terms, credits and conditions as are deemed advisable.

E. To borrow money from itself individually or from others, upon such terms and conditions as it deems advisable and to mortgage or pledge trust property as security for the repayment thereof.

.•

I. To retain such reserves out of income as the Trustee deems proper for expenses, taxes, depreciation and other liabilities of the trust.

L. The Principal and Income Act shall not apply to the provisions of this Trust.

M. To purchase assets from, or lend money to, the Settlors' estate at a fair value. Any such purchased assets shall be treated as part of this trust as if originally made a part hereof. The propriety of the purchase, the amount of the assets purchased, and the ascertainment of fair value shall be solely within the discretion of the Trustee, and the Trustee shall incur no liability as a result of any such purchase or the retention of such assets whether or not such assets constitute investments which may be legally made by Trustees.

...

0. To purchase and/or maintain any real estate as a residence for any one or more of the then current income beneficiaries and the spouse, issue, and/or guardian of any such beneficiary (or other person residing with, and caring for, the beneficiary) without charging rent to any one or more of such occupants.

...

Q. By unanimous agreement of all the members serving as Trustee, to add to, or subtract from, the number of members comprising the Trustee, provided that in the event the number of Trustees is increased, there shall be deemed to be a vacancy in the membership of the Trustee, and such vacancy shall be filled in accordance with the proper procedures otherwise applicable to this trust.

...

ARTICLE XIII
Resignation and Appointment of Trustee

I. Any Trustee may resign as Trustee from the trusts hereby created at any time by giving thirty (30) days written notice delivered

personally or by certified or registered mail to the then legally competent current income beneficiaries and to the legal guardians of any current income beneficiaries who are not legally competent. In such event the resigning Trustee may appoint a Successor Trustee, and shall do so in the instrument of resignation, if able....

II. ...Nothing contained in this Article shall be construed to limit the power of the Settlor to substitute a new Trustee.

ARTICLE XVIII
Tax Liability

It is the intent of the Settlors that this Trust be construed as a "Grantor Trust" under Internal Revenue Code Section 677(a). All income distributed, held, or accumulated by this Trust shall be taxable to .the Settlors. The Trustee may, to the extent that the income of the Trust generates a tax liability for the Settlors, distribute, *[sic]* to the Settlors such amounts of income of the Trust as the Trustee deems necessary to satisfy such tax obligation.

ARTICLE VC
Right of Substitution

The Settlors retains *[sic]* the right to reacquire the principal of this Trust by substituting property of an equivalent value therefor.

ARTICLE XXI
Income

"Income" means net income and accumulated income not added to principal and does not include capital gain....

(Exhibit 5.) (Emphasis in original.)

9. The Trust net income is countable to the appellant for Medicaid purposes.

10. Accumulated income becomes part of the Trust corpus in the month after it is received.

11. The appellant cannot access Trust principal.

Analysis and Conclusions of Law

The Trust provisions and arguments of the parties are documented above and are incorporated by

reference herein.

An irrevocable trust is defined as "a trust that cannot be in any way revoked by the grantor." (130 CMR 515.001.) The Trust provides, in Article II, that the Settlors cannot amend, revoke, alter, or terminate the Trust, and explicitly states that the Trust is irrevocable. As there is no provision that allows for the Trust to be revoked by the appellant as Settlor, the Trust is irrevocable.

Federal law at 42 U.S.C. 1396p(d)(3)(B)(i)(I) states, in pertinent part:

> (B) In the case of an irrevocable trust—
>
> (i) if there are **any circumstances** under which payment from the trust could be made to or for the benefit of the individual, the portion of the corpus from which, or the income on the corpus from which, payment to the individual could be made shall be considered resources available to the individual, and payments from that portion of the corpus or income—
>
> (I) to or for the benefit of the individual, shall be considered income of the individual...

(Emphasis added.)[6]

Regulation 130 CMR 520.023 addresses trusts that were created on or after August 11, 1993, and reads, in pertinent part, as follows:

> The trust and transfer rules at 42 U.S.C. 1396p apply to trusts or similar legal devices created on or after August 11, 1993, that are created or funded other than by a will. Generally, resources held in a trust are considered available if under any circumstances described in the terms of the trust, any of the resources can be made available to the individual.
>
> . . .
>
> (C) Irrevocable Trusts.
>
> (1) Portion Payable.
>
> (a) Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could be paid under any circumstances to or for the benefit of the individual is a countable asset.

---

[6] See Cohen, 423 Mass. at 413 ("[I]f there is a peppercorn of discretion, then whatever is the most the beneficiary might under any state of affairs receive in the full exercise of that discretion is the amount that is counted as available for Medicaid eligibility.")

(b) Payments from the income or from the principal of an irrevocable trust made to or for the benefit of the individual are countable income.

(c) Payments from the income or from the principal of an irrevocable trust made to another and not to or for the benefit of the nursing-facility resident are considered transfers of resources for less than fair-market value and are treated in accordance with the transfer rules at 130 CMR 520.019(G).

(d) The home or fanner home of a nursing-facility resident or spouse held in an irrevocable trust that is available according to the terms of the trust is a countable asset. Where the home or former home is an asset of the trust, it is not subject to the exemptions of 130 CMR 520.007(G)(2) or 520.007(G)(8).

(2) Portion Not Payable. Any portion of the principal or income from the principal (such as interest) of an irrevocable trust that could not be paid under any circumstances to or for the benefit of the nursing-facility resident will be considered a transfer for less than fair-market value and treated in accordance with the transfer rules at 130 CMR 520.019(G).

In addition, 130 CMR 520.024(A) addresses irrevocable trusts:

(A) Irrevocable Trust.

(1) The assets and income held in an irrevocable trust established by the individual or spouse that the trustee is required to distribute to or for the benefit of the individual are countable.

(2) Payments from the income or principal of an irrevocable trust established by the individual or spouse to or for the benefit of the individual are countable.

(3) The assets and income held in an irrevocable trust established by other than the individual or spouse that the trustee is required to distribute to the individual are countable.

(4) Payments from the income or the principal of an irrevocable trust established by other than the individual or spouse to the individual are countable.[7]

[7] If any part of 130 CMR 520.021 through 130 CMR 520.024 conflicts with federal law, federal

Under Article III of the Trust, the appellant has the right to use and occupancy for any real estate held under the Trust. The appellant and community spouse must also receive all of the net income of the Trust at least quarterly. I agree with MassHealth that the SJC in Daley establishes that a use and occupancy in a Trust entitles the applicant to fair market value rental incomes from the property whether actual rental income is generated or received. Specifically, the SJC stated that "[s]uch payments, whether actually received as rental income or imputed as the fair market rental value of the grantors' occupancy of the home, may be countable as income of the grantors, but the value of the home is not thereby countable as their asset." Daley at 15. In imputing income to the Saugus property, which the appellant has the right to use and occupy under the terms of the Trust, MassHealth presents a reasonable valuation based on the HUD Fair Market Rent tables for 2016 to determine the estimated fair market monthly rental value of $1,567 per month. The appellant, while stating that MassHealth's calculation is speculative in that it does not take into consideration property type, quality, size, and neighborhood, offers no alternative calculation, but instead argues that the appellant's use and occupancy interest has no value. The appellant supports this argument by citing to 20 CFR § 416.1201 (which addresses resources and exclusions for supplemental security income) and stating that the use and occupancy value cannot be liquidated within a period of 20 business days.[8] He further states that the value of the property should be assessed as shared occupancy with the appellant's spouse for the period of the appellant's life, which he contends renders the right to use and occupancy not marketable and therefore without value. I simply do not agree that the appellant's right to use and occupancy has no value. The methodology MassHealth used to calculate the fair market rental value of the property takes into consideration that the property is located in Saugus, MA as well as how many bedrooms the property has. (See Exhibit 11.) This is a reasonable and acceptable manner by which to calculate fair rental value. Again, the appellant offers no alternative calculation other than an argument that the appellant's interest holds no value.

However, despite MassHealth's reasonable valuation of the Trust property's fair market value rental income, I find no direction from the SJC, and MassHealth has cited no authority, that directs MassHealth to convert to an asset the imputed value of rental income based upon the appellant's life expectancy. Rather, with regard to "income on the corpus" the SJC states that such payments "do not affect an applicant's eligibility for Medicaid long-term care benefits, but they may affect how much the applicant is required to contribute to the payment for that care." Daley at 15. The amount of income an individual is required to contribute to his or her care is appropriately characterized as patient-paid amount and not an asset. Accordingly, $1,567 is the monthly fair market rental value of the Trust corpus. The appellant has a 50% interest in the corpus, and thus has a 50% interest in the "income on the corpus" which totals $783.50 per month. Based on the clear direction from the SJC in determining that MassHealth may impute income on the corpus, I conclude that imputed income is countable to the appellant whether the Saugus property is actually rented.[9]

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supersedes. (130 CMR 520.021.)

[8] These resources are assessed according to equity value, which is defined as "[t]he price that item can reasonably be expected to sell for on the open market in the particular geographic area involved[...]" (20 CFR § 416.1201(c)(2)(i).)

. [9] According to the Center for Medicare and Medicaid Services, an applicant's "right to use and occupy"

The question then becomes whether the income that is accumulated may be distributed to the appellant. Based upon federal law, MassHealth regulations, and the terms of the Trust, **I** conclude that any accumulated income cannot in fact be distributed to the appellant. Federal law defines "corpus" as "all property and other interests held by the trust, including accumulated earnings and any other addition to the trust after its establishment (except that such term does not include any such earnings or addition in the month in which the earnings or addition is credited or otherwise transferred to the trust)[.]" (42 USC § 1382b(e)(6)(B).) MassHealth argues that accumulated income, which becomes principal in the month after receipt, can be distributed to the appellant under Article XXI. However, Article XXI defines "income" as both "net income and accumulated income **not added to principal...**" (Exhibit 5) (emphasis added). Since income becomes part of the Trust corpus in the month after it is received, the appellant cannot in fact receive accumulated income and is only entitled to distributions of net income in the month received, as all accumulated income becomes part of the Trust corpus. Further, a "clause may not be read in isolation; rather, it must be construed and qualified in light of the trust instrument as a whole." (Doherty v. Dir. of the Office of Medicaid, 74 Mass. App. Ct. 439, 441 (2009).) Reading the definition of income in Article XXI along with Article III ("The Settlors shall not have the right to any principal distributions under any circumstances[ ]"), distribution of principal to the appellant in the form of accumulated income is foreclosed; that is, since income becomes corpus in the month after it is received, accumulated income cannot be distributed under Articles III and XXI. (Exhibit 5.)

The appellant argues that 42 USC § 1396p(d)(3)(B) indicates that income (accumulated earnings) retains its characterization even when held after the month of receipt and does not convert to principal. This argument does not seem to be in accord with the federal statute, which specifically includes accumulated earnings in its definition of "corpus" and makes a distinction between accumulated earnings and earnings that become part of the trust in the month of receipt. While the term "accumulated income" is used, the statute makes clear that such value becomes part of the Trust corpus. The appellant's argument on this point seems to be one of semantics. Despite the appellant's assertion that accumulated income remains income and is not principal, the articles of the Trust do not actually allow for accumulated income to be disbursed, as federal law dictates that income that accumulates beyond the month of receipt becomes part of Trust corpus.

Therefore, for the reasons stated above, the appeal is approved.

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property that is held in trust is a payment:

> Payment—For purposes of this section a payment from a trust is any disbursal from the corpus of the trust or from income generated by the trust which benefits the party receiving it. A payment may include actual cash, as well as noncash or property disbursements, such as the right to use and occupy real property.

(HCFA Tr# 64, p. 3-3-109.25.8.)

Order for MassHealth

Rescind notice dated November 28, 2016 and remove the value of the principal of the Trust from the countable assets when redetermining. eligibility. The imputed rental income may be factored into a future patient-paid amount determination if and when the appellant is approved for MassHealth long-term care benefits.

Implementation of this Decision

If this decision is not implemented within 30 days after the date of this decision, you should contact your MassHealth Enrollment Center. If you experience problems with the implementation of this decision, you should report this in writing to the Director of the Board of Hearings at the address on the first page of this decision.

Samantha Kurkjy
Hearing Officer
Board of Hearings

cc:
MassHealth Representative: Sylvia Tiar
Robert Ford, Esq., 807 Turnpike Street, Suite 201, North Andover, MA 01845

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MARTIN FAGAN by his agent Pamela Fagan and PAMELA FAGAN, *Plaintiffs,* *v.* RODERICK L. BREMBY, in his official capacity as Commissioner of the Connecticut Department of Social Services, *Defendant.*	Civil No. 3:16cv73 (JBA) March 21, 2017

RULING ON PARTIES' CROSS MOTIONS FOR SUMMARY JUDGMENT

Plaintiffs Martin Fagan ("Mr. Fagan") and Pamela Fagan ("Mrs. Fagan") filed this suit against Defendant Roderick L. Bremby, in his official capacity as Commissioner of the Connecticut Department of Social Services ("DSS"), on January 18, 2016, requesting injunctive relief from Defendant's decision to impose a transfer of assets penalty on Mr. Fagan that results in his being ineligible for Medicaid benefits until March 6, 2022. The parties now bring cross motions for summary judgment. For the following reasons, Plaintiffs' Motion [Doc. #31] for Summary Judgment is denied and Defendant's Motion [Doc. #28] for Summary Judgment is granted.

I. Background

A. Medicaid: The Statutory Landscape

The federal Medicaid program, enacted in 1965 as Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., provides funding to States that assist persons with paying for medical care who have insufficient income and resources. *See* Social Security Act, tit. XIX, as added, 79 Stat. 343, and as amended, 42 U.S.C. § 1396 et seq. "Each participating State develops a plan containing reasonable standards . . . for determining eligibility for and the extent of medical assistance within

boundaries set by the Medicaid statute and the Secretary of Health and Human Services." *Wisconsin Dep't of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479 (2002) (internal quotation marks and citations omitted). In formulating those standards, States must "provide for taking into account only such income and resources as are, as determined in accordance with standards prescribed by the Secretary, available to the applicant." 42 U.S.C. § 1396a(a)(17)(B).

In 1988 Congress amended Title XIX of the Social Security Act by passing the Medicare Catastrophic Coverage Act ("MCCA"). The purpose of the MCCA was both "to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *Blumer*, 534 U.S. at 480 (citing H.R.Rep. No. 100-105, pt. 2, pp. 66-67 (1987)).[1] In order to achieve this goal, the MCCA established "a set of intricate and interlocking requirements with which States must comply in allocating a couple's income and resources." *Id.*

When an institutionalized spouse first applies to Medicaid, the State Agency totals the assets of both the institutionalized and the community spouse "*as of the beginning of the first continuous period of institutionalization* . . . of the institutionalized spouse," and divides that sum in half resulting in what is called a "spousal share." 42 U.S.C. § 1396r-5(c)(1)(A) (emphasis added). This spousal share then becomes the basis for the calculation of the "community spouse resource

[1] The MCCA accordingly contains a set of instructions called the "spousal impoverishment" provisions, which "permit a spouse living at home (called the 'community spouse') to reserve certain income and assets to meet the minimum monthly maintenance needs he or she will have when the other spouse (the 'institutionalized spouse') is institutionalized, usually in a nursing home, and becomes eligible for Medicaid." *Blumer*, 534 U.S. at 478.

allowance" ("CSRA").[2] 42 U.S.C. § 1396r-5(f)(2). Thus, at the "initial determination of eligibility," the State Medicaid Agency treats "the resources held by either the institutionalized spouse, the community spouse, or both" to be available to the institutionalized spouse, 42 U.S.C. § 1396r-5(c)(2)(A), except that "the CSRA is considered unavailable to the institutionalized spouse . . . [so] all resources above the CSRA (excluding a . . . personal allowance reserved for the institutionalized spouse . . .) must be spent before eligibility can be achieved." *Blumer*, 534 U.S. at 482-83 (citing 42 U.S.C. § 1396r-5(c)(2)). In other words, aside from the calculated CSRA, all other community resources are considered in determining whether an institutionalized spouse is eligible for Medicaid, meaning that if the remaining resources exceed the Medicaid limit, the institutionalized spouse must "spend down" the remaining resources to qualify. (Ex. 2 (HHS Amicus Brief in *Hughes*) to Def.'s Mem. Supp. Mot. for Summary Judgment at 8.) This statutory scheme permits the institutionalized spouse to qualify for Medicaid while also allowing the community spouse to retain the CSRA to support him or herself.

When reviewing an application, the State Agency will also check that neither spouse disposed of any assets for less than fair market value "on or after the look-back date," which is defined as 60 months before "the first date as of which the individual both is an institutionalized individual and has applied for medical assistance under the State plan." 42 U.S.C. § 1396p(c)(1)(A)-(B).[3] Any such disposition of assets would result in a "penalty period" of

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[2] In Connecticut the CSRA is called the "community spouse protected amount" ("CSPA"), but the Court will refer to it as the CSRA throughout this opinion.

[3] This is referred to as the "look-back period" in this Ruling. *See* 42 U.S.C. § 1396p(c)(B)(i).

ineligibility.[4] However, there is an exemption (referred to as the "unlimited transfer exception") from this penalty period where the assets were transferred to the individual's spouse during the look-back period for the sole benefit of the spouse. § 1396p(c)(2)(B).

As explained by the Centers for Medicare & Medicaid Services ("CMS"),[5] "the unlimited transfer exception should have little effect on the eligibility determination, primarily because resources belonging to both spouses are combined in determining eligibility for the institutionalized spouse. Thus, resources transferred to a community spouse are still . . . considered available to the institutionalized spouse for eligibility purposes." (Def.'s Ex. 1 (State Medicaid Manual § 3258.11).)[6] However, once the institutionalized spouse has commenced a continuous period in which he is in an institution and "after the month in which [he] is determined to be eligible for benefits . . . no resources of the community spouse shall be deemed available to the institutionalized spouse." 42 U.S.C.A. § 1396r-5(c)(4). An institutionalized spouse does have an opportunity to transfer assets to the community spouse "as soon as practicable after the date of the initial determination of eligibility," but only "in an amount equal to the community spouse

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[4] If a penalty period is imposed, the institutionalized spouse will be ineligible "for the number[ ] . . . of months that the assets would have covered the average monthly cost of such services." *Hughes v. McCarthy*, 734 F.3d 473, 476 (6th Cir. 2013) (citing 42 U.S.C. § 1396p(c)(1)(A), (B)(i-ii), (C)(i)(I), D(ii), (E)(i)). This is also referred to as a "transfer of assets penalty."

[5] CMS is the division within the United States Department of Health and Human Services ("HHS") that sets Medicaid policy.

[6] This view is also articulated by HHS in its amicus brief. (*See* Ex. 2 to Def.'s Mem. Supp. Mot. for Summary Judgment at 7) ("prior to an eligibility determination, transfers between spouses or between either spouse and a third party for the sole benefit of either spouse as provided in Section 1396p(c)(2)(B)(i) have little, if any, effect on Medicaid eligibility because the assets of both spouses are pooled together and deemed to be available to the institutionalized spouse. Section 1396r-5(c)(1)(A)(i).").

resource allowance." 42 U.S.C. § 1396r-5(f)(1). It is the meaning of this phrase—"initial determination of eligibility"—in Section 1396r-5(f)(1) that controls disposition of this case.

B. Facts

After Mr. Fagan was severely injured in a motorcycle accident in June 2011, he was moved into Masonicare, a skilled nursing facility in Wallingford, Connecticut, where he has resided ever since. (Ex. 3 to Def.'s Mot. [Doc. # 28] for Summary Judgment ¶¶ 3, 5.) He applied to DSS for Medicaid long-term care benefits in February 2012 and was approved, effective March 1, 2012.[7] (*Id.* ¶¶ 6, 11.) Mr. Fagan continued to receive Medicaid coverage for long-term care services for the cost of his nursing home care until May 31, 2015, when his benefits were discontinued because in April he received a $2 million personal injury settlement,[8] which pushed Mr. Fagan over the Medicaid asset limit. (Pl.'s Local Rule 56(a) stmt. ("Pl.'s LR 56") ¶ 10.) After payment of attorney's fees, medical bills not covered by Medicaid, a Medicare lien, and repayment of $233,037.77 to the Connecticut Department of Administrative Services pursuant to the Medicaid Recovery Act, his

[7] DSS determined Plaintiffs' CSRA was $115,240.00, representing $1,600 for Mr. Fagan as the institutionalized spouse and $113,640 for Mrs. Fagan. (Ex. 3 to Def.'s Mot. for Summary Judgment ¶ 10.)

[8] DSS became aware of the lawsuit and subsequent settlement through Plaintiffs' attorney for the personal injury case in April 2012. (*See* Ex. 3, Attachment G (Letter from Attorney Donna R. Levine to DSS) to Def.'s Mem. Supp. Mot. for Summary Judgment.) On May 8, 2012 DSS sent Plaintiff notice his benefits would be discontinued effective May 31 due to his receipt of the settlement check, which placed him over the $1,600 asset limit for Medicaid eligibility. (Ex 3 to Def.'s Mot. for Summary Judgment ¶ 14.)

net proceeds were $966,102.69.[9] (Ex. 3 (Affidavit of Laura Catarino)[10] to Def.'s Mot. for Summary Judgment ¶ 12.)

On August 12 and September 23, 2015, several months after his coverage was discontinued, Mr. Fagan transferred $879,453.32 of his settlement proceeds to his wife in two transactions. (Pl.'s LR 56 ¶¶ 12, 13.) The amount of the first transfer, $581,453.32, is equivalent to the amount Mrs. Fagan paid for the purchase of her primary residence in Florida.[11] (*Id.* ¶ 12.) She subsequently purchased an actuarially sound single premium annuity with the money from the second transfer.[12] On September 30, 2015 Mr. Fagan reapplied for Medicaid long-term care, by which time his wife's assets countable by the Medicaid program were less than the CSRA she was allowed to retain without affecting her husband's Medicaid eligibility. (*Id.* ¶¶ 15, 17.)

Upon review of Mr. Fagan's reapplication for Medicaid long-term care benefits, DSS determined that the August 12 and September 23 transfers of funds from Mr. Fagan to Mrs. Fagan constituted improper transfers of assets for less than fair market value. (Ex. 3 to Def.'s Mot. for

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[9] Mrs. Fagan also received a personal injury settlement–with a net recovery of $948,964.10. (Ex. 3 to Def.'s Mot. for Summary Judgment ¶ 13.) Her recovery did not affect Mr. Fagan's ongoing Medicaid eligibility because of the "separate treatment of resources" requirement of 42 U.S.C. § 1396r-5(c)(4). (Def.'s Mem. [Doc. # 28-1] Supp. Mot. for Summary Judgment at 8 n. 7.)

[10] Ms. Catarino is a public assistance consultant for DSS who is familiar with Mr. Fagan's Medicaid case.

[11] 42 U.S.C. § 1396p(c)(2)(A)(i) provides that "[a]n individual shall not be ineligible for medical assistance . . . to the extent that the assets transferred were a home and title to the home was transferred to the spouse of such individual."

[12] "An annuity that satisfies various conditions does not qualify as a resource." *Morris v. Oklahoma Dep't of Human Servs.*, 685 F.3d 925, 932-33 (10th Cir. 2012) (citing § 1396p(c)(1)(G)). As the Medicaid regulations explain, "[i]f a property right cannot be liquidated, the property will not be considered a resource of the individual (or spouse)." 20 C.F.R. § 416.1201.

Summary Judgment ¶ 18.) On December 7, 2015 DSS sent Mr. Fagan a Preliminary Decision Notice (a W-495A form) informing him of its decision that the transfers totaling $952,006.52[13] to Mrs. Fagan were improperly transferred assets. (*Id.* ¶ 19.) Mr. Fagan disputed DSS's preliminary decision, arguing that because the transfers to his wife were pre-eligibility transfers they were exempt from § 1396r-5(f)(1)'s CSRA cap. (*Id.* ¶ 20.) However, DSS disagreed and issued its final decision notice on December 22, 2015 affirming its conclusion that Mr. Fagan improperly transferred assets to Mrs. Fagan, and consequently imposing a transfer of assets penalty precluding Mr. Fagan from receiving any Medicaid long-term benefits until March 7, 2022.[14] (*Id.* ¶ 22; Pl.'s LR 56 ¶ 22.) Mr. Fagan is now responsible for paying his monthly Masonicare bill of approximately $13,000. (Pl.'s LR 56 ¶ 25.)

II. Discussion[15]

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[13] There is a discrepancy between the amount Plaintiffs claim Mr. Fagan transferred to Mrs. Fagan and the amount computed by DSS. However, this is not a fact that is material under Rule 56 to the question of whether Mr. Fagan could transfer funds in excess of the CSRA to his wife because using either amount Mr. Fagan's transfer would have resulted in an asset penalty.

[14] The Final Decision Notice reads: "[a]though you are eligible for certain Medicaid benefits beginning 9/2015, we are setting up a penalty period starting 9/30/2015. This penalty ends 3/6/2022. During this time, Medicaid will not pay for any long-term care services." (Ex. E to Compl.) This penalty period was calculated based upon the number of months that the assets Mr. Fagan improperly transferred would have covered the monthly cost of the services. *See Hughes v. McCarthy*, 734 F.3d 473, 476 (6th Cir. 2013) (citing 42 U.S.C. § 1396p(c)(1)(A), (B)(i-ii), (C)(i)(I), D(ii), (E)(i)).

[15] Summary judgment is appropriate where, "resolv[ing] all ambiguities and draw[ing] all permissible factual inferences in favor of the party against whom summary judgment is sought," *Holcomb v. Iona Coll.*, 521 F.3d 130, 137 (2d Cir. 2008), "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(a). "A dispute regarding a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Williams v. Utica Coll. of Syracuse Univ.*, 453 F.3d 112, 116 (2d Cir. 2006) (quotation marks omitted). "The substantive law governing the case

A. There is no Factual Dispute and Only The Single Legal Issue

Neither party claims any material factual dispute, and therefore this case is appropriate for disposition by summary judgment on the legal issue of whether the penalty DSS imposed on Mr. Fagan for his transfer of assets to his wife was lawful. Both parties agree that (1) Mr. Fagan was institutionalized in 2011, and has been continuously institutionalized since that time (Pl.'s LR 56 ¶ 2; Ex. 3 to Def.'s Mem. Supp. Mot. for Summary Judgment ¶ 3); (2) Mr. Fagan began receiving Medicaid benefits in early 2012, and continued to receive them until they were discontinued on May 31, 2015 because Mr. Fagan was over the asset limit (Pl.'s LR 56 ¶¶ 7, 10; Ex. 3 to Def.'s Mem. Supp. Mot. for Summary Judgment ¶¶ 11, 14); and (3) between May 31, 2015 and Mr. Fagan's subsequent reapplication in September 2015, Mr. Fagan transferred his personal injury settlement proceeds to Mrs. Fagan (Pl.'s LR 56 ¶¶ 12, 13; Ex. 3 to Def.'s Mem. Supp. Mot. for Summary Judgment ¶¶ 15, 16).

The Court must decide whether, once Mr. Fagan was originally determined eligible for Medicaid in 2012, the limits on spousal transfers found in 42 U.S.C. § 1396r-5(f)(1) continued to apply to Mr. Fagan's transfers of assets to Mrs. Fagan made after his benefits had been discontinued but before he reapplied for Medicaid; or whether this limitation provision does not apply and §

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will identify those facts that are material, and '[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.'" *Bouboulis v. Transp. Workers Union of Am.*, 442 F.3d 55, 59 (2d Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). When considering a motion for summary judgment, the Court may consider depositions, documents, affidavits, interrogatory answers, and other exhibits in the record. Fed. R. Civ. P. 56(c). The same standard applies to cross-motions for summary judgment. *See Morales v. Quintel Entm't, Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). The court must examine the merits of each motion independently and in each case must consider the facts in the light most favorable to the non-moving party. *Id.* at 121.

1396p(c)(2)(B)'s "unlimited transfer exception" should be the controlling statutory provision in these circumstances.

After the initial determination of eligibility, assets belonging to the institutionalized spouse and the community spouse are treated separately for purposes of determining the institutionalized spouse's ongoing Medicaid eligibility and "if [after initially being determined eligible] the institutionalized spouse attempts to transfer newly received resources . . . he will face a penalty." *Morris v. Oklahoma Dep't of Human Servs.*, 685 F.3d 925, 937 (10th Cir. 2012). The question is thus whether, with respect to a single continuous period of institutionalization, the "initial determination" in § 1396r-5(f)(1) refers only to the State Agency's first determination of an applicant's eligibility for Medicaid benefits, as Defendant contends, or as Plaintiffs argue, that "initial determination" also refers to a second application where an individual who, after having been deemed eligible and receiving benefits for a period of time, loses eligibility and then reapplies for benefits all while continuously institutionalized. Plaintiffs argue that Mr. Fagan's second application for benefits, although for future coverage on the same continuous period of institutionalization as his first application, constitutes a separate "initial determination of eligibility" resulting in a reversion back to the pre-eligibility transfer of assets rules. Defendant maintains that once Mr. Fagan became eligible for Medicaid and was institutionalized, thereby triggering the statute's separate treatment of resources provision, he and his wife's resources were to be treated separately and any subsequent transfer by Mr. Fagan to Mrs. Fagan while he remained

institutionalized would violate the statute unless it complied with the limited exception in § 1396r-5(f)(1).[16]

B. Neither the Courts nor HSS have Addressed Whether a Break in Eligibility After the Initial Determination Resets the Process

The applicability of Section 1396r-5(f)(1) to the Fagans' circumstances presents a case of first impression. Plaintiffs and Defendants rely almost exclusively on their different interpretations of *Morris*, 685 F.3d 925 (10th Cir. 2012) and *Hughes v. McCarthy*, 734 F.3d 473 (6th Cir. 2013), neither of which directly addresses the issue here, as well as an HHS amicus brief filed in *Hughes*, and two letters from CMS responding to questions from States regarding compliance of their policies with federal law.[17]

Plaintiffs claim that the circumstances in *Morris*, 685 F.3d 925 are identical to the Fagans' except for differences in time periods between the applications and that factually *Hughes*, 734 F.3d 473 is not materially different from their own case. However, there are important distinctions. Neither *Morris* nor *Hughes* involved an institutionalized spouse who reapplied for Medicaid benefits after having earlier received benefits with respect to a continuous period of institutionalization, as Mr. Fagan did. Nor did the institutionalized spouses in *Morris* or *Hughes*

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[16] Mr. Fagan does not contend that he is entitled to retroactive coverage for the months before he reapplied for Medicaid, but rather that his coverage should recommence from the date his second application was processed.

[17] "To the extent that HHS has issued guidance on the federal Medicaid statutes in the form of [the amicus brief and opinion letters] that lack the force of law, its statutory interpretations are not afforded deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), but are entitled to respect under . . . *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), only to the extent that those interpretations have the power to persuade." *Hughes v. McCarthy*, 734 F.3d 473, 478 (6th Cir. 2013) (internal citations and quotation marks omitted).

transfer assets to their community spouse after their benefits were discontinued because they were over the asset limit and before submitting a second application for Medicaid benefits. Therefore, although both *Morris* and *Hughes* analyzed Section 1396r-5(f)(1), at issue here, which permits transfer as soon as practicable after the eligibility determination in an amount less than the CSRA, neither did so under the critical factual circumstances presented by the Fagans.

In *Morris* the institutionalized spouse applied for Medicaid but was denied because she and her community spouse had assets over the asset limit. 685 F.3d at 928. In an effort to spend down her assets so that she could qualify for Medicaid, the institutionalized spouse purchased a federally approved annuity paying benefits to her husband, the community spouse. *Id.* After her purchase of this annuity, the institutionalized spouse again applied for Medicaid. *Id.* The State Medicaid Agency imposed a transfer of assets penalty finding that the institutionalized spouse's purchase of the annuity for the community spouse was a transfer of assets for less than fair market value within the look-back period in violation of Sections 1396p(c)(1) and 1396r-5(f)(1) and thus concluded that the institutionalized spouse was ineligible for Medicaid. *Id.*

Morris focused on whether "initial determination of eligibility" refers only to a determination that the institutionalized spouse was in fact eligible for benefits, as those plaintiffs argued, or whether the denial of Medicaid benefits also constitutes an "initial determination" triggering Section 1396r-5(f)(1)'s spousal limit. The Tenth Circuit held that the limitations on spouse-to-spouse transfers only apply in cases where the applicant was determined to be eligible for Medicaid because "an agency's denial of Medicaid benefits is not a watershed moment; a determination that an individual is eligible, however, results in a dramatic change." *Id.* at 937. The court reasoned that § 1396r-5(f)(1) is not triggered upon the State Medicaid Agency's finding that an applicant is ineligible because from that finding the "couple merely learns that they must spend

down further in order to become eligible, and all resources – irrespective of which partner holds title – continue to affect the institutionalized spouse's eligibility for Medicaid." *Id.* The court found further support for its conclusion in 42 U.S.C. § 1396r-5(c)(4), under which the separate treatment of resources for a couple applies only after an institutionalized spouse is determined eligible for Medicaid. *Id.*[18]

Hughes similarly involved a pre-eligibility transfer of assets where the institutionalized spouse had never previously been determined to be eligible. There, the institutionalized spouse had paid her own costs at a nursing facility for about four years. Before she applied for Medicaid, the community spouse purchased an annuity for $175,000 that paid benefits only to him. 734 F.3d at 477. The institutionalized spouse then applied for Medicaid three months later and the State Medicaid Agency imposed a transfer of assets penalty on the institutionalized spouse because her community spouse "used a community resource in an amount that exceeded his CSRA." *Id.* The Sixth Circuit held that the transfer was allowed without penalty under § 1396p(c)(2)(B) because "§ 1396r-5(f)(1) 'has nothing to say about the inter-spousal transfers that are permissible before a determination of eligibility'" and that 42 U.S.C. § 1396r-5(f)(1) only applies to transfers "after the

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[18] Plaintiffs here contend that in *Morris* the Tenth Circuit rejected DSS's argument "that the cap on transfers to a spouse applies once there has been an initial eligibility determination, even though there has been a subsequent period of ineligibility, the applicant has made a second application, and there has been a second eligibility determination." (Pl.'s Mem. Supp. Mot. for Summary Judgment at 6.) However, in actuality, what the court rejected was the argument that a determination of *ineligibility* triggers the limitations on spouse-to-spouse transfers. *See Morris,* 685 F.3d at 937 ("[W]e see no reason why a determination of ineligibility would justify different transfer rules" than those in effect prior to that determination).

date of the initial determination of eligibility." *Id.* at 479-80 (emphasis in the original) (internal citations and quotation marks omitted).

Therefore, *Morris* and *Hughes* stand for the proposition that § 1396r-5(f)(1) applies only where the individual makes the transfer after he or she has been deemed eligible for Medicaid, rather than (1) where the transfer was made after the Agency initially determined that the institutionalized individual was not eligible, as in *Morris*; or (2) where the transfer was made after the institutionalization period had begun but before the institutionalized individual applied for benefits, as in *Hughes*. Thus, these cases do not inform the precise determination here: whether, when Mr. Fagan, while still institutionalized, reapplied for benefits in 2015 after they had been discontinued because he had surpassed the asset limit, Agency approval of his second application would still be considered "the initial determination of eligibility" relating to the same continuous period of institutionalization, or whether the whole process re-set with the second application and Agency's determination that Mr. Fagan was again eligible for benefits.

C. The Transfer of Asset Penalty Imposed by Defendant was Proper

i. Statutory Construction

The critical question in this case is which provision, 42 U.S.C. § 1396r-5(f)(1) or § 1396p(c)(2)(B), applies to Mr. Fagan's transfers of assets to Mrs. Fagan. Generally, where an individual "disposes of assets for less than fair market value on or after the look-back date" he will not be eligible for Medicaid. 42 U.S.C. 1396p(c)(1)(A). However, "a transfer of assets penalty will not be assessed for transfers that occur during the look-back period where assets were transferred 'to the individual's [institutionalized spouse's] spouse or to another for the sole benefit of the individual's spouse.'" (Def.'s Mem. Supp. Mot. for Summary Judgment at 5-6 (quoting 42 U.S.C. §

1396p(c)(2)(B)(i)).) If this look-back Section applies to Mr. Fagan's second Medicaid application, as Plaintiffs contend, Mr. Fagan's transfers would be a permissible exception to the limits on transfers. But, Section 1396r-5(f)(1) only permits a transfer of assets to be done "as soon as practicable after the date of the initial determination of eligibility."[19]

These two sections work in tandem, each applying to a different temporal period, to provide couples with the opportunity to reallocate their assets between them so that the institutionalized spouse's resources do not exceed the Medicaid limit.[20] Section 1396p(c)(2)(B) permits unlimited redistribution prior to the Agency's determination that the institutionalized spouse is eligible for benefits, and Section 1396r-5(f)(1) gives the couple the opportunity to correct

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[19] Mr. Fagan's transfers were indisputably in excess of "an amount equal to the community spouse resource allowance" for Mrs. Fagan and were made long after DSS's first determination of Plaintiff's eligibility. *See* 42 U.S.C. § 1396r-5(f)(1).

[20] Defendant argues that Section 1396(f)(1) controls by reason of Section 1396r-5(a)(1)'s supersedence provision because the two sections conflict with one another. *See* 42 U.S.C. § 1396r-5(a)(1) ("In determining the eligibility for medical assistance of an institutionalized spouse . . . the provisions of this section supersede any other provision of this subchapter . . . which is inconsistent with them.). However, HHS has taken the position that the two Sections pertain to different time periods and thus are not inconsistent with one another. *See Hughes v. McCarthy*, 734 F.3d 473, 480 (6th Cir. 2013) ("HHS has taken the same position in a series of opinion letters issued to state plan administrators and to the public, reasoning that § 1396r–5(f)(1) does not conflict with, and thus does not supersede, § 1396p(c)(2)(B), as the two provisions apply to different situations, before and after eligibility is established; and that permitting inter-spousal transfers under § 1396p(c)(2)(B) does not render § 1396r–5(f)(1) a nullity, as the latter provision still has meaning with respect to resource allocation after eligibility is established."); *see also Morris*, 685 F.3d 925; (Ex. 2 to Def.'s Mem. Supp. Mot. for Summary Judgment); (Ex. 1 (HHS Letters) to Pl.'s Statement [Doc. # 33] of Material Facts.) Although Defendant specifically disagrees with the language in *Hughes*, the Court need not decide if there is a conflict between the spousal transfer limit in Section 1396r-5(f)(1) and 1396p(c)(2)'s unlimited transfer exception because whether by supersedence or by virtue of the two provisions simply applying to different time periods, it is clear that Section 1396p(c)(2)(B) applies to pre-eligibility transfers of assets while Section 1396r-5(f)(1)'s limited transfer exception controls after the initial determination of eligibility.

any issues with regards to the titling of assets "as soon as practicable" after the applicant is first deemed eligible.[21] Defendant thus concludes that, by implication, aside from 1396r-5(f)(1)'s limited exception, any transfer to the community spouse made after the Agency first determines that the institutionalized spouse is Medicaid eligible for that period of institutionalization is prohibited by the statute. This Court agrees. If Section 1396p(c)(2) permitted an eligible institutionalized spouse who subsequently acquired disqualifying excess assets and who thus lost eligibility, to transfer those excess assets to the community spouse and seek resumption of Medicaid benefits without consequence, there would have been no need for Congress to create the specific limited exception of Section 1396r-5(f)(1). *See e.g., United States Olympic Comm. v. Intelicense Corp.*, 737 F.2d 263, 266 (2d Cir. 1984) ("[R]ules of statutory construction require a statute to be construed to give force and effect to each of its provisions rather than to render some of them meaningless.").

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[21] In its amicus brief in *Hughes,* HHS notes that

> Section 1396r-5(f)(1) was designed to serve a limited and somewhat different purpose than Section 1396p(c)(2)(B)(i). It is basically a "clean up" provision. If, after the date of eligibility, assets within the CSRA remain in the institutionalized spouse's name, the institutionalized spouse may transfer those assets to (or for the sole benefit of) the community spouse "as soon as practicable after the date of the initial determination of eligibility." 42 U.S.C. 1396r-5(f)(1). A failure to make such a transfer would lead to the denial of Medicaid eligibility when it came time for the institutionalized spouse's first eligibility redetermination – which must take place at least once every 12 months, *see* 42 C.F.R. 435.916(a).

(Ex. 2 to Def.'s Mem. Supp. Mot. for Summary Judgment at 8.)

The central dispute then, is what constitutes "the initial determination of eligibility," as the phrase is used in Section 1396r-5(f)(1).[22] The Court first examines whether the language of the statute itself "has a plain and unambiguous meaning with regard to the particular dispute in the case." *See Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). Here, the inquiry is whether use of the word "initial" means that the phrase "initial determination of eligibility" was intended to apply to each continuous period of institutionalization, or whether it corresponds to each new application for Medicaid benefits such that a break in eligibility resets the process.[23]

Defendant argues that "[b]y its plain language an 'initial determination' cannot mean a second determination of eligibility with respect to the same period of institutionalization." (Def.'s Mem. Supp. Opp'n to Summary Judgment at 10.) According to Webster's Dictionary, "initial" means "of or relating to the beginning," and thus, according to Defendant, this "would logically be the first finding that an applicant is eligible for Medicaid." (*See* Def.'s Mem. Supp. Mot. for Summary Judgment at 18.) In opposition, Plaintiffs claim that the only significance of the word "initial" is to distinguish between the first determination the Agency makes on an application for

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[22] This phrase is referenced in two other places in the statute. Section 1396r-5(c)(2), titled "Attribution of resources at time of initial eligibility determination," refers to the period during which the State Agency decides whether an applicant is eligible for Medicaid. Additionally, Section1396a(e)(13)(A)(iii) provides that "[t]he State may apply the provisions of this paragraph when conducting *initial determinations of eligibility*, redeterminations of eligibility, or both, as described in the State plan." 42 U.S.C.A. § 1396a(e)(13)(A)(iii) (emphasis added).

[23] Defendant indicates that the limit on spouse-to-spouse transfers after the initial determination of eligibility applies only when there has been a continuous period of institutionalization. Therefore, "if the institutionalized spouse's condition improves and he is discharged, the entire process may reset, allowing unlimited spouse-to-spouse transfers again." (Def.'s Reply to Pl.'s Opp'n at 3.)

Medicaid and its subsequent redeterminations of a beneficiary's eligibility.[24] (Pl.'s Mem. Supp. Opp'n to Summary Judgment at 2.)

The flaw in Plaintiff's argument regarding the significance of the word "initial" is that because they acknowledge that Mr. Fagan could not have made the transfers at issue prior to a redetermination without penalty, allowing Mr. Fagan to make these same prohibited transfers after his benefits were discontinued (upon redetermination) without penalty would essentially allow him to bypass the transfer limits essential to the statute's purpose. The Court sees no convincing reason why the language of the MCCA should be interpreted to give an institutionalized individual, found ineligible for benefits upon redetermination, a second opportunity to make transfers to his spouse prohibited at the time of his initial eligibility determination when the coverage relates to the same period of institutionalization. As Defendant reasons, the logical reading of the statute's plain language is that the *initial* determination of eligibility attaches not to each application for Medicaid, but rather to each continuous period of institutionalization regardless of the outcomes of renewal determinations during that period of care. Absent any language in the statute intimating that it was the intent of Congress to link the initial determination of eligibility to each new application for the same institutionalization, the Court interprets the word "initial" as encompassing only the very first determination declaring an individual eligible for Medicaid with respect to a single period of institutionalization.

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[24] "[T]he eligibility of Medicaid beneficiaries . . . must be renewed once every 12 months, and no more frequently than once every 12 months." 42 C.F.R. § 435.916(a)(1). However, "the agency must [also] promptly redetermine eligibility between regular renewals of eligibility . . . whenever it receives information about a change in a beneficiary's circumstances that may affect eligibility." *Id.* § 435.916(d)(1). It appears this is the way in which Mr. Fagan's eligibility was revoked.

Because Section 1396r-5(f)(1) permits a limited transfer only "as soon as practicable" after the first determination of eligibility relating to one continuous period of institutionalization, and is silent about subsequent redeterminations resulting in discontinuation of benefits for that same period, a post-transfer application to resume benefits cannot constitute the "initial determination."

ii. The Dual Purposes of the Statute

In addition to the fact that the plain language of the statute is logically read as limiting the initial determination of eligibility to the first occasion where the Agency deems an individual eligible for Medicaid for a single period of institutionalization, this reading is also consistent with the dual purposes of the statute "to protect community spouses from 'pauperization' while preventing financially secure couples from obtaining Medicaid assistance." *See Blumer*, 534 U.S. at 480 (citing H.R.Rep. No. 100-105, pt. 2, pp. 66-67 (1987)). Medicaid is intended to assist "needy persons for the cost of medical care" and Mr. Fagan was such a person when he first applied in February 2012 because he and his wife's assets fell below the necessary threshold. *See id.* at 479. But, that status changed after he recovered nearly a million dollars in proceeds from a lawsuit, significantly ameliorating his financial position such that he no longer qualified for benefits.[25]

Plaintiffs contend that interpreting the statute as preventing Mr. Fagan from making transfers to his wife after his eligibility was revoked "would limit any inter-spousal transfers forever and ever, for years or decades, despite [the individual's] Medicaid eligibility having been terminated." (Pl.'s Mem. Supp. Opp'n to Summary Judgment at 2.) Plaintiffs' argument overlooks that Mr. Fagan's period of ineligibility is mathematically linked to the period of time his excess

[25] Nor was Mrs. Fagan, who recovered close to a million dollars herself, at risk of "pauperization." *See Blumer*, 534 U.S. at 480.

assets would cover the cost of his care, which is entirely consistent with the statute's purpose to prevent couples with the means of paying for their own care from receiving Medicaid benefits.[26]

It is difficult to imagine that Congress intended that an institutionalized spouse, upon inheriting or otherwise acquiring substantial assets after having initially been determined eligible for Medicaid, could wait for the Agency to determine he was no longer eligible for benefits and then transfer those assets to his spouse and successfully reapply for Medicaid.[27] This would create a loophole enabling couples with sufficient assets to pay for the institutionalized spouse's care to remain on Medicaid with little interruption of benefits, which flies in the face of Congress' clear expression that the MCCA was meant to "prevent[] financially secure couples from obtaining Medicaid assistance." *See Blumer*, 534 U.S. at 480 (citing H.R.Rep. No. 100-105, pt. 2, pp. 66-67 (1987)). This legislative goal is better served by construing the phrase "initial eligibility determination" as referring only to the very first determination by State Medicaid Agency declaring an applicant eligible with respect to one continuous period of institutionalization.[28]

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[26] Additionally, if Mr. Fagan's condition were to improve, resulting in his discharge from the institution, the entire process would reset, allowing him to transfer assets to his spouse without limit, thereby refuting Plaintiffs' argument that Defendant's interpretation would prohibit inter-spousal transfers indefinitely.

[27] Plaintiffs contend that because Medicaid is generally determined on a monthly basis, an individual could successfully reapply just one month after having his benefits discontinued without being penalized.

[28] Plaintiffs creatively argue that because Mr. Fagan repaid DSS for all of the Medicaid benefits he had received prior to the new application "[f]or all intents and purposes he had never been on Medicaid at all." (Pl.'s Mem. Supp. Opp'n to Summary Judgment at 2.) However, Plaintiffs were required by law to repay those expenses and they point to no authority that this is somehow significant when making a subsequent determination of an individual's eligibility for Medicaid. *See* 42 U.S.C. § 1396a(a)(25)(A)-(B), (H); Conn. Gen. Stat. §§ 17b-93, 17b-94.

iii. Morris' Watershed Moment

Finally, although *Morris* dealt with a different benefits posture, its analysis of the "initial determination of eligibility" as a "watershed moment" provides a useful construct. In *Morris* the court unequivocally held "that § 1396r-5(f)(1)'s limit on spousal transfers applies only after a State Agency has declared the institutionalized spouse *eligible* for Medicaid benefits," 658 F.3d at 928 (emphasis added), because this, unlike when an individual is *denied* benefits, "results in a dramatic change" *id.* at 937.[29]

Plaintiffs thus argue that because Mr. Fagan was deemed *ineligible* by DSS as of May 31, 2015, the spousal transfer limit is inapplicable. (Pl.'s Mem. Supp. Mot. for Summary Judgment at 5.) However, this argument fails to account for the fact that unlike in *Morris*, prior to that determination of ineligibility DSS had already determined that Mr. Fagan was eligible for Medicaid for that very same period of institutionalization. Therefore, Defendant asserts that once "Mr. Fagan's application was granted, Mr. Fagan's ongoing eligibility depended solely on his assets" and "[t]he only assets Mr. Fagan could transfer to Mrs. Fagan after his Medicaid application was approved were assets up to the CSRA, and he was required to do so 'as soon as practicable after the date of the initial determination of eligibility.' 42 U.S.C. § 1396r-5(f)(1)." (Def.'s Mem. Supp. Mot. for Summary Judgment at 16.) The Court agrees with this analysis.

Moreover, if an individual could simply transfer newly acquired assets after his benefits were discontinued and then reapply for Medicaid for that same period of institutionalization, the

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[29] *Hughes* likewise held that § 1396(f)(2) is irrelevant "before a determination of eligibility" but says nothing about what constitutes an initial determination of eligibility. *See* 734 F.3d at 480.

"watershed moment" of initially being granted Medicaid benefits would lose any significance. Instead, the moment of "initial determination" would be like a water faucet whose flow was controlled by the institutionalized spouse, with eligibility turned on and off, resulting in multiple cycles of applications, eligibility determinations, ineligibility determinations, and reapplications. This would allow any institutionalized spouse to transfer any newly obtained assets to his or her community spouse as soon as he or she went off Medicaid only to go back on the next month after the assets were transferred. Were the statute read to permit this, there would be no "dramatic change" as emphasized in *Morris*, given the fluidity between going on and off Medicaid that such a reading compels.

Given the clear asset consequences that relate to eligibility, the *initial* eligibility determination is a pivotal moment. Once the institutionalized spouse is first determined to be eligible for Medicaid, the Agency may look only at his individual resources (and not the community spouse's) in making determinations about his continued eligibility. *See* § 42 U.S.C. 1396r-5(c)(4). To this end, an institutionalized spouse cannot transfer disqualifying assets to the community spouse after he is determined to be eligible for benefits except for as provided by § 1396r-5(f)(1). Plaintiff's transfer did not fall into this limited exception–he transferred the money after he had initially been determined eligible for Medicaid, the transfer was well over the applicable CSRA, and the transfer occurred long after his initial determination of eligibility. Consequently, the penalty imposed by DSS was proper.

III. Conclusion

In sum, after DSS first found Mr. Fagan eligible for Medicaid, he was prohibited from transferring assets to his community spouse apart from the limited transfer provided for by Section 1396r-5(f)(1), as long as he remained continuously institutionalized, even if there was a break in

his eligibility and he reapplied and was again approved for benefits. This reading of the statute is required by the rules of statutory interpretation, consistent with the dual purposes of the statute, and follows from Morris's "watershed moment" analysis. Therefore, Defendant properly imposed a transfer of asset penalty on Mr. Fagan once he had been found eligible for Medicaid upon reapplication.

For the foregoing reasons, the Court finds that Defendant's imposition of a transfer of asset penalty was proper. Consequently Plaintiffs' Motion for Summary Judgment is DENIED and Defendant's Motion for Summary Judgment is GRANTED. The Clerk is requested to close this case.

IT IS SO ORDERED.

/s/
Janet Bond Arterton, U.S.D.J.

Dated at New Haven, Connecticut this 21st day of March 2017.

In the Senate of the United States,

December 20 (legislative day, December 19), 2017.

Resolved, That the report of the Committee of Conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1) entitled ''An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018.'', fails on a point of order.

Resolved, That the Senate recede from its amendment to the above-titled bill with a further amendment as follows:

SENATE AMENDMENT:

Strike out all after the enacting clause and insert:

TITLE I

SEC. 11000. SHORT TITLE, ETC.

(a) AMENDMENT OF 1986 CODE.—Except as otherwise expressly provided, whenever in this title an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or other provision, the reference shall be considered to be made to a section or other provision of the Internal Revenue Code of 1986.

Subtitle A—Individual Tax Reform

PART I—TAX RATE REFORM

SEC. 11001. MODIFICATION OF RATES.

(a) IN GENERAL.—Section 1 is amended by adding at the end the following new subsection:

"(j) MODIFICATIONS FOR TAXABLE YEARS 2018 THROUGH 2025.—

"(1) IN GENERAL.—In the case of a taxable year beginning after December 31, 2017, and before January 1, 2026—

"(A) subsection (i) shall not apply, and

"(B) this section (other than subsection (i)) shall be applied as provided in paragraphs (2) through (6).

"(2) RATE TABLES.—

"(A) MARRIED INDIVIDUALS FILING JOINT RETURNS AND SURVIVING SPOUSES.—The following table shall be applied in lieu of the table contained in subsection (a):

"If taxable income is:	***The tax is:***
Not over $19,050	*10% of taxable income.*
Over $19,050 but not over $77,400	*$1,905, plus 12% of the excess over $19,050.*
Over $77,400 but not over $165,000	*$8,907, plus 22% of the excess over $77,400.*
Over $165,000 but not over $315,000	*$28,179, plus 24% of the excess over $165,000.*
Over $315,000 but not over $400,000	*$64,179, plus 32% of the excess over $315,000.*
Over $400,000 but not over $600,000	*$91,379, plus 35% of the excess over $400,000.*

"If taxable income is:	***The tax is:***
Over $600,000	*$161,379, plus 37% of the excess over $600,000.*

"(B) HEADS OF HOUSEHOLDS.—The following table shall be applied in lieu of the table contained in subsection (b):

"If taxable income is:	***The tax is:***
Not over $13,600	*10% of taxable income.*
Over $13,600 but not over $51,800	*$1,360, plus 12% of the excess over $13,600.*
Over $51,800 but not over $82,500	*$5,944, plus 22% of the excess over $51,800.*
Over $82,500 but not over $157,500	*$12,698, plus 24% of the excess over $82,500.*
Over $157,500 but not over $200,000	*$30,698, plus 32% of the excess over $157,500.*
Over $200,000 but not over $500,000	*$44,298, plus 35% of the excess over $200,000.*
Over $500,000	*$149,298, plus 37% of the excess over $500,000.*

"(C) UNMARRIED INDIVIDUALS OTHER THAN SURVIVING SPOUSES AND HEADS OF HOUSEHOLDS.—The following table shall be applied in lieu of the table contained in subsection (c):

"If taxable income is:	***The tax is:***
Not over $9,525	*10% of taxable income.*
Over $9,525 but not over $38,700	*$952.50, plus 12% of the excess over $9,525.*
Over $38,700 but not over $82,500	*$4,453.50, plus 22% of the excess over $38,700.*
Over $82,500 but not over $157,500	*$14,089.50, plus 24% of the excess over $82,500.*
Over $157,500 but not over $200,000	*$32,089.50, plus 32% of the excess over $157,500.*
Over $200,000 but not over $500,000	*$45,689.50, plus 35% of the excess over $200,000.*
Over $500,000	*$150,689.50, plus 37% of the excess over $500,000.*

"(D) MARRIED INDIVIDUALS FILING SEPARATE RETURNS.—The following table shall be applied in lieu of the table contained in subsection (d):

"If taxable income is:	***The tax is:***
Not over $9,525	*10% of taxable income.*
Over $9,525 but not over $38,700	*$952.50, plus 12% of the excess over $9,525.*
Over $38,700 but not over $82,500	*$4,453.50, plus 22% of the excess over $38,700.*
Over $82,500 but not over $157,500	*$14,089.50, plus 24% of the excess over $82,500.*
Over $157,500 but not over $200,000	*$32,089.50, plus 32% of the excess over $157,500.*
Over $200,000 but not over $300,000	*$45,689.50, plus 35% of the excess over $200,000.*
Over $300,000	*$80,689.50, plus 37% of the excess over $300,000.*

"(E) ESTATES AND TRUSTS.—The following table shall be applied in lieu of the table contained in subsection (e):

"If taxable income is:	***The tax is:***
Not over $2,550	*10% of taxable income.*
Over $2,550 but not over $9,150	*$255, plus 24% of the excess over $2,550.*
Over $9,150 but not over $12,500	*$1,839, plus 35% of the excess over $9,150.*
Over $12,500	*$3,011.50, plus 37% of the excess over $12,500.*

"(F) REFERENCES TO RATE TABLES.—Any reference in this title to a rate of tax under subsection (c) shall be treated as a reference to the corresponding rate bracket under subparagraph (C) of this paragraph, except that the reference in section 3402(q)(1) to the third lowest rate of

tax applicable under subsection (c) shall be treated as a reference to the fourth lowest rate of tax under subparagraph (C).

"(3) ADJUSTMENTS.—

"(A) NO ADJUSTMENT IN 2018.—The tables contained in paragraph (2) shall apply without adjustment for taxable years beginning after December 31, 2017, and before January 1, 2019.

"(B) SUBSEQUENT YEARS.—For taxable years beginning after December 31, 2018, the Secretary shall prescribe tables which shall apply in lieu of the tables contained in paragraph (2) in the same manner as under paragraphs (1) and (2) of subsection (f) (applied without regard to clauses (i) and (ii) of subsection (f)(2)(A)), except that in prescribing such tables—

"(i) subsection (f)(3) shall be applied by substituting 'calendar year 2017' for 'calendar year 2016' in subparagraph (A)(ii) thereof,

"(ii) subsection (f)(7)(B) shall apply to any unmarried individual other than a surviving spouse or head of household, and

"(iii) subsection (f)(8) shall not apply.

"(4) SPECIAL RULES FOR CERTAIN CHILDREN WITH UNEARNED INCOME.—

"(A) IN GENERAL.—In the case of a child to whom subsection (g) applies for the taxable year, the rules of subparagraphs (B) and (C) shall apply in lieu of the rule under subsection (g)(1).

"(B) MODIFICATIONS TO APPLICABLE RATE BRACKETS.—In determining the amount of tax imposed by this section for the taxable year on a child described in subparagraph (A), the income tax table otherwise applicable under this subsection to the child shall be applied with the following modifications:

"(i) 24-PERCENT BRACKET.—The maximum taxable income which is taxed at a rate below 24 percent shall not be more than the sum of—

"(I) the earned taxable income of such child, plus

"(II) the minimum taxable income for the 24-percent bracket in the table under paragraph (2)(E) (as adjusted under paragraph (3)) for the taxable year.

"(ii) 35-PERCENT BRACKET.—The maximum taxable income which is taxed at a rate below 35 percent shall not be more than the sum of—

"(I) the earned taxable income of such child, plus

"(II) the minimum taxable income for the 35-percent bracket in the table under paragraph (2)(E) (as adjusted under paragraph (3)) for the taxable year.

"(iii) 37-PERCENT BRACKET.—The maximum taxable income which is taxed at a rate below 37 percent shall not be more than the sum of—

"(I) the earned taxable income of such child, plus

"(II) the minimum taxable income for the 37-percent bracket in the table under paragraph (2)(E) (as adjusted under paragraph (3)) for the taxable year.

"(C) COORDINATION WITH CAPITAL GAINS RATES.—For purposes of applying section 1(h)

(after the modifications under paragraph (5)(A))—

"(i) the maximum zero rate amount shall not be more than the sum of—

"(I) the earned taxable income of such child, plus

"(II) the amount in effect under paragraph (5)(B)(i)(IV) for the taxable year, and

"(ii) the maximum 15-percent rate amount shall not be more than the sum of—

"(I) the earned taxable income of such child, plus

"(II) the amount in effect under paragraph (5)(B)(ii)(IV) for the taxable year.

"(D) EARNED TAXABLE INCOME.—For purposes of this paragraph, the term 'earned taxable income' means, with respect to any child for any taxable year, the taxable income of such child reduced (but not below zero) by the net unearned income (as defined in subsection (g)(4)) of such child.

"(5) APPLICATION OF CURRENT INCOME TAX BRACKETS TO CAPITAL GAINS BRACKETS.—

"(A) IN GENERAL.—Section 1(h)(1) shall be applied—

"(i) by substituting 'below the maximum zero rate amount' for 'which would (without regard to this paragraph) be taxed at a rate below 25 percent' in subparagraph (B)(i), and

"(ii) by substituting 'below the maximum 15-percent rate amount' for 'which would (without regard to this paragraph) be taxed at a rate below 39.6 percent' in subparagraph (C)(ii)(I).

"(B) MAXIMUM AMOUNTS DEFINED.—For purposes of applying section 1(h) with the modifications described in subparagraph (A)—

"(i) MAXIMUM ZERO RATE AMOUNT.—The maximum zero rate amount shall be—

"(I) in the case of a joint return or surviving spouse, $77,200,

"(II) in the case of an individual who is a head of household (as defined in section 2(b)), $51,700,

"(III) in the case of any other individual (other than an estate or trust), an amount equal to ½ of the

amount in effect for the taxable year under subclause (I), and

"(IV) in the case of an estate or trust, $2,600.

"(ii) MAXIMUM 15-PERCENT RATE AMOUNT.—The maximum 15-percent rate amount shall be—

"(I) in the case of a joint return or surviving spouse, $479,000 (½ such amount in the case of a married individual filing a separate return),

"(II) in the case of an individual who is the head of a household (as defined in section 2(b)), $452,400,

"(III) in the case of any other individual (other than an estate or trust), $425,800, and

"(IV) in the case of an estate or trust, $12,700.

"(C) INFLATION ADJUSTMENT.—In the case of any taxable year beginning after 2018, each of the dollar amounts in clauses (i) and (ii) of subparagraph (B) shall be increased by an amount equal to—

"(i) such dollar amount, multiplied by

"(ii) the cost-of-living adjustment determined under subsection (f)(3) for the calendar year in which the taxable year begins, determined by substituting 'calendar year 2017' for 'calendar year 2016' in subparagraph (A)(ii) thereof.

If any increase under this subparagraph is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

"(6) SECTION 15 NOT TO APPLY.—Section 15 shall not apply to any change in a rate of tax by reason of this subsection.".

(b) DUE DILIGENCE TAX PREPARER REQUIREMENT WITH RESPECT TO HEAD OF HOUSEHOLD FILING STATUS.—Subsection (g) of section 6695 is amended to read as follows:

"(g) FAILURE TO BE DILIGENT IN DETERMINING ELIGIBILITY FOR CERTAIN TAX BENEFITS.—Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with due diligence requirements imposed by the Secretary by regulations with respect to determining—

"(1) eligibility to file as a head of household (as defined in section 2(b)) on the return, or

"(2) eligibility for, or the amount of, the credit allowable by section 24, 25A(a)(1), or 32,

shall pay a penalty of $500 for each such failure.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 11002. INFLATION ADJUSTMENTS BASED ON CHAINED CPI.

(a) IN GENERAL.—Subsection (f) of section 1 is amended by striking paragraph (3) and by inserting after paragraph (2) the following new paragraph:

"(3) COST-OF-LIVING ADJUSTMENT.—For purposes of this subsection—

"(A) IN GENERAL.—The cost-of-living adjustment for any calendar year is the percentage (if any) by which—

"(i) the C-CPI-U for the preceding calendar year, exceeds

"(ii) the CPI for calendar year 2016, multiplied by the amount determined under subparagraph (B).

"(B) AMOUNT DETERMINED.—The amount determined under this clause is the amount obtained by dividing—

"(i) the C-CPI-U for calendar year 2016, by

"(ii) the CPI for calendar year 2016.

"(C) SPECIAL RULE FOR ADJUSTMENTS WITH A BASE YEAR AFTER 2016.—For purposes of any provision of this title which provides for the substitution of a year after 2016 for '2016' in subparagraph (A)(ii), subparagraph (A) shall be applied by substituting 'the C-CPI-U for calendar year 2016' for 'the CPI for calendar year 2016' and all that follows in clause (ii) thereof.".

(b) C-CPI-U.—Subsection (f) of section 1 is amended by striking paragraph (7), by redesignating paragraph (6) as paragraph (7), and by inserting after paragraph (5) the following new paragraph:

"(6) C-CPI-U.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'C-CPI-U' means the Chained Consumer Price Index for All Urban Consumers (as published by the Bureau of Labor Statistics of the Department of Labor). The values of the Chained Consumer Price Index for All Urban Consumers taken into account for purposes of determining the cost-of-living adjustment for any calendar year under this subsection

shall be the latest values so published as of the date on which such Bureau publishes the initial value of the Chained Consumer Price Index for All Urban Consumers for the month of August for the preceding calendar year.

"(B) DETERMINATION FOR CALENDAR YEAR.—The C-CPI-U for any calendar year is the average of the C-CPI-U as of the close of the 12-month period ending on August 31 of such calendar year.".

(c) APPLICATION TO PERMANENT TAX TABLES.—

(1) IN GENERAL.—Section 1(f)(2)(A) is amended to read as follows:

"(A) except as provided in paragraph (8), by increasing the minimum and maximum dollar amounts for each bracket for which a tax is imposed under such table by the cost-of-living adjustment for such calendar year, determined—

"(i) except as provided in clause (ii), by substituting '1992' for '2016' in paragraph (3)(A)(ii), and

"(ii) in the case of adjustments to the dollar amounts at which the 36 percent rate bracket begins or at which the 39.6 percent

rate bracket begins, by substituting '1993' for '2016' in paragraph (3)(A)(ii),".

(2) CONFORMING AMENDMENTS.—Section 1(i) is amended—

(A) by striking "for '1992' in subparagraph (B)" in paragraph (1)(C) and inserting "for '2016' in subparagraph (A)(ii)", and

(B) by striking "subsection (f)(3)(B) shall be applied by substituting '2012' for '1992'" in paragraph (3)(C) and inserting "subsection (f)(3)(A)(ii) shall be applied by substituting '2012' for '2016'".

(d) APPLICATION TO OTHER INTERNAL REVENUE CODE OF 1986 PROVISIONS.—

(1) The following sections are each amended by striking "for 'calendar year 1992' in subparagraph (B)" and inserting "for 'calendar year 2016' in subparagraph (A)(ii)":

(A) Section 23(h)(2).

(B) Paragraphs (1)(A)(ii) and (2)(A)(ii) of section 25A(h).

(C) Section 25B(b)(3)(B).

(D) Subsection (b)(2)(B)(ii)(II), and clauses (i) and (ii) of subsection (j)(1)(B), of section 32.

(E) Section 36B(f)(2)(B)(ii)(II).

(F) Section 41(e)(5)(C)(i).

(G) Subsections (e)(3)(D)(ii) and (h)(3)(H)(i)(II) of section 42.

(H) Section 45R(d)(3)(B)(ii).

(I) Section 55(d)(4)(A)(ii).

(J) Section 62(d)(3)(B).

(K) Section 63(c)(4)(B).

(L) Section 125(i)(2)(B).

(M) Section 135(b)(2)(B)(ii).

(N) Section 137(f)(2).

(O) Section 146(d)(2)(B).

(P) Section 147(c)(2)(H)(ii).

(Q) Section 151(d)(4)(B).

(R) Section 179(b)(6)(A)(ii).

(S) Subsections (b)(5)(C)(i)(II) and (g)(8)(B) of section 219.

(T) Section 220(g)(2).

(U) Section 221(f)(1)(B).

(V) Section 223(g)(1)(B).

(W) Section 408A(c)(3)(D)(ii).

(X) Section 430(c)(7)(D)(vii)(II).

(Y) Section 512(d)(2)(B).

(Z) Section 513(h)(2)(C)(ii).

(AA) Section 831(b)(2)(D)(ii).

(BB) Section 877A(a)(3)(B)(i)(II).

(CC) Section 2010(c)(3)(B)(ii).

(DD) Section 2032A(a)(3)(B).

(EE) Section 2503(b)(2)(B).

(FF) Section 4261(e)(4)(A)(ii).

(GG) Section 5000A(c)(3)(D)(ii).

(HH) Section 6323(i)(4)(B).

(II) Section 6334(g)(1)(B).

(JJ) Section 6601(j)(3)(B).

(KK) Section 6651(i)(1).

(LL) Section 6652(c)(7)(A).

(MM) Section 6695(h)(1).

(NN) Section 6698(e)(1).

(OO) Section 6699(e)(1).

(PP) Section 6721(f)(1).

(QQ) Section 6722(f)(1).

(RR) Section 7345(f)(2).

(SS) Section 7430(c)(1).

(TT) Section 9831(d)(2)(D)(ii)(II).

(2) Sections 41(e)(5)(C)(ii) and 68(b)(2)(B) are each amended—

(A) by striking "1(f)(3)(B)" and inserting "1(f)(3)(A)(ii)", and

(B) by striking "1992" and inserting "2016".

(3) Section 42(h)(6)(G) is amended—

(A) by striking "for 'calendar year 1987'" in clause (i)(II) and inserting "for 'calendar year 2016' in subparagraph (A)(ii) thereof", and

(B) by striking "if the CPI for any calendar year" and all that follows in clause (ii) and inserting "if the C-CPI-U for any calendar year (as defined in section 1(f)(6)) exceeds the C-CPI-U for the preceding calendar year by more than 5 percent, the C-CPI-U for the base calendar year shall be increased such that such excess shall never be taken into account under clause (i). In the case of a base calendar year before 2017, the C-CPI-U for such year shall be determined by multiplying the CPI for such year by the amount determined under section 1(f)(3)(B).".

(4) Section 59(j)(2)(B) is amended by striking "for '1992' in subparagraph (B)" and inserting "for '2016' in subparagraph (A)(ii)".

(5) Section 132(f)(6)(A)(ii) is amended by striking "for 'calendar year 1992'" and inserting "for 'calendar year 2016' in subparagraph (A)(ii) thereof".

(6) Section 162(o)(3) is amended by striking "adjusted for changes in the Consumer Price Index

(as defined in section 1(f)(5)) since 1991" and inserting "adjusted by increasing any such amount under the 1991 agreement by an amount equal to—

"(A) such amount, multiplied by

"(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting 'calendar year 1990' for 'calendar year 2016' in subparagraph (A)(ii) thereof".

(7) So much of clause (ii) of section 213(d)(10)(B) as precedes the last sentence is amended to read as follows:

"(ii) MEDICAL CARE COST ADJUSTMENT.—For purposes of clause (i), the medical care cost adjustment for any calendar year is the percentage (if any) by which—

"(I) the medical care component of the C-CPI-U (as defined in section 1(f)(6)) for August of the preceding calendar year, exceeds

"(II) such component of the CPI (as defined in section 1(f)(4)) for August of 1996, multiplied by the amount determined under section 1(f)(3)(B).".

(8) Subparagraph (B) of section 280F(d)(7) is amended to read as follows:

"(B) AUTOMOBILE PRICE INFLATION ADJUSTMENT.—For purposes of this paragraph—

"(i) IN GENERAL.—The automobile price inflation adjustment for any calendar year is the percentage (if any) by which—

"(I) the C-CPI-U automobile component for October of the preceding calendar year, exceeds

"(II) the automobile component of the CPI (as defined in section 1(f)(4)) for October of 1987, multiplied by the amount determined under 1(f)(3)(B).

"(ii) C-CPI-U AUTOMOBILE COMPONENT.—The term 'C-CPI-U automobile component' means the automobile component of the Chained Consumer Price Index for All Urban Consumers (as described in section 1(f)(6)).".

(9) Section 911(b)(2)(D)(ii)(II) is amended by striking "for '1992' in subparagraph (B)" and inserting "for '2016' in subparagraph (A)(ii)".

(10) Paragraph (2) of section 1274A(d) is amended to read as follows:

"(2) ADJUSTMENT FOR INFLATION.—In the case of any debt instrument arising out of a sale or exchange during any calendar year after 1989, each dollar amount contained in the preceding provisions of this section shall be increased by an amount equal to—

"(A) such amount, multiplied by

"(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting 'calendar year 1988' for 'calendar year 2016' in subparagraph (A)(ii) thereof.

Any increase under the preceding sentence shall be rounded to the nearest multiple of $100 (or, if such increase is a multiple of $50, such increase shall be increased to the nearest multiple of $100).".

(11) Section 4161(b)(2)(C)(i)(II) is amended by striking "for '1992' in subparagraph (B)" and inserting "for '2016' in subparagraph (A)(ii)".

(12) Section 4980I(b)(3)(C)(v)(II) is amended by striking "for '1992' in subparagraph (B)" and inserting "for '2016' in subparagraph (A)(ii)".

(13) Section 6039F(d) is amended by striking "subparagraph (B) thereof shall be applied by substituting '1995' for '1992'" and inserting "subpara-

graph (A)(ii) thereof shall be applied by substituting '1995' for '2016'".

(14) Section 7872(g)(5) is amended to read as follows:

"(5) ADJUSTMENT OF LIMIT FOR INFLATION.—In the case of any loan made during any calendar year after 1986, the dollar amount in paragraph (2) shall be increased by an amount equal to—

"(A) such amount, multiplied by

"(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting 'calendar year 1985' for 'calendar year 2016' in subparagraph (A)(ii) thereof.

Any increase under the preceding sentence shall be rounded to the nearest multiple of $100 (or, if such increase is a multiple of $50, such increase shall be increased to the nearest multiple of $100).".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

PART II—DEDUCTION FOR QUALIFIED BUSINESS INCOME OF PASS-THRU ENTITIES

SEC. 11011. DEDUCTION FOR QUALIFIED BUSINESS INCOME.

(a) IN GENERAL.—Part VI of subchapter B of chapter 1 is amended by adding at the end the following new section:

"SEC. 199A. QUALIFIED BUSINESS INCOME.

"(a) IN GENERAL.—In the case of a taxpayer other than a corporation, there shall be allowed as a deduction for any taxable year an amount equal to the sum of—

"(1) the lesser of—

"(A) the combined qualified business income amount of the taxpayer, or

"(B) an amount equal to 20 percent of the excess (if any) of—

"(i) the taxable income of the taxpayer for the taxable year, over

"(ii) the sum of any net capital gain (as defined in section 1(h)), plus the aggregate amount of the qualified cooperative dividends, of the taxpayer for the taxable year, plus

"(2) the lesser of—

"(A) 20 percent of the aggregate amount of the qualified cooperative dividends of the taxpayer for the taxable year, or

"(B) taxable income (reduced by the net capital gain (as so defined)) of the taxpayer for the taxable year.

The amount determined under the preceding sentence shall not exceed the taxable income (reduced by the net capital gain (as so defined)) of the taxpayer for the taxable year.

"(b) COMBINED QUALIFIED BUSINESS INCOME AMOUNT.—For purposes of this section—

"(1) IN GENERAL.—The term 'combined qualified business income amount' means, with respect to any taxable year, an amount equal to—

"(A) the sum of the amounts determined under paragraph (2) for each qualified trade or business carried on by the taxpayer, plus

"(B) 20 percent of the aggregate amount of the qualified REIT dividends and qualified publicly traded partnership income of the taxpayer for the taxable year.

"(2) DETERMINATION OF DEDUCTIBLE AMOUNT FOR EACH TRADE OR BUSINESS.—The amount determined under this paragraph with respect to any qualified trade or business is the lesser of—

"(A) 20 percent of the taxpayer's qualified business income with respect to the qualified trade or business, or

"(B) the greater of—

"(i) 50 percent of the W–2 wages with respect to the qualified trade or business, or

"(ii) the sum of 25 percent of the W–2 wages with respect to the qualified trade or business, plus 2.5 percent of the unadjusted basis immediately after acquisition of all qualified property.

"(3) MODIFICATIONS TO LIMIT BASED ON TAXABLE INCOME.—

"(A) EXCEPTION FROM LIMIT.—In the case of any taxpayer whose taxable income for the taxable year does not exceed the threshold amount, paragraph (2) shall be applied without regard to subparagraph (B).

"(B) PHASE-IN OF LIMIT FOR CERTAIN TAXPAYERS.—

"(i) IN GENERAL.—If—

"(I) the taxable income of a taxpayer for any taxable year exceeds the threshold amount, but does not exceed the sum of the threshold amount plus

$50,000 ($100,000 in the case of a joint return), and

"(II) the amount determined under paragraph (2)(B) (determined without regard to this subparagraph) with respect to any qualified trade or business carried on by the taxpayer is less than the amount determined under paragraph (2)(A) with respect such trade or business,

then paragraph (2) shall be applied with respect to such trade or business without regard to subparagraph (B) thereof and by reducing the amount determined under subparagraph (A) thereof by the amount determined under clause (ii).

"(ii) AMOUNT OF REDUCTION.—The amount determined under this subparagraph is the amount which bears the same ratio to the excess amount as—

"(I) the amount by which the taxpayer's taxable income for the taxable year exceeds the threshold amount, bears to

"(II) $50,000 ($100,000 in the case of a joint return).

"(iii) EXCESS AMOUNT.—For purposes of clause (ii), the excess amount is the excess of—

"(I) the amount determined under paragraph (2)(A) (determined without regard to this paragraph), over

"(II) the amount determined under paragraph (2)(B) (determined without regard to this paragraph).

"(4) WAGES, ETC.—

"(A) IN GENERAL.—The term 'W–2 wages' means, with respect to any person for any taxable year of such person, the amounts described in paragraphs (3) and (8) of section 6051(a) paid by such person with respect to employment of employees by such person during the calendar year ending during such taxable year.

"(B) LIMITATION TO WAGES ATTRIBUTABLE TO QUALIFIED BUSINESS INCOME.—Such term shall not include any amount which is not properly allocable to qualified business income for purposes of subsection (c)(1).

"(C) RETURN REQUIREMENT.—Such term shall not include any amount which is not properly included in a return filed with the Social Security Administration on or before the 60th day after the due date (including extensions) for such return.

"(5) ACQUISITIONS, DISPOSITIONS, AND SHORT TAXABLE YEARS.—The Secretary shall provide for the application of this subsection in cases of a short taxable year or where the taxpayer acquires, or disposes of, the major portion of a trade or business or the major portion of a separate unit of a trade or business during the taxable year.

"(6) QUALIFIED PROPERTY.—For purposes of this section:

"(A) IN GENERAL.—The term 'qualified property' means, with respect to any qualified trade or business for a taxable year, tangible property of a character subject to the allowance for depreciation under section 167—

"(i) which is held by, and available for use in, the qualified trade or business at the close of the taxable year,

"(ii) which is used at any point during the taxable year in the production of qualified business income, and

"(iii) the depreciable period for which has not ended before the close of the taxable year.

"(B) DEPRECIABLE PERIOD.—The term 'depreciable period' means, with respect to qualified property of a taxpayer, the period beginning on the date the property was first placed in service by the taxpayer and ending on the later of—

"(i) the date that is 10 years after such date, or

"(ii) the last day of the last full year in the applicable recovery period that would apply to the property under section 168 (determined without regard to subsection (g) thereof).

"(c) QUALIFIED BUSINESS INCOME.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified business income' means, for any taxable year, the net amount of qualified items of income, gain, deduction, and loss with respect to any qualified trade or business of the taxpayer. Such term shall not include any qualified

REIT dividends, qualified cooperative dividends, or qualified publicly traded partnership income.

"(2) CARRYOVER OF LOSSES.—If the net amount of qualified income, gain, deduction, and loss with respect to qualified trades or businesses of the taxpayer for any taxable year is less than zero, such amount shall be treated as a loss from a qualified trade or business in the succeeding taxable year.

"(3) QUALIFIED ITEMS OF INCOME, GAIN, DEDUCTION, AND LOSS.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'qualified items of income, gain, deduction, and loss' means items of income, gain, deduction, and loss to the extent such items are—

"(i) effectively connected with the conduct of a trade or business within the United States (within the meaning of section 864(c), determined by substituting 'qualified trade or business (within the meaning of section 199A)' for 'nonresident alien individual or a foreign corporation' or for 'a foreign corporation' each place it appears), and

"(ii) included or allowed in determining taxable income for the taxable year.

"(B) EXCEPTIONS.—The following investment items shall not be taken into account as a qualified item of income, gain, deduction, or loss:

"(i) Any item of short-term capital gain, short-term capital loss, long-term capital gain, or long-term capital loss.

"(ii) Any dividend, income equivalent to a dividend, or payment in lieu of dividends described in section 954(c)(1)(G).

"(iii) Any interest income other than interest income which is properly allocable to a trade or business.

"(iv) Any item of gain or loss described in subparagraph (C) or (D) of section 954(c)(1) (applied by substituting 'qualified trade or business' for 'controlled foreign corporation').

"(v) Any item of income, gain, deduction, or loss taken into account under section 954(c)(1)(F) (determined without regard to clause (ii) thereof and other than items attributable to notional principal con-

tracts entered into in transactions qualifying under section 1221(a)(7)).

"(vi) Any amount received from an annuity which is not received in connection with the trade or business.

"(vii) Any item of deduction or loss properly allocable to an amount described in any of the preceding clauses.

"(4) TREATMENT OF REASONABLE COMPENSATION AND GUARANTEED PAYMENTS.—Qualified business income shall not include—

"(A) reasonable compensation paid to the taxpayer by any qualified trade or business of the taxpayer for services rendered with respect to the trade or business,

"(B) any guaranteed payment described in section 707(c) paid to a partner for services rendered with respect to the trade or business, and

"(C) to the extent provided in regulations, any payment described in section 707(a) to a partner for services rendered with respect to the trade or business.

"(d) QUALIFIED TRADE OR BUSINESS.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified trade or business' means any trade or business other than—

"(A) a specified service trade or business, or

"(B) the trade or business of performing services as an employee.

"(2) SPECIFIED SERVICE TRADE OR BUSINESS.—The term 'specified service trade or business' means any trade or business—

"(A) which is described in section 1202(e)(3)(A) (applied without regard to the words 'engineering, architecture,') or which would be so described if the term 'employees or owners' were substituted for 'employees' therein, or

"(B) 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)).

"(3) EXCEPTION FOR SPECIFIED SERVICE BUSINESSES BASED ON TAXPAYER'S INCOME.—

"(A) IN GENERAL.—If, for any taxable year, the taxable income of any taxpayer is less than the sum of the threshold amount plus

$50,000 ($100,000 in the case of a joint return), then—

"(i) any specified service trade or business of the taxpayer shall not fail to be treated as a qualified trade or business due to paragraph (1)(A), but

"(ii) only the applicable percentage of qualified items of income, gain, deduction, or loss, and the W–2 wages and the unadjusted basis immediately after acquisition of qualified property, of the taxpayer allocable to such specified service trade or business shall be taken into account in computing the qualified business income, W–2 wages, and the unadjusted basis immediately after acquisition of qualified property of the taxpayer for the taxable year for purposes of applying this section.

"(B) APPLICABLE PERCENTAGE.—For purposes of subparagraph (A), the term 'applicable percentage' means, with respect to any taxable year, 100 percent reduced (not below zero) by the percentage equal to the ratio of—

"(i) the taxable income of the taxpayer for the taxable year in excess of the threshold amount, bears to

"(ii) $50,000 ($100,000 in the case of a joint return).

"(e) OTHER DEFINITIONS.—For purposes of this section—

"(1) TAXABLE INCOME.—Taxable income shall be computed without regard to the deduction allowable under this section.

"(2) THRESHOLD AMOUNT.—

"(A) IN GENERAL.—The term 'threshold amount' means $157,500 (200 percent of such amount in the case of a joint return).

"(B) INFLATION ADJUSTMENT.—In the case of any taxable year beginning after 2018, the dollar amount in subparagraph (A) shall be increased by an amount equal to—

"(i) such dollar amount, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting 'calendar year 2017' for 'calendar year 2016' in subparagraph (A)(ii) thereof.

The amount of any increase under the preceding sentence shall be rounded as provided in section 1(f)(7).

"(3) QUALIFIED REIT DIVIDEND.—The term 'qualified REIT dividend' means any dividend from a real estate investment trust received during the taxable year which—

"(A) is not a capital gain dividend, as defined in section 857(b)(3), and

"(B) is not qualified dividend income, as defined in section 1(h)(11).

"(4) QUALIFIED COOPERATIVE DIVIDEND.—The term 'qualified cooperative dividend' means any patronage dividend (as defined in section 1388(a)), any per-unit retain allocation (as defined in section 1388(f)), and any qualified written notice of allocation (as defined in section 1388(c)), or any similar amount received from an organization described in subparagraph (B)(ii), which—

"(A) is includible in gross income, and

"(B) is received from—

"(i) an organization or corporation described in section 501(c)(12) or 1381(a), or

"(ii) an organization which is governed under this title by the rules applicable

to cooperatives under this title before the enactment of subchapter T.

"(5) QUALIFIED PUBLICLY TRADED PARTNERSHIP INCOME.—The term 'qualified publicly traded partnership income' means, with respect to any qualified trade or business of a taxpayer, the sum of—

"(A) the net amount of such taxpayer's allocable share of each qualified item of income, gain, deduction, and loss (as defined in subsection (c)(3) and determined after the application of subsection (c)(4)) from a publicly traded partnership (as defined in section 7704(a)) which is not treated as a corporation under section 7704(c), plus

"(B) any gain recognized by such taxpayer upon disposition of its interest in such partnership to the extent such gain is treated as an amount realized from the sale or exchange of property other than a capital asset under section 751(a).

"(f) SPECIAL RULES.—

"(1) APPLICATION TO PARTNERSHIPS AND S CORPORATIONS.—

"(A) IN GENERAL.—In the case of a partnership or S corporation—

"(i) this section shall be applied at the partner or shareholder level,

"(ii) each partner or shareholder shall take into account such person's allocable share of each qualified item of income, gain, deduction, and loss, and

"(iii) each partner or shareholder shall be treated for purposes of subsection (b) as having W–2 wages and unadjusted basis immediately after acquisition of qualified property for the taxable year in an amount equal to such person's allocable share of the W–2 wages and the unadjusted basis immediately after acquisition of qualified property of the partnership or S corporation for the taxable year (as determined under regulations prescribed by the Secretary).

For purposes of clause (iii), a partner's or shareholder's allocable share of W–2 wages shall be determined in the same manner as the partner's or shareholder's allocable share of wage expenses. For purposes of such clause, partner's or shareholder's allocable share of the unadjusted basis immediately after acquisition of qualified property shall be determined in the same manner as

the partner's or shareholder's allocable share of depreciation. For purposes of this subparagraph, in the case of an S corporation, an allocable share shall be the shareholder's pro rata share of an item.

"(B) APPLICATION TO TRUSTS AND ESTATES.—Rules similar to the rules under section 199(d)(1)(B)(i) (as in effect on December 1, 2017) for the apportionment of W–2 wages shall apply to the apportionment of W–2 wages and the apportionment of unadjusted basis immediately after acquisition of qualified property under this section.

"(C) TREATMENT OF TRADES OR BUSINESS IN PUERTO RICO.—

"(i) IN GENERAL.—In the case of any taxpayer with qualified business income from sources within the commonwealth of Puerto Rico, if all such income is taxable under section 1 for such taxable year, then for purposes of determining the qualified business income of such taxpayer for such taxable year, the term 'United States' shall include the Commonwealth of Puerto Rico.

"(ii) SPECIAL RULE FOR APPLYING LIMIT.—In the case of any taxpayer described in clause (i), the determination of W–2 wages of such taxpayer with respect to any qualified trade or business conducted in Puerto Rico shall be made without regard to any exclusion under section 3401(a)(8) for remuneration paid for services in Puerto Rico.

"(2) COORDINATION WITH MINIMUM TAX.—For purposes of determining alternative minimum taxable income under section 55, qualified business income shall be determined without regard to any adjustments under sections 56 through 59.

"(3) DEDUCTION LIMITED TO INCOME TAXES.—The deduction under subsection (a) shall only be allowed for purposes of this chapter.

"(4) REGULATIONS.—The Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section, including regulations—

"(A) for requiring or restricting the allocation of items and wages under this section and such reporting requirements as the Secretary determines appropriate, and

"(B) for the application of this section in the case of tiered entities.

"(g) DEDUCTION ALLOWED TO SPECIFIED AGRICULTURAL OR HORTICULTURAL COOPERATIVES.—

"(1) IN GENERAL.—In the case of any taxable year of a specified agricultural or horticultural cooperative beginning after December 31, 2017, there shall be allowed a deduction in an amount equal to the lesser of—

"(A) 20 percent of the excess (if any) of—

"(i) the gross income of a specified agricultural or horticultural cooperative, over

"(ii) the qualified cooperative dividends (as defined in subsection (e)(4)) paid during the taxable year for the taxable year, or

"(B) the greater of—

"(i) 50 percent of the W–2 wages of the cooperative with respect to its trade or business, or

"(ii) the sum of 25 percent of the W–2 wages of the cooperative with respect to its trade or business, plus 2.5 percent of the unadjusted basis immediately after acquisi-

tion of all qualified property of the cooperative.

"(2) LIMITATION.—The amount determined under paragraph (1) shall not exceed the taxable income of the specified agricultural or horticultural for the taxable year.

"(3) SPECIFIED AGRICULTURAL OR HORTICULTURAL COOPERATIVE.—For purposes of this subsection, the term 'specified agricultural or horticultural cooperative' means an organization to which part I of subchapter T applies which is engaged in—

"(A) the manufacturing, production, growth, or extraction in whole or significant part of any agricultural or horticultural product,

"(B) the marketing of agricultural or horticultural products which its patrons have so manufactured, produced, grown, or extracted, or

"(C) the provision of supplies, equipment, or services to farmers or to organizations described in subparagraph (A) or (B).

"(h) ANTI-ABUSE RULES.—The Secretary shall—

"(1) apply rules similar to the rules under section 179(d)(2) in order to prevent the manipulation

of the depreciable period of qualified property using transactions between related parties, and

"(2) prescribe rules for determining the unadjusted basis immediately after acquisition of qualified property acquired in like-kind exchanges or involuntary conversions.

"(i) TERMINATION.—This section shall not apply to taxable years beginning after December 31, 2025.".

(b) TREATMENT OF DEDUCTION IN COMPUTING ADJUSTED GROSS AND TAXABLE INCOME.—

(1) DEDUCTION NOT ALLOWED IN COMPUTING ADJUSTED GROSS INCOME.—Section 62(a) is amended by adding at the end the following new sentence: "The deduction allowed by section 199A shall not be treated as a deduction described in any of the preceding paragraphs of this subsection.".

(2) DEDUCTION ALLOWED TO NONITEMIZERS.—Section 63(b) is amended by striking "and" at the end of paragraph (1), by striking the period at the end of paragraph (2) and inserting ", and", and by adding at the end the following new paragraph:

"(3) the deduction provided in section 199A.".

(3) DEDUCTION ALLOWED TO ITEMIZERS WITHOUT LIMITS ON ITEMIZED DEDUCTIONS.—Section 63(d) is amended by striking "and" at the end of

paragraph (1), by striking the period at the end of paragraph (2) and inserting ", and", and by adding at the end the following new paragraph:

"(3) the deduction provided in section 199A.".

(4) CONFORMING AMENDMENT.—Section 3402(m)(1) is amended by inserting "and the estimated deduction allowed under section 199A" after "chapter 1".

(c) ACCURACY-RELATED PENALTY ON DETERMINATION OF APPLICABLE PERCENTAGE.—Section 6662(d)(1) is amended by inserting at the end the following new subparagraph:

"(C) SPECIAL RULE FOR TAXPAYERS CLAIMING SECTION 199A DEDUCTION.—In the case of any taxpayer who claims the deduction allowed under section 199A for the taxable year, subparagraph (A) shall be applied by substituting '5 percent' for '10 percent'.".

(d) CONFORMING AMENDMENTS.—

(1) Section 172(d) is amended by adding at the end the following new paragraph:

"(8) QUALIFIED BUSINESS INCOME DEDUCTION.—The deduction under section 199A shall not be allowed.".

(2) Section 246(b)(1) is amended by inserting "199A," before "243(a)(1)".

(3) Section 613(a) is amended by inserting "and without the deduction under section 199A" after "and without the deduction under section 199".

(4) Section 613A(d)(1) is amended by redesignating subparagraphs (C), (D), and (E) as subparagraphs (D), (E), and (F), respectively, and by inserting after subparagraph (B), the following new subparagraph:

"(C) any deduction allowable under section 199A,".

(5) Section 170(b)(2)(D) is amended by striking "and" in clause (iv), by striking the period at the end of clause (v), and by adding at the end the following new clause:

"(vi) section 199A(g).".

(6) The table of sections for part VI of subchapter B of chapter 1 is amended by inserting at the end the following new item:

"Sec. 199A. Qualified business income.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 11012. LIMITATION ON LOSSES FOR TAXPAYERS OTHER THAN CORPORATIONS.

(a) IN GENERAL.—Section 461 is amended by adding at the end the following new subsection:

"(l) LIMITATION ON EXCESS BUSINESS LOSSES OF NONCORPORATE TAXPAYERS.—

"(1) LIMITATION.—In the case of taxable year of a taxpayer other than a corporation beginning after December 31, 2017, and before January 1, 2026—

"(A) subsection (j) (relating to limitation on excess farm losses of certain taxpayers) shall not apply, and

"(B) any excess business loss of the taxpayer for the taxable year shall not be allowed.

"(2) DISALLOWED LOSS CARRYOVER.—Any loss which is disallowed under paragraph (1) shall be treated as a net operating loss carryover to the following taxable year under section 172.

"(3) EXCESS BUSINESS LOSS.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'excess business loss' means the excess (if any) of—

"(i) the aggregate deductions of the taxpayer for the taxable year which are attributable to trades or businesses of such taxpayer (determined without regard to

whether or not such deductions are disallowed for such taxable year under paragraph (1)), over

"(ii) the sum of—

"(I) the aggregate gross income or gain of such taxpayer for the taxable year which is attributable to such trades or businesses, plus

"(II) $250,000 (200 percent of such amount in the case of a joint return).

"(B) ADJUSTMENT FOR INFLATION.—In the case of any taxable year beginning after December 31, 2018, the $250,000 amount in subparagraph (A)(ii)(II) shall be increased by an amount equal to—

"(i) such dollar amount, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting '2017' for '2016' in subparagraph (A)(ii) thereof.

If any amount as increased under the preceding sentence is not a multiple of $1,000,

such amount shall be rounded to the nearest multiple of $1,000.

"(4) APPLICATION OF SUBSECTION IN CASE OF PARTNERSHIPS AND S CORPORATIONS.—In the case of a partnership or S corporation—

"(A) this subsection shall be applied at the partner or shareholder level, and

"(B) each partner's or shareholder's allocable share of the items of income, gain, deduction, or loss of the partnership or S corporation for any taxable year from trades or businesses attributable to the partnership or S corporation shall be taken into account by the partner or shareholder in applying this subsection to the taxable year of such partner or shareholder with or within which the taxable year of the partnership or S corporation ends.

For purposes of this paragraph, in the case of an S corporation, an allocable share shall be the shareholder's pro rata share of an item.

"(5) ADDITIONAL REPORTING.—The Secretary shall prescribe such additional reporting requirements as the Secretary determines necessary to carry out the purposes of this subsection.

"(6) COORDINATION WITH SECTION 469.—This subsection shall be applied after the application of section 469.".

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

PART III—TAX BENEFITS FOR FAMILIES AND INDIVIDUALS

SEC. 11021. INCREASE IN STANDARD DEDUCTION.

(a) IN GENERAL.—Subsection (c) of section 63 is amended by adding at the end the following new paragraph:

"(7) SPECIAL RULES FOR TAXABLE YEARS 2018 THROUGH 2025.—In the case of a taxable year beginning after December 31, 2017, and before January 1, 2026—

"(A) INCREASE IN STANDARD DEDUCTION.—Paragraph (2) shall be applied—

"(i) by substituting '$18,000' for '$4,400' in subparagraph (B), and

"(ii) by substituting '$12,000' for '$3,000' in subparagraph (C).

"(B) ADJUSTMENT FOR INFLATION.—

"(i) IN GENERAL.—Paragraph (4) shall not apply to the dollar amounts contained in paragraphs (2)(B) and (2)(C).

"(ii) ADJUSTMENT OF INCREASED AMOUNTS.—In the case of a taxable year beginning after 2018, the $18,000 and $12,000 amounts in subparagraph (A) shall each be increased by an amount equal to—

"(I) such dollar amount, multiplied by

"(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting '2017' for '2016' in subparagraph (A)(ii) thereof.

If any increase under this clause is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.".

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

SEC. 11022. INCREASE IN AND MODIFICATION OF CHILD TAX CREDIT.

(a) IN GENERAL.—Section 24 is amended by adding at the end the following new subsection:

"(h) SPECIAL RULES FOR TAXABLE YEARS 2018 THROUGH 2025.—

"(1) IN GENERAL.—In the case of a taxable year beginning after December 31, 2017, and before January 1, 2026, this section shall be applied as provided in paragraphs (2) through (7).

"(2) CREDIT AMOUNT.—Subsection (a) shall be applied by substituting '$2,000' for '$1,000'.

"(3) LIMITATION.—In lieu of the amount determined under subsection (b)(2), the threshold amount shall be $400,000 in the case of a joint return ($200,000 in any other case).

"(4) PARTIAL CREDIT ALLOWED FOR CERTAIN OTHER DEPENDENTS.—

"(A) IN GENERAL.—The credit determined under subsection (a) (after the application of paragraph (2)) shall be increased by $500 for each dependent of the taxpayer (as defined in section 152) other than a qualifying child described in subsection (c).

"(B) EXCEPTION FOR CERTAIN NONCITIZENS.—Subparagraph (A) shall not apply with respect to any individual who would not be a dependent if subparagraph (A) of section 152(b)(3)

were applied without regard to all that follows 'resident of the United States'.

"(C) CERTAIN QUALIFYING CHILDREN.—In the case of any qualifying child with respect to whom a credit is not allowed under this section by reason of paragraph (7), such child shall be treated as a dependent to whom subparagraph (A) applies.

"(5) MAXIMUM AMOUNT OF REFUNDABLE CREDIT.—

"(A) IN GENERAL.—The amount determined under subsection (d)(1)(A) with respect to any qualifying child shall not exceed $1,400, and such subsection shall be applied without regard to paragraph (4) of this subsection.

"(B) ADJUSTMENT FOR INFLATION.—In the case of a taxable year beginning after 2018, the $1,400 amount in subparagraph (A) shall be increased by an amount equal to—

"(i) such dollar amount, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting '2017' for '2016' in subparagraph (A)(ii) thereof.

If any increase under this clause is not a multiple of $100, such increase shall be rounded to the next lowest multiple of $100.

"(6) EARNED INCOME THRESHOLD FOR REFUNDABLE CREDIT.—Subsection (d)(1)(B)(i) shall be applied by substituting '$2,500' for '$3,000'.

"(7) SOCIAL SECURITY NUMBER REQUIRED.—No credit shall be allowed under this section to a taxpayer with respect to any qualifying child unless the taxpayer includes the social security number of such child on the return of tax for the taxable year. For purposes of the preceding sentence, the term 'social security number' means a social security number issued to an individual by the Social Security Administration, but only if the social security number is issued—

"(A) to a citizen of the United States or pursuant to subclause (I) (or that portion of subclause (III) that relates to subclause (I)) of section 205(c)(2)(B)(i) of the Social Security Act, and

"(B) before the due date for such return.".

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

SEC. 11023. INCREASED LIMITATION FOR CERTAIN CHARITABLE CONTRIBUTIONS.

(a) IN GENERAL.—Section 170(b)(1) is amended by redesignating subparagraph (G) as subparagraph (H) and by inserting after subparagraph (F) the following new subparagraph:

"(G) INCREASED LIMITATION FOR CASH CONTRIBUTIONS.—

"(i) IN GENERAL.—In the case of any contribution of cash to an organization described in subparagraph (A), the total amount of such contributions which may be taken into account under subsection (a) for any taxable year beginning after December 31, 2017, and before January 1, 2026, shall not exceed 60 percent of the taxpayer's contribution base for such year.

"(ii) CARRYOVER.—If the aggregate amount of contributions described in clause (i) exceeds the applicable limitation under clause (i) for any taxable year described in such clause, such excess shall be treated (in a manner consistent with the rules of subsection (d)(1)) as a charitable contribution to which clause (i) applies in each of the 5 succeeding years in order of time.

"(iii) COORDINATION WITH SUBPARAGRAPHS (A) AND (B).—

"(I) IN GENERAL.—Contributions taken into account under this subparagraph shall not be taken into account under subparagraph (A).

"(II) LIMITATION REDUCTION.—For each taxable year described in clause (i), and each taxable year to which any contribution under this subparagraph is carried over under clause (ii), subparagraph (A) shall be applied by reducing (but not below zero) the contribution limitation allowed for the taxable year under such subparagraph by the aggregate contributions allowed under this subparagraph for such taxable year, and subparagraph (B) shall be applied by treating any reference to subparagraph (A) as a reference to both subparagraph (A) and this subparagraph.".

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

SEC. 11024. INCREASED CONTRIBUTIONS TO ABLE ACCOUNTS.

(a) INCREASE IN LIMITATION FOR CONTRIBUTIONS FROM COMPENSATION OF INDIVIDUALS WITH DISABILITIES.—

(1) IN GENERAL.—Section 529A(b)(2)(B) is amended to read as follows:

"(B) except in the case of contributions under subsection (c)(1)(C), if such contribution to an ABLE account would result in aggregate contributions from all contributors to the ABLE account for the taxable year exceeding the sum of—

"(i) the amount in effect under section 2503(b) for the calendar year in which the taxable year begins, plus

"(ii) in the case of any contribution by a designated beneficiary described in paragraph (7) before January 1, 2026, the lesser of—

"(I) compensation (as defined by section 219(f)(1)) includible in the designated beneficiary's gross income for the taxable year, or

"(II) an amount equal to the poverty line for a one-person household, as

determined for the calendar year preceding the calendar year in which the taxable year begins.".

(2) RESPONSIBILITY FOR CONTRIBUTION LIMITATION.—Paragraph (2) of section 529A(b) is amended by adding at the end the following: "A designated beneficiary (or a person acting on behalf of such beneficiary) shall maintain adequate records for purposes of ensuring, and shall be responsible for ensuring, that the requirements of subparagraph (B)(ii) are met."

(3) ELIGIBLE DESIGNATED BENEFICIARY.—Section 529A(b) is amended by adding at the end the following:

"(7) SPECIAL RULES RELATED TO CONTRIBUTION LIMIT.—For purposes of paragraph (2)(B)(ii)—

"(A) DESIGNATED BENEFICIARY.—A designated beneficiary described in this paragraph is an employee (including an employee within the meaning of section 401(c)) with respect to whom—

"(i) no contribution is made for the taxable year to a defined contribution plan (within the meaning of section 414(i)) with

respect to which the requirements of section 401(a) or 403(a) are met,

"(ii) no contribution is made for the taxable year to an annuity contract described in section 403(b), and

"(iii) no contribution is made for the taxable year to an eligible deferred compensation plan described in section 457(b).

"(B) POVERTY LINE.—The term 'poverty line' has the meaning given such term by section 673 of the Community Services Block Grant Act (42 U.S.C. 9902).".

(b) ALLOWANCE OF SAVER'S CREDIT FOR ABLE CONTRIBUTIONS BY ACCOUNT HOLDER.—Section 25B(d)(1) is amended by striking "and" at the end of subparagraph (B)(ii), by striking the period at the end of subparagraph (C) and inserting ", and", and by inserting at the end the following:

"(D) the amount of contributions made before January 1, 2026, by such individual to the ABLE account (within the meaning of section 529A) of which such individual is the designated beneficiary.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

SEC. 11025. ROLLOVERS TO ABLE PROGRAMS FROM 529 PROGRAMS.

(a) IN GENERAL.—Clause (i) of section 529(c)(3)(C) is amended by striking "or" at the end of subclause (I), by striking the period at the end of subclause (II) and inserting ", or", and by adding at the end the following:

> *"(III) before January 1, 2026, to an ABLE account (as defined in section 529A(e)(6)) of the designated beneficiary or a member of the family of the designated beneficiary.*
>
> *Subclause (III) shall not apply to so much of a distribution which, when added to all other contributions made to the ABLE account for the taxable year, exceeds the limitation under section 529A(b)(2)(B)(i).".*

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions after the date of the enactment of this Act.

SEC. 11026. TREATMENT OF CERTAIN INDIVIDUALS PERFORMING SERVICES IN THE SINAI PENINSULA OF EGYPT.

(a) IN GENERAL.—For purposes of the following provisions of the Internal Revenue Code of 1986, with respect to the applicable period, a qualified hazardous duty area shall be treated in the same manner as if it were a combat zone (as determined under section 112 of such Code):

(1) Section 2(a)(3) (relating to special rule where deceased spouse was in missing status).

(2) Section 112 (relating to the exclusion of certain combat pay of members of the Armed Forces).

(3) Section 692 (relating to income taxes of members of Armed Forces on death).

(4) Section 2201 (relating to members of the Armed Forces dying in combat zone or by reason of combat-zone-incurred wounds, etc.).

(5) Section 3401(a)(1) (defining wages relating to combat pay for members of the Armed Forces).

(6) Section 4253(d) (relating to the taxation of phone service originating from a combat zone from members of the Armed Forces).

(7) Section 6013(f)(1) (relating to joint return where individual is in missing status).

(8) Section 7508 (relating to time for performing certain acts postponed by reason of service in combat zone).

(b) QUALIFIED HAZARDOUS DUTY AREA.—For purposes of this section, the term "qualified hazardous duty area" means the Sinai Peninsula of Egypt, if as of the date of the enactment of this section any member of the Armed Forces of the United States is entitled to special pay under section 310 of title 37, United States Code (relating to special pay; duty subject to hostile fire or imminent danger), for services performed in such location. Such term includes such location only during the period such entitlement is in effect.

(c) APPLICABLE PERIOD.—

(1) IN GENERAL.—Except as provided in paragraph (2), the applicable period is—

(A) the portion of the first taxable year ending after June 9, 2015, which begins on such date, and

(B) any subsequent taxable year beginning before January 1, 2026.

(2) WITHHOLDING.—In the case of subsection (a)(5), the applicable period is—

(A) the portion of the first taxable year ending after the date of the enactment of this Act which begins on such date, and

(B) any subsequent taxable year beginning before January 1, 2026.

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the provisions of this section shall take effect on June 9, 2015.

(2) WITHHOLDING.—Subsection (a)(5) shall apply to remuneration paid after the date of the enactment of this Act.

SEC. 11027. TEMPORARY REDUCTION IN MEDICAL EXPENSE DEDUCTION FLOOR.

(a) IN GENERAL.—Subsection (f) of section 213 is amended to read as follows:

"(f) SPECIAL RULES FOR 2013 THROUGH 2018.—In the case of any taxable year—

"(1) beginning after December 31, 2012, and ending before January 1, 2017, in the case of a taxpayer if such taxpayer or such taxpayer's spouse has attained age 65 before the close of such taxable year, and

"(2) beginning after December 31, 2016, and ending before January 1, 2019, in the case of any taxpayer,

subsection (a) shall be applied with respect to a taxpayer by substituting '7.5 percent' for '10 percent'.".

(b) MINIMUM TAX PREFERENCE NOT TO APPLY.—Section 56(b)(1)(B) is amended by adding at the end the following new sentence:"This subparagraph shall not apply to taxable years beginning after December 31, 2016, and ending before January 1, 2019".

(c) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2016.

SEC. 11028. RELIEF FOR 2016 DISASTER AREAS.

(a) IN GENERAL.—For purposes of this section, the term "2016 disaster area" means any area with respect to which a major disaster has been declared by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act during calendar year 2016.

(b) SPECIAL RULES FOR USE OF RETIREMENT FUNDS WITH RESPECT TO AREAS DAMAGED BY 2016 DISASTERS.—

(1) TAX-FAVORED WITHDRAWALS FROM RETIREMENT PLANS.—

(A) IN GENERAL.—Section 72(t) of the Internal Revenue Code of 1986 shall not apply to any qualified 2016 disaster distribution.

(B) AGGREGATE DOLLAR LIMITATION.—

(i) IN GENERAL.—For purposes of this subsection, the aggregate amount of distributions received by an individual which may be treated as qualified 2016 disaster distributions for any taxable year shall not exceed the excess (if any) of—

(I) $100,000, over

(II) the aggregate amounts treated as qualified 2016 disaster distributions received by such individual for all prior taxable years.

(ii) TREATMENT OF PLAN DISTRIBUTIONS.—If a distribution to an individual would (without regard to clause (i)) be a qualified 2016 disaster distribution, a plan shall not be treated as violating any requirement of this title merely because the plan treats such distribution as a qualified 2016 disaster distribution, unless the aggregate amount of such distributions from all plans maintained by the employer (and any

member of any controlled group which includes the employer) to such individual exceeds $100,000.

(iii) CONTROLLED GROUP.—For purposes of clause (ii), the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m), or (o) of section 414 of the Internal Revenue Code of 1986.

(C) AMOUNT DISTRIBUTED MAY BE REPAID.—

(i) IN GENERAL.—Any individual who receives a qualified 2016 disaster distribution may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make one or more contributions in an aggregate amount not to exceed the amount of such distribution to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16) of the Internal Revenue Code of 1986, as the case may be.

(ii) TREATMENT OF REPAYMENTS OF DISTRIBUTIONS FROM ELIGIBLE RETIREMENT PLANS OTHER THAN IRAS.—For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to clause (i) with respect to a qualified 2016 disaster distribution from an eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received the qualified 2016 disaster distribution in an eligible rollover distribution (as defined in section 402(c)(4) of the Internal Revenue Code of 1986) and as having transferred the amount to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(iii) TREATMENT OF REPAYMENTS FOR DISTRIBUTIONS FROM IRAS.—For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to clause (i) with respect to a qualified 2016 disaster distribution from an individual retirement plan (as defined by section 7701(a)(37) of

the Internal Revenue Code of 1986), then, to the extent of the amount of the contribution, the qualified 2016 disaster distribution shall be treated as a distribution described in section 408(d)(3) of such Code and as having been transferred to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.

(D) DEFINITIONS.—For purposes of this paragraph—

(i) QUALIFIED 2016 DISASTER DISTRIBUTION.—Except as provided in subparagraph (B), the term "qualified 2016 disaster distribution" means any distribution from an eligible retirement plan made on or after January 1, 2016, and before January 1, 2018, to an individual whose principal place of abode at any time during calendar year 2016 was located in a disaster area described in subsection (a) and who has sustained an economic loss by reason of the events giving rise to the Presidential declaration described in subsection (a) which was applicable to such area.

(ii) ELIGIBLE RETIREMENT PLAN.—The term "eligible retirement plan" shall have the meaning given such term by section 402(c)(8)(B) of the Internal Revenue Code of 1986.

(E) INCOME INCLUSION SPREAD OVER 3-YEAR PERIOD.—

(i) IN GENERAL.—In the case of any qualified 2016 disaster distribution, unless the taxpayer elects not to have this subparagraph apply for any taxable year, any amount required to be included in gross income for such taxable year shall be so included ratably over the 3-taxable-year period beginning with such taxable year.

(ii) SPECIAL RULE.—For purposes of clause (i), rules similar to the rules of subparagraph (E) of section 408A(d)(3) of the Internal Revenue Code of 1986 shall apply.

(F) SPECIAL RULES.—

(i) EXEMPTION OF DISTRIBUTIONS FROM TRUSTEE TO TRUSTEE TRANSFER AND WITHHOLDING RULES.—For purposes of sections 401(a)(31), 402(f), and 3405 of the Internal Revenue Code of 1986, qualified

2016 disaster distribution shall not be treated as eligible rollover distributions.

(ii) QUALIFIED 2016 DISASTER DISTRIBUTIONS TREATED AS MEETING PLAN DISTRIBUTION REQUIREMENTS.—For purposes of the Internal Revenue Code of 1986, a qualified 2016 disaster distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(ii), 403(b)(11), and 457(d)(1)(A) of the Internal Revenue Code of 1986.

(2) PROVISIONS RELATING TO PLAN AMENDMENTS.—

(A) IN GENERAL.—If this paragraph applies to any amendment to any plan or annuity contract, such plan or contract shall be treated as being operated in accordance with the terms of the plan during the period described in subparagraph (B)(ii)(I).

(B) AMENDMENTS TO WHICH SUBSECTION APPLIES.—

(i) IN GENERAL.—This paragraph shall apply to any amendment to any plan or annuity contract which is made—

(I) pursuant to any provision of this section, or pursuant to any regulation under any provision of this section, and

(II) on or before the last day of the first plan year beginning on or after January 1, 2018, or such later date as the Secretary prescribes.

In the case of a governmental plan (as defined in section 414(d) of the Internal Revenue Code of 1986), subclause (II) shall be applied by substituting the date which is 2 years after the date otherwise applied under subclause (II).

(ii) CONDITIONS.—This paragraph shall not apply to any amendment to a plan or contract unless such amendment applies retroactively for such period, and shall not apply to any such amendment unless the plan or contract is operated as if such amendment were in effect during the period—

(I) beginning on the date that this section or the regulation described in clause (i)(I) takes effect (or in the case

of a plan or contract amendment not required by this section or such regulation, the effective date specified by the plan), and

(II) ending on the date described in clause (i)(II) (or, if earlier, the date the plan or contract amendment is adopted).

(c) SPECIAL RULES FOR PERSONAL CASUALTY LOSSES RELATED TO 2016 MAJOR DISASTER.—

(1) IN GENERAL.—If an individual has a net disaster loss for any taxable year beginning after December 31, 2015, and before January 1, 2018—

(A) the amount determined under section 165(h)(2)(A)(ii) of the Internal Revenue Code of 1986 shall be equal to the sum of—

(i) such net disaster loss, and

(ii) so much of the excess referred to in the matter preceding clause (i) of section 165(h)(2)(A) of such Code (reduced by the amount in clause (i) of this subparagraph) as exceeds 10 percent of the adjusted gross income of the individual,

(B) section 165(h)(1) of such Code shall be applied by substituting "$500" for "$500 ($100

for taxable years beginning after December 31, 2009)",

(C) the standard deduction determined under section 63(c) of such Code shall be increased by the net disaster loss, and

(D) section 56(b)(1)(E) of such Code shall not apply to so much of the standard deduction as is attributable to the increase under subparagraph (C) of this paragraph.

(2) NET DISASTER LOSS.—For purposes of this subsection, the term "net disaster loss" means the excess of qualified disaster-related personal casualty losses over personal casualty gains (as defined in section 165(h)(3)(A) of the Internal Revenue Code of 1986).

(3) QUALIFIED DISASTER-RELATED PERSONAL CASUALTY LOSSES.—For purposes of this paragraph, the term "qualified disaster-related personal casualty losses" means losses described in section 165(c)(3) of the Internal Revenue Code of 1986 which arise in a disaster area described in subsection (a) on or after January 1, 2016, and which are attributable to the events giving rise to the Presidential declaration described in subsection (a) which was applicable to such area.

PART IV—EDUCATION

SEC. 11031. TREATMENT OF STUDENT LOANS DISCHARGED ON ACCOUNT OF DEATH OR DISABILITY.

(a) IN GENERAL.—Section 108(f) is amended by adding at the end the following new paragraph:

"(5) DISCHARGES ON ACCOUNT OF DEATH OR DISABILITY.—

"(A) IN GENERAL.—In the case of an individual, gross income does not include any amount which (but for this subsection) would be includible in gross income for such taxable year by reasons of the discharge (in whole or in part) of any loan described in subparagraph (B) after December 31, 2017, and before January 1, 2026, if such discharge was—

"(i) pursuant to subsection (a) or (d) of section 437 of the Higher Education Act of 1965 or the parallel benefit under part D of title IV of such Act (relating to the repayment of loan liability),

"(ii) pursuant to section 464(c)(1)(F) of such Act, or

"(iii) otherwise discharged on account of the death or total and permanent disability of the student.

"(B) LOANS DESCRIBED.—A loan is described in this subparagraph if such loan is—

"(i) a student loan (as defined in paragraph (2)), or

"(ii) a private education loan (as defined in section 140(7) of the Consumer Credit Protection Act (15 U.S.C. 1650(7))).".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to discharges of indebtedness after December 31, 2017.

SEC. 11032. 529 ACCOUNT FUNDING FOR ELEMENTARY AND SECONDARY EDUCATION.

(a) IN GENERAL.—

(1) IN GENERAL.—Section 529(c) is amended by adding at the end the following new paragraph:

"(7) TREATMENT OF ELEMENTARY AND SECONDARY TUITION.—Any reference in this subsection to the term 'qualified higher education expense' shall include a reference to expenses for tuition in connection with enrollment or attendance at an elementary or secondary public, private, or religious school.".

(2) LIMITATION.—Section 529(e)(3)(A) is amended by adding at the end the following: "The amount of cash distributions from all qualified tui-

tion programs described in subsection (b)(1)(A)(ii) with respect to a beneficiary during any taxable year shall, in the aggregate, include not more than $10,000 in expenses described in subsection (c)(7) incurred during the taxable year.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions made after December 31, 2017.

PART V—DEDUCTIONS AND EXCLUSIONS

SEC. 11041. SUSPENSION OF DEDUCTION FOR PERSONAL EXEMPTIONS.

(a) IN GENERAL.—Subsection (d) of section 151 is amended—

(1) by striking "In the case of" in paragraph (4) and inserting "Except as provided in paragraph (5), in the case of", and

(2) by adding at the end the following new paragraph:

"(5) SPECIAL RULES FOR TAXABLE YEARS 2018 THROUGH 2025.—In the case of a taxable year beginning after December 31, 2017, and before January 1, 2026—

"(A) EXEMPTION AMOUNT.—The term 'exemption amount' means zero.

"(B) REFERENCES.—For purposes of any other provision of this title, the reduction of the exemption amount to zero under subparagraph (A) shall not be taken into account in determining whether a deduction is allowed or allowable, or whether a taxpayer is entitled to a deduction, under this section.".

(b) APPLICATION TO ESTATES AND TRUSTS.—Section 642(b)(2)(C) is amended by adding at the end the following new clause:

"(iii) YEARS WHEN PERSONAL EXEMPTION AMOUNT IS ZERO.—

"(I) IN GENERAL.—In the case of any taxable year in which the exemption amount under section 151(d) is zero, clause (i) shall be applied by substituting '$4,150' for 'the exemption amount under section 151(d)'.

"(II) INFLATION ADJUSTMENT.—In the case of any taxable year beginning in a calendar year after 2018, the $4,150 amount in subparagraph (A) shall be increased in the same manner as provided in section 6334(d)(4)(C).".

(c) MODIFICATION OF WAGE WITHHOLDING RULES.—

(1) IN GENERAL.—Section 3402(a)(2) is amended by striking "means the amount" and all that follows and inserting "means the amount by which the wages exceed the taxpayer's withholding allowance, prorated to the payroll period.".

(2) CONFORMING AMENDMENTS.—

(A) Section 3401 is amended by striking subsection (e).

(B) Paragraphs (1) and (2) of section 3402(f) are amended to read as follows:

"(1) IN GENERAL.—Under rules determined by the Secretary, an employee receiving wages shall on any day be entitled to a withholding allowance determined based on—

"(A) whether the employee is an individual for whom a deduction is allowable with respect to another taxpayer under section 151;

"(B) if the employee is married, whether the employee's spouse is entitled to an allowance, or would be so entitled if such spouse were an employee receiving wages, under subparagraph (A) or (D), but only if such spouse does not have in effect a withholding allowance certificate claiming such allowance;

"(C) the number of individuals with respect to whom, on the basis of facts existing at the beginning of such day, there may reasonably be expected to be allowable a credit under section 24(a) for the taxable year under subtitle A in respect of which amounts deducted and withheld under this chapter in the calendar year in which such day falls are allowed as a credit;

"(D) any additional amounts to which the employee elects to take into account under subsection (m), but only if the employee's spouse does not have in effect a withholding allowance certificate making such an election;

"(E) the standard deduction allowable to such employee (one-half of such standard deduction in the case of an employee who is married (as determined under section 7703) and whose spouse is an employee receiving wages subject to withholding); and

"(F) whether the employee has withholding allowance certificates in effect with respect to more than 1 employer.

"(2) ALLOWANCE CERTIFICATES.—

"(A) ON COMMENCEMENT OF EMPLOYMENT.—On or before the date of the commence-

ment of employment with an employer, the employee shall furnish the employer with a signed withholding allowance certificate relating to the withholding allowance claimed by the employee, which shall in no event exceed the amount to which the employee is entitled.

"(B) CHANGE OF STATUS.—If, on any day during the calendar year, an employee's withholding allowance is in excess of the withholding allowance to which the employee would be entitled had the employee submitted a true and accurate withholding allowance certificate to the employer on that day, the employee shall within 10 days thereafter furnish the employer with a new withholding allowance certificate. If, on any day during the calendar year, an employee's withholding allowance is greater than the withholding allowance claimed, the employee may furnish the employer with a new withholding allowance certificate relating to the withholding allowance to which the employee is so entitled, which shall in no event exceed the amount to which the employee is entitled on such day.

"(C) CHANGE OF STATUS WHICH AFFECTS NEXT CALENDAR YEAR.—If on any day during

the calendar year the withholding allowance to which the employee will be, or may reasonably be expected to be, entitled at the beginning of the employee's next taxable year under subtitle A is different from the allowance to which the employee is entitled on such day, the employee shall, in such cases and at such times as the Secretary shall by regulations prescribe, furnish the employer with a withholding allowance certificate relating to the withholding allowance which the employee claims with respect to such next taxable year, which shall in no event exceed the withholding allowance to which the employee will be, or may reasonably be expected to be, so entitled.".

(C) Subsections (b)(1), (b)(2), (f)(3), (f)(4), (f)(5), (f)(7) (including the heading thereof), (g)(4), (l)(1), (l)(2), and (n) of section 3402 are each amended by striking "exemption" each place it appears and inserting "allowance".

(D) The heading of section 3402(f) is amended by striking "EXEMPTIONS" and inserting "ALLOWANCE".

(E) Section 3402(m) is amended by striking "additional withholding allowances or addi-

tional reductions in withholding under this subsection. In determining the number of additional withholding allowances" and inserting "an additional withholding allowance or additional reductions in withholding under this subsection. In determining the additional withholding allowance".

(F) Paragraphs (3) and (4) of section 3405(a) (and the heading for such paragraph (4)) are each amended by striking "exemption" each place it appears and inserting "allowance".

(G) Section 3405(a)(4) is amended by striking "shall be determined" and all that follows through "3 withholding exemptions" and inserting "shall be determined under rules prescribed by the Secretary".

(d) EXCEPTION FOR DETERMINING PROPERTY EXEMPT FROM LEVY.—Section 6334(d) is amended by adding at the end the following new paragraph:

"(4) YEARS WHEN PERSONAL EXEMPTION AMOUNT IS ZERO.—

"(A) IN GENERAL.—In the case of any taxable year in which the exemption amount under section 151(d) is zero, paragraph (2) shall not apply and for purposes of paragraph (1) the

term 'exempt amount' means an amount equal to—

"(i) the sum of the amount determined under subparagraph (B) and the standard deduction, divided by

"(ii) 52.

"(B) AMOUNT DETERMINED.—For purposes of subparagraph (A), the amount determined under this subparagraph is $4,150 multiplied by the number of the taxpayer's dependents for the taxable year in which the levy occurs.

"(C) INFLATION ADJUSTMENT.—In the case of any taxable year beginning in a calendar year after 2018, the $4,150 amount in subparagraph (B) shall be increased by an amount equal to—

"(i) such dollar amount, multiplied by

"(ii) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting '2017' for '2016' in subparagraph (A)(ii) thereof.

If any increase determined under the preceding sentence is not a multiple of $100, such increase shall be rounded to the next lowest multiple of $100.

"(D) VERIFIED STATEMENT.—Unless the taxpayer submits to the Secretary a written and properly verified statement specifying the facts necessary to determine the proper amount under subparagraph (A), subparagraph (A) shall be applied as if the taxpayer were a married individual filing a separate return with no dependents.".

(e) PERSONS REQUIRED TO MAKE RETURNS OF INCOME.—Section 6012 is amended by adding at the end the following new subsection:

"(f) SPECIAL RULE FOR TAXABLE YEARS 2018 THROUGH 2025.—In the case of a taxable year beginning after December 31, 2017, and before January 1, 2026, subsection (a)(1) shall not apply, and every individual who has gross income for the taxable year shall be required to make returns with respect to income taxes under subtitle A, except that a return shall not be required of—

"(1) an individual who is not married (determined by applying section 7703) and who has gross income for the taxable year which does not exceed the standard deduction applicable to such individual for such taxable year under section 63, or

"(2) an individual entitled to make a joint return if—

"(A) the gross income of such individual, when combined with the gross income of such individual's spouse, for the taxable year does not exceed the standard deduction which would be applicable to the taxpayer for such taxable year under section 63 if such individual and such individual's spouse made a joint return,

"(B) such individual and such individual's spouse have the same household as their home at the close of the taxable year,

"(C) such individual's spouse does not make a separate return, and

"(D) neither such individual nor such individual's spouse is an individual described in section 63(c)(5) who has income (other than earned income) in excess of the amount in effect under section 63(c)(5)(A).".

(f) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(2) WAGE WITHHOLDING.—The Secretary of the Treasury may administer section 3402 for taxable years beginning before January 1, 2019, without re-

gard to the amendments made by subsections (a) and (c).

SEC. 11042. LIMITATION ON DEDUCTION FOR STATE AND LOCAL, ETC. TAXES.

(a) IN GENERAL.—Subsection (b) of section 164 is amended by adding at the end the following new paragraph:

"(6) LIMITATION ON INDIVIDUAL DEDUCTIONS FOR TAXABLE YEARS 2018 THROUGH 2025.—In the case of an individual and a taxable year beginning after December 31, 2017, and before January 1, 2026—

"(A) foreign real property taxes shall not be taken into account under subsection (a)(1), and

"(B) the aggregate amount of taxes taken into account under paragraphs (1), (2), and (3) of subsection (a) and paragraph (5) of this subsection for any taxable year shall not exceed $10,000 ($5,000 in the case of a married individual filing a separate return).

The preceding sentence shall not apply to any foreign taxes described in subsection (a)(3) or to any taxes described in paragraph (1) and (2) of subsection (a) which are paid or accrued in carrying on a trade or business or an activity described in section 212. For purposes of subparagraph (B), an amount paid in a taxable year beginning before January 1, 2018, with

respect to a State or local income tax imposed for a taxable year beginning after December 31, 2017, shall be treated as paid on the last day of the taxable year for which such tax is so imposed.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after December 31, 2016.

SEC. 11043. LIMITATION ON DEDUCTION FOR QUALIFIED RESIDENCE INTEREST.

(a) IN GENERAL.—Section 163(h)(3) is amended by adding at the end the following new subparagraph:

"(F) SPECIAL RULES FOR TAXABLE YEARS 2018 THROUGH 2025.—

"(i) IN GENERAL.—In the case of taxable years beginning after December 31, 2017, and before January 1, 2026—

"(I) DISALLOWANCE OF HOME EQUITY INDEBTEDNESS INTEREST.—Subparagraph (A)(ii) shall not apply.

"(II) LIMITATION ON ACQUISITION INDEBTEDNESS.—Subparagraph (B)(ii) shall be applied by substituting '$750,000 ($375,000' for '$1,000,000 ($500,000'.

"(III) TREATMENT OF INDEBTEDNESS INCURRED ON OR BEFORE DECEMBER 15, 2017.—Subclause (II) shall not apply to any indebtedness incurred on or before December 15, 2017, and, in applying such subclause to any indebtedness incurred after such date, the limitation under such subclause shall be reduced (but not below zero) by the amount of any indebtedness incurred on or before December 15, 2017, which is treated as acquisition indebtedness for purposes of this subsection for the taxable year.

"(IV) BINDING CONTRACT EXCEPTION.—In the case of a taxpayer who enters into a written binding contract before December 15, 2017, to close on the purchase of a principal residence before January 1, 2018, and who purchases such residence before April 1, 2018, subclause (III) shall be applied by substituting 'April 1, 2018' for 'December 15, 2017'.

"(ii) TREATMENT OF LIMITATION IN TAXABLE YEARS AFTER DECEMBER 31, 2025.—In the case of taxable years beginning after December 31, 2025, the limitation under subparagraph (B)(ii) shall be applied to the aggregate amount of indebtedness of the taxpayer described in subparagraph (B)(i) without regard to the taxable year in which the indebtedness was incurred.

"(iii) TREATMENT OF REFINANCINGS OF INDEBTEDNESS.—

"(I) IN GENERAL.—In the case of any indebtedness which is incurred to refinance indebtedness, such refinanced indebtedness shall be treated for purposes of clause (i)(III) as incurred on the date that the original indebtedness was incurred to the extent the amount of the indebtedness resulting from such refinancing does not exceed the amount of the refinanced indebtedness.

"(II) LIMITATION ON PERIOD OF REFINANCING.—Subclause (I) shall not apply to any indebtedness after the ex-

piration of the term of the original indebtedness or, if the principal of such original indebtedness is not amortized over its term, the expiration of the term of the 1st refinancing of such indebtedness (or if earlier, the date which is 30 years after the date of such 1st refinancing).

"(iv) COORDINATION WITH EXCLUSION OF INCOME FROM DISCHARGE OF INDEBTEDNESS.—Section 108(h)(2) shall be applied without regard to this subparagraph.".

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

SEC. 11044. MODIFICATION OF DEDUCTION FOR PERSONAL CASUALTY LOSSES.

(a) IN GENERAL.—Subsection (h) of section 165 is amended by adding at the end the following new paragraph:

"(5) LIMITATION FOR TAXABLE YEARS 2018 THROUGH 2025.—

"(A) IN GENERAL.—In the case of an individual, except as provided in subparagraph (B), any personal casualty loss which (but for this

paragraph) would be deductible in a taxable year beginning after December 31, 2017, and before January 1, 2026, shall be allowed as a deduction under subsection (a) only to the extent it is attributable to a Federally declared disaster (as defined in subsection (i)(5)).

"(B) EXCEPTION RELATED TO PERSONAL CASUALTY GAINS.—If a taxpayer has personal casualty gains for any taxable year to which subparagraph (A) applies—

"(i) subparagraph (A) shall not apply to the portion of the personal casualty loss not attributable to a Federally declared disaster (as so defined) to the extent such loss does not exceed such gains, and

"(ii) in applying paragraph (2) for purposes of subparagraph (A) to the portion of personal casualty loss which is so attributable to such a disaster, the amount of personal casualty gains taken into account under paragraph (2)(A) shall be reduced by the portion of such gains taken into account under clause (i).".

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

SEC. 11045. SUSPENSION OF MISCELLANEOUS ITEMIZED DEDUCTIONS.

(a) IN GENERAL.—Section 67 is amended by adding at the end the following new subsection:

"(g) SUSPENSION FOR TAXABLE YEARS 2018 THROUGH 2025.—Notwithstanding subsection (a), no miscellaneous itemized deduction shall be allowed for any taxable year beginning after December 31, 2017, and before January 1, 2026.".

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

SEC. 11046. SUSPENSION OF OVERALL LIMITATION ON ITEMIZED DEDUCTIONS.

(a) IN GENERAL.—Section 68 is amended by adding at the end the following new subsection:

"(f) SECTION NOT TO APPLY.—This section shall not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.".

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

SEC. 11047. SUSPENSION OF EXCLUSION FOR QUALIFIED BICYCLE COMMUTING REIMBURSEMENT.

(a) IN GENERAL.—Section 132(f) is amended by adding at the end the following new paragraph:

"(8) SUSPENSION OF QUALIFIED BICYCLE COMMUTING REIMBURSEMENT EXCLUSION.—Paragraph (1)(D) shall not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.".

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

SEC. 11048. SUSPENSION OF EXCLUSION FOR QUALIFIED MOVING EXPENSE REIMBURSEMENT.

(a) IN GENERAL.—Section 132(g) is amended—

(1) by striking "For purposes of this section, the term" and inserting "For purposes of this section—

"(1) IN GENERAL.—The term", and

(2) by adding at the end the following new paragraph:

"(2) SUSPENSION FOR TAXABLE YEARS 2018 THROUGH 2025.—Except in the case of a member of the Armed Forces of the United States on active duty who moves pursuant to a military order and incident to a permanent change of station, subsection (a)(6)

shall not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.".

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

SEC. 11049. SUSPENSION OF DEDUCTION FOR MOVING EXPENSES.

(a) IN GENERAL.—Section 217 is amended by adding at the end the following new subsection:

"(k) SUSPENSION OF DEDUCTION FOR TAXABLE YEARS 2018 THROUGH 2025.—Except in the case of an individual to whom subsection (g) applies, this section shall not apply to any taxable year beginning after December 31, 2017, and before January 1, 2026.".

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

SEC. 11050. LIMITATION ON WAGERING LOSSES.

(a) IN GENERAL.—Section 165(d) is amended by adding at the end the following: "For purposes of the preceding sentence, in the case of taxable years beginning after December 31, 2017, and before January 1, 2026, the term 'losses from wagering transactions' includes any deduction otherwise allowable under this chapter incurred in carrying on any wagering transaction.".

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

SEC. 11051. REPEAL OF DEDUCTION FOR ALIMONY PAYMENTS.

(a) IN GENERAL.—Part VII of subchapter B is amended by striking by striking section 215 (and by striking the item relating to such section in the table of sections for such subpart).

(b) CONFORMING AMENDMENTS.—

(1) CORRESPONDING REPEAL OF PROVISIONS PROVIDING FOR INCLUSION OF ALIMONY IN GROSS INCOME.—

(A) Subsection (a) of section 61 is amended by striking paragraph (8) and by redesignating paragraphs (9) through (15) as paragraphs (8) through (14), respectively.

(B) Part II of subchapter B of chapter 1 is amended by striking section 71 (and by striking the item relating to such section in the table of sections for such part).

(C) Subpart F of part I of subchapter J of chapter 1 is amended by striking section 682 (and by striking the item relating to such section in the table of sections for such subpart).

(2) RELATED TO REPEAL OF SECTION 215.—

(A) Section 62(a) is amended by striking paragraph (10).

(B) Section 3402(m)(1) is amended by striking "(other than paragraph (10) thereof)".

(C) Section 6724(d)(3) is amended by striking subparagraph (C) and by redesignating subparagraph (D) as subparagraph (C).

(3) RELATED TO REPEAL OF SECTION 71.—

(A) Section 121(d)(3) is amended—

(i) by striking "(as defined in section 71(b)(2))" in subparagraph (B), and

(ii) by adding at the end the following new subparagraph:

"(C) DIVORCE OR SEPARATION INSTRUMENT.—For purposes of this paragraph, the term 'divorce or separation instrument' means—

"(i) a decree of divorce or separate maintenance or a written instrument incident to such a decree,

"(ii) a written separation agreement, or

"(iii) a decree (not described in clause (i)) requiring a spouse to make payments

for the support or maintenance of the other spouse.".

(B) Section 152(d)(5) is amended to read as follows:

"(5) SPECIAL RULES FOR SUPPORT.—

"(A) IN GENERAL.—For purposes of this subsection—

"(i) payments to a spouse of alimony or separate maintenance payments shall not be treated as a payment by the payor spouse for the support of any dependent, and

"(ii) in the case of the remarriage of a parent, support of a child received from the parent's spouse shall be treated as received from the parent.

"(B) ALIMONY OR SEPARATE MAINTENANCE PAYMENT.—For purposes of subparagraph (A), the term 'alimony or separate maintenance payment' means any payment in cash if—

"(i) such payment is received by (or on behalf of) a spouse under a divorce or separation instrument (as defined in section 121(d)(3)(C)),

"(ii) in the case of an individual legally separated from the individual's spouse under a decree of divorce or of separate maintenance, the payee spouse and the payor spouse are not members of the same household at the time such payment is made, and

"(iii) there is no liability to make any such payment for any period after the death of the payee spouse and there is no liability to make any payment (in cash or property) as a substitute for such payments after the death of the payee spouse.".

(C) Section 219(f)(1) is amended by striking the third sentence.

(D) Section 220(f)(7) is amended by striking "subparagraph (A) of section 71(b)(2)" and inserting "clause (i) of section 121(d)(3)(C)".

(E) Section 223(f)(7) is amended by striking "subparagraph (A) of section 71(b)(2)" and inserting "clause (i) of section 121(d)(3)(C)".

(F) Section 382(l)(3)(B)(iii) is amended by striking "section 71(b)(2)" and inserting "section 121(d)(3)(C)".

(G) Section 408(d)(6) is amended by striking "subparagraph (A) of section 71(b)(2)" and inserting "clause (i) of section 121(d)(3)(C)".

(4) ADDITIONAL CONFORMING AMENDMENTS.—Section 7701(a)(17) is amended—

(A) by striking "sections 682 and 2516" and inserting "section 2516", and

(B) by striking "such sections" each place it appears and inserting "such section".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to—

(1) any divorce or separation instrument (as defined in section 71(b)(2) of the Internal Revenue Code of 1986 as in effect before the date of the enactment of this Act) executed after December 31, 2018, and

(2) any divorce or separation instrument (as so defined) executed on or before such date and modified after such date if the modification expressly provides that the amendments made by this section apply to such modification.

PART VI—INCREASE IN ESTATE AND GIFT TAX EXEMPTION

SEC. 11061. INCREASE IN ESTATE AND GIFT TAX EXEMPTION.

(a) IN GENERAL.—Section 2010(c)(3) is amended by adding at the end the following new subparagraph:

"(C) INCREASE IN BASIC EXCLUSION AMOUNT.—In the case of estates of decedents dying or gifts made after December 31, 2017, and before January 1, 2026, subparagraph (A) shall be applied by substituting '$10,000,000' for '$5,000,000'.".

(b) CONFORMING AMENDMENT.—Subsection (g) of section 2001 is amended to read as follows:

"(g) MODIFICATIONS TO TAX PAYABLE.—

"(1) MODIFICATIONS TO GIFT TAX PAYABLE TO REFLECT DIFFERENT TAX RATES.—For purposes of applying subsection (b)(2) with respect to 1 or more gifts, the rates of tax under subsection (c) in effect at the decedent's death shall, in lieu of the rates of tax in effect at the time of such gifts, be used both to compute—

"(A) the tax imposed by chapter 12 with respect to such gifts, and

"(B) the credit allowed against such tax under section 2505, including in computing—

"(i) the applicable credit amount under section 2505(a)(1), and

"(ii) the sum of the amounts allowed as a credit for all preceding periods under section 2505(a)(2).

"(2) MODIFICATIONS TO ESTATE TAX PAYABLE TO REFLECT DIFFERENT BASIC EXCLUSION AMOUNTS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out this section with respect to any difference between—

"(A) the basic exclusion amount under section 2010(c)(3) applicable at the time of the decedent's death, and

"(B) the basic exclusion amount under such section applicable with respect to any gifts made by the decedent.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to estates of decedents dying and gifts made after December 31, 2017.

PART VII—EXTENSION OF TIME LIMIT FOR CONTESTING IRS LEVY

SEC. 11071. EXTENSION OF TIME LIMIT FOR CONTESTING IRS LEVY.

(a) EXTENSION OF TIME FOR RETURN OF PROPERTY SUBJECT TO LEVY.—Subsection (b) of section 6343 is amended by striking "9 months" and inserting "2 years".

(b) PERIOD OF LIMITATION ON SUITS.—Subsection (c) of section 6532 is amended—

(1) by striking "9 months" in paragraph (1) and inserting "2 years", and

(2) by striking "9-month" in paragraph (2) and inserting "2-year".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to—

(1) levies made after the date of the enactment of this Act, and

(2) levies made on or before such date if the 9-month period has not expired under section 6343(b) of the Internal Revenue Code of 1986 (without regard to this section) as of such date.

PART VIII—INDIVIDUAL MANDATE

SEC. 11081. ELIMINATION OF SHARED RESPONSIBILITY PAYMENT FOR INDIVIDUALS FAILING TO MAINTAIN MINIMUM ESSENTIAL COVERAGE.

(a) IN GENERAL.—Section 5000A(c) is amended—

(1) in paragraph (2)(B)(iii), by striking "2.5 percent" and inserting "Zero percent", and

(2) in paragraph (3)—

(A) by striking "$695" in subparagraph (A) and inserting "$0", and

(B) by striking subparagraph (D).

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to months beginning after December 31, 2018.

Subtitle B—Alternative Minimum Tax

SEC. 12001. REPEAL OF TAX FOR CORPORATIONS.

(a) IN GENERAL.—Section 55(a) is amended by striking "There" and inserting "In the case of a taxpayer other than a corporation, there".

(b) CONFORMING AMENDMENTS.—

(1) Section 38(c)(6) is amended by adding at the end the following new subparagraph:

"(E) CORPORATIONS.—In the case of a corporation, this subsection shall be applied by treating the corporation as having a tentative minimum tax of zero.".

(2) Section 53(d)(2) is amended by inserting ", except that in the case of a corporation, the tentative

minimum tax shall be treated as zero" before the period at the end.

(3)(A) Section 55(b)(1) is amended to read as follows:

"(1) AMOUNT OF TENTATIVE TAX.—

"(A) IN GENERAL.—The tentative minimum tax for the taxable year is the sum of—

"(i) 26 percent of so much of the taxable excess as does not exceed $175,000, plus

"(ii) 28 percent of so much of the taxable excess as exceeds $175,000.

The amount determined under the preceding sentence shall be reduced by the alternative minimum tax foreign tax credit for the taxable year.

"(B) TAXABLE EXCESS.—For purposes of this subsection, the term 'taxable excess' means so much of the alternative minimum taxable income for the taxable year as exceeds the exemption amount.

"(C) MARRIED INDIVIDUAL FILING SEPARATE RETURN.—In the case of a married individual filing a separate return, subparagraph (A) shall be applied by substituting 50 percent of the dollar amount otherwise applicable under clause (i) and clause (ii) thereof. For purposes of

the preceding sentence, marital status shall be determined under section 7703.".

(B) Section 55(b)(3) is amended by striking "paragraph (1)(A)(i)" and inserting "paragraph (1)(A)".

(C) Section 59(a) is amended—

(i) by striking "subparagraph (A)(i) or (B)(i) of section 55(b)(1) (whichever applies) in lieu of the highest rate of tax specified in section 1 or 11 (whichever applies)" in paragraph (1)(C) and inserting "section 55(b)(1) in lieu of the highest rate of tax specified in section 1", and

(ii) in paragraph (2), by striking "means" and all that follows and inserting "means the amount determined under the first sentence of section 55(b)(1)(A).".

(D) Section 897(a)(2)(A) is amended by striking "section 55(b)(1)(A)" and inserting "section 55(b)(1)".

(E) Section 911(f) is amended—

(i) in paragraph (1)(B)—

(I) by striking "section 55(b)(1)(A)(ii)" and inserting "section 55(b)(1)(B)", and

(II) by striking "section 55(b)(1)(A)(i)" and inserting "section 55(b)(1)(A)", and

(ii) in paragraph (2)(B), by striking "section 55(b)(1)(A)(ii)" each place it appears and inserting "section 55(b)(1)(B)".

(4) Section 55(c)(1) is amended by striking ", the section 936 credit allowable under section 27(b), and the Puerto Rico economic activity credit under section 30A".

(5) Section 55(d), as amended by section 11002, is amended—

(A) by striking paragraph (2) and redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively,

(B) in paragraph (2) (as so redesignated), by inserting "and" at the end of subparagraph (B), by striking ", and" at the end of subparagraph (C) and inserting a period, and by striking subparagraph (D), and

(C) in paragraph (3) (as so redesignated)—

(i) by striking "(b)(1)(A)(i)" in subparagraph (B)(i) and inserting "(b)(1)(A)", and

(ii) by striking "paragraph (3)" in subparagraph (B)(iii) and inserting "paragraph (2)".

(6) Section 55 is amended by striking subsection (e).

(7) Section 56(b)(2) is amended by striking subparagraph (C) and by redesignating subparagraph (D) as subparagraph (C).

(8)(A) Section 56 is amended by striking subsections (c) and (g).

(B) Section 847 is amended by striking the last sentence of paragraph (9).

(C) Section 848 is amended by striking subsection (i).

(9) Section 58(a) is amended by striking paragraph (3) and redesignating paragraph (4) as paragraph (3).

(10) Section 59 is amended by striking subsections (b) and (f).

(11) Section 11(d) is amended by striking "the taxes imposed by subsection (a) and section 55" and inserting "the tax imposed by subsection (a)".

(12) Section 12 is amended by striking paragraph (7).

(13) Section 168(k) is amended by striking paragraph (4).

(14) Section 882(a)(1) is amended by striking ", 55,".

(15) Section 962(a)(1) is amended by striking "sections 11 and 55" and inserting "section 11".

(16) Section 1561(a) is amended—

(A) by inserting "and" at the end of paragraph (1), by striking ", and" at the end of paragraph (2) and inserting a period, and by striking paragraph (3), and

(B) by striking the last sentence.

(17) Section 6425(c)(1)(A) is amended to read as follows:

"(A) the tax imposed by section 11 or 1201(a), or subchapter L of chapter 1, whichever is applicable, over".

(18) Section 6655(e)(2) is amended by striking "and alternative minimum taxable income" each place it appears in subparagraphs (A) and (B)(i).

(19) Section 6655(g)(1)(A) is amended by inserting "plus" at the end of clause (i), by striking clause (ii), and by redesignating clause (iii) as clause (ii).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 12002. CREDIT FOR PRIOR YEAR MINIMUM TAX LIABILITY OF CORPORATIONS.

(a) CREDITS TREATED AS REFUNDABLE.—Section 53 is amended by adding at the end the following new subsection:

"(e) PORTION OF CREDIT TREATED AS REFUNDABLE.—

"(1) IN GENERAL.—In the case of any taxable year of a corporation beginning in 2018, 2019, 2020, or 2021, the limitation under subsection (c) shall be increased by the AMT refundable credit amount for such year.

"(2) AMT REFUNDABLE CREDIT AMOUNT.—For purposes of paragraph (1), the AMT refundable credit amount is an amount equal to 50 percent (100 percent in the case of a taxable year beginning in 2021) of the excess (if any) of—

"(A) the minimum tax credit determined under subsection (b) for the taxable year, over

"(B) the minimum tax credit allowed under subsection (a) for such year (before the application of this subsection for such year).

"(3) CREDIT REFUNDABLE.—For purposes of this title (other than this section), the credit allowed by reason of this subsection shall be treated as a credit allowed under subpart C (and not this subpart).

"(4) SHORT TAXABLE YEARS.—In the case of any taxable year of less than 365 days, the AMT refundable credit amount determined under paragraph (2) with respect to such taxable year shall be the amount which bears the same ratio to such amount determined without regard to this paragraph as the number of days in such taxable year bears to 365.".

(b) TREATMENT OF REFERENCES.—Section 53(d) is amended by adding at the end the following new paragraph:

"(3) AMT TERM REFERENCES.—In the case of a corporation, any references in this subsection to section 55, 56, or 57 shall be treated as a reference to such section as in effect before the amendments made by Tax Cuts and Jobs Act.".

(c) CONFORMING AMENDMENT.—Section 1374(b)(3)(B) is amended by striking the last sentence thereof.

(d) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(2) CONFORMING AMENDMENT.—The amendment made by subsection (c) shall apply to taxable years beginning after December 31, 2021.

SEC. 12003. INCREASED EXEMPTION FOR INDIVIDUALS.

(a) IN GENERAL.—Section 55(d), as amended by the preceding provisions of this Act, is amended by adding at the end the following new paragraph:

"(4) SPECIAL RULE FOR TAXABLE YEARS BEGINNING AFTER 2017 AND BEFORE 2026.—

"(A) IN GENERAL.—In the case of any taxable year beginning after December 31, 2017, and before January 1, 2026—

"(i) paragraph (1) shall be applied—

"(I) by substituting '$109,400' for '$78,750' in subparagraph (A), and

"(II) by substituting '$70,300' for '$50,600' in subparagraph (B), and

"(ii) paragraph (2) shall be applied—

"(I) by substituting '$1,000,000' for '$150,000' in subparagraph (A),

"(II) by substituting '50 percent of the dollar amount applicable under subparagraph (A)' for '$112,500' in subparagraph (B), and

"(III) in the case of a taxpayer described in paragraph (1)(D), without regard to the substitution under subclause (I).

"(B) INFLATION ADJUSTMENT.—

"(i) IN GENERAL.—In the case of any taxable year beginning in a calendar year after 2018, the amounts described in clause (ii) shall each be increased by an amount equal to—

"(I) such dollar amount, multiplied by

"(II) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, determined by substituting 'calendar year 2017' for 'calendar year 2016' in subparagraph (A)(ii) thereof.

"(ii) AMOUNTS DESCRIBED.—The amounts described in this clause are the $109,400 amount in subparagraph (A)(i)(I), the $70,300 amount in subparagraph (A)(i)(II), and the $1,000,000 amount in subparagraph (A)(ii)(I).

"(iii) ROUNDING.—Any increased amount determined under clause (i) shall be rounded to the nearest multiple of $100.

"(iv) COORDINATION WITH CURRENT ADJUSTMENTS.—In the case of any taxable year to which subparagraph (A) applies, no adjustment shall be made under paragraph (3) to any of the numbers which are substituted under subparagraph (A) and adjusted under this subparagraph.".

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

Subtitle C—Business-related Provisions

PART I—CORPORATE PROVISIONS

SEC. 13001. 21-PERCENT CORPORATE TAX RATE.

(a) IN GENERAL.—Subsection (b) of section 11 is amended to read as follows:

"(b) AMOUNT OF TAX.—The amount of the tax imposed by subsection (a) shall be 21 percent of taxable income.".

(b) CONFORMING AMENDMENTS.—

(1) The following sections are each amended by striking "section 11(b)(1)" and inserting "section 11(b)":

(A) Section 280C(c)(3)(B)(ii)(II).

(B) Paragraphs (2)(B) and (6)(A)(ii) of section 860E(e).

(C) Section 7874(e)(1)(B).

(2)(A) Part I of subchapter P of chapter 1 is amended by striking section 1201 (and by striking the item relating to such section in the table of sections for such part).

(B) Section 12 is amended by striking paragraphs (4) and (6), and by redesignating paragraph (5) as paragraph (4).

(C) Section 453A(c)(3) is amended by striking "or 1201 (whichever is appropriate)".

(D) Section 527(b) is amended—

(i) by striking paragraph (2), and

(ii) by striking all that precedes "is hereby imposed" and inserting:

"(b) TAX IMPOSED.—A tax".

(E) Sections 594(a) is amended by striking "taxes imposed by section 11 or 1201(a)" and inserting "tax imposed by section 11".

(F) Section 691(c)(4) is amended by striking "1201,".

(G) Section 801(a) is amended—

(i) by striking paragraph (2), and

(ii) by striking all that precedes "is hereby imposed" and inserting:

"(a) TAX IMPOSED.—A tax".

(H) Section 831(e) is amended by striking paragraph (1) and by redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

(I) Sections 832(c)(5) and 834(b)(1)(D) are each amended by striking "sec. 1201 and following,".

(J) Section 852(b)(3)(A) is amended by striking "section 1201(a)" and inserting "section 11(b)".

(K) Section 857(b)(3) is amended—

(i) by striking subparagraph (A) and redesignating subparagraphs (B) through (F) as subparagraphs (A) through (E), respectively,

(ii) in subparagraph (C), as so redesignated—

(I) by striking "subparagraph (A)(ii)" in clause (i) thereof and inserting "paragraph (1)",

(II) by striking "the tax imposed by subparagraph (A)(ii)" in clauses (ii) and

(iv) thereof and inserting "the tax imposed by paragraph (1) on undistributed capital gain",

(iii) in subparagraph (E), as so redesignated, by striking "subparagraph (B) or (D)" and inserting "subparagraph (A) or (C)", and

(iv) by adding at the end the following new subparagraph:

"(F) UNDISTRIBUTED CAPITAL GAIN.—For purposes of this paragraph, the term 'undistributed capital gain' means the excess of the net capital gain over the deduction for dividends paid (as defined in section 561) determined with reference to capital gain dividends only.".

(L) Section 882(a)(1), as amended by section 12001, is further amended by striking "or 1201(a)".

(M) Section 904(b) is amended—

(i) by striking "or 1201(a)" in paragraph (2)(C),

(ii) by striking paragraph (3)(D) and inserting the following:

"(D) CAPITAL GAIN RATE DIFFERENTIAL.—There is a capital gain rate differential for any year if subsection (h) of section 1 applies to such taxable year.", and

(iii) by striking paragraph (3)(E) and inserting the following:

"(E) RATE DIFFERENTIAL PORTION.—The rate differential portion of foreign source net capital gain, net capital gain, or the excess of net capital gain from sources within the United States over net capital gain, as the case may be, is the same proportion of such amount as—

"(i) the excess of—

"(I) the highest rate of tax set forth in subsection (a), (b), (c), (d), or (e) of section 1 (whichever applies), over

"(II) the alternative rate of tax determined under section 1(h), bears to

"(ii) that rate referred to in subclause (I).".

(N) Section 1374(b) is amended by striking paragraph (4).

(O) Section 1381(b) is amended by striking "taxes imposed by section 11 or 1201" and inserting "tax imposed by section 11".

(P) Sections 6425(c)(1)(A), as amended by section 12001, and 6655(g)(1)(A)(i) are each amended by striking "or 1201(a),".

(Q) Section 7518(g)(6)(A) is amended by striking "or 1201(a)".

(3)(A) Section 1445(e)(1) is amended—

(i) by striking "35 percent" and inserting "the highest rate of tax in effect for the taxable year under section 11(b)", and

(ii) by striking "of the gain" and inserting "multiplied by the gain".

(B) Section 1445(e)(2) is amended by striking "35 percent of the amount" and inserting "the highest rate of tax in effect for the taxable year under section 11(b) multiplied by the amount".

(C) Section 1445(e)(6) is amended—

(i) by striking "35 percent" and inserting "the highest rate of tax in effect for the taxable year under section 11(b)", and

(ii) by striking "of the amount" and inserting "multiplied by the amount".

(D) Section 1446(b)(2)(B) is amended by striking "section 11(b)(1)" and inserting "section 11(b)".

(4) Section 852(b)(1) is amended by striking the last sentence.

(5)(A) Part I of subchapter B of chapter 5 is amended by striking section 1551 (and by striking the

item relating to such section in the table of sections for such part).

(B) Section 535(c)(5) is amended to read as follows:

"(5) CROSS REFERENCE.—For limitation on credit provided in paragraph (2) or (3) in the case of certain controlled corporations, see section 1561.".

(6)(A) Section 1561, as amended by section 12001, is amended to read as follows:

"SEC. 1561. LIMITATION ON ACCUMULATED EARNINGS CREDIT IN THE CASE OF CERTAIN CONTROLLED CORPORATIONS.

"(a) IN GENERAL.—The component members of a controlled group of corporations on a December 31 shall, for their taxable years which include such December 31, be limited for purposes of this subtitle to one $250,000 ($150,000 if any component member is a corporation described in section 535(c)(2)(B)) amount for purposes of computing the accumulated earnings credit under section 535(c)(2) and (3). Such amount shall be divided equally among the component members of such group on such December 31 unless the Secretary prescribes regulations permitting an unequal allocation of such amount.

"(b) CERTAIN SHORT TAXABLE YEARS.—If a corporation has a short taxable year which does not include a De-

cember 31 and is a component member of a controlled group of corporations with respect to such taxable year, then for purposes of this subtitle, the amount to be used in computing the accumulated earnings credit under section 535(c)(2) and (3) of such corporation for such taxable year shall be the amount specified in subsection (a) with respect to such group, divided by the number of corporations which are component members of such group on the last day of such taxable year. For purposes of the preceding sentence, section 1563(b) shall be applied as if such last day were substituted for December 31.".

(B) The table of sections for part II of subchapter B of chapter 5 is amended by striking the item relating to section 1561 and inserting the following new item:

"Sec. 1561. Limitation on accumulated earnings credit in the case of certain controlled corporations.".

(7) Section 7518(g)(6)(A) is amended—

(A) by striking "With respect to the portion" and inserting "In the case of a taxpayer other than a corporation, with respect to the portion", and

(B) by striking "(34 percent in the case of a corporation)".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by subsections (a) and (b) shall apply to taxable years beginning after December 31, 2017.

(2) WITHHOLDING.—The amendments made by subsection (b)(3) shall apply to distributions made after December 31, 2017.

(3) CERTAIN TRANSFERS.—The amendments made by subsection (b)(6) shall apply to transfers made after December 31, 2017.

(d) NORMALIZATION REQUIREMENTS.—

(1) IN GENERAL.—A normalization method of accounting shall not be treated as being used with respect to any public utility property for purposes of section 167 or 168 of the Internal Revenue Code of 1986 if the taxpayer, in computing its cost of service for ratemaking purposes and reflecting operating results in its regulated books of account, reduces the excess tax reserve more rapidly or to a greater extent than such reserve would be reduced under the average rate assumption method.

(2) ALTERNATIVE METHOD FOR CERTAIN TAXPAYERS.—If, as of the first day of the taxable year that includes the date of enactment of this Act—

(A) the taxpayer was required by a regulatory agency to compute depreciation for public utility property on the basis of an average life or composite rate method, and

(B) the taxpayer's books and underlying records did not contain the vintage account data necessary to apply the average rate assumption method,

the taxpayer will be treated as using a normalization method of accounting if, with respect to such jurisdiction, the taxpayer uses the alternative method for public utility property that is subject to the regulatory authority of that jurisdiction.

(3) DEFINITIONS.—For purposes of this subsection—

(A) EXCESS TAX RESERVE.—The term "excess tax reserve" means the excess of—

(i) the reserve for deferred taxes (as described in section 168(i)(9)(A)(ii) of the Internal Revenue Code of 1986) as of the day before the corporate rate reductions provided in the amendments made by this section take effect, over

(ii) the amount which would be the balance in such reserve if the amount of

such reserve were determined by assuming that the corporate rate reductions provided in this Act were in effect for all prior periods.

(B) AVERAGE RATE ASSUMPTION METHOD.—The average rate assumption method is the method under which the excess in the reserve for deferred taxes is reduced over the remaining lives of the property as used in its regulated books of account which gave rise to the reserve for deferred taxes. Under such method, during the time period in which the timing differences for the property reverse, the amount of the adjustment to the reserve for the deferred taxes is calculated by multiplying—

(i) the ratio of the aggregate deferred taxes for the property to the aggregate timing differences for the property as of the beginning of the period in question, by

(ii) the amount of the timing differences which reverse during such period.

(C) ALTERNATIVE METHOD.—The "alternative method" is the method in which the taxpayer—

(i) computes the excess tax reserve on all public utility property included in the plant account on the basis of the weighted average life or composite rate used to compute depreciation for regulatory purposes, and

(ii) reduces the excess tax reserve ratably over the remaining regulatory life of the property.

(4) TAX INCREASED FOR NORMALIZATION VIOLATION.—If, for any taxable year ending after the date of the enactment of this Act, the taxpayer does not use a normalization method of accounting for the corporate rate reductions provided in the amendments made by this section—

(A) the taxpayer's tax for the taxable year shall be increased by the amount by which it reduces its excess tax reserve more rapidly than permitted under a normalization method of accounting, and

(B) such taxpayer shall not be treated as using a normalization method of accounting for purposes of subsections (f)(2) and (i)(9)(C) of section 168 of the Internal Revenue Code of 1986.

SEC. 13002. REDUCTION IN DIVIDEND RECEIVED DEDUCTIONS TO REFLECT LOWER CORPORATE INCOME TAX RATES.

(a) DIVIDENDS RECEIVED BY CORPORATIONS.—

(1) IN GENERAL.—Section 243(a)(1) is amended by striking "70 percent" and inserting "50 percent".

(2) DIVIDENDS FROM 20-PERCENT OWNED CORPORATIONS.—Section 243(c)(1) is amended—

(A) by striking "80 percent" and inserting "65 percent", and

(B) by striking "70 percent" and inserting "50 percent".

(3) CONFORMING AMENDMENT.—The heading for section 243(c) is amended by striking "RETENTION OF 80-PERCENT DIVIDEND RECEIVED DEDUCTION" and inserting "INCREASED PERCENTAGE".

(b) DIVIDENDS RECEIVED FROM FSC.—Section 245(c)(1)(B) is amended—

(1) by striking "70 percent" and inserting "50 percent", and

(2) by striking "80 percent" and inserting "65 percent".

(c) LIMITATION ON AGGREGATE AMOUNT OF DEDUCTIONS.—Section 246(b)(3) is amended—

(1) by striking "80 percent" in subparagraph (A) and inserting "65 percent", and

(2) by striking "70 percent" in subparagraph (B) and inserting "50 percent".

(d) REDUCTION IN DEDUCTION WHERE PORTFOLIO STOCK IS DEBT-FINANCED.—Section 246A(a)(1) is amended—

(1) by striking "70 percent" and inserting "50 percent", and

(2) by striking "80 percent" and inserting "65 percent".

(e) INCOME FROM SOURCES WITHIN THE UNITED STATES.—Section 861(a)(2) is amended—

(1) by striking "100/70th" and inserting "100/50th" in subparagraph (B), and

(2) in the flush sentence at the end—

(A) by striking "100/80th" and inserting "100/65th", and

(B) by striking "100/70th" and inserting "100/50th".

(f) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

PART II—SMALL BUSINESS REFORMS

SEC. 13101. MODIFICATIONS OF RULES FOR EXPENSING DEPRECIABLE BUSINESS ASSETS.

(a) INCREASE IN LIMITATION.—

(1) DOLLAR LIMITATION.—Section 179(b)(1) is amended by striking "$500,000" and inserting "$1,000,000".

(2) REDUCTION IN LIMITATION.—Section 179(b)(2) is amended by striking "$2,000,000" and inserting "$2,500,000".

(3) INFLATION ADJUSTMENTS.—

(A) IN GENERAL.—Subparagraph (A) of section 179(b)(6), as amended by section 11002(d), is amended—

(i) by striking "2015" and inserting "2018", and

(ii) in clause (ii), by striking "calendar year 2014" and inserting "calendar year 2017".

(B) SPORT UTILITY VEHICLES.—Section 179(b)(6) is amended—

(i) in subparagraph (A), by striking "paragraphs (1) and (2)" and inserting "paragraphs (1), (2), and (5)(A)", and

(ii) in subparagraph (B), by inserting "($100 in the case of any increase in the amount under paragraph (5)(A))" after "$10,000".

(b) Section 179 Property To Include Qualified Real Property.—

(1) IN GENERAL.—Subparagraph (B) of section 179(d)(1) is amended to read as follows:

"(B) which is—

"(i) section 1245 property (as defined in section 1245(a)(3)), or

"(ii) at the election of the taxpayer, qualified real property (as defined in subsection (f)), and".

(2) QUALIFIED REAL PROPERTY DEFINED.—Subsection (f) of section 179 is amended to read as follows:

"(f) QUALIFIED REAL PROPERTY.—For purposes of this section, the term 'qualified real property' means—

"(1) any qualified improvement property described in section 168(e)(6), and

"(2) any of the following improvements to nonresidential real property placed in service after the date such property was first placed in service:

"(A) Roofs.

"(B) Heating, ventilation, and air-conditioning property.

"(C) Fire protection and alarm systems.

"(D) Security systems.".

(c) REPEAL OF EXCLUSION FOR CERTAIN PROPERTY.—The last sentence of section 179(d)(1) is amended by inserting "(other than paragraph (2) thereof)" after "section 50(b)".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to property placed in service in taxable years beginning after December 31, 2017.

SEC. 13102. SMALL BUSINESS ACCOUNTING METHOD REFORM AND SIMPLIFICATION.

(a) MODIFICATION OF LIMITATION ON CASH METHOD OF ACCOUNTING.—

(1) INCREASED LIMITATION.—So much of section 448(c) as precedes paragraph (2) is amended to read as follows:

"(c) GROSS RECEIPTS TEST.—For purposes of this section—

"(1) IN GENERAL.—A corporation or partnership meets the gross receipts test of this subsection for any taxable year if the average annual gross receipts of such entity for the 3-taxable-year period ending with the taxable year which precedes such taxable year does not exceed $25,000,000.".

(2) APPLICATION OF EXCEPTION ON ANNUAL BASIS.—Section 448(b)(3) is amended to read as follows:

"(3) ENTITIES WHICH MEET GROSS RECEIPTS TEST.—Paragraphs (1) and (2) of subsection (a) shall not apply to any corporation or partnership for any taxable year if such entity (or any predecessor) meets the gross receipts test of subsection (c) for such taxable year.".

(3) INFLATION ADJUSTMENT.—Section 448(c) is amended by adding at the end the following new paragraph:

"(4) ADJUSTMENT FOR INFLATION.—In the case of any taxable year beginning after December 31, 2018, the dollar amount in paragraph (1) shall be increased by an amount equal to—

"(A) such dollar amount, multiplied by

"(B) the cost-of-living adjustment determined under section 1(f)(3) for the calendar year in which the taxable year begins, by substituting 'calendar year 2017' for 'calendar year 2016' in subparagraph (A)(ii) thereof.

If any amount as increased under the preceding sentence is not a multiple of $1,000,000, such amount shall be rounded to the nearest multiple of $1,000,000.".

(4) COORDINATION WITH SECTION 481.—Section 448(d)(7) is amended to read as follows:

"(7) COORDINATION WITH SECTION 481.—Any change in method of accounting made pursuant to this section shall be treated for purposes of section 481 as initiated by the taxpayer and made with the consent of the Secretary.".

(5) APPLICATION OF EXCEPTION TO CORPORATIONS ENGAGED IN FARMING.—

(A) IN GENERAL.—Section 447(c) is amended—

(i) by inserting "for any taxable year" after "not being a corporation" in the matter preceding paragraph (1), and

(ii) by amending paragraph (2) to read as follows:

"(2) a corporation which meets the gross receipts test of section 448(c) for such taxable year.".

(B) COORDINATION WITH SECTION 481.—Section 447(f) is amended to read as follows:

"(f) COORDINATION WITH SECTION 481.—Any change in method of accounting made pursuant to this section shall be treated for purposes of section 481 as initiated by the taxpayer and made with the consent of the Secretary.".

(C) CONFORMING AMENDMENTS.—Section 447 is amended—

(i) by striking subsections (d), (e), (h), and (i), and

(ii) by redesignating subsections (f) and (g) (as amended by subparagraph (B)) as subsections (d) and (e), respectively.

(b) EXEMPTION FROM UNICAP REQUIREMENTS.—

(1) IN GENERAL.—Section 263A is amended by redesignating subsection (i) as subsection (j) and by inserting after subsection (h) the following new subsection:

"(i) EXEMPTION FOR CERTAIN SMALL BUSINESSES.—

"(1) IN GENERAL.—In the case of any taxpayer (other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3)) which meets the gross receipts test of section 448(c) for any taxable year, this section shall not apply with respect to such taxpayer for such taxable year.

"(2) APPLICATION OF GROSS RECEIPTS TEST TO INDIVIDUALS, ETC.—In the case of any taxpayer which is not a corporation or a partnership, the gross receipts test of section 448(c) shall be applied in the same manner as if each trade or business of such taxpayer were a corporation or partnership.

"(3) COORDINATION WITH SECTION 481.—Any change in method of accounting made pursuant to this subsection shall be treated for purposes of section 481 as initiated by the taxpayer and made with the consent of the Secretary.".

(2) CONFORMING AMENDMENT.—Section 263A(b)(2) is amended to read as follows:

"(2) PROPERTY ACQUIRED FOR RESALE.—Real or personal property described in section 1221(a)(1) which is acquired by the taxpayer for resale.".

(c) EXEMPTION FROM INVENTORIES.—Section 471 is amended by redesignating subsection (c) as subsection (d) and by inserting after subsection (b) the following new subsection:

"(c) EXEMPTION FOR CERTAIN SMALL BUSINESSES.—

"(1) IN GENERAL.—In the case of any taxpayer (other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3)) which meets the gross receipts test of section 448(c) for any taxable year—

"(A) subsection (a) shall not apply with respect to such taxpayer for such taxable year, and

"(B) the taxpayer's method of accounting for inventory for such taxable year shall not be

treated as failing to clearly reflect income if such method either—

"(i) treats inventory as non-incidental materials and supplies, or

"(ii) conforms to such taxpayer's method of accounting reflected in an applicable financial statement of the taxpayer with respect to such taxable year or, if the taxpayer does not have any applicable financial statement with respect to such taxable year, the books and records of the taxpayer prepared in accordance with the taxpayer's accounting procedures.

"(2) APPLICABLE FINANCIAL STATEMENT.—For purposes of this subsection, the term 'applicable financial statement' has the meaning given the term in section 451(b)(3).

"(3) APPLICATION OF GROSS RECEIPTS TEST TO INDIVIDUALS, ETC.—In the case of any taxpayer which is not a corporation or a partnership, the gross receipts test of section 448(c) shall be applied in the same manner as if each trade or business of such taxpayer were a corporation or partnership.

"(4) COORDINATION WITH SECTION 481.—Any change in method of accounting made pursuant to

this subsection shall be treated for purposes of section 481 as initiated by the taxpayer and made with the consent of the Secretary.".

(d) EXEMPTION FROM PERCENTAGE COMPLETION FOR LONG-TERM CONTRACTS.—

(1) IN GENERAL.—Section 460(e)(1)(B) is amended—

(A) by inserting "(other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3))" after "taxpayer" in the matter preceding clause (i), and

(B) by amending clause (ii) to read as follows:

"(ii) who meets the gross receipts test of section 448(c) for the taxable year in which such contract is entered into.".

(2) CONFORMING AMENDMENTS.—Section 460(e) is amended by striking paragraphs (2) and (3), by redesignating paragraphs (4), (5), and (6) as paragraphs (3), (4), and (5), respectively, and by inserting after paragraph (1) the following new paragraph:

"(2) RULES RELATED TO GROSS RECEIPTS TEST.—

"(A) APPLICATION OF GROSS RECEIPTS TEST TO INDIVIDUALS, ETC.—For purposes of paragraph (1)(B)(ii), in the case of any taxpayer which is not a corporation or a partnership, the gross receipts test of section 448(c) shall be applied in the same manner as if each trade or business of such taxpayer were a corporation or partnership.

"(B) COORDINATION WITH SECTION 481.—Any change in method of accounting made pursuant to paragraph (1)(B)(ii) shall be treated as initiated by the taxpayer and made with the consent of the Secretary. Such change shall be effected on a cut-off basis for all similarly classified contracts entered into on or after the year of change.".

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(2) PRESERVATION OF SUSPENSE ACCOUNT RULES WITH RESPECT TO ANY EXISTING SUSPENSE ACCOUNTS.—So much of the amendments made by subsection (a)(5)(C) as relate to section 447(i) of the

Internal Revenue Code of 1986 shall not apply with respect to any suspense account established under such section before the date of the enactment of this Act.

(3) EXEMPTION FROM PERCENTAGE COMPLETION FOR LONG-TERM CONTRACTS.—The amendments made by subsection (d) shall apply to contracts entered into after December 31, 2017, in taxable years ending after such date.

PART III—COST RECOVERY AND ACCOUNTING METHODS

Subpart A—Cost Recovery

SEC. 13201. TEMPORARY 100-PERCENT EXPENSING FOR CERTAIN BUSINESS ASSETS.

(a) INCREASED EXPENSING.—

(1) IN GENERAL.—Section 168(k) is amended—

(A) in paragraph (1)(A), by striking "50 percent" and inserting "the applicable percentage", and

(B) in paragraph (5)(A)(i), by striking "50 percent" and inserting "the applicable percentage".

(2) APPLICABLE PERCENTAGE.—Paragraph (6) of section 168(k) is amended to read as follows:

"(6) APPLICABLE PERCENTAGE.—For purposes of this subsection—

"(A) IN GENERAL.—Except as otherwise provided in this paragraph, the term 'applicable percentage' means—

"(i) in the case of property placed in service after September 27, 2017, and before January 1, 2023, 100 percent,

"(ii) in the case of property placed in service after December 31, 2022, and before January 1, 2024, 80 percent,

"(iii) in the case of property placed in service after December 31, 2023, and before January 1, 2025, 60 percent,

"(iv) in the case of property placed in service after December 31, 2024, and before January 1, 2026, 40 percent, and

"(v) in the case of property placed in service after December 31, 2025, and before January 1, 2027, 20 percent.

"(B) RULE FOR PROPERTY WITH LONGER PRODUCTION PERIODS.—In the case of property described in subparagraph (B) or (C) of paragraph (2), the term 'applicable percentage' means—

"(i) in the case of property placed in service after September 27, 2017, and before January 1, 2024, 100 percent,

"(ii) in the case of property placed in service after December 31, 2023, and before January 1, 2025, 80 percent,

"(iii) in the case of property placed in service after December 31, 2024, and before January 1, 2026, 60 percent,

"(iv) in the case of property placed in service after December 31, 2025, and before January 1, 2027, 40 percent, and

"(v) in the case of property placed in service after December 31, 2026, and before January 1, 2028, 20 percent.

"(C) RULE FOR PLANTS BEARING FRUITS AND NUTS.—In the case of a specified plant described in paragraph (5), the term 'applicable percentage' means—

"(i) in the case of a plant which is planted or grafted after September 27, 2017, and before January 1, 2023, 100 percent,

"(ii) in the case of a plant which is planted or grafted after December 31, 2022, and before January 1, 2024, 80 percent,

"(iii) in the case of a plant which is planted or grafted after December 31, 2023, and before January 1, 2025, 60 percent,

"(iv) in the case of a plant which is planted or grafted after December 31, 2024, and before January 1, 2026, 40 percent, and

"(v) in the case of a plant which is planted or grafted after December 31, 2025, and before January 1, 2027, 20 percent.".

(3) CONFORMING AMENDMENT.—

(A) Paragraph (5) of section 168(k) is amended by striking subparagraph (F).

(B) Section 168(k) is amended by adding at the end the following new paragraph:

"(8) PHASE DOWN.—In the case of qualified property acquired by the taxpayer before September 28, 2017, and placed in service by the taxpayer after September 27, 2017, paragraph (6) shall be applied by substituting for each percentage therein—

"(A) '50 percent' in the case of—

"(i) property placed in service before January 1, 2018, and

"(ii) property described in subparagraph (B) or (C) of paragraph (2) which is placed in service in 2018,

"(B) '40 percent' in the case of—

"(i) property placed in service in 2018 (other than property described in subparagraph (B) or (C) of paragraph (2)), and

"(ii) property described in subparagraph (B) or (C) of paragraph (2) which is placed in service in 2019,

"(C) '30 percent' in the case of—

"(i) property placed in service in 2019 (other than property described in subparagraph (B) or (C) of paragraph (2)), and

"(ii) property described in subparagraph (B) or (C) of paragraph (2) which is placed in service in 2020, and

"(D) '0 percent' in the case of—

"(i) property placed in service after 2019 (other than property described in subparagraph (B) or (C) of paragraph (2)), and

"(ii) property described in subparagraph (B) or (C) of paragraph (2) which is placed in service after 2020.".

(b) EXTENSION.—

(1) IN GENERAL.—Section 168(k) is amended—

(A) in paragraph (2)—

(i) in subparagraph (A)(iii), clauses (i)(III) and (ii) of subparagraph (B), and subparagraph (E)(i), by striking "January 1, 2020" each place it appears and inserting "January 1, 2027", and

(ii) in subparagraph (B)—

(I) in clause (i)(II), by striking "January 1, 2021" and inserting "January 1, 2028", and

(II) in the heading of clause (ii), by striking "PRE-JANUARY 1, 2020" and inserting "PRE-JANUARY 1, 2027", and

(B) in paragraph (5)(A), by striking "January 1, 2020" and inserting "January 1, 2027".

(2) CONFORMING AMENDMENTS.—

(A) Clause (ii) of section 460(c)(6)(B) is amended by striking "January 1, 2020 (January 1, 2021" and inserting "January 1, 2027 (January 1, 2028".

(B) The heading of section 168(k) is amended by striking "ACQUIRED AFTER DECEMBER 31, 2007, AND BEFORE JANUARY 1, 2020".

(c) APPLICATION TO USED PROPERTY.—

(1) IN GENERAL.—Section 168(k)(2)(A)(ii) is amended to read as follows:

"(ii) the original use of which begins with the taxpayer or the acquisition of which by the taxpayer meets the requirements of clause (ii) of subparagraph (E), and".

(2) ACQUISITION REQUIREMENTS.—Section 168(k)(2)(E)(ii) is amended to read as follows:

"(ii) ACQUISITION REQUIREMENTS.—An acquisition of property meets the requirements of this clause if—

"(I) such property was not used by the taxpayer at any time prior to such acquisition, and

"(II) the acquisition of such property meets the requirements of paragraphs (2)(A), (2)(B), (2)(C), and (3) of section 179(d).",

(3) ANTI-ABUSE RULES.—Section 168(k)(2)(E) is further amended by amending clause (iii)(I) to read as follows:

"(I) property is used by a lessor of such property and such use is the lessor's first use of such property,".

(d) EXCEPTION FOR CERTAIN PROPERTY.—Section 168(k), as amended by this section, is amended by adding at the end the following new paragraph:

"(9) EXCEPTION FOR CERTAIN PROPERTY.—The term 'qualified property' shall not include—

"(A) any property which is primarily used in a trade or business described in clause (iv) of section 163(j)(7)(A), or

"(B) any property used in a trade or business that has had floor plan financing indebtedness (as defined in paragraph (9) of section 163(j)), if the floor plan financing interest related to such indebtedness was taken into account under paragraph (1)(C) of such section.".

(e) SPECIAL RULE.—Section 168(k), as amended by this section, is amended by adding at the end the following new paragraph:

"(10) SPECIAL RULE FOR PROPERTY PLACED IN SERVICE DURING CERTAIN PERIODS.—

"(A) IN GENERAL.—In the case of qualified property placed in service by the taxpayer during the first taxable year ending after September

27, 2017, if the taxpayer elects to have this paragraph apply for such taxable year, paragraphs (1)(A) and (5)(A)(i) shall be applied by substituting '50 percent' for 'the applicable percentage'.

"(B) FORM OF ELECTION.—Any election under this paragraph shall be made at such time and in such form and manner as the Secretary may prescribe.".

(f) COORDINATION WITH SECTION 280F.—Clause (iii) of section 168(k)(2)(F) is amended by striking "placed in service by the taxpayer after December 31, 2017" and inserting "acquired by the taxpayer before September 28, 2017, and placed in service by the taxpayer after September 27, 2017".

(g) QUALIFIED FILM AND TELEVISION AND LIVE THEATRICAL PRODUCTIONS.—

(1) IN GENERAL.—Clause (i) of section 168(k)(2)(A), as amended by section 13204, is amended—

(A) in subclause (II), by striking "or",

(B) in subclause (III), by adding "or" after the comma, and

(C) by adding at the end the following:

"(IV) which is a qualified film or television production (as defined in subsection (d) of section 181) for which a deduction would have been allowable under section 181 without regard to subsections (a)(2) and (g) of such section or this subsection, or

"(V) which is a qualified live theatrical production (as defined in subsection (e) of section 181) for which a deduction would have been allowable under section 181 without regard to subsections (a)(2) and (g) of such section or this subsection,".

(2) PRODUCTION PLACED IN SERVICE.—Paragraph (2) of section 168(k) is amended by adding at the end the following:

"(H) PRODUCTION PLACED IN SERVICE.—For purposes of subparagraph (A)—

"(i) a qualified film or television production shall be considered to be placed in service at the time of initial release or broadcast, and

"(ii) a qualified live theatrical production shall be considered to be placed in service at the time of the initial live staged performance.".

(h) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided by paragraph (2), the amendments made by this section shall apply to property which—

(A) is acquired after September 27, 2017, and

(B) is placed in service after such date.

For purposes of the preceding sentence, property shall not be treated as acquired after the date on which a written binding contract is entered into for such acquisition.

(2) SPECIFIED PLANTS.—The amendments made by this section shall apply to specified plants planted or grafted after September 27, 2017.

SEC. 13202. MODIFICATIONS TO DEPRECIATION LIMITATIONS ON LUXURY AUTOMOBILES AND PERSONAL USE PROPERTY.

(a) LUXURY AUTOMOBILES.—

(1) IN GENERAL.—280F(a)(1)(A) is amended—

(A) in clause (i), by striking "$2,560" and inserting "$10,000",

(B) in clause (ii), by striking "$4,100" and inserting "$16,000",

(C) in clause (iii), by striking "$2,450" and inserting "$9,600", and

(D) in clause (iv), by striking "$1,475" and inserting "$5,760".

(2) CONFORMING AMENDMENTS.—

(A) Clause (ii) of section 280F(a)(1)(B) is amended by striking "$1,475" in the text and heading and inserting "$5,760".

(B) Paragraph (7) of section 280F(d) is amended—

(i) in subparagraph (A), by striking "1988" and inserting "2018", and

(ii) in subparagraph (B)(i)(II), by striking "1987" and inserting "2017".

(b) REMOVAL OF COMPUTER EQUIPMENT FROM LISTED PROPERTY.—

(1) IN GENERAL.—Section 280F(d)(4)(A) is amended—

(A) by inserting "and" at the end of clause (iii),

(B) by striking clause (iv), and

(C) by redesignating clause (v) as clause (iv).

(2) CONFORMING AMENDMENT.—Section 280F(d)(4) is amended by striking subparagraph (B) and by redesignating subparagraph (C) as subparagraph (B).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to property placed in service after December 31, 2017, in taxable years ending after such date.

SEC. 13203. MODIFICATIONS OF TREATMENT OF CERTAIN FARM PROPERTY.

(a) TREATMENT OF CERTAIN FARM PROPERTY AS 5-YEAR PROPERTY.—Clause (vii) of section 168(e)(3)(B) is amended by striking "after December 31, 2008, and which is placed in service before January 1, 2010" and inserting "after December 31, 2017".

(b) REPEAL OF REQUIRED USE OF 150-PERCENT DECLINING BALANCE METHOD.—Section 168(b)(2) is amended by striking subparagraph (B) and by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to property placed in service after December 31, 2017, in taxable years ending after such date.

SEC. 13204. APPLICABLE RECOVERY PERIOD FOR REAL PROPERTY.

(a) IMPROVEMENTS TO REAL PROPERTY.—

(1) ELIMINATION OF QUALIFIED LEASEHOLD IMPROVEMENT, QUALIFIED RESTAURANT, AND QUALIFIED RETAIL IMPROVEMENT PROPERTY.—Subsection (e) of section 168 is amended—

(A) in subparagraph (E) of paragraph (3)—

(i) by striking clauses (iv), (v), and (ix),

(ii) in clause (vii), by inserting "and" at the end,

(iii) in clause (viii), by striking ", and" and inserting a period, and

(iv) by redesignating clauses (vi), (vii), and (viii), as so amended, as clauses (iv), (v), and (vi), respectively, and

(B) by striking paragraphs (6), (7), and (8).

(2) APPLICATION OF STRAIGHT LINE METHOD TO QUALIFIED IMPROVEMENT PROPERTY.—Paragraph (3) of section 168(b) is amended—

(A) by striking subparagraphs (G), (H), and (I), and

(B) by inserting after subparagraph (F) the following new subparagraph:

"(G) Qualified improvement property described in subsection (e)(6).".

(3) ALTERNATIVE DEPRECIATION SYSTEM.—

(A) ELECTING REAL PROPERTY TRADE OR BUSINESS.—Subsection (g) of section 168 is amended—

(i) in paragraph (1)—

(I) in subparagraph (D), by striking "and" at the end,

(II) in subparagraph (E), by inserting "and" at the end, and

(III) by inserting after subparagraph (E) the following new subparagraph:

"(F) any property described in paragraph (8),", and

(ii) by adding at the end the following new paragraph:

"(8) ELECTING REAL PROPERTY TRADE OR BUSINESS.—The property described in this paragraph shall consist of any nonresidential real property, residential rental property, and qualified improvement property held by an electing real property trade or business (as defined in 163(j)(7)(B)).".

(B) QUALIFIED IMPROVEMENT PROPERTY.—The table contained in subparagraph (B) of section 168(g)(3) is amended—

(i) by inserting after the item relating to subparagraph (D)(ii) the following new item:

"(D)(v)	*20"*

, and

(ii) by striking the item relating to subparagraph (E)(iv) and all that follows through the item relating to subparagraph (E)(ix) and inserting the following:

"(E)(iv)	*20*
(E)(v)	*30*
(E)(vi)	*35".*

(C) APPLICABLE RECOVERY PERIOD FOR RESIDENTIAL RENTAL PROPERTY.—The table contained in subparagraph (C) of section 168(g)(2) is amended by striking clauses (iii) and (iv) and inserting the following:

"(iii) Residential rental property	*30 years*
(iv) Nonresidential real property	*40 years*
(v) Any railroad grading or tunnel bore or water utility property	*50 years".*

(4) CONFORMING AMENDMENTS.—

(A) Clause (i) of section 168(k)(2)(A) is amended—

(i) in subclause (II), by inserting "or" after the comma,

(ii) in subclause (III), by striking "or" at the end, and

(iii) by striking subclause (IV).

(B) Section 168 is amended—

(i) in subsection (e), as amended by paragraph (1)(B), by adding at the end the following:

"(6) QUALIFIED IMPROVEMENT PROPERTY.—

"(A) IN GENERAL.—The term 'qualified improvement property' means any improvement to an interior portion of a building which is nonresidential real property if such improvement is placed in service after the date such building was first placed in service.

"(B) CERTAIN IMPROVEMENTS NOT INCLUDED.—Such term shall not include any improvement for which the expenditure is attributable to—

"(i) the enlargement of the building,

"(ii) any elevator or escalator, or

"(iii) the internal structural framework of the building.", and

(ii) in subsection (k), by striking paragraph (3).

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to property placed in service after December 31, 2017.

(2) AMENDMENTS RELATED TO ELECTING REAL PROPERTY TRADE OR BUSINESS.—The amendments made by subsection (a)(3)(A) shall apply to taxable years beginning after December 31, 2017.

SEC. 13205. USE OF ALTERNATIVE DEPRECIATION SYSTEM FOR ELECTING FARMING BUSINESSES.

(a) IN GENERAL.—Section 168(g)(1), as amended by section 13204, is amended by striking "and" at the end of subparagraph (E), by inserting "and" at the end of subparagraph (F), and by inserting after subparagraph (F) the following new subparagraph:

"(G) any property with a recovery period of 10 years or more which is held by an electing farming business (as defined in section 163(j)(7)(C)),".

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

SEC. 13206. AMORTIZATION OF RESEARCH AND EXPERIMENTAL EXPENDITURES.

(a) IN GENERAL.—Section 174 is amended to read as follows:

"SEC. 174. AMORTIZATION OF RESEARCH AND EXPERIMENTAL EXPENDITURES.

"(a) IN GENERAL.—In the case of a taxpayer's specified research or experimental expenditures for any taxable year—

"(1) except as provided in paragraph (2), no deduction shall be allowed for such expenditures, and

"(2) the taxpayer shall—

"(A) charge such expenditures to capital account, and

"(B) be allowed an amortization deduction of such expenditures ratably over the 5-year period (15-year period in the case of any specified research or experimental expenditures which are attributable to foreign research (within the meaning of section 41(d)(4)(F))) beginning with the midpoint of the taxable year in which such expenditures are paid or incurred.

"(b) SPECIFIED RESEARCH OR EXPERIMENTAL EXPENDITURES.—For purposes of this section, the term 'specified research or experimental expenditures' means, with respect to any taxable year, research or experimental expenditures which are paid or incurred by the taxpayer during such taxable year in connection with the taxpayer's trade or business.

"(c) SPECIAL RULES.—

"(1) LAND AND OTHER PROPERTY.—This section shall not apply to any expenditure for the acquisition or improvement of land, or for the acquisition or improvement of property to be used in connection with the research or experimentation and of a character which is subject to the allowance under section 167 (relating to allowance for depreciation, etc.) or section 611 (relating to allowance for depletion); but for purposes of this section allowances under section 167, and allowances under section 611, shall be considered as expenditures.

"(2) EXPLORATION EXPENDITURES.—This section shall not apply to any expenditure paid or incurred for the purpose of ascertaining the existence, location, extent, or quality of any deposit of ore or other mineral (including oil and gas).

"(3) SOFTWARE DEVELOPMENT.—For purposes of this section, any amount paid or incurred in connection with the development of any software shall be treated as a research or experimental expenditure.

"(d) TREATMENT UPON DISPOSITION, RETIREMENT, OR ABANDONMENT.—If any property with respect to which specified research or experimental expenditures are paid or incurred is disposed, retired, or abandoned during the period during which such expenditures are allowed as an am-

ortization deduction under this section, no deduction shall be allowed with respect to such expenditures on account of such disposition, retirement, or abandonment and such amortization deduction shall continue with respect to such expenditures.".

(b) CHANGE IN METHOD OF ACCOUNTING.—The amendments made by subsection (a) shall be treated as a change in method of accounting for purposes of section 481 of the Internal Revenue Code of 1986 and—

(1) such change shall be treated as initiated by the taxpayer,

(2) such change shall be treated as made with the consent of the Secretary, and

(3) such change shall be applied only on a cut-off basis for any research or experimental expenditures paid or incurred in taxable years beginning after December 31, 2021, and no adjustments under section 481(a) shall be made.

(c) CLERICAL AMENDMENT.—The table of sections for part VI of subchapter B of chapter 1 is amended by striking the item relating to section 174 and inserting the following new item:

"Sec. 174. Amortization of research and experimental expenditures.".

(d) CONFORMING AMENDMENTS.—

(1) Section 41(d)(1)(A) is amended by striking "expenses under section 174" and inserting "specified

research or experimental expenditures under section 174".

(2) Subsection (c) of section 280C is amended—

(A) by striking paragraph (1) and inserting the following:

"(1) IN GENERAL.—If—

"(A) the amount of the credit determined for the taxable year under section 41(a)(1), exceeds

"(B) the amount allowable as a deduction for such taxable year for qualified research expenses or basic research expenses,

the amount chargeable to capital account for the taxable year for such expenses shall be reduced by the amount of such excess.",

(B) by striking paragraph (2),

(C) by redesignating paragraphs (3) (as amended by this Act) and (4) as paragraphs (2) and (3), respectively, and

(D) in paragraph (2), as redesignated by subparagraph (C), by striking "paragraphs (1) and (2)" and inserting "paragraph (1)".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to amounts paid or incurred in taxable years beginning after December 31, 2021.

SEC. 13207. EXPENSING OF CERTAIN COSTS OF REPLANTING CITRUS PLANTS LOST BY REASON OF CASUALTY.

(a) IN GENERAL.—Section 263A(d)(2) is amended by adding at the end the following new subparagraph:

"(C) SPECIAL TEMPORARY RULE FOR CITRUS PLANTS LOST BY REASON OF CASUALTY.—

"(i) IN GENERAL.—In the case of the replanting of citrus plants, subparagraph (A) shall apply to amounts paid or incurred by a person (other than the taxpayer described in subparagraph (A)) if—

"(I) the taxpayer described in subparagraph (A) has an equity interest of not less than 50 percent in the replanted citrus plants at all times during the taxable year in which such amounts were paid or incurred and such other person holds any part of the remaining equity interest, or

"(II) such other person acquired the entirety of such taxpayer's equity interest in the land on which the lost or damaged citrus plants were located at the time of such loss or damage, and the replanting is on such land.

"(ii) TERMINATION.—Clause (i) shall not apply to any cost paid or incurred after the date which is 10 years after the date of the enactment of the Tax Cuts and Jobs Act.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to costs paid or incurred after the date of the enactment of this Act.

Subpart B—Accounting Methods

SEC. 13221. CERTAIN SPECIAL RULES FOR TAXABLE YEAR OF INCLUSION.

(a) INCLUSION NOT LATER THAN FOR FINANCIAL ACCOUNTING PURPOSES.—Section 451 is amended by redesignating subsections (b) through (i) as subsections (c) through (j), respectively, and by inserting after subsection (a) the following new subsection:

"(b) INCLUSION NOT LATER THAN FOR FINANCIAL ACCOUNTING PURPOSES.—

"(1) INCOME TAKEN INTO ACCOUNT IN FINANCIAL STATEMENT.—

"(A) IN GENERAL.—In the case of a taxpayer the taxable income of which is computed under an accrual method of accounting, the all events test with respect to any item of gross income (or portion thereof) shall not be treated as

met any later than when such item (or portion thereof) is taken into account as revenue in—

"(i) an applicable financial statement of the taxpayer, or

"(ii) such other financial statement as the Secretary may specify for purposes of this subsection.

"(B) EXCEPTION.—This paragraph shall not apply to—

"(i) a taxpayer which does not have a financial statement described in clause (i) or (ii) of subparagraph (A) for a taxable year, or

"(ii) any item of gross income in connection with a mortgage servicing contract.

"(C) ALL EVENTS TEST.—For purposes of this section, the all events test is met with respect to any item of gross income if all the events have occurred which fix the right to receive such income and the amount of such income can be determined with reasonable accuracy.

"(2) COORDINATION WITH SPECIAL METHODS OF ACCOUNTING.—Paragraph (1) shall not apply with respect to any item of gross income for which the taxpayer uses a special method of accounting provided

under any other provision of this chapter, other than any provision of part V of subchapter P (except as provided in clause (ii) of paragraph (1)(B)).

"(3) APPLICABLE FINANCIAL STATEMENT.—For purposes of this subsection, the term 'applicable financial statement' means—

"(A) a financial statement which is certified as being prepared in accordance with generally accepted accounting principles and which is—

"(i) a 10–K (or successor form), or annual statement to shareholders, required to be filed by the taxpayer with the United States Securities and Exchange Commission,

"(ii) an audited financial statement of the taxpayer which is used for—

"(I) credit purposes,

"(II) reporting to shareholders, partners, or other proprietors, or to beneficiaries, or

"(III) any other substantial nontax purpose,

but only if there is no statement of the taxpayer described in clause (i), or

"(iii) filed by the taxpayer with any other Federal agency for purposes other than Federal tax purposes, but only if there is no statement of the taxpayer described in clause (i) or (ii),

"(B) a financial statement which is made on the basis of international financial reporting standards and is filed by the taxpayer with an agency of a foreign government which is equivalent to the United States Securities and Exchange Commission and which has reporting standards not less stringent than the standards required by such Commission, but only if there is no statement of the taxpayer described in subparagraph (A), or

"(C) a financial statement filed by the taxpayer with any other regulatory or governmental body specified by the Secretary, but only if there is no statement of the taxpayer described in subparagraph (A) or (B).

"(4) ALLOCATION OF TRANSACTION PRICE.—For purposes of this subsection, in the case of a contract which contains multiple performance obligations, the allocation of the transaction price to each performance obligation shall be equal to the amount allocated

to each performance obligation for purposes of including such item in revenue in the applicable financial statement of the taxpayer.

"(5) GROUP OF ENTITIES.—For purposes of paragraph (1), if the financial results of a taxpayer are reported on the applicable financial statement (as defined in paragraph (3)) for a group of entities, such statement shall be treated as the applicable financial statement of the taxpayer.".

(b) TREATMENT OF ADVANCE PAYMENTS.—Section 451, as amended by subsection (a), is amended by redesignating subsections (c) through (j) as subsections (d) through (k), respectively, and by inserting after subsection (b) the following new subsection:

"(c) TREATMENT OF ADVANCE PAYMENTS.—

"(1) IN GENERAL.—A taxpayer which computes taxable income under the accrual method of accounting, and receives any advance payment during the taxable year, shall—

"(A) except as provided in subparagraph (B), include such advance payment in gross income for such taxable year, or

"(B) if the taxpayer elects the application of this subparagraph with respect to the category

of advance payments to which such advance payment belongs, the taxpayer shall—

"(i) to the extent that any portion of such advance payment is required under subsection (b) to be included in gross income in the taxable year in which such payment is received, so include such portion, and

"(ii) include the remaining portion of such advance payment in gross income in the taxable year following the taxable year in which such payment is received.

"(2) ELECTION.—

"(A) IN GENERAL.—Except as otherwise provided in this paragraph, the election under paragraph (1)(B) shall be made at such time, in such form and manner, and with respect to such categories of advance payments, as the Secretary may provide.

"(B) PERIOD TO WHICH ELECTION APPLIES.—An election under paragraph (1)(B) shall be effective for the taxable year with respect to which it is first made and for all subsequent taxable years, unless the taxpayer secures the consent of the Secretary to revoke such election.

For purposes of this title, the computation of taxable income under an election made under paragraph (1)(B) shall be treated as a method of accounting.

"(3) TAXPAYERS CEASING TO EXIST.—Except as otherwise provided by the Secretary, the election under paragraph (1)(B) shall not apply with respect to advance payments received by the taxpayer during a taxable year if such taxpayer ceases to exist during (or with the close of) such taxable year.

"(4) ADVANCE PAYMENT.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'advance payment' means any payment—

"(i) the full inclusion of which in the gross income of the taxpayer for the taxable year of receipt is a permissible method of accounting under this section (determined without regard to this subsection),

"(ii) any portion of which is included in revenue by the taxpayer in a financial statement described in clause (i) or (ii) of subsection (b)(1)(A) for a subsequent taxable year, and

"(iii) which is for goods, services, or such other items as may be identified by the Secretary for purposes of this clause.

"(B) EXCLUSIONS.—Except as otherwise provided by the Secretary, such term shall not include—

"(i) rent,

"(ii) insurance premiums governed by subchapter L,

"(iii) payments with respect to financial instruments,

"(iv) payments with respect to warranty or guarantee contracts under which a third party is the primary obligor,

"(v) payments subject to section 871(a), 881, 1441, or 1442,

"(vi) payments in property to which section 83 applies, and

"(vii) any other payment identified by the Secretary for purposes of this subparagraph.

"(C) RECEIPT.—For purposes of this subsection, an item of gross income is received by the taxpayer if it is actually or constructively re-

ceived, or if it is due and payable to the taxpayer.

"(D) ALLOCATION OF TRANSACTION PRICE.—For purposes of this subsection, rules similar to subsection (b)(4) shall apply.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(d) COORDINATION WITH SECTION 481.—

(1) IN GENERAL.—In the case of any qualified change in method of accounting for the taxpayer's first taxable year beginning after December 31, 2017—

(A) such change shall be treated as initiated by the taxpayer, and

(B) such change shall be treated as made with the consent of the Secretary of the Treasury.

(2) QUALIFIED CHANGE IN METHOD OF ACCOUNTING.—For purposes of this subsection, the term "qualified change in method of accounting" means any change in method of accounting which—

(A) is required by the amendments made by this section, or

(B) was prohibited under the Internal Revenue Code of 1986 prior to such amendments

and is permitted under such Code after such amendments.

(e) SPECIAL RULES FOR ORIGINAL ISSUE DISCOUNT.—Notwithstanding subsection (c), in the case of income from a debt instrument having original issue discount—

(1) the amendments made by this section shall apply to taxable years beginning after December 31, 2018, and

(2) the period for taking into account any adjustments under section 481 by reason of a qualified change in method of accounting (as defined in subsection (d)) shall be 6 years.

PART IV—BUSINESS-RELATED EXCLUSIONS AND DEDUCTIONS

SEC. 13301. LIMITATION ON DEDUCTION FOR INTEREST.

(a) IN GENERAL.—Section 163(j) is amended to read as follows:

"(j) LIMITATION ON BUSINESS INTEREST.—

"(1) IN GENERAL.—The amount allowed as a deduction under this chapter for any taxable year for business interest shall not exceed the sum of—

"(A) the business interest income of such taxpayer for such taxable year,

"(B) 30 percent of the adjusted taxable income of such taxpayer for such taxable year, plus

"(C) the floor plan financing interest of such taxpayer for such taxable year.

The amount determined under subparagraph (B) shall not be less than zero.

"(2) CARRYFORWARD OF DISALLOWED BUSINESS INTEREST.—The amount of any business interest not allowed as a deduction for any taxable year by reason of paragraph (1) shall be treated as business interest paid or accrued in the succeeding taxable year.

"(3) EXEMPTION FOR CERTAIN SMALL BUSINESSES.—In the case of any taxpayer (other than a tax shelter prohibited from using the cash receipts and disbursements method of accounting under section 448(a)(3)) which meets the gross receipts test of section 448(c) for any taxable year, paragraph (1) shall not apply to such taxpayer for such taxable year. In the case of any taxpayer which is not a corporation or a partnership, the gross receipts test of section 448(c) shall be applied in the same manner as if such taxpayer were a corporation or partnership.

"(4) APPLICATION TO PARTNERSHIPS, ETC.—

"(A) IN GENERAL.—In the case of any partnership—

"(i) this subsection shall be applied at the partnership level and any deduction for business interest shall be taken into account in determining the non-separately stated taxable income or loss of the partnership, and

"(ii) the adjusted taxable income of each partner of such partnership—

"(I) shall be determined without regard to such partner's distributive share of any items of income, gain, deduction, or loss of such partnership, and

"(II) shall be increased by such partner's distributive share of such partnership's excess taxable income.

For purposes of clause (ii)(II), a partner's distributive share of partnership excess taxable income shall be determined in the same manner as the partner's distributive share of nonseparately stated taxable income or loss of the partnership.

"(B) SPECIAL RULES FOR CARRYFORWARDS.—

"(i) IN GENERAL.—The amount of any business interest not allowed as a deduction to a partnership for any taxable year by reason of paragraph (1) for any taxable year—

"(I) shall not be treated under paragraph (2) as business interest paid or accrued by the partnership in the succeeding taxable year, and

"(II) shall, subject to clause (ii), be treated as excess business interest which is allocated to each partner in the same manner as the non-separately stated taxable income or loss of the partnership.

"(ii) TREATMENT OF EXCESS BUSINESS INTEREST ALLOCATED TO PARTNERS.—If a partner is allocated any excess business interest from a partnership under clause (i) for any taxable year—

"(I) such excess business interest shall be treated as business interest paid or accrued by the partner in the next succeeding taxable year in which the partner is allocated excess taxable

income from such partnership, but only to the extent of such excess taxable income, and

"(II) any portion of such excess business interest remaining after the application of subclause (I) shall, subject to the limitations of subclause (I), be treated as business interest paid or accrued in succeeding taxable years.

For purposes of applying this paragraph, excess taxable income allocated to a partner from a partnership for any taxable year shall not be taken into account under paragraph (1)(A) with respect to any business interest other than excess business interest from the partnership until all such excess business interest for such taxable year and all preceding taxable years has been treated as paid or accrued under clause (ii).

"(iii) BASIS ADJUSTMENTS.—

"(I) IN GENERAL.—The adjusted basis of a partner in a partnership interest shall be reduced (but not below zero) by the amount of excess business

interest allocated to the partner under clause (i)(II).

"(II) SPECIAL RULE FOR DISPOSITIONS.—If a partner disposes of a partnership interest, the adjusted basis of the partner in the partnership interest shall be increased immediately before the disposition by the amount of the excess (if any) of the amount of the basis reduction under subclause (I) over the portion of any excess business interest allocated to the partner under clause (i)(II) which has previously been treated under clause (ii) as business interest paid or accrued by the partner. The preceding sentence shall also apply to transfers of the partnership interest (including by reason of death) in a transaction in which gain is not recognized in whole or in part. No deduction shall be allowed to the transferor or transferee under this chapter for any excess business interest resulting in a basis increase under this subclause.

"(C) EXCESS TAXABLE INCOME.—The term 'excess taxable income' means, with respect to any partnership, the amount which bears the same ratio to the partnership's adjusted taxable income as—

"(i) the excess (if any) of—

"(I) the amount determined for the partnership under paragraph (1)(B), over

"(II) the amount (if any) by which the business interest of the partnership, reduced by the floor plan financing interest, exceeds the business interest income of the partnership, bears to

"(ii) the amount determined for the partnership under paragraph (1)(B).

"(D) APPLICATION TO S CORPORATIONS.—Rules similar to the rules of subparagraphs (A) and (C) shall apply with respect to any S corporation and its shareholders.

"(5) BUSINESS INTEREST.—For purposes of this subsection, the term 'business interest' means any interest paid or accrued on indebtedness properly allocable to a trade or business. Such term shall not in-

clude investment interest (within the meaning of subsection (d)).

"(6) BUSINESS INTEREST INCOME.—For purposes of this subsection, the term 'business interest income' means the amount of interest includible in the gross income of the taxpayer for the taxable year which is properly allocable to a trade or business. Such term shall not include investment income (within the meaning of subsection (d)).

"(7) TRADE OR BUSINESS.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'trade or business' shall not include—

"(i) the trade or business of performing services as an employee,

"(ii) any electing real property trade or business,

"(iii) any electing farming business, or

"(iv) the trade or business of the furnishing or sale of—

"(I) electrical energy, water, or sewage disposal services,

"(II) gas or steam through a local distribution system, or

"(III) transportation of gas or steam by pipeline,

if the rates for such furnishing or sale, as the case may be, have been established or approved by a State or political subdivision thereof, by any agency or instrumentality of the United States, by a public service or public utility commission or other similar body of any State or political subdivision thereof, or by the governing or ratemaking body of an electric cooperative.

"(B) ELECTING REAL PROPERTY TRADE OR BUSINESS.—For purposes of this paragraph, the term 'electing real property trade or business' means any trade or business which is described in section 469(c)(7)(C) and which makes an election under this subparagraph. Any such election shall be made at such time and in such manner as the Secretary shall prescribe, and, once made, shall be irrevocable.

"(C) ELECTING FARMING BUSINESS.—For purposes of this paragraph, the term 'electing farming business' means—

"(i) a farming business (as defined in section 263A(e)(4)) which makes an election under this subparagraph, or

"(ii) any trade or business of a specified agricultural or horticultural cooperative (as defined in section 199A(g)(2)) with respect to which the cooperative makes an election under this subparagraph.

Any such election shall be made at such time and in such manner as the Secretary shall prescribe, and, once made, shall be irrevocable.

"(8) ADJUSTED TAXABLE INCOME.—For purposes of this subsection, the term 'adjusted taxable income' means the taxable income of the taxpayer—

"(A) computed without regard to—

"(i) any item of income, gain, deduction, or loss which is not properly allocable to a trade or business,

"(ii) any business interest or business interest income,

"(iii) the amount of any net operating loss deduction under section 172,

"(iv) the amount of any deduction allowed under section 199A, and

"(v) in the case of taxable years beginning before January 1, 2022, any deduction allowable for depreciation, amortization, or depletion, and

"(B) computed with such other adjustments as provided by the Secretary.

"(9) FLOOR PLAN FINANCING INTEREST DEFINED.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'floor plan financing interest' means interest paid or accrued on floor plan financing indebtedness.

"(B) FLOOR PLAN FINANCING INDEBTEDNESS.—The term 'floor plan financing indebtedness' means indebtedness—

"(i) used to finance the acquisition of motor vehicles held for sale or lease, and

"(ii) secured by the inventory so acquired.

"(C) MOTOR VEHICLE.—The term 'motor vehicle' means a motor vehicle that is any of the following:

"(i) Any self-propelled vehicle designed for transporting persons or property on a public street, highway, or road.

"(ii) A boat.

"(iii) Farm machinery or equipment.

"(10) CROSS REFERENCES.—

"(A) For requirement that an electing real property trade or business use the alternative depreciation system, see section 168(g)(1)(F).

"(B) For requirement that an electing farming business use the alternative depreciation system, see section 168(g)(1)(G).".

(b) TREATMENT OF CARRYFORWARD OF DISALLOWED BUSINESS INTEREST IN CERTAIN CORPORATE ACQUISITIONS.—

(1) IN GENERAL.—Section 381(c) is amended by inserting after paragraph (19) the following new paragraph:

"(20) CARRYFORWARD OF DISALLOWED BUSINESS INTEREST.—The carryover of disallowed business interest described in section 163(j)(2) to taxable years ending after the date of distribution or transfer.".

(2) APPLICATION OF LIMITATION.—Section 382(d) is amended by adding at the end the following new paragraph:

"(3) APPLICATION TO CARRYFORWARD OF DISALLOWED INTEREST.—The term 'pre-change loss' shall include any carryover of disallowed interest de-

scribed in section 163(j)(2) under rules similar to the rules of paragraph (1).".

(3) CONFORMING AMENDMENT.—Section 382(k)(1) is amended by inserting after the first sentence the following: "Such term shall include any corporation entitled to use a carryforward of disallowed interest described in section 381(c)(20).".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13302. MODIFICATION OF NET OPERATING LOSS DEDUCTION.

(a) LIMITATION ON DEDUCTION.—

(1) IN GENERAL.—Section 172(a) is amended to read as follows:

"(a) DEDUCTION ALLOWED.—There shall be allowed as a deduction for the taxable year an amount equal to the lesser of—

"(1) the aggregate of the net operating loss carryovers to such year, plus the net operating loss carrybacks to such year, or

"(2) 80 percent of taxable income computed without regard to the deduction allowable under this section.

For purposes of this subtitle, the term 'net operating loss deduction' means the deduction allowed by this subsection.".

(2) COORDINATION OF LIMITATION WITH CARRYBACKS AND CARRYOVERS.—Section 172(b)(2) is amended by striking "shall be computed—" and all that follows and inserting "shall—

"(A) be computed with the modifications specified in subsection (d) other than paragraphs (1), (4), and (5) thereof, and by determining the amount of the net operating loss deduction without regard to the net operating loss for the loss year or for any taxable year thereafter,

"(B) not be considered to be less than zero, and

"(C) not exceed the amount determined under subsection (a)(2) for such prior taxable year.".

(3) CONFORMING AMENDMENT.—Section 172(d)(6) is amended by striking "and" at the end of subparagraph (A), by striking the period at the end of subparagraph (B) and inserting "; and", and by adding at the end the following new subparagraph:

"(C) subsection (a)(2) shall be applied by substituting 'real estate investment trust taxable income (as defined in section 857(b)(2) but with-

out regard to the deduction for dividends paid (as defined in section 561))' for 'taxable income'.".

(b) REPEAL OF NET OPERATING LOSS CARRYBACK; INDEFINITE CARRYFORWARD.—

(1) IN GENERAL.—Section 172(b)(1)(A) is amended—

(A) by striking "shall be a net operating loss carryback to each of the 2 taxable years" in clause (i) and inserting "except as otherwise provided in this paragraph, shall not be a net operating loss carryback to any taxable year", and

(B) by striking "to each of the 20 taxable years" in clause (ii) and inserting "to each taxable year".

(2) CONFORMING AMENDMENT.—Section 172(b)(1) is amended by striking subparagraphs (B) through (F).

(c) TREATMENT OF FARMING LOSSES.—

(1) ALLOWANCE OF CARRYBACKS.—Section 172(b)(1), as amended by subsection (b)(2), is amended by adding at the end the following new subparagraph:

"(B) FARMING LOSSES.—

"(i) IN GENERAL.—In the case of any portion of a net operating loss for the taxable year which is a farming loss with respect to the taxpayer, such loss shall be a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss.

"(ii) FARMING LOSS.—For purposes of this section, the term 'farming loss' means the lesser of—

"(I) the amount which would be the net operating loss for the taxable year if only income and deductions attributable to farming businesses (as defined in section 263A(e)(4)) are taken into account, or

"(II) the amount of the net operating loss for such taxable year.

"(iii) COORDINATION WITH PARAGRAPH (2).—For purposes of applying paragraph (2), a farming loss for any taxable year shall be treated as a separate net operating loss for such taxable year to be taken into account after the remaining portion of the net operating loss for such taxable year.

"(iv) ELECTION.—Any taxpayer entitled to a 2-year carryback under clause (i) from any loss year may elect not to have such clause apply to such loss year. Such election shall be made in such manner as prescribed by the Secretary and shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxable year of the net operating loss. Such election, once made for any taxable year, shall be irrevocable for such taxable year.".

(2) CONFORMING AMENDMENTS.—

(A) Section 172 is amended by striking subsections (f), (g), and (h), and by redesignating subsection (i) as subsection (f).

(B) Section 537(b)(4) is amended by inserting "(as in effect before the date of enactment of the Tax Cuts and Jobs Act)" after "as defined in section 172(f)".

(d) TREATMENT OF CERTAIN INSURANCE LOSSES.—

(1) TREATMENT OF CARRYFORWARDS AND CARRYBACKS.—Section 172(b)(1), as amended by subsections (b)(2) and (c)(1), is amended by adding at the end the following new subparagraph:

"(C) INSURANCE COMPANIES.—In the case of an insurance company (as defined in section 816(a)) other than a life insurance company, the net operating loss for any taxable year—

"(i) shall be a net operating loss carryback to each of the 2 taxable years preceding the taxable year of such loss, and

"(ii) shall be a net operating loss carryover to each of the 20 taxable years following the taxable year of the loss.".

(2) EXEMPTION FROM LIMITATION.—Section 172, as amended by subsection (c)(2)(A), is amended by redesignating subsection (f) as subsection (g) and inserting after subsection (e) the following new subsection:

"(f) SPECIAL RULE FOR INSURANCE COMPANIES.—In the case of an insurance company (as defined in section 816(a)) other than a life insurance company—

"(1) the amount of the deduction allowed under subsection (a) shall be the aggregate of the net operating loss carryovers to such year, plus the net operating loss carrybacks to such year, and

"(2) subparagraph (C) of subsection (b)(2) shall not apply.".

(e) EFFECTIVE DATE.—

(1) NET OPERATING LOSS LIMITATION.—The amendments made by subsections (a) and (d)(2) shall apply to losses arising in taxable years beginning after December 31, 2017.

(2) CARRYFORWARDS AND CARRYBACKS.—The amendments made by subsections (b), (c), and (d)(1) shall apply to net operating losses arising in taxable years ending after December 31, 2017.

SEC. 13303. LIKE-KIND EXCHANGES OF REAL PROPERTY.

(a) IN GENERAL.—Section 1031(a)(1) is amended by striking "property" each place it appears and inserting "real property".

(b) CONFORMING AMENDMENTS.—

(1)(A) Paragraph (2) of section 1031(a) is amended to read as follows:

"(2) EXCEPTION FOR REAL PROPERTY HELD FOR SALE.—This subsection shall not apply to any exchange of real property held primarily for sale.".

(B) Section 1031 is amended by striking subsection (i).

(2) Section 1031 is amended by striking subsection (e).

(3) Section 1031, as amended by paragraph (2), is amended by inserting after subsection (d) the following new subsection:

"(e) APPLICATION TO CERTAIN PARTNERSHIPS.—For purposes of this section, an interest in a partnership which has in effect a valid election under section 761(a) to be excluded from the application of all of subchapter K shall be treated as an interest in each of the assets of such partnership and not as an interest in a partnership.".

(4) Section 1031(h) is amended to read as follows:

"(h) SPECIAL RULES FOR FOREIGN REAL PROPERTY.—Real property located in the United States and real property located outside the United States are not property of a like kind.".

*(5) The heading of section 1031 is amended by striking "**PROPERTY**" and inserting "**REAL PROPERTY**".*

(6) The table of sections for part III of subchapter O of chapter 1 is amended by striking the item relating to section 1031 and inserting the following new item:

"Sec. 1031. Exchange of real property held for productive use or investment.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall apply to exchanges completed after December 31, 2017.

(2) TRANSITION RULE.—The amendments made by this section shall not apply to any exchange if—

(A) the property disposed of by the taxpayer in the exchange is disposed of on or before December 31 2017, or

(B) the property received by the taxpayer in the exchange is received on or before December 31, 2017.

SEC. 13304. LIMITATION ON DEDUCTION BY EMPLOYERS OF EXPENSES FOR FRINGE BENEFITS.

(a) NO DEDUCTION ALLOWED FOR ENTERTAINMENT EXPENSES.—

(1) IN GENERAL.—Section 274(a) is amended—

(A) in paragraph (1)(A), by striking "unless" and all that follows through "trade or business,",

(B) by striking the flush sentence at the end of paragraph (1), and

(C) by striking paragraph (2)(C).

(2) CONFORMING AMENDMENTS.—

(A) Section 274(d) is amended—

(i) by striking paragraph (2) and redesignating paragraphs (3) and (4) as paragraphs (2) and (3), respectively, and

(ii) in the flush text following paragraph (3) (as so redesignated)—

(I) by striking ", entertainment, amusement, recreation, or use of the facility or property," in item (B), and

(II) by striking "(D) the business relationship to the taxpayer of persons entertained, using the facility or property, or receiving the gift" and inserting "(D) the business relationship to the taxpayer of the person receiving the benefit",

(B) Section 274 is amended by striking subsection (l).

(C) Section 274(n) is amended by striking "AND ENTERTAINMENT" in the heading.

(D) Section 274(n)(1) is amended to read as follows:

"(1) IN GENERAL.—The amount allowable as a deduction under this chapter for any expense for food or beverages shall not exceed 50 percent of the amount of such expense which would (but for this paragraph) be allowable as a deduction under this chapter.".

(E) Section 274(n)(2) is amended—

(i) in subparagraph (B), by striking "in the case of an expense for food or beverages,",

(ii) by striking subparagraph (C) and redesignating subparagraphs (D) and (E) as subparagraphs (C) and (D), respectively,

(iii) by striking "of subparagraph (E)" the last sentence and inserting "of subparagraph (D)", and

(iv) by striking "in subparagraph (D)" in the last sentence and inserting "in subparagraph (C)".

(F) Clause (iv) of section 7701(b)(5)(A) is amended to read as follows:

"(iv) a professional athlete who is temporarily in the United States to compete in a sports event—

"(I) which is organized for the primary purpose of benefiting an organization which is described in section 501(c)(3) and exempt from tax under section 501(a),

"(II) all of the net proceeds of which are contributed to such organization, and,

"(III) which utilizes volunteers for substantially all of the work performed in carrying out such event.".

(b) ONLY 50 PERCENT OF EXPENSES FOR MEALS PROVIDED ON OR NEAR BUSINESS PREMISES ALLOWED AS DEDUCTION.—Paragraph (2) of section 274(n), as amended by subsection (a), is amended—

(1) by striking subparagraph (B),

(2) by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively,

(3) by striking "of subparagraph (D)" in the last sentence and inserting "of subparagraph (C)", and

(4) by striking "in subparagraph (C)" in the last sentence and inserting "in subparagraph (B)".

(c) TREATMENT OF TRANSPORTATION BENEFITS.—Section 274, as amended by subsection (a), is amended—

(1) in subsection (a)—

(A) in the heading, by striking "OR RECREATION" and inserting "RECREATION, OR QUALIFIED TRANSPORTATION FRINGES", and

(B) by adding at the end the following new paragraph:

"(4) QUALIFIED TRANSPORTATION FRINGES.—No deduction shall be allowed under this chapter for the expense of any qualified transportation fringe (as de-

fined in section 132(f)) provided to an employee of the taxpayer.", and

(2) by inserting after subsection (k) the following new subsection:

"(l) TRANSPORTATION AND COMMUTING BENEFITS.—

"(1) IN GENERAL.—No deduction shall be allowed under this chapter for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee.

"(2) EXCEPTION.—In the case of any qualified bicycle commuting reimbursement (as described in section 132(f)(5)(F)), this subsection shall not apply for any amounts paid or incurred after December 31, 2017, and before January 1, 2026.".

(d) ELIMINATION OF DEDUCTION FOR MEALS PROVIDED AT CONVENIENCE OF EMPLOYER.—Section 274, as amended by subsection (c), is amended—

(1) by redesignating subsection (o) as subsection (p), and

(2) by inserting after subsection (n) the following new subsection:

"(o) MEALS PROVIDED AT CONVENIENCE OF EMPLOYER.—No deduction shall be allowed under this chapter for—

"(1) any expense for the operation of a facility described in section 132(e)(2), and any expense for food or beverages, including under section 132(e)(1), associated with such facility, or

"(2) any expense for meals described in section 119(a).".

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to amounts incurred or paid after December 31, 2017.

(2) EFFECTIVE DATE FOR ELIMINATION OF DEDUCTION FOR MEALS PROVIDED AT CONVENIENCE OF EMPLOYER.—The amendments made by subsection (d) shall apply to amounts incurred or paid after December 31, 2025.

SEC. 13305. REPEAL OF DEDUCTION FOR INCOME ATTRIBUTABLE TO DOMESTIC PRODUCTION ACTIVITIES.

(a) IN GENERAL.—Part VI of subchapter B of chapter 1 is amended by striking section 199 (and by striking the

item relating to such section in the table of sections for such part).

(b) CONFORMING AMENDMENTS.—

(1) Sections 74(d)(2)(B), 86(b)(2)(A), 135(c)(4)(A), 137(b)(3)(A), 219(g)(3)(A)(ii), 221(b)(2)(C), 222(b)(2)(C), 246(b)(1), and 469(i)(3)(F)(iii) are each amended by striking "199,".

(2) Section 170(b)(2)(D), as amended by subtitle A, is amended by striking clause (iv), and by redesignating clauses (v) and (vi) as clauses (iv) and (v).

(3) Section 172(d) is amended by striking paragraph (7).

(4) Section 613(a), as amended by section 11011, is amended by striking "and without the deduction under section 199".

(5) Section 613A(d)(1), as amended by section 11011, is amended by striking subparagraph (B) and by redesignating subparagraphs (C), (D), (E), and (F) as subparagraphs (B), (C), (D), and (E), respectively.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13306. DENIAL OF DEDUCTION FOR CERTAIN FINES, PENALTIES, AND OTHER AMOUNTS.

(a) DENIAL OF DEDUCTION.—

(1) IN GENERAL.—Subsection (f) of section 162 is amended to read as follows:

"(f) FINES, PENALTIES, AND OTHER AMOUNTS.—

"(1) IN GENERAL.—Except as provided in the following paragraphs of this subsection, no deduction otherwise allowable shall be allowed under this chapter for any amount paid or incurred (whether by suit, agreement, or otherwise) to, or at the direction of, a government or governmental entity in relation to the violation of any law or the investigation or inquiry by such government or entity into the potential violation of any law.

"(2) EXCEPTION FOR AMOUNTS CONSTITUTING RESTITUTION OR PAID TO COME INTO COMPLIANCE WITH LAW.—

"(A) IN GENERAL.—Paragraph (1) shall not apply to any amount that—

"(i) the taxpayer establishes—

"(I) constitutes restitution (including remediation of property) for damage or harm which was or may be caused by the violation of any law or the potential violation of any law, or

"(II) is paid to come into compliance with any law which was violated or otherwise involved in the investigation or inquiry described in paragraph (1),

"(ii) is identified as restitution or as an amount paid to come into compliance with such law, as the case may be, in the court order or settlement agreement, and

"(iii) in the case of any amount of restitution for failure to pay any tax imposed under this title in the same manner as if such amount were such tax, would have been allowed as a deduction under this chapter if it had been timely paid.

The identification under clause (ii) alone shall not be sufficient to make the establishment required under clause (i).

"(B) LIMITATION.—Subparagraph (A) shall not apply to any amount paid or incurred as reimbursement to the government or entity for the costs of any investigation or litigation.

"(3) EXCEPTION FOR AMOUNTS PAID OR INCURRED AS THE RESULT OF CERTAIN COURT ORDERS.—Paragraph (1) shall not apply to any

amount paid or incurred by reason of any order of a court in a suit in which no government or governmental entity is a party.

"(4) EXCEPTION FOR TAXES DUE.—Paragraph (1) shall not apply to any amount paid or incurred as taxes due.

"(5) TREATMENT OF CERTAIN NONGOVERNMENTAL REGULATORY ENTITIES.—For purposes of this subsection, the following nongovernmental entities shall be treated as governmental entities:

"(A) Any nongovernmental entity which exercises self-regulatory powers (including imposing sanctions) in connection with a qualified board or exchange (as defined in section 1256(g)(7)).

"(B) To the extent provided in regulations, any nongovernmental entity which exercises self-regulatory powers (including imposing sanctions) as part of performing an essential governmental function.".

(2) EFFECTIVE DATE.—The amendment made by this subsection shall apply to amounts paid or incurred on or after the date of the enactment of this Act, except that such amendments shall not apply to amounts paid or incurred under any binding order or

agreement entered into before such date. Such exception shall not apply to an order or agreement requiring court approval unless the approval was obtained before such date.

(b) REPORTING OF DEDUCTIBLE AMOUNTS.—

(1) IN GENERAL.—Subpart B of part III of subchapter A of chapter 61 is amended by inserting after section 6050W the following new section:

"SEC. 6050X. INFORMATION WITH RESPECT TO CERTAIN FINES, PENALTIES, AND OTHER AMOUNTS.

"(a) REQUIREMENT OF REPORTING.—

"(1) IN GENERAL.—The appropriate official of any government or any entity described in section 162(f)(5) which is involved in a suit or agreement described in paragraph (2) shall make a return in such form as determined by the Secretary setting forth—

"(A) the amount required to be paid as a result of the suit or agreement to which paragraph (1) of section 162(f) applies,

"(B) any amount required to be paid as a result of the suit or agreement which constitutes restitution or remediation of property, and

"(C) any amount required to be paid as a result of the suit or agreement for the purpose of coming into compliance with any law which was

violated or involved in the investigation or inquiry.

"(2) SUIT OR AGREEMENT DESCRIBED.—

"(A) IN GENERAL.—A suit or agreement is described in this paragraph if—

"(i) it is—

"(I) a suit with respect to a violation of any law over which the government or entity has authority and with respect to which there has been a court order, or

"(II) an agreement which is entered into with respect to a violation of any law over which the government or entity has authority, or with respect to an investigation or inquiry by the government or entity into the potential violation of any law over which such government or entity has authority, and

"(ii) the aggregate amount involved in all court orders and agreements with respect to the violation, investigation, or inquiry is $600 or more.

"(B) ADJUSTMENT OF REPORTING THRESHOLD.—The Secretary shall adjust the $600 amount in subparagraph (A)(ii) as necessary in order to ensure the efficient administration of the internal revenue laws.

"(3) TIME OF FILING.—The return required under this subsection shall be filed at the time the agreement is entered into, as determined by the Secretary.

"(b) STATEMENTS TO BE FURNISHED TO INDIVIDUALS INVOLVED IN THE SETTLEMENT.—Every person required to make a return under subsection (a) shall furnish to each person who is a party to the suit or agreement a written statement showing—

"(1) the name of the government or entity, and

"(2) the information supplied to the Secretary under subsection (a)(1).

The written statement required under the preceding sentence shall be furnished to the person at the same time the government or entity provides the Secretary with the information required under subsection (a).

"(c) APPROPRIATE OFFICIAL DEFINED.—For purposes of this section, the term 'appropriate official' means the officer or employee having control of the suit, investigation,

or inquiry or the person appropriately designated for purposes of this section.".

(2) CONFORMING AMENDMENT.—The table of sections for subpart B of part III of subchapter A of chapter 61 is amended by inserting after the item relating to section 6050W the following new item:

"Sec. 6050X. Information with respect to certain fines, penalties, and other amounts.".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to amounts paid or incurred on or after the date of the enactment of this Act, except that such amendments shall not apply to amounts paid or incurred under any binding order or agreement entered into before such date. Such exception shall not apply to an order or agreement requiring court approval unless the approval was obtained before such date.

SEC. 13307. DENIAL OF DEDUCTION FOR SETTLEMENTS SUBJECT TO NONDISCLOSURE AGREEMENTS PAID IN CONNECTION WITH SEXUAL HARASSMENT OR SEXUAL ABUSE.

(a) DENIAL OF DEDUCTION.—Section 162 is amended by redesignating subsection (q) as subsection (r) and by inserting after subsection (p) the following new subsection:

"(q) PAYMENTS RELATED TO SEXUAL HARASSMENT AND SEXUAL ABUSE.—No deduction shall be allowed under this chapter for—

"(1) any settlement or payment related to sexual harassment or sexual abuse if such settlement or payment is subject to a nondisclosure agreement, or

"(2) attorney's fees related to such a settlement or payment.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to amounts paid or incurred after the date of the enactment of this Act.

SEC. 13308. REPEAL OF DEDUCTION FOR LOCAL LOBBYING EXPENSES.

(a) IN GENERAL.—Section 162(e) is amended by striking paragraphs (2) and (7) and by redesignating paragraphs (3), (4), (5), (6), and (8) as paragraphs (2), (3), (4), (5), and (6), respectively.

(b) CONFORMING AMENDMENT.—Section 6033(e)(1)(B)(ii) is amended by striking "section 162(e)(5)(B)(ii)" and inserting "section 162(e)(4)(B)(ii)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to amounts paid or incurred on or after the date of the enactment of this Act.

SEC. 13309. RECHARACTERIZATION OF CERTAIN GAINS IN THE CASE OF PARTNERSHIP PROFITS INTERESTS HELD IN CONNECTION WITH PERFORMANCE OF INVESTMENT SERVICES.

(a) IN GENERAL.—Part IV of subchapter O of chapter 1 is amended—

(1) by redesignating section 1061 as section 1062, and

(2) by inserting after section 1060 the following new section:

"SEC. 1061. PARTNERSHIP INTERESTS HELD IN CONNECTION WITH PERFORMANCE OF SERVICES.

"(a) IN GENERAL.—If one or more applicable partnership interests are held by a taxpayer at any time during the taxable year, the excess (if any) of—

"(1) the taxpayer's net long-term capital gain with respect to such interests for such taxable year, over

"(2) the taxpayer's net long-term capital gain with respect to such interests for such taxable year computed by applying paragraphs (3) and (4) of sections 1222 by substituting '3 years' for '1 year',

shall be treated as short-term capital gain, notwithstanding section 83 or any election in effect under section 83(b).

"(b) SPECIAL RULE.—To the extent provided by the Secretary, subsection (a) shall not apply to income or gain

attributable to any asset not held for portfolio investment on behalf of third party investors.

"(c) APPLICABLE PARTNERSHIP INTEREST.—For purposes of this section—

"(1) IN GENERAL.—Except as provided in this paragraph or paragraph (4), the term 'applicable partnership interest' means any interest in a partnership which, directly or indirectly, is transferred to (or is held by) the taxpayer in connection with the performance of substantial services by the taxpayer, or any other related person, in any applicable trade or business. The previous sentence shall not apply to an interest held by a person who is employed by another entity that is conducting a trade or business (other than an applicable trade or business) and only provides services to such other entity.

"(2) APPLICABLE TRADE OR BUSINESS.—The term 'applicable trade or business' means any activity conducted on a regular, continuous, and substantial basis which, regardless of whether the activity is conducted in one or more entities, consists, in whole or in part, of—

"(A) raising or returning capital, and

"(B) either—

"(i) investing in (or disposing of) specified assets (or identifying specified assets for such investing or disposition), or

"(ii) developing specified assets.

"(3) SPECIFIED ASSET.—The term 'specified asset' means securities (as defined in section 475(c)(2) without regard to the last sentence thereof), commodities (as defined in section 475(e)(2)), real estate held for rental or investment, cash or cash equivalents, options or derivative contracts with respect to any of the foregoing, and an interest in a partnership to the extent of the partnership's proportionate interest in any of the foregoing.

"(4) EXCEPTIONS.—The term 'applicable partnership interest' shall not include—

"(A) any interest in a partnership directly or indirectly held by a corporation, or

"(B) any capital interest in the partnership which provides the taxpayer with a right to share in partnership capital commensurate with—

"(i) the amount of capital contributed (determined at the time of receipt of such partnership interest), or

"(ii) the value of such interest subject to tax under section 83 upon the receipt or vesting of such interest.

"(5) THIRD PARTY INVESTOR.—The term 'third party investor' means a person who—

"(A) holds an interest in the partnership which does not constitute property held in connection with an applicable trade or business; and

"(B) is not (and has not been) actively engaged, and is (and was) not related to a person so engaged, in (directly or indirectly) providing substantial services described in paragraph (1) for such partnership or any applicable trade or business.

"(d) TRANSFER OF APPLICABLE PARTNERSHIP INTEREST TO RELATED PERSON.—

"(1) IN GENERAL.—If a taxpayer transfers any applicable partnership interest, directly or indirectly, to a person related to the taxpayer, the taxpayer shall include in gross income (as short term capital gain) the excess (if any) of—

"(A) so much of the taxpayer's long-term capital gains with respect to such interest for such taxable year attributable to the sale or ex-

change of any asset held for not more than 3 years as is allocable to such interest, over

"(B) any amount treated as short term capital gain under subsection (a) with respect to the transfer of such interest.

"(2) RELATED PERSON.—For purposes of this paragraph, a person is related to the taxpayer if—

"(A) the person is a member of the taxpayer's family within the meaning of section 318(a)(1), or

"(B) the person performed a service within the current calendar year or the preceding three calendar years in any applicable trade or business in which or for which the taxpayer performed a service.

"(e) REPORTING.—The Secretary shall require such reporting (at the time and in the manner prescribed by the Secretary) as is necessary to carry out the purposes of this section.

"(f) REGULATIONS.—The Secretary shall issue such regulations or other guidance as is necessary or appropriate to carry out the purposes of this section".

(b) CLERICAL AMENDMENT.—The table of sections for part IV of subchapter O of chapter 1 is amended by striking

the item relating to 1061 and inserting the following new items:

"Sec. 1061. Partnership interests held in connection with performance of services.
"Sec. 1062. Cross references.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13310. PROHIBITION ON CASH, GIFT CARDS, AND OTHER NON-TANGIBLE PERSONAL PROPERTY AS EMPLOYEE ACHIEVEMENT AWARDS.

(a) IN GENERAL.—Subparagraph (A) of section 274(j)(3) is amended—

(1) by striking "The term" and inserting the following:

"(i) IN GENERAL.—The term".

(2) by redesignating clauses (i), (ii), and (iii) as subclauses (I), (II), and (III), respectively, and conforming the margins accordingly, and

(3) by adding at the end the following new clause:

"(ii) TANGIBLE PERSONAL PROPERTY.—For purposes of clause (i), the term 'tangible personal property' shall not include—

"(I) cash, cash equivalents, gift cards, gift coupons, or gift certificates

(other than arrangements conferring only the right to select and receive tangible personal property from a limited array of such items pre-selected or pre-approved by the employer), or

"(II) vacations, meals, lodging, tickets to theater or sporting events, stocks, bonds, other securities, and other similar items.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to amounts paid or incurred after December 31, 2017.

SEC. 13311. ELIMINATION OF DEDUCTION FOR LIVING EXPENSES INCURRED BY MEMBERS OF CONGRESS.

(a) IN GENERAL.—Subsection (a) of section 162 is amended in the matter following paragraph (3) by striking "in excess of $3,000".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years beginning after the date of the enactment of this Act.

SEC. 13312. CERTAIN CONTRIBUTIONS BY GOVERNMENTAL ENTITIES NOT TREATED AS CONTRIBUTIONS TO CAPITAL.

(a) IN GENERAL.—Section 118 is amended—

(1) by striking subsections (b), (c), and (d),

(2) by redesignating subsection (e) as subsection (d), and

(3) by inserting after subsection (a) the following new subsections:

"(b) EXCEPTIONS.—For purposes of subsection (a), the term 'contribution to the capital of the taxpayer' does not include—

"(1) any contribution in aid of construction or any other contribution as a customer or potential customer, and

"(2) any contribution by any governmental entity or civic group (other than a contribution made by a shareholder as such).

"(c) REGULATIONS.—The Secretary shall issue such regulations or other guidance as may be necessary or appropriate to carry out this section, including regulations or other guidance for determining whether any contribution constitutes a contribution in aid of construction.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to contributions made after the date of enactment of this Act.

(2) EXCEPTION.—The amendments made by this section shall not apply to any contribution, made after the date of enactment of this Act by a governmental entity, which is made pursuant to a master development plan that has been approved prior to such date by a governmental entity.

SEC. 13313. REPEAL OF ROLLOVER OF PUBLICLY TRADED SECURITIES GAIN INTO SPECIALIZED SMALL BUSINESS INVESTMENT COMPANIES.

(a) IN GENERAL.—Part III of subchapter O of chapter 1 is amended by striking section 1044 (and by striking the item relating to such section in the table of sections of such part).

(b) CONFORMING AMENDMENTS.—Section 1016(a)(23) is amended—

(1) by striking "1044,", and

(2) by striking "1044(d),".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to sales after December 31, 2017.

SEC. 13314. CERTAIN SELF-CREATED PROPERTY NOT TREATED AS A CAPITAL ASSET.

(a) PATENTS, ETC.—Section 1221(a)(3) is amended by inserting "a patent, invention, model or design (whether or not patented), a secret formula or process," before "a copyright".

(b) CONFORMING AMENDMENT.—Section 1231(b)(1)(C) is amended by inserting "a patent, invention, model or design (whether or not patented), a secret formula or process," before "a copyright".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to dispositions after December 31, 2017.

PART V—BUSINESS CREDITS

SEC. 13401. MODIFICATION OF ORPHAN DRUG CREDIT.

(a) CREDIT RATE.—Subsection (a) of section 45C is amended by striking "50 percent" and inserting "25 percent".

(b) ELECTION OF REDUCED CREDIT.—Subsection (b) of section 280C is amended by redesignating paragraph (3) as paragraph (4) and by inserting after paragraph (2) the following new paragraph:

"(3) ELECTION OF REDUCED CREDIT.—

"(A) IN GENERAL.—In the case of any taxable year for which an election is made under this paragraph—

"(i) paragraphs (1) and (2) shall not apply, and

"(ii) the amount of the credit under section 45C(a) shall be the amount determined under subparagraph (B).

"(B) AMOUNT OF REDUCED CREDIT.—The amount of credit determined under this subparagraph for any taxable year shall be the amount equal to the excess of—

"(i) the amount of credit determined under section 45C(a) without regard to this paragraph, over

"(ii) the product of—

"(I) the amount described in clause (i), and

"(II) the maximum rate of tax under section 11(b).

"(C) ELECTION.—An election under this paragraph for any taxable year shall be made not later than the time for filing the return of tax for such year (including extensions), shall be made on such return, and shall be made in such manner as the Secretary shall prescribe. Such an election, once made, shall be irrevocable.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13402. REHABILITATION CREDIT LIMITED TO CERTIFIED HISTORIC STRUCTURES.

(a) IN GENERAL.—Subsection (a) of section 47 is amended to read as follows:

"(a) GENERAL RULE.—

"(1) IN GENERAL.—For purposes of section 46, for any taxable year during the 5-year period beginning in the taxable year in which a qualified rehabilitated building is placed in service, the rehabilitation credit for such year is an amount equal to the ratable share for such year.

"(2) RATABLE SHARE.—For purposes of paragraph (1), the ratable share for any taxable year during the period described in such paragraph is the amount equal to 20 percent of the qualified rehabilitation expenditures with respect to the qualified rehabilitated building, as allocated ratably to each year during such period.".

(b) CONFORMING AMENDMENTS.—

(1) Section 47(c) is amended—

(A) in paragraph (1)—

(i) in subparagraph (A), by amending clause (iii) to read as follows:

"(iii) such building is a certified historic structure, and",

(ii) by striking subparagraph (B), and

(iii) by redesignating subparagraphs (C) and (D) as subparagraphs (B) and (C), respectively, and

(B) in paragraph (2)(B), by amending clause (iv) to read as follows:

"(iv) CERTIFIED HISTORIC STRUCTURE.—Any expenditure attributable to the rehabilitation of a qualified rehabilitated building unless the rehabilitation is a certified rehabilitation (within the meaning of subparagraph (C)).".

(2) Paragraph (4) of section 145(d) is amended—

(A) by striking "of section 47(c)(1)(C)" each place it appears and inserting "of section 47(c)(1)(B)", and

(B) by striking "section 47(c)(1)(C)(i)" and inserting "section 47(c)(1)(B)(i)".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to amounts paid or incurred after December 31, 2017.

(2) TRANSITION RULE.—In the case of qualified rehabilitation expenditures with respect to any building—

(A) owned or leased by the taxpayer during the entirety of the period after December 31, 2017, and

(B) with respect to which the 24-month period selected by the taxpayer under clause (i) of section 47(c)(1)(B) of the Internal Revenue Code (as amended by subsection (b)), or the 60-month period applicable under clause (ii) of such section, begins not later than 180 days after the date of the enactment of this Act,

the amendments made by this section shall apply to such expenditures paid or incurred after the end of the taxable year in which the 24-month period, or the 60-month period, referred to in subparagraph (B) ends.

SEC. 13403. EMPLOYER CREDIT FOR PAID FAMILY AND MEDICAL LEAVE.

(a) IN GENERAL.—

(1) ALLOWANCE OF CREDIT.—Subpart D of part IV of subchapter A of chapter 1 is amended by adding at the end the following new section:

"SEC. 45S. EMPLOYER CREDIT FOR PAID FAMILY AND MEDICAL LEAVE.

"(a) ESTABLISHMENT OF CREDIT.—

"(1) IN GENERAL.—For purposes of section 38, in the case of an eligible employer, the paid family and medical leave credit is an amount equal to the applicable percentage of the amount of wages paid to qualifying employees during any period in which such employees are on family and medical leave.

"(2) APPLICABLE PERCENTAGE.—For purposes of paragraph (1), the term 'applicable percentage' means 12.5 percent increased (but not above 25 percent) by 0.25 percentage points for each percentage point by which the rate of payment (as described under subsection (c)(1)(B)) exceeds 50 percent.

"(b) LIMITATION.—

"(1) IN GENERAL.—The credit allowed under subsection (a) with respect to any employee for any taxable year shall not exceed an amount equal to the product of the normal hourly wage rate of such employee for each hour (or fraction thereof) of actual services performed for the employer and the number of hours (or fraction thereof) for which family and medical leave is taken.

"(2) NON-HOURLY WAGE RATE.—For purposes of paragraph (1), in the case of any employee who is not

paid on an hourly wage rate, the wages of such employee shall be prorated to an hourly wage rate under regulations established by the Secretary.

"(3) MAXIMUM AMOUNT OF LEAVE SUBJECT TO CREDIT.—The amount of family and medical leave that may be taken into account with respect to any employee under subsection (a) for any taxable year shall not exceed 12 weeks.

"(c) ELIGIBLE EMPLOYER.—For purposes of this section—

"(1) IN GENERAL.—The term 'eligible employer' means any employer who has in place a written policy that meets the following requirements:

"(A) The policy provides—

"(i) in the case of a qualifying employee who is not a part-time employee (as defined in section 4980E(d)(4)(B)), not less than 2 weeks of annual paid family and medical leave, and

"(ii) in the case of a qualifying employee who is a part-time employee, an amount of annual paid family and medical leave that is not less than an amount which bears the same ratio to the amount of annual paid family and medical leave that is

provided to a qualifying employee described in clause (i) as—

"(I) the number of hours the employee is expected to work during any week, bears to

"(II) the number of hours an equivalent qualifying employee described in clause (i) is expected to work during the week.

"(B) The policy requires that the rate of payment under the program is not less than 50 percent of the wages normally paid to such employee for services performed for the employer.

"(2) SPECIAL RULE FOR CERTAIN EMPLOYERS.—

"(A) IN GENERAL.—An added employer shall not be treated as an eligible employer unless such employer provides paid family and medical leave in compliance with a written policy which ensures that the employer—

"(i) will not interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under the policy, and

"(ii) will not discharge or in any other manner discriminate against any indi-

vidual for opposing any practice prohibited by the policy.

"(B) ADDED EMPLOYER; ADDED EMPLOYEE.—For purposes of this paragraph—

"(i) ADDED EMPLOYEE.—The term 'added employee' means a qualifying employee who is not covered by title I of the Family and Medical Leave Act of 1993, as amended.

"(ii) ADDED EMPLOYER.—The term 'added employer' means an eligible employer (determined without regard to this paragraph), whether or not covered by that title I, who offers paid family and medical leave to added employees.

"(3) AGGREGATION RULE.—All persons which are treated as a single employer under subsections (a) and (b) of section 52 shall be treated as a single taxpayer.

"(4) TREATMENT OF BENEFITS MANDATED OR PAID FOR BY STATE OR LOCAL GOVERNMENTS.—For purposes of this section, any leave which is paid by a State or local government or required by State or local law shall not be taken into account in deter-

mining the amount of paid family and medical leave provided by the employer.

"(5) NO INFERENCE.—Nothing in this subsection shall be construed as subjecting an employer to any penalty, liability, or other consequence (other than ineligibility for the credit allowed by reason of subsection (a) or recapturing the benefit of such credit) for failure to comply with the requirements of this subsection.

"(d) QUALIFYING EMPLOYEES.—For purposes of this section, the term 'qualifying employee' means any employee (as defined in section 3(e) of the Fair Labor Standards Act of 1938, as amended) who—

"(1) has been employed by the employer for 1 year or more, and

"(2) for the preceding year, had compensation not in excess of an amount equal to 60 percent of the amount applicable for such year under clause (i) of section 414(q)(1)(B).

"(e) FAMILY AND MEDICAL LEAVE.—

"(1) IN GENERAL.—Except as provided in paragraph (2), for purposes of this section, the term 'family and medical leave' means leave for any 1 or more of the purposes described under subparagraph (A), (B), (C), (D), or (E) of paragraph (1), or paragraph

(3), of section 102(a) of the Family and Medical Leave Act of 1993, as amended, whether the leave is provided under that Act or by a policy of the employer.

"(2) EXCLUSION.—If an employer provides paid leave as vacation leave, personal leave, or medical or sick leave (other than leave specifically for 1 or more of the purposes referred to in paragraph (1)), that paid leave shall not be considered to be family and medical leave under paragraph (1).

"(3) DEFINITIONS.—In this subsection, the terms 'vacation leave', 'personal leave', and 'medical or sick leave' mean those 3 types of leave, within the meaning of section 102(d)(2) of that Act.

"(f) DETERMINATIONS MADE BY SECRETARY OF TREASURY.—For purposes of this section, any determination as to whether an employer or an employee satisfies the applicable requirements for an eligible employer (as described in subsection (c)) or qualifying employee (as described in subsection (d)), respectively, shall be made by the Secretary based on such information, to be provided by the employer, as the Secretary determines to be necessary or appropriate.

"(g) WAGES.—For purposes of this section, the term 'wages' has the meaning given such term by subsection (b)

of section 3306 (determined without regard to any dollar limitation contained in such section). Such term shall not include any amount taken into account for purposes of determining any other credit allowed under this subpart.

"(h) ELECTION TO HAVE CREDIT NOT APPLY.—

"(1) IN GENERAL.—A taxpayer may elect to have this section not apply for any taxable year.

"(2) OTHER RULES.—Rules similar to the rules of paragraphs (2) and (3) of section 51(j) shall apply for purposes of this subsection.

"(i) TERMINATION.—This section shall not apply to wages paid in taxable years beginning after December 31, 2019.".

(b) CREDIT PART OF GENERAL BUSINESS CREDIT.—Section 38(b) is amended by striking "plus" at the end of paragraph (35), by striking the period at the end of paragraph (36) and inserting ", plus", and by adding at the end the following new paragraph:

"(37) in the case of an eligible employer (as defined in section 45S(c)), the paid family and medical leave credit determined under section 45S(a).".

(c) CREDIT ALLOWED AGAINST AMT.—Subparagraph (B) of section 38(c)(4) is amended by redesignating clauses (ix) through (xi) as clauses (x) through (xii), respectively, and by inserting after clause (viii) the following new clause:

"(ix) the credit determined under section 45S,".

(d) CONFORMING AMENDMENTS.—

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

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

(3) CLERICAL AMENDMENT.—The table of sections for subpart D of part IV of subchapter A of chapter 1 is amended by adding at the end the following new item:

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

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to wages paid in taxable years beginning after December 31, 2017.

SEC. 13404. REPEAL OF TAX CREDIT BONDS.

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

(b) PAYMENTS TO ISSUERS.—Subchapter B of chapter 65 is amended by striking section 6431 (and by striking the item relating to such section in the table of sections for such subchapter).

(c) CONFORMING AMENDMENTS.—

(1) Part IV of subchapter U of chapter 1 is amended by striking section 1397E (and by striking the item relating to such section in the table of sections for such part).

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

(3) Section 6211(b)(4)(A) is amended by striking ", and 6431" and inserting "and" before "36B".

(4) Section 6401(b)(1) is amended by striking "G, H, I, and J" and inserting "and G".

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

PART VI—PROVISIONS RELATED TO SPECIFIC ENTITIES AND INDUSTRIES

Subpart A—Partnership Provisions

SEC. 13501. TREATMENT OF GAIN OR LOSS OF FOREIGN PERSONS FROM SALE OR EXCHANGE OF INTERESTS IN PARTNERSHIPS ENGAGED IN TRADE OR BUSINESS WITHIN THE UNITED STATES.

(a) AMOUNT TREATED AS EFFECTIVELY CONNECTED.—

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

"(8) GAIN OR LOSS OF FOREIGN PERSONS FROM SALE OR EXCHANGE OF CERTAIN PARTNERSHIP INTERESTS.—

"(A) IN GENERAL.—Notwithstanding any other provision of this subtitle, if a nonresident alien individual or foreign corporation owns, directly or indirectly, an interest in a partnership which is engaged in any trade or business within the United States, gain or loss on the sale or exchange of all (or any portion of) such interest shall be treated as effectively connected with the conduct of such trade or business to the extent such gain or loss does not exceed the amount determined under subparagraph (B).

"(B) AMOUNT TREATED AS EFFECTIVELY CONNECTED.—The amount determined under this subparagraph with respect to any partnership interest sold or exchanged—

"(i) in the case of any gain on the sale or exchange of the partnership interest, is—

"(I) the portion of the partner's distributive share of the amount of gain which would have been effectively

connected with the conduct of a trade or business within the United States if the partnership had sold all of its assets at their fair market value as of the date of the sale or exchange of such interest, or

"(II) zero if no gain on such deemed sale would have been so effectively connected, and

"(ii) in the case of any loss on the sale or exchange of the partnership interest, is—

"(I) the portion of the partner's distributive share of the amount of loss on the deemed sale described in clause (i)(I) which would have been so effectively connected, or

"(II) zero if no loss on such deemed sale would be have been so effectively connected.

For purposes of this subparagraph, a partner's distributive share of gain or loss on the deemed sale shall be determined in the same manner as such partner's distributive share of the non-separately stated taxable income or loss of such partnership.

"(C) COORDINATION WITH UNITED STATES REAL PROPERTY INTERESTS.—If a partnership described in subparagraph (A) holds any United States real property interest (as defined in section 897(c)) at the time of the sale or exchange of the partnership interest, then the gain or loss treated as effectively connected income under subparagraph (A) shall be reduced by the amount so treated with respect to such United States real property interest under section 897.

"(D) SALE OR EXCHANGE.—For purposes of this paragraph, the term 'sale or exchange' means any sale, exchange, or other disposition.

"(E) SECRETARIAL AUTHORITY.—The Secretary shall prescribe such regulations or other guidance as the Secretary determines appropriate for the application of this paragraph, including with respect to exchanges described in section 332, 351, 354, 355, 356, or 361.".

(2) CONFORMING AMENDMENTS.—Section 864(c)(1) is amended—

(A) by striking "and (7)" in subparagraph (A), and inserting "(7), and (8)", and

(B) by striking "or (7)" in subparagraph (B), and inserting "(7), or (8)".

(b) WITHHOLDING REQUIREMENTS.—Section 1446 is amended by redesignating subsection (f) as subsection (g) and by inserting after subsection (e) the following:

"(f) SPECIAL RULES FOR WITHHOLDING ON DISPOSITIONS OF PARTNERSHIP INTERESTS.—

"(1) IN GENERAL.—Except as provided in this subsection, if any portion of the gain (if any) on any disposition of an interest in a partnership would be treated under section 864(c)(8) as effectively connected with the conduct of a trade or business within the United States, the transferee shall be required to deduct and withhold a tax equal to 10 percent of the amount realized on the disposition.

"(2) EXCEPTION IF NONFOREIGN AFFIDAVIT FURNISHED.—

"(A) IN GENERAL.—No person shall be required to deduct and withhold any amount under paragraph (1) with respect to any disposition if the transferor furnishes to the transferee an affidavit by the transferor stating, under penalty of perjury, the transferor's United States taxpayer identification number and that the transferor is not a foreign person.

"(B) FALSE AFFIDAVIT.—Subparagraph (A) shall not apply to any disposition if—

"(i) the transferee has actual knowledge that the affidavit is false, or the transferee receives a notice (as described in section 1445(d)) from a transferor's agent or transferee's agent that such affidavit or statement is false, or

"(ii) the Secretary by regulations requires the transferee to furnish a copy of such affidavit or statement to the Secretary and the transferee fails to furnish a copy of such affidavit or statement to the Secretary at such time and in such manner as required by such regulations.

"(C) RULES FOR AGENTS.—The rules of section 1445(d) shall apply to a transferor's agent or transferee's agent with respect to any affidavit described in subparagraph (A) in the same manner as such rules apply with respect to the disposition of a United States real property interest under such section.

"(3) AUTHORITY OF SECRETARY TO PRESCRIBE REDUCED AMOUNT.—At the request of the transferor or transferee, the Secretary may prescribe a reduced amount to be withheld under this section if the Secretary determines that to substitute such reduced

amount will not jeopardize the collection of the tax imposed under this title with respect to gain treated under section 864(c)(8) as effectively connected with the conduct of a trade or business with in the United States.

"(4) PARTNERSHIP TO WITHHOLD AMOUNTS NOT WITHHELD BY THE TRANSFEREE.—If a transferee fails to withhold any amount required to be withheld under paragraph (1), the partnership shall be required to deduct and withhold from distributions to the transferee a tax in an amount equal to the amount the transferee failed to withhold (plus interest under this title on such amount).

"(5) DEFINITIONS.—Any term used in this subsection which is also used under section 1445 shall have the same meaning as when used in such section.

"(6) REGULATIONS.—The Secretary shall prescribe such regulations or other guidance as may be necessary to carry out the purposes of this subsection, including regulations providing for exceptions from the provisions of this subsection.".

(c) EFFECTIVE DATES.—

(1) SUBSECTION (a).—The amendments made by subsection (a) shall apply to sales, exchanges, and dispositions on or after November 27, 2017.

(2) SUBSECTION (b).—The amendment made by subsection (b) shall apply to sales, exchanges, and dispositions after December 31, 2017.

SEC. 13502. MODIFY DEFINITION OF SUBSTANTIAL BUILT-IN LOSS IN THE CASE OF TRANSFER OF PARTNERSHIP INTEREST.

(a) IN GENERAL.—Paragraph (1) of section 743(d) is to read as follows:

"(1) IN GENERAL.—For purposes of this section, a partnership has a substantial built-in loss with respect to a transfer of an interest in the partnership if—

"(A) the partnership's adjusted basis in the partnership property exceeds by more than $250,000 the fair market value of such property, or

"(B) the transferee partner would be allocated a loss of more than $250,000 if the partnership assets were sold for cash equal to their fair market value immediately after such transfer.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to transfers of partnership interests after December 31, 2017.

SEC. 13503. CHARITABLE CONTRIBUTIONS AND FOREIGN TAXES TAKEN INTO ACCOUNT IN DETERMINING LIMITATION ON ALLOWANCE OF PARTNER'S SHARE OF LOSS.

(a) IN GENERAL.—Subsection (d) of section 704 is amended—

(1) by striking "A partner's distributive share" and inserting the following:

"(1) IN GENERAL.—A partner's distributive share",

(2) by striking "Any excess of such loss" and inserting the following:

"(2) CARRYOVER.—Any excess of such loss", and

(3) by adding at the end the following new paragraph:

"(3) SPECIAL RULES.—

"(A) IN GENERAL.—In determining the amount of any loss under paragraph (1), there shall be taken into account the partner's distributive share of amounts described in paragraphs (4) and (6) of section 702(a).

"(B) EXCEPTION.—In the case of a charitable contribution of property whose fair market value exceeds its adjusted basis, subparagraph (A) shall not apply to the extent of the partner's distributive share of such excess.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to partnership taxable years beginning after December 31, 2017.

SEC. 13504. REPEAL OF TECHNICAL TERMINATION OF PARTNERSHIPS.

(a) IN GENERAL.—Paragraph (1) of section 708(b) is amended—

(1) by striking ", or" at the end of subparagraph (A) and all that follows and inserting a period, and

(2) by striking "only if—" and all that follows through "no part of any business" and inserting the following: "only if no part of any business".

(b) CONFORMING AMENDMENT.—

(1) Section 168(i)(7)(B) is amended by striking the second sentence.

(2) Section 743(e) is amended by striking paragraph (4) and redesignating paragraphs (5), (6), and (7) as paragraphs (4), (5), and (6).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to partnership taxable years beginning after December 31, 2017.

Subpart B—Insurance Reforms

SEC. 13511. NET OPERATING LOSSES OF LIFE INSURANCE COMPANIES.

(a) IN GENERAL.—Section 805(b) is amended by striking paragraph (4) and by redesignating paragraph (5) as paragraph (4).

(b) CONFORMING AMENDMENTS.—

(1) Part I of subchapter L of chapter 1 is amended by striking section 810 (and by striking the item relating to such section in the table of sections for such part).

(2)(A) Part III of subchapter L of chapter 1 is amended by striking section 844 (and by striking the item relating to such section in the table of sections for such part).

(B) Section 831(b)(3) is amended by striking "except as provided in section 844,"

(3) Section 381 is amended by striking subsection (d).

(4) Section 805(a)(4)(B)(ii) is amended to read as follows:

"(ii) the deduction allowed under section 172,".

(5) Section 805(a) is amended by striking paragraph (5).

(6) Section 805(b)(2)(A)(iv) is amended to read as follows:

"(iv) any net operating loss carryback to the taxable year under section 172, and".

(7) Section 953(b)(1)(B) is amended to read as follows:

"(B) So much of section 805(a)(8) as relates to the deduction allowed under section 172.".

(8) Section 1351(i)(3) is amended by striking "or the operations loss deduction under section 810,".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to losses arising in taxable years beginning after December 31, 2017.

SEC. 13512. REPEAL OF SMALL LIFE INSURANCE COMPANY DEDUCTION.

(a) IN GENERAL.—Part I of subchapter L of chapter 1 is amended by striking section 806 (and by striking the item relating to such section in the table of sections for such part).

(b) CONFORMING AMENDMENTS.—

(1) Section 453B(e) is amended—

(A) by striking "(as defined in section 806(b)(3))" in paragraph (2)(B), and

(B) by adding at the end the following new paragraph:

"(3) NONINSURANCE BUSINESS.—

"(A) IN GENERAL.—For purposes of this subsection, the term 'noninsurance business' means any activity which is not an insurance business.

"(B) CERTAIN ACTIVITIES TREATED AS INSURANCE BUSINESSES.—For purposes of subparagraph (A), any activity which is not an insurance business shall be treated as an insurance business if—

"(i) it is of a type traditionally carried on by life insurance companies for investment purposes, but only if the carrying on of such activity (other than in the case of real estate) does not constitute the active conduct of a trade or business, or

"(ii) it involves the performance of administrative services in connection with plans providing life insurance, pension, or accident and health benefits.".

(2) Section 465(c)(7)(D)(v)(II) is amended by striking "section 806(b)(3)" and inserting "section 453B(e)(3)".

(3) Section 801(a)(2) is amended by striking subparagraph (C).

(4) Section 804 is amended by striking "means—" and all that follows and inserting "means the general deductions provided in section 805.".

(5) Section 805(a)(4)(B), as amended by this Act, is amended by striking clause (i) and by redesignating clauses (ii), (iii), and (iv) as clauses (i), (ii), and (iii), respectively.

(6) Section 805(b)(2)(A), as amended by this Act, is amended by striking clause (iii) and by redesignating clauses (iv) and (v) as clauses (iii) and (iv), respectively.

(7) Section 842(c) is amended by striking paragraph (1) and by redesignating paragraphs (2) and (3) as paragraphs (1) and (2), respectively.

(8) Section 953(b)(1), as amended by section 13511, is amended by striking subparagraph (A) and by redesignating subparagraphs (B) and (C) as subparagraphs (A) and (B), respectively.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13513. ADJUSTMENT FOR CHANGE IN COMPUTING RESERVES.

(a) IN GENERAL.—Paragraph (1) of section 807(f) is amended to read as follows:

"(1) TREATMENT AS CHANGE IN METHOD OF ACCOUNTING.—If the basis for determining any item referred to in subsection (c) as of the close of any taxable year differs from the basis for such determination as of the close of the preceding taxable year, then so much of the difference between—

"(A) the amount of the item at the close of the taxable year, computed on the new basis, and

"(B) the amount of the item at the close of the taxable year, computed on the old basis,

as is attributable to contracts issued before the taxable year shall be taken into account under section 481 as adjustments attributable to a change in method of accounting initiated by the taxpayer and made with the consent of the Secretary.".

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

SEC. 13514. REPEAL OF SPECIAL RULE FOR DISTRIBUTIONS TO SHAREHOLDERS FROM PRE-1984 POLICYHOLDERS SURPLUS ACCOUNT.

(a) IN GENERAL.—Subpart D of part I of subchapter L is amended by striking section 815 (and by striking the item relating to such section in the table of sections for such subpart).

(b) CONFORMING AMENDMENT.—Section 801 is amended by striking subsection (c).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(d) PHASED INCLUSION OF REMAINING BALANCE OF POLICYHOLDERS SURPLUS ACCOUNTS.—In the case of any stock life insurance company which has a balance (determined as of the close of such company's last taxable year beginning before January 1, 2018) in an existing policyholders surplus account (as defined in section 815 of the Internal Revenue Code of 1986, as in effect before its repeal), the tax imposed by section 801 of such Code for the first 8 taxable years beginning after December 31, 2017, shall be the amount which would be imposed by such section for such year on the sum of—

(1) life insurance company taxable income for such year (within the meaning of such section 801 but not less than zero), plus

(2) 1/8 of such balance.

SEC. 13515. MODIFICATION OF PRORATION RULES FOR PROPERTY AND CASUALTY INSURANCE COMPANIES.

(a) IN GENERAL.—Section 832(b)(5)(B) is amended—

(1) by striking "15 percent" and inserting "the applicable percentage", and

(2) by inserting at the end the following new sentence: "For purposes of this subparagraph, the applicable percentage is 5.25 percent divided by the highest rate in effect under section 11(b).".

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

SEC. 13516. REPEAL OF SPECIAL ESTIMATED TAX PAYMENTS.

(a) IN GENERAL.—Part III of subchapter L of chapter 1 is amended by striking section 847 (and by striking the item relating to such section in the table of sections for such part).

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

SEC. 13517. COMPUTATION OF LIFE INSURANCE TAX RESERVES.

(a) IN GENERAL.—

(1) APPROPRIATE RATE OF INTEREST.—The second sentence of section 807(c) is amended to read as follows: "For purposes of paragraph (3), the appropriate rate of interest is the highest rate or rates per-

mitted to be used to discount the obligations by the National Association of Insurance Commissioners as of the date the reserve is determined.".

(2) METHOD OF COMPUTING RESERVES.—Section 807(d) is amended—

(A) by striking paragraphs (1), (2), (4), and (5),

(B) by redesignating paragraph (6) as paragraph (4),

(C) by inserting before paragraph (3) the following new paragraphs:

"(1) DETERMINATION OF RESERVE.—

"(A) IN GENERAL.—For purposes of this part (other than section 816), the amount of the life insurance reserves for any contract (other than a contract to which subparagraph (B) applies) shall be the greater of—

"(i) the net surrender value of such contract, or

"(ii) 92.81 percent of the reserve determined under paragraph (2).

"(B) VARIABLE CONTRACTS.—For purposes of this part (other than section 816), the amount of the life insurance reserves for a variable contract shall be equal to the sum of—

"(i) the greater of—

"(I) the net surrender value of such contract, or

"(II) the portion of the reserve that is separately accounted for under section 817, plus

"(ii) 92.81 percent of the excess (if any) of the reserve determined under paragraph (2) over the amount in clause (i).

"(C) STATUTORY CAP.—In no event shall the reserves determined under subparagraphs (A) or (B) for any contract as of any time exceed the amount which would be taken into account with respect to such contract as of such time in determining statutory reserves (as defined in paragraph (4)).

"(D) NO DOUBLE COUNTING.—In no event shall any amount or item be taken into account more than once in determining any reserve under this subchapter.

"(2) AMOUNT OF RESERVE.—The amount of the reserve determined under this paragraph with respect to any contract shall be determined by using the tax reserve method applicable to such contract.".

(D) by striking "(other than a qualified long-term care insurance contract, as defined in section 7702B(b)), a 2-year full preliminary term method" in paragraph (3)(A)(iii) and inserting ", the reserve method prescribed by the National Association of Insurance Commissioners which covers such contract as of the date the reserve is determined",

(E) by striking "(as of the date of issuance)" in paragraph (3)(A)(iv)(I) and inserting "(as of the date the reserve is determined)",

(F) by striking "as of the date of the issuance of" in paragraph (3)(A)(iv)(II) and inserting "as of the date the reserve is determined for",

(G) by striking "in effect on the date of the issuance of the contract" in paragraph (3)(B)(i) and inserting "applicable to the contract and in effect as of the date the reserve is determined", and

(H) by striking "in effect on the date of the issuance of the contract" in paragraph (3)(B)(ii) and inserting "applicable to the contract and in effect as of the date the reserve is determined".

(3) SPECIAL RULES.—Section 807(e) is amended—

(A) by striking paragraphs (2) and (5),

(B) by redesignating paragraphs (3), (4), (6), and (7) as paragraphs (2), (3), (4), and (5), respectively,

(C) by amending paragraph (2) (as so redesignated) to read as follows:

"(2) QUALIFIED SUPPLEMENTAL BENEFITS.—

"(A) QUALIFIED SUPPLEMENTAL BENEFITS TREATED SEPARATELY.—For purposes of this part, the amount of the life insurance reserve for any qualified supplemental benefit shall be computed separately as though such benefit were under a separate contract.

"(B) QUALIFIED SUPPLEMENTAL BENEFIT.—For purposes of this paragraph, the term 'qualified supplemental benefit' means any supplemental benefit described in subparagraph (C) if—

"(i) there is a separately identified premium or charge for such benefit, and

"(ii) any net surrender value under the contract attributable to any other benefit is not available to fund such benefit.

"(C) SUPPLEMENTAL BENEFITS.—For purposes of this paragraph, the supplemental benefits described in this subparagraph are any—

"(i) guaranteed insurability,

"(ii) accidental death or disability benefit,

"(iii) convertibility,

"(iv) disability waiver benefit, or

"(v) other benefit prescribed by regulations,

which is supplemental to a contract for which there is a reserve described in subsection (c).", and

(D) by adding at the end the following new paragraph:

"(6) REPORTING RULES.—The Secretary shall require reporting (at such time and in such manner as the Secretary shall prescribe) with respect to the opening balance and closing balance of reserves and with respect to the method of computing reserves for purposes of determining income.".

(4) DEFINITION OF LIFE INSURANCE CONTRACT.—Section 7702 is amended—

(A) by striking clause (i) of subsection (c)(3)(B) and inserting the following:

"(i) reasonable mortality charges which meet the requirements prescribed in regulations to be promulgated by the Secretary or that do not exceed the mortality charges specified in the prevailing commissioners' standard tables as defined in subsection (f)(10)," and

(B) by adding at the end of subsection (f) the following new paragraph:

"(10) PREVAILING COMMISSIONERS' STANDARD TABLES.—For purposes of subsection (c)(3)(B)(i), the term 'prevailing commissioners' standard tables' means the most recent commissioners' standard tables prescribed by the National Association of Insurance Commissioners which are permitted to be used in computing reserves for that type of contract under the insurance laws of at least 26 States when the contract was issued. If the prevailing commissioners' standard tables as of the beginning of any calendar year (hereinafter in this paragraph referred to as the 'year of change') are different from the prevailing commissioners' standard tables as of the beginning of the preceding calendar year, the issuer may use the prevailing commissioners' standard tables as of the beginning of the preceding calendar year with respect to

any contract issued after the change and before the close of the 3-year period beginning on the first day of the year of change.".

(b) CONFORMING AMENDMENTS.—

(1) Section 808 is amended by adding at the end the following new subsection:

"(g) PREVAILING STATE ASSUMED INTEREST RATE.—For purposes of this subchapter—

"(1) IN GENERAL.—The term 'prevailing State assumed interest rate' means, with respect to any contract, the highest assumed interest rate permitted to be used in computing life insurance reserves for insurance contracts or annuity contracts (as the case may be) under the insurance laws of at least 26 States. For purposes of the preceding sentence, the effect of nonforfeiture laws of a State on interest rates for reserves shall not be taken into account.

"(2) WHEN RATE DETERMINED.—The prevailing State assumed interest rate with respect to any contract shall be determined as of the beginning of the calendar year in which the contract was issued.".

(2) Paragraph (1) of section 811(d) is amended by striking "the greater of the prevailing State assumed interest rate or applicable Federal interest rate

in effect under section 807" and inserting "the interest rate in effect under section 808(g)".

(3) Subparagraph (A) of section 846(f)(6) is amended by striking "except that" and all that follows and inserting "except that the limitation of subsection (a)(3) shall apply, and".

(4) Section 848(e)(1)(B)(iii) is amended by striking "807(e)(4)" and inserting "807(e)(3)".

(5) Subparagraph (B) of section 954(i)(5) is amended by striking "shall be substituted for the prevailing State assumed interest rate," and inserting "shall apply,".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(2) TRANSITION RULE.—For the first taxable year beginning after December 31, 2017, the reserve with respect to any contract (as determined under section 807(d) of the Internal Revenue Code of 1986) at the end of the preceding taxable year shall be determined as if the amendments made by this section had applied to such reserve in such preceding taxable year.

(3) TRANSITION RELIEF.—

(A) IN GENERAL.—If—

(i) the reserve determined under section 807(d) of the Internal Revenue Code of 1986 (determined after application of paragraph (2)) with respect to any contract as of the close of the year preceding the first taxable year beginning after December 31, 2017, differs from

(ii) the reserve which would have been determined with respect to such contract as of the close of such taxable year under such section determined without regard to paragraph (2),

then the difference between the amount of the reserve described in clause (i) and the amount of the reserve described in clause (ii) shall be taken into account under the method provided in subparagraph (B).

(B) METHOD.—The method provided in this subparagraph is as follows:

(i) If the amount determined under subparagraph (A)(i) exceeds the amount determined under subparagraph (A)(ii), 1/8 of such excess shall be taken into account, for each of the 8 succeeding taxable years, as a

deduction under section 805(a)(2) or 832(c)(4) of such Code, as applicable.

(ii) If the amount determined under subparagraph (A)(ii) exceeds the amount determined under subparagraph (A)(i), 1/8 of such excess shall be included in gross income, for each of the 8 succeeding taxable years, under section 803(a)(2) or 832(b)(1)(C) of such Code, as applicable.

SEC. 13518. MODIFICATION OF RULES FOR LIFE INSURANCE PRORATION FOR PURPOSES OF DETERMINING THE DIVIDENDS RECEIVED DEDUCTION.

(a) IN GENERAL.—Section 812 is amended to read as follows:

"SEC. 812. DEFINITION OF COMPANY'S SHARE AND POLICYHOLDER'S SHARE.

"(a) COMPANY'S SHARE.—For purposes of section 805(a)(4), the term 'company's share' means, with respect to any taxable year beginning after December 31, 2017, 70 percent.

"(b) POLICYHOLDER'S SHARE.—For purposes of section 807, the term 'policyholder's share' means, with respect to any taxable year beginning after December 31, 2017, 30 percent.".

(b) CONFORMING AMENDMENT.—Section 817A(e)(2) is amended by striking ", 807(d)(2)(B), and 812" and inserting "and 807(d)(2)(B)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13519. CAPITALIZATION OF CERTAIN POLICY ACQUISITION EXPENSES.

(a) IN GENERAL.—

(1) Section 848(a)(2) is amended by striking "120-month" and inserting "180-month".

(2) Section 848(c)(1) is amended by striking "1.75 percent" and inserting "2.09 percent".

(3) Section 848(c)(2) is amended by striking "2.05 percent" and inserting "2.45 percent".

(4) Section 848(c)(3) is amended by striking "7.7 percent" and inserting "9.2 percent".

(b) CONFORMING AMENDMENTS.—Section 848(b)(1) is amended by striking "120-month" and inserting "180-month".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to net premiums for taxable years beginning after December 31, 2017.

(2) TRANSITION RULE.—Specified policy acquisition expenses first required to be capitalized in a taxable year beginning before January 1, 2018, will continue to be allowed as a deduction ratably over the 120-month period beginning with the first month in the second half of such taxable year.

SEC. 13520. TAX REPORTING FOR LIFE SETTLEMENT TRANSACTIONS.

(a) IN GENERAL.—Subpart B of part III of subchapter A of chapter 61, as amended by section 13306, is amended by adding at the end the following new section:

"SEC. 6050Y. RETURNS RELATING TO CERTAIN LIFE INSURANCE CONTRACT TRANSACTIONS.

"(a) REQUIREMENT OF REPORTING OF CERTAIN PAYMENTS.—

"(1) IN GENERAL.—Every person who acquires a life insurance contract or any interest in a life insurance contract in a reportable policy sale during any taxable year shall make a return for such taxable year (at such time and in such manner as the Secretary shall prescribe) setting forth—

"(A) the name, address, and TIN of such person,

"(B) the name, address, and TIN of each recipient of payment in the reportable policy sale,

"(C) the date of such sale,

"(D) the name of the issuer of the life insurance contract sold and the policy number of such contract, and

"(E) the amount of each payment.

"(2) STATEMENT TO BE FURNISHED TO PERSONS WITH RESPECT TO WHOM INFORMATION IS REQUIRED.—Every person required to make a return under this subsection shall furnish to each person whose name is required to be set forth in such return a written statement showing—

"(A) the name, address, and phone number of the information contact of the person required to make such return, and

"(B) the information required to be shown on such return with respect to such person, except that in the case of an issuer of a life insurance contract, such statement is not required to include the information specified in paragraph (1)(E).

"(b) REQUIREMENT OF REPORTING OF SELLER'S BASIS IN LIFE INSURANCE CONTRACTS.—

"(1) IN GENERAL.—Upon receipt of the statement required under subsection (a)(2) or upon notice of a transfer of a life insurance contract to a foreign

person, each issuer of a life insurance contract shall make a return (at such time and in such manner as the Secretary shall prescribe) setting forth—

"(A) the name, address, and TIN of the seller who transfers any interest in such contract in such sale,

"(B) the investment in the contract (as defined in section 72(e)(6)) with respect to such seller, and

"(C) the policy number of such contract.

"(2) STATEMENT TO BE FURNISHED TO PERSONS WITH RESPECT TO WHOM INFORMATION IS REQUIRED.—Every person required to make a return under this subsection shall furnish to each person whose name is required to be set forth in such return a written statement showing—

"(A) the name, address, and phone number of the information contact of the person required to make such return, and

"(B) the information required to be shown on such return with respect to each seller whose name is required to be set forth in such return.

"(c) REQUIREMENT OF REPORTING WITH RESPECT TO REPORTABLE DEATH BENEFITS.—

"(1) IN GENERAL.—Every person who makes a payment of reportable death benefits during any taxable year shall make a return for such taxable year (at such time and in such manner as the Secretary shall prescribe) setting forth—

"(A) the name, address, and TIN of the person making such payment,

"(B) the name, address, and TIN of each recipient of such payment,

"(C) the date of each such payment,

"(D) the gross amount of each such payment, and

"(E) such person's estimate of the investment in the contract (as defined in section 72(e)(6)) with respect to the buyer.

"(2) STATEMENT TO BE FURNISHED TO PERSONS WITH RESPECT TO WHOM INFORMATION IS REQUIRED.—Every person required to make a return under this subsection shall furnish to each person whose name is required to be set forth in such return a written statement showing—

"(A) the name, address, and phone number of the information contact of the person required to make such return, and

"(B) the information required to be shown on such return with respect to each recipient of payment whose name is required to be set forth in such return.

"(d) DEFINITIONS.—For purposes of this section:

"(1) PAYMENT.—The term 'payment' means, with respect to any reportable policy sale, the amount of cash and the fair market value of any consideration transferred in the sale.

"(2) REPORTABLE POLICY SALE.—The term 'reportable policy sale' has the meaning given such term in section 101(a)(3)(B).

"(3) ISSUER.—The term 'issuer' means any life insurance company that bears the risk with respect to a life insurance contract on the date any return or statement is required to be made under this section.

"(4) REPORTABLE DEATH BENEFITS.—The term 'reportable death benefits' means amounts paid by reason of the death of the insured under a life insurance contract that has been transferred in a reportable policy sale.".

(b) CLERICAL AMENDMENT.—The table of sections for subpart B of part III of subchapter A of chapter 61, as amended by section 13306, is amended by inserting after the item relating to section 6050X the following new item:

"Sec. 6050Y. Returns relating to certain life insurance contract transactions.".

(c) CONFORMING AMENDMENTS.—

(1) Subsection (d) of section 6724 is amended—

(A) by striking "or" at the end of clause (xxiv) of paragraph (1)(B), by striking "and" at the end of clause (xxv) of such paragraph and inserting "or", and by inserting after such clause (xxv) the following new clause:

"(xxvi) section 6050Y (relating to returns relating to certain life insurance contract transactions), and", and

(B) by striking "or" at the end of subparagraph (HH) of paragraph (2), by striking the period at the end of subparagraph (II) of such paragraph and inserting ", or", and by inserting after such subparagraph (II) the following new subparagraph:

"(JJ) subsection (a)(2), (b)(2), or (c)(2) of section 6050Y (relating to returns relating to certain life insurance contract transactions).".

(2) Section 6047 is amended—

(A) by redesignating subsection (g) as subsection (h),

(B) by inserting after subsection (f) the following new subsection:

"(g) INFORMATION RELATING TO LIFE INSURANCE CONTRACT TRANSACTIONS.—This section shall not apply to any information which is required to be reported under section 6050Y.", and

(C) by adding at the end of subsection (h), as so redesignated, the following new paragraph:

"(4) For provisions requiring reporting of information relating to certain life insurance contract transactions, see section 6050Y.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to—

(1) reportable policy sales (as defined in section 6050Y(d)(2) of the Internal Revenue Code of 1986 (as added by subsection (a)) after December 31, 2017, and

(2) reportable death benefits (as defined in section 6050Y(d)(4) of such Code (as added by subsection (a)) paid after December 31, 2017.

SEC. 13521. CLARIFICATION OF TAX BASIS OF LIFE INSURANCE CONTRACTS.

(a) CLARIFICATION WITH RESPECT TO ADJUSTMENTS.—Paragraph (1) of section 1016(a) is amended by striking subparagraph (A) and all that follows and inserting the following:

"(A) for—

"(i) taxes or other carrying charges described in section 266; or

"(ii) expenditures described in section 173 (relating to circulation expenditures),

for which deductions have been taken by the taxpayer in determining taxable income for the taxable year or prior taxable years; or

"(B) for mortality, expense, or other reasonable charges incurred under an annuity or life insurance contract;".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to transactions entered into after August 25, 2009.

SEC. 13522. EXCEPTION TO TRANSFER FOR VALUABLE CONSIDERATION RULES.

(a) IN GENERAL.—Subsection (a) of section 101 is amended by inserting after paragraph (2) the following new paragraph:

"(3) EXCEPTION TO VALUABLE CONSIDERATION RULES FOR COMMERCIAL TRANSFERS.—

"(A) IN GENERAL.—The second sentence of paragraph (2) shall not apply in the case of a transfer of a life insurance contract, or any interest therein, which is a reportable policy sale.

"(B) REPORTABLE POLICY SALE.—For purposes of this paragraph, the term 'reportable policy sale' means the acquisition of an interest in a life insurance contract, directly or indirectly, if the acquirer has no substantial family, business, or financial relationship with the insured apart from the acquirer's interest in such life insurance contract. For purposes of the preceding sentence, the term 'indirectly' applies to the acquisition of an interest in a partnership, trust, or other entity that holds an interest in the life insurance contract.".

(b) CONFORMING AMENDMENT.—Paragraph (1) of section 101(a) is amended by striking "paragraph (2)" and inserting "paragraphs (2) and (3)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to transfers after December 31, 2017.

SEC. 13523. MODIFICATION OF DISCOUNTING RULES FOR PROPERTY AND CASUALTY INSURANCE COMPANIES.

(a) MODIFICATION OF RATE OF INTEREST USED TO DISCOUNT UNPAID LOSSES.—Paragraph (2) of section 846(c) is amended to read as follows:

"(2) DETERMINATION OF ANNUAL RATE.—The annual rate determined by the Secretary under this

paragraph for any calendar year shall be a rate determined on the basis of the corporate bond yield curve (as defined in section 430(h)(2)(D)(i), determined by substituting '60-month period' for '24-month period' therein).".

(b) MODIFICATION OF COMPUTATIONAL RULES FOR LOSS PAYMENT PATTERNS.—Section 846(d)(3) is amended by striking subparagraphs (B) through (G) and inserting the following new subparagraph:

"(B) TREATMENT OF CERTAIN LOSSES.—

"(i) 3-YEAR LOSS PAYMENT PATTERN.—In the case of any line of business not described in subparagraph (A)(ii), losses paid after the 1st year following the accident year shall be treated as paid equally in the 2nd and 3rd year following the accident year.

"(ii) 10-YEAR LOSS PAYMENT PATTERN.—

"(I) IN GENERAL.—The period taken into account under subparagraph (A)(ii) shall be extended to the extent required under subclause (II).

"(II) COMPUTATION OF EXTENSION.—The amount of losses which

would have been treated as paid in the 10th year after the accident year shall be treated as paid in such 10th year and each subsequent year in an amount equal to the amount of the average of the losses treated as paid in the 7th, 8th, and 9th years after the accident year (or, if lesser, the portion of the unpaid losses not theretofore taken into account). To the extent such unpaid losses have not been treated as paid before the 24th year after the accident year, they shall be treated as paid in such 24th year.".

(c) REPEAL OF HISTORICAL PAYMENT PATTERN ELECTION.—Section 846, as amended by this Act, is amended by striking subsection (e) and by redesignating subsections (f) and (g) as subsections (e) and (f), respectively.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(e) TRANSITIONAL RULE.—For the first taxable year beginning after December 31, 2017—

(1) the unpaid losses and the expenses unpaid (as defined in paragraphs (5)(B) and (6) of section 832(b) of the Internal Revenue Code of 1986) at the end of the preceding taxable year, and

(2) the unpaid losses as defined in sections 807(c)(2) and 805(a)(1) of such Code at the end of the preceding taxable year,

shall be determined as if the amendments made by this section had applied to such unpaid losses and expenses unpaid in the preceding taxable year and by using the interest rate and loss payment patterns applicable to accident years ending with calendar year 2018, and any adjustment shall be taken into account ratably in such first taxable year and the 7 succeeding taxable years. For subsequent taxable years, such amendments shall be applied with respect to such unpaid losses and expenses unpaid by using the interest rate and loss payment patterns applicable to accident years ending with calendar year 2018.

Subpart C—Banks and Financial Instruments

SEC. 13531. LIMITATION ON DEDUCTION FOR FDIC PREMIUMS.

(a) IN GENERAL.—Section 162, as amended by sections 13307, is amended by redesignating subsection (r) as subsection (s) and by inserting after subsection (q) the following new subsection:

"(r) DISALLOWANCE OF FDIC PREMIUMS PAID BY CERTAIN LARGE FINANCIAL INSTITUTIONS.—

"(1) IN GENERAL.—No deduction shall be allowed for the applicable percentage of any FDIC premium paid or incurred by the taxpayer.

"(2) EXCEPTION FOR SMALL INSTITUTIONS.—Paragraph (1) shall not apply to any taxpayer for any taxable year if the total consolidated assets of such taxpayer (determined as of the close of such taxable year) do not exceed $10,000,000,000.

"(3) APPLICABLE PERCENTAGE.—For purposes of this subsection, the term 'applicable percentage' means, with respect to any taxpayer for any taxable year, the ratio (expressed as a percentage but not greater than 100 percent) which—

"(A) the excess of—

"(i) the total consolidated assets of such taxpayer (determined as of the close of such taxable year), over

"(ii) $10,000,000,000, bears to

"(B) $40,000,000,000.

"(4) FDIC PREMIUMS.—For purposes of this subsection, the term 'FDIC premium' means any assessment imposed under section 7(b) of the Federal Deposit Insurance Act (12 U.S.C. 1817(b)).

"(5) TOTAL CONSOLIDATED ASSETS.—For purposes of this subsection, the term 'total consolidated assets' has the meaning given such term under section 165 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (12 U.S.C. 5365).

"(6) AGGREGATION RULE.—

"(A) IN GENERAL.—Members of an expanded affiliated group shall be treated as a single taxpayer for purposes of applying this subsection.

"(B) EXPANDED AFFILIATED GROUP.—

"(i) IN GENERAL.—For purposes of this paragraph, the term 'expanded affiliated group' means an affiliated group as defined in section 1504(a), determined—

"(I) by substituting 'more than 50 percent' for 'at least 80 percent' each place it appears, and

"(II) without regard to paragraphs (2) and (3) of section 1504(b).

"(ii) CONTROL OF NON-CORPORATE ENTITIES.—A partnership or any other entity (other than a corporation) shall be treated as a member of an expanded affiliated group if such entity is controlled (within

the meaning of section 954(d)(3)) by members of such group (including any entity treated as a member of such group by reason of this clause).".

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

SEC. 13532. REPEAL OF ADVANCE REFUNDING BONDS.

(a) IN GENERAL.—Paragraph (1) of section 149(d) is amended by striking "as part of an issue described in paragraph (2), (3), or (4)." and inserting "to advance refund another bond.".

(b) CONFORMING AMENDMENTS.—

(1) Section 149(d) is amended by striking paragraphs (2), (3), (4), and (6) and by redesignating paragraphs (5) and (7) as paragraphs (2) and (3).

(2) Section 148(f)(4)(C) is amended by striking clause (xiv) and by redesignating clauses (xv) to (xvii) as clauses (xiv) to (xvi).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to advance refunding bonds issued after December 31, 2017.

Subpart D—S Corporations

SEC. 13541. EXPANSION OF QUALIFYING BENEFICIARIES OF AN ELECTING SMALL BUSINESS TRUST.

(a) NO LOOK-THROUGH FOR ELIGIBILITY PURPOSES.—Section 1361(c)(2)(B)(v) is amended by adding at the end the following new sentence: "This clause shall not apply for purposes of subsection (b)(1)(C).".

(b) EFFECTIVE DATE.—The amendment made by this section shall take effect on January 1, 2018.

SEC. 13542. CHARITABLE CONTRIBUTION DEDUCTION FOR ELECTING SMALL BUSINESS TRUSTS.

(a) IN GENERAL.—Section 641(c)(2) is amended by inserting after subparagraph (D) the following new subparagraph:

"(E)(i) Section 642(c) shall not apply.

"(ii) For purposes of section 170(b)(1)(G), adjusted gross income shall be computed in the same manner as in the case of an individual, except that the deductions for costs which are paid or incurred in connection with the administration of the trust and which would not have been incurred if the property were not held in such trust shall be treated as allowable in arriving at adjusted gross income.".

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

SEC. 13543. MODIFICATION OF TREATMENT OF S CORPORATION CONVERSIONS TO C CORPORATIONS.

(a) ADJUSTMENTS ATTRIBUTABLE TO CONVERSION FROM S CORPORATION TO C CORPORATION.—Section 481 is amended by adding at the end the following new subsection:

"(d) ADJUSTMENTS ATTRIBUTABLE TO CONVERSION FROM S CORPORATION TO C CORPORATION.—

"(1) IN GENERAL.—In the case of an eligible terminated S corporation, any adjustment required by subsection (a)(2) which is attributable to such corporation's revocation described in paragraph (2)(A)(ii) shall be taken into account ratably during the 6-taxable year period beginning with the year of change.

"(2) ELIGIBLE TERMINATED S CORPORATION.—For purposes of this subsection, the term 'eligible terminated S corporation' means any C corporation—

"(A) which—

"(i) was an S corporation on the day before the date of the enactment of the Tax Cuts and Jobs Act, and

"(ii) during the 2-year period beginning on the date of such enactment makes a revocation of its election under section 1362(a), and

"(B) the owners of the stock of which, determined on the date such revocation is made, are the same owners (and in identical proportions) as on the date of such enactment.".

(b) CASH DISTRIBUTIONS FOLLOWING POST-TERMINATION TRANSITION PERIOD FROM S CORPORATION STATUS.—Section 1371 is amended by adding at the end the following new subsection:

"(f) CASH DISTRIBUTIONS FOLLOWING POST-TERMINATION TRANSITION PERIOD.—In the case of a distribution of money by an eligible terminated S corporation (as defined in section 481(d)) after the post-termination transition period, the accumulated adjustments account shall be allocated to such distribution, and the distribution shall be chargeable to accumulated earnings and profits, in the same ratio as the amount of such accumulated adjustments account bears to the amount of such accumulated earnings and profits.".

PART VII—EMPLOYMENT

Subpart A—Compensation

SEC. 13601. MODIFICATION OF LIMITATION ON EXCESSIVE EMPLOYEE REMUNERATION.

(a) REPEAL OF PERFORMANCE-BASED COMPENSATION AND COMMISSION EXCEPTIONS FOR LIMITATION ON EXCESSIVE EMPLOYEE REMUNERATION.—

(1) IN GENERAL.—Paragraph (4) of section 162(m) is amended by striking subparagraphs (B) and (C) and by redesignating subparagraphs (D), (E), (F), and (G) as subparagraphs (B), (C), (D), and (E), respectively.

(2) CONFORMING AMENDMENTS.—

(A) Paragraphs (5)(E) and (6)(D) of section 162(m) are each amended by striking "subparagraphs (B), (C), and (D)" and inserting "subparagraph (B)".

(B) Paragraphs (5)(G) and (6)(G) of section 162(m) are each amended by striking "(F) and (G)" and inserting "(D) and (E)".

(b) MODIFICATION OF DEFINITION OF COVERED EMPLOYEES.—Paragraph (3) of section 162(m) is amended—

(1) in subparagraph (A), by striking "as of the close of the taxable year, such employee is the chief executive officer of the taxpayer or is" and inserting "such employee is the principal executive officer or

principal financial officer of the taxpayer at any time during the taxable year, or was",

(2) in subparagraph (B)—

(A) by striking "4" and inserting "3", and

(B) by striking "(other than the chief executive officer)" and inserting "(other than any individual described in subparagraph (A))", and

(3) by striking "or" at the end of subparagraph (A), by striking the period at the end of subparagraph (B) and inserting ", or", and by adding at the end the following:

"(C) was a covered employee of the taxpayer (or any predecessor) for any preceding taxable year beginning after December 31, 2016.".

(c) EXPANSION OF APPLICABLE EMPLOYER.—

(1) IN GENERAL.—Section 162(m)(2) is amended to read as follows:

"(2) PUBLICLY HELD CORPORATION.—For purposes of this subsection, the term 'publicly held corporation' means any corporation which is an issuer (as defined in section 3 of the Securities Exchange Act of 1934 (15 U.S.C. 78c))—

"(A) the securities of which are required to be registered under section 12 of such Act (15 U.S.C. 78l), or

"(B) that is required to file reports under section 15(d) of such Act (15 U.S.C. 78o(d)).".

(2) CONFORMING AMENDMENT.—Section 162(m)(3), as amended by subsection (b), is amended by adding at the end the following flush sentence:

"Such term shall include any employee who would be described in subparagraph (B) if the reporting described in such subparagraph were required as so described.".

(d) SPECIAL RULE FOR REMUNERATION PAID TO BENEFICIARIES, ETC.—Paragraph (4) of section 162(m), as amended by subsection (a), is amended by adding at the end the following new subparagraph:

"(F) SPECIAL RULE FOR REMUNERATION PAID TO BENEFICIARIES, ETC.—Remuneration shall not fail to be applicable employee remuneration merely because it is includible in the income of, or paid to, a person other than the covered employee, including after the death of the covered employee.".

(e) EFFECTIVE DATE.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to taxable years beginning after December 31, 2017.

(2) EXCEPTION FOR BINDING CONTRACTS.—The amendments made by this section shall not apply to remuneration which is provided pursuant to a written binding contract which was in effect on November 2, 2017, and which was not modified in any material respect on or after such date.

SEC. 13602. EXCISE TAX ON EXCESS TAX-EXEMPT ORGANIZATION EXECUTIVE COMPENSATION.

(a) IN GENERAL.—Subchapter D of chapter 42 is amended by adding at the end the following new section:

"SEC. 4960. TAX ON EXCESS TAX-EXEMPT ORGANIZATION EXECUTIVE COMPENSATION.

"(a) TAX IMPOSED.—There is hereby imposed a tax equal to the product of the rate of tax under section 11 and the sum of—

"(1) so much of the remuneration paid (other than any excess parachute payment) by an applicable tax-exempt organization for the taxable year with respect to employment of any covered employee in excess of $1,000,000, plus

"(2) any excess parachute payment paid by such an organization to any covered employee.

For purposes of the preceding sentence, remuneration shall be treated as paid when there is no substantial risk of for-

feiture (within the meaning of section 457(f)(3)(B)) of the rights to such remuneration.

"(b) LIABILITY FOR TAX.—The employer shall be liable for the tax imposed under subsection (a).

"(c) DEFINITIONS AND SPECIAL RULES.—For purposes of this section—

"(1) APPLICABLE TAX-EXEMPT ORGANIZATION.—The term 'applicable tax-exempt organization' means any organization which for the taxable year—

"(A) is exempt from taxation under section 501(a),

"(B) is a farmers' cooperative organization described in section 521(b)(1),

"(C) has income excluded from taxation under section 115(1), or

"(D) is a political organization described in section 527(e)(1).

"(2) COVERED EMPLOYEE.—For purposes of this section, the term 'covered employee' means any employee (including any former employee) of an applicable tax-exempt organization if the employee—

"(A) is one of the 5 highest compensated employees of the organization for the taxable year, or

"(B) was a covered employee of the organization (or any predecessor) for any preceding taxable year beginning after December 31, 2016.

"(3) REMUNERATION.—For purposes of this section:

"(A) IN GENERAL.—The term 'remuneration' means wages (as defined in section 3401(a)), except that such term shall not include any designated Roth contribution (as defined in section 402A(c)) and shall include amounts required to be included in gross income under section 457(f).

"(B) EXCEPTION FOR REMUNERATION FOR MEDICAL SERVICES.—The term 'remuneration' shall not include the portion of any remuneration paid to a licensed medical professional (including a veterinarian) which is for the performance of medical or veterinary services by such professional.

"(4) REMUNERATION FROM RELATED ORGANIZATIONS.—

"(A) IN GENERAL.—Remuneration of a covered employee by an applicable tax-exempt organization shall include any remuneration paid

with respect to employment of such employee by any related person or governmental entity.

"(B) RELATED ORGANIZATIONS.—A person or governmental entity shall be treated as related to an applicable tax-exempt organization if such person or governmental entity—

"(i) controls, or is controlled by, the organization,

"(ii) is controlled by one or more persons which control the organization,

"(iii) is a supported organization (as defined in section 509(f)(3)) during the taxable year with respect to the organization,

"(iv) is a supporting organization described in section 509(a)(3) during the taxable year with respect to the organization, or

"(v) in the case of an organization which is a voluntary employees' beneficiary association described in section 501(c)(9), establishes, maintains, or makes contributions to such voluntary employees' beneficiary association.

"(C) LIABILITY FOR TAX.—In any case in which remuneration from more than one em-

ployer is taken into account under this paragraph in determining the tax imposed by subsection (a), each such employer shall be liable for such tax in an amount which bears the same ratio to the total tax determined under subsection (a) with respect to such remuneration as—

"(i) the amount of remuneration paid by such employer with respect to such employee, bears to

"(ii) the amount of remuneration paid by all such employers to such employee.

"(5) EXCESS PARACHUTE PAYMENT.—For purposes of determining the tax imposed by subsection (a)(2)—

"(A) IN GENERAL.—The term 'excess parachute payment' means an amount equal to the excess of any parachute payment over the portion of the base amount allocated to such payment.

"(B) PARACHUTE PAYMENT.—The term 'parachute payment' means any payment in the nature of compensation to (or for the benefit of) a covered employee if—

"(i) such payment is contingent on such employee's separation from employment with the employer, and

"(ii) the aggregate present value of the payments in the nature of compensation to (or for the benefit of) such individual which are contingent on such separation equals or exceeds an amount equal to 3 times the base amount.

"(C) EXCEPTION.—Such term does not include any payment—

"(i) described in section 280G(b)(6) (relating to exemption for payments under qualified plans),

"(ii) made under or to an annuity contract described in section 403(b) or a plan described in section 457(b),

"(iii) to a licensed medical professional (including a veterinarian) to the extent that such payment is for the performance of medical or veterinary services by such professional, or

"(iv) to an individual who is not a highly compensated employee as defined in section 414(q).

"(D) BASE AMOUNT.—Rules similar to the rules of 280G(b)(3) shall apply for purposes of determining the base amount.

"(E) PROPERTY TRANSFERS; PRESENT VALUE.—Rules similar to the rules of paragraphs (3) and (4) of section 280G(d) shall apply.

"(6) COORDINATION WITH DEDUCTION LIMITATION.—Remuneration the deduction for which is not allowed by reason of section 162(m) shall not be taken into account for purposes of this section.

"(d) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary to prevent avoidance of the tax under this section, including regulations to prevent avoidance of such tax through the performance of services other than as an employee or by providing compensation through a pass-through or other entity to avoid such tax.".

(b) CLERICAL AMENDMENT.—The table of sections for subchapter D of chapter 42 is amended by adding at the end the following new item:

"Sec. 4960. Tax on excess tax-exempt organization executive compensation.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13603. TREATMENT OF QUALIFIED EQUITY GRANTS.

(a) IN GENERAL.—Section 83 is amended by adding at the end the following new subsection:

"(i) QUALIFIED EQUITY GRANTS.—

"(1) IN GENERAL.—For purposes of this subtitle—

"(A) TIMING OF INCLUSION.—If qualified stock is transferred to a qualified employee who makes an election with respect to such stock under this subsection, subsection (a) shall be applied by including the amount determined under such subsection with respect to such stock in income of the employee in the taxable year determined under subparagraph (B) in lieu of the taxable year described in subsection (a).

"(B) TAXABLE YEAR DETERMINED.—The taxable year determined under this subparagraph is the taxable year of the employee which includes the earliest of—

"(i) the first date such qualified stock becomes transferable (including, solely for purposes of this clause, becoming transferable to the employer),

"(ii) the date the employee first becomes an excluded employee,

"(iii) the first date on which any stock of the corporation which issued the qualified stock becomes readily tradable on an established securities market (as determined by the Secretary, but not including any market unless such market is recognized as an established securities market by the Secretary for purposes of a provision of this title other than this subsection),

"(iv) the date that is 5 years after the first date the rights of the employee in such stock are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, or

"(v) the date on which the employee revokes (at such time and in such manner as the Secretary provides) the election under this subsection with respect to such stock.

"(2) QUALIFIED STOCK.—

"(A) IN GENERAL.—For purposes of this subsection, the term 'qualified stock' means, with respect to any qualified employee, any stock in a corporation which is the employer of such employee, if—

"(i) such stock is received—

"(I) in connection with the exercise of an option, or

"(II) in settlement of a restricted stock unit, and

"(ii) such option or restricted stock unit was granted by the corporation—

"(I) in connection with the performance of services as an employee, and

"(II) during a calendar year in which such corporation was an eligible corporation.

"(B) LIMITATION.—The term 'qualified stock' shall not include any stock if the employee may sell such stock to, or otherwise receive cash in lieu of stock from, the corporation at the time that the rights of the employee in such stock first become transferable or not subject to a substantial risk of forfeiture.

"(C) ELIGIBLE CORPORATION.—For purposes of subparagraph (A)(ii)(II)—

"(i) IN GENERAL.—The term 'eligible corporation' means, with respect to any calendar year, any corporation if—

"(I) no stock of such corporation (or any predecessor of such corporation) is readily tradable on an established securities market (as determined under paragraph (1)(B)(iii)) during any preceding calendar year, and

"(II) such corporation has a written plan under which, in such calendar year, not less than 80 percent of all employees who provide services to such corporation in the United States (or any possession of the United States) are granted stock options, or are granted restricted stock units, with the same rights and privileges to receive qualified stock.

"(ii) SAME RIGHTS AND PRIVILEGES.—For purposes of clause (i)(II)—

"(I) except as provided in subclauses (II) and (III), the determination of rights and privileges with respect to stock shall be made in a similar manner as under section 423(b)(5),

"(II) employees shall not fail to be treated as having the same rights and

privileges to receive qualified stock solely because the number of shares available to all employees is not equal in amount, so long as the number of shares available to each employee is more than a de minimis amount, and

"(III) rights and privileges with respect to the exercise of an option shall not be treated as the same as rights and privileges with respect to the settlement of a restricted stock unit.

"(iii) EMPLOYEE.—For purposes of clause (i)(II), the term 'employee' shall not include any employee described in section 4980E(d)(4) or any excluded employee.

"(iv) SPECIAL RULE FOR CALENDAR YEARS BEFORE 2018.—In the case of any calendar year beginning before January 1, 2018, clause (i)(II) shall be applied without regard to whether the rights and privileges with respect to the qualified stock are the same.

"(3) QUALIFIED EMPLOYEE; EXCLUDED EMPLOYEE.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'qualified employee' means any individual who—

"(i) is not an excluded employee, and

"(ii) agrees in the election made under this subsection to meet such requirements as are determined by the Secretary to be necessary to ensure that the withholding requirements of the corporation under chapter 24 with respect to the qualified stock are met.

"(B) EXCLUDED EMPLOYEE.—The term 'excluded employee' means, with respect to any corporation, any individual—

"(i) who is a 1-percent owner (within the meaning of section 416(i)(1)(B)(ii)) at any time during the calendar year or who was such a 1 percent owner at any time during the 10 preceding calendar years,

"(ii) who is or has been at any prior time—

"(I) the chief executive officer of such corporation or an individual acting in such a capacity, or

"(II) the chief financial officer of such corporation or an individual acting in such a capacity,

"(iii) who bears a relationship described in section 318(a)(1) to any individual described in subclause (I) or (II) of clause (ii), or

"(iv) who is one of the 4 highest compensated officers of such corporation for the taxable year, or was one of the 4 highest compensated officers of such corporation for any of the 10 preceding taxable years, determined with respect to each such taxable year on the basis of the shareholder disclosure rules for compensation under the Securities Exchange Act of 1934 (as if such rules applied to such corporation).

"(4) ELECTION.—

"(A) TIME FOR MAKING ELECTION.—An election with respect to qualified stock shall be made under this subsection no later than 30 days after the first date the rights of the employee in such stock are transferable or are not subject to a substantial risk of forfeiture, whichever occurs earlier, and shall be made in a man-

ner similar to the manner in which an election is made under subsection (b).

"(B) LIMITATIONS.—No election may be made under this section with respect to any qualified stock if—

"(i) the qualified employee has made an election under subsection (b) with respect to such qualified stock,

"(ii) any stock of the corporation which issued the qualified stock is readily tradable on an established securities market (as determined under paragraph (1)(B)(iii)) at any time before the election is made, or

"(iii) such corporation purchased any of its outstanding stock in the calendar year preceding the calendar year which includes the first date the rights of the employee in such stock are transferable or are not subject to a substantial risk of forfeiture, unless—

"(I) not less than 25 percent of the total dollar amount of the stock so purchased is deferral stock, and

"(II) the determination of which individuals from whom deferral stock

is purchased is made on a reasonable basis.

"(C) DEFINITIONS AND SPECIAL RULES RELATED TO LIMITATION ON STOCK REDEMPTIONS.—

"(i) DEFERRAL STOCK.—For purposes of this paragraph, the term 'deferral stock' means stock with respect to which an election is in effect under this subsection.

"(ii) DEFERRAL STOCK WITH RESPECT TO ANY INDIVIDUAL NOT TAKEN INTO ACCOUNT IF INDIVIDUAL HOLDS DEFERRAL STOCK WITH LONGER DEFERRAL PERIOD.—Stock purchased by a corporation from any individual shall not be treated as deferral stock for purposes of subparagraph (B)(iii) if such individual (immediately after such purchase) holds any deferral stock with respect to which an election has been in effect under this subsection for a longer period than the election with respect to the stock so purchased.

"(iii) PURCHASE OF ALL OUTSTANDING DEFERRAL STOCK.—The requirements of subclauses (I) and (II) of subparagraph

(B)(iii) shall be treated as met if the stock so purchased includes all of the corporation's outstanding deferral stock.

"(iv) REPORTING.—Any corporation which has outstanding deferral stock as of the beginning of any calendar year and which purchases any of its outstanding stock during such calendar year shall include on its return of tax for the taxable year in which, or with which, such calendar year ends the total dollar amount of its outstanding stock so purchased during such calendar year and such other information as the Secretary requires for purposes of administering this paragraph.

"(5) CONTROLLED GROUPS.—For purposes of this subsection, all persons treated as a single employer under section 414(b) shall be treated as 1 corporation.

"(6) NOTICE REQUIREMENT.—Any corporation which transfers qualified stock to a qualified employee shall, at the time that (or a reasonable period before) an amount attributable to such stock would (but for this subsection) first be includible in the gross income of such employee—

"(A) certify to such employee that such stock is qualified stock, and

"(B) notify such employee—

"(i) that the employee may be eligible to elect to defer income on such stock under this subsection, and

"(ii) that, if the employee makes such an election—

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

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

"(III) the responsibilities of the employee (as determined by the Sec-

retary under paragraph (3)(A)(ii)) with respect to such withholding.

"(7) RESTRICTED STOCK UNITS.—This section (other than this subsection), including any election under subsection (b), shall not apply to restricted stock units.".

(b) WITHHOLDING.—

(1) TIME OF WITHHOLDING.—Section 3401 is amended by adding at the end the following new subsection:

"(i) QUALIFIED STOCK FOR WHICH AN ELECTION IS IN EFFECT UNDER SECTION 83(I).—For purposes of subsection (a), qualified stock (as defined in section 83(i)) with respect to which an election is made under section 83(i) shall be treated as wages—

"(1) received on the earliest date described in section 83(i)(1)(B), and

"(2) in an amount equal to the amount included in income under section 83 for the taxable year which includes such date.".

(2) AMOUNT OF WITHHOLDING.—Section 3402 is amended by adding at the end the following new subsection:

"(t) RATE OF WITHHOLDING FOR CERTAIN STOCK.—In the case of any qualified stock (as defined in section

83(i)(2)) with respect to which an election is made under section 83(i)—

"(1) the rate of tax under subsection (a) shall not be less than the maximum rate of tax in effect under section 1, and

"(2) such stock shall be treated for purposes of section 3501(b) in the same manner as a non-cash fringe benefit.".

(c) COORDINATION WITH OTHER DEFERRED COMPENSATION RULES.—

(1) ELECTION TO APPLY DEFERRAL TO STATUTORY OPTIONS.—

(A) INCENTIVE STOCK OPTIONS.—Section 422(b) is amended by adding at the end the following: "Such term shall not include any option if an election is made under section 83(i) with respect to the stock received in connection with the exercise of such option.".

(B) EMPLOYEE STOCK PURCHASE PLANS.—Section 423 is amended—

(i) in subsection (b)(5), by striking "and" before "the plan" and by inserting ", and the rules of section 83(i) shall apply in determining which employees have a right

to make an election under such section" before the semicolon at the end, and

(ii) by adding at the end the following new subsection:

"(d) COORDINATION WITH QUALIFIED EQUITY GRANTS.—An option for which an election is made under section 83(i) with respect to the stock received in connection with its exercise shall not be considered as granted pursuant an employee stock purchase plan.".

(2) EXCLUSION FROM DEFINITION OF NONQUALIFIED DEFERRED COMPENSATION PLAN.—Subsection (d) of section 409A is amended by adding at the end the following new paragraph:

"(7) TREATMENT OF QUALIFIED STOCK.—An arrangement under which an employee may receive qualified stock (as defined in section 83(i)(2)) shall not be treated as a nonqualified deferred compensation plan with respect to such employee solely because of such employee's election, or ability to make an election, to defer recognition of income under section 83(i).".

(d) INFORMATION REPORTING.—Section 6051(a) is amended by striking "and" at the end of paragraph (14)(B), by striking the period at the end of paragraph (15)

and inserting a comma, and by inserting after paragraph (15) the following new paragraphs:

"(16) the amount includible in gross income under subparagraph (A) of section 83(i)(1) with respect to an event described in subparagraph (B) of such section which occurs in such calendar year, and

"(17) the aggregate amount of income which is being deferred pursuant to elections under section 83(i), determined as of the close of the calendar year.".

(e) PENALTY FOR FAILURE OF EMPLOYER TO PROVIDE NOTICE OF TAX CONSEQUENCES.—Section 6652 is amended by adding at the end the following new subsection:

"(p) FAILURE TO PROVIDE NOTICE UNDER SECTION 83(I).—In the case of each failure to provide a notice as required by section 83(i)(6), at the time prescribed therefor, unless it is shown that such failure is due to reasonable cause and not to willful neglect, there shall be paid, on notice and demand of the Secretary and in the same manner as tax, by the person failing to provide such notice, an amount equal to $100 for each such failure, but the total amount imposed on such person for all such failures during any calendar year shall not exceed $50,000.".

(f) EFFECTIVE DATES.—

(1) IN GENERAL.—Except as provided in paragraph (2), the amendments made by this section shall apply to stock attributable to options exercised, or restricted stock units settled, after December 31, 2017.

(2) REQUIREMENT TO PROVIDE NOTICE.—The amendments made by subsection (e) shall apply to failures after December 31, 2017.

(g) TRANSITION RULE.—Until such time as the Secretary (or the Secretary's delegate) issues regulations or other guidance for purposes of implementing the requirements of paragraph (2)(C)(i)(II) of section 83(i) of the Internal Revenue Code of 1986 (as added by this section), or the requirements of paragraph (6) of such section, a corporation shall be treated as being in compliance with such requirements (respectively) if such corporation complies with a reasonable good faith interpretation of such requirements.

SEC. 13604. INCREASE IN EXCISE TAX RATE FOR STOCK COMPENSATION OF INSIDERS IN EXPATRIATED CORPORATIONS.

(a) IN GENERAL.—Section 4985(a)(1) is amended by striking "section 1(h)(1)(C)" and inserting "section 1(h)(1)(D)".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to corporations first becoming expatri-

ated corporations (as defined in section 4985 of the Internal Revenue Code of 1986) after the date of enactment of this Act.

Subpart B—Retirement Plans

SEC. 13611. REPEAL OF SPECIAL RULE PERMITTING RECHARACTERIZATION OF ROTH CONVERSIONS.

(a) IN GENERAL.—Section 408A(d)(6)(B) is amended by adding at the end the following new clause:

> *"(iii) CONVERSIONS.—Subparagraph (A) shall not apply in the case of a qualified rollover contribution to which subsection (d)(3) applies (including by reason of subparagraph (C) thereof).".*

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

SEC. 13612. MODIFICATION OF RULES APPLICABLE TO LENGTH OF SERVICE AWARD PLANS.

(a) MAXIMUM DEFERRAL AMOUNT.—Clause (ii) of section 457(e)(11)(B) is amended by striking "$3,000" and inserting "$6,000".

(b) COST OF LIVING ADJUSTMENT.—Subparagraph (B) of section 457(e)(11) is amended by adding at the end the following:

"(iii) COST OF LIVING ADJUSTMENT.—In the case of taxable years beginning after December 31, 2017, the Secretary shall adjust the $6,000 amount under clause (ii) at the same time and in the same manner as under section 415(d), except that the base period shall be the calendar quarter beginning July 1, 2016, and any increase under this paragraph that is not a multiple of $500 shall be rounded to the next lowest multiple of $500.".

(c) APPLICATION OF LIMITATION ON ACCRUALS.—Subparagraph (B) of section 457(e)(11), as amended by subsection (b), is amended by adding at the end the following:

"(iv) SPECIAL RULE FOR APPLICATION OF LIMITATION ON ACCRUALS FOR CERTAIN PLANS.—In the case of a plan described in subparagraph (A)(ii) which is a defined benefit plan (as defined in section 414(j)), the limitation under clause (ii) shall apply to the actuarial present value of the aggregate amount of length of service awards accruing with respect to any year of service. Such actuarial present value with respect to any year shall be calculated using reason-

able actuarial assumptions and methods, assuming payment will be made under the most valuable form of payment under the plan with payment commencing at the later of the earliest age at which unreduced benefits are payable under the plan or the participant's age at the time of the calculation.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13613. EXTENDED ROLLOVER PERIOD FOR PLAN LOAN OFFSET AMOUNTS.

(a) IN GENERAL.—Paragraph (3) of section 402(c) is amended by adding at the end the following new subparagraph:

"(C) ROLLOVER OF CERTAIN PLAN LOAN OFFSET AMOUNTS.—

"(i) IN GENERAL.—In the case of a qualified plan loan offset amount, paragraph (1) shall not apply to any transfer of such amount made after the due date (including extensions) for filing the return of tax for the taxable year in which such

amount is treated as distributed from a qualified employer plan.

"(ii) QUALIFIED PLAN LOAN OFFSET AMOUNT.—For purposes of this subparagraph, the term 'qualified plan loan offset amount' means a plan loan offset amount which is treated as distributed from a qualified employer plan to a participant or beneficiary solely by reason of—

"(I) the termination of the qualified employer plan, or

"(II) the failure to meet the repayment terms of the loan from such plan because of the severance from employment of the participant.

"(iii) PLAN LOAN OFFSET AMOUNT.—For purposes of clause (ii), the term 'plan loan offset amount' means the amount by which the participant's accrued benefit under the plan is reduced in order to repay a loan from the plan.

"(iv) LIMITATION.—This subparagraph shall not apply to any plan loan offset amount unless such plan loan offset amount relates to a loan to which section 72(p)(1)

does not apply by reason of section 72(p)(2).

"(v) QUALIFIED EMPLOYER PLAN.—For purposes of this subsection, the term 'qualified employer plan' has the meaning given such term by section 72(p)(4).".

(b) CONFORMING AMENDMENTS.—Section 402(c)(3) is amended—

(1) by striking "TRANSFER MUST BE MADE WITHIN 60 DAYS OF RECEIPT" in the heading and inserting "TIME LIMIT ON TRANSFERS", and

(2) by striking "subparagraph (B)" in subparagraph (A) and inserting "subparagraphs (B) and (C)".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to plan loan offset amounts which are treated as distributed in taxable years beginning after December 31, 2017.

PART VIII—EXEMPT ORGANIZATIONS

SEC. 13701. EXCISE TAX BASED ON INVESTMENT INCOME OF PRIVATE COLLEGES AND UNIVERSITIES.

(a) IN GENERAL.—Chapter 42 is amended by adding at the end the following new subchapter:

"Subchapter H—Excise Tax Based on Investment Income of Private Colleges and Universities

"SEC. 4968. EXCISE TAX BASED ON INVESTMENT INCOME OF PRIVATE COLLEGES AND UNIVERSITIES.

"(a) TAX IMPOSED.—There is hereby imposed on each applicable educational institution for the taxable year a tax equal to 1.4 percent of the net investment income of such institution for the taxable year.

"(b) APPLICABLE EDUCATIONAL INSTITUTION.—For purposes of this subchapter—

"(1) IN GENERAL.—The term 'applicable educational institution' means an eligible educational institution (as defined in section 25A(f)(2))—

"(A) which had at least 500 students during the preceding taxable year,

"(B) more than 50 percent of the students of which are located in the United States,

"(C) which is not described in the first sentence of section 511(a)(2)(B) (relating to State colleges and universities), and

"(D) the aggregate fair market value of the assets of which at the end of the preceding taxable year (other than those assets which are used

directly in carrying out the institution's exempt purpose) is at least $500,000 per student of the institution.

"(2) STUDENTS.—For purposes of paragraph (1), the number of students of an institution (including for purposes of determining the number of students at a particular location) shall be based on the daily average number of full-time students attending such institution (with part-time students taken into account on a full-time student equivalent basis).

"(c) NET INVESTMENT INCOME.—For purposes of this section, net investment income shall be determined under rules similar to the rules of section 4940(c).

"(d) ASSETS AND NET INVESTMENT INCOME OF RELATED ORGANIZATIONS.—

"(1) IN GENERAL.—For purposes of subsections (b)(1)(C) and (c), assets and net investment income of any related organization with respect to an educational institution shall be treated as assets and net investment income, respectively, of the educational institution, except that—

"(A) no such amount shall be taken into account with respect to more than 1 educational institution, and

"(B) unless such organization is controlled by such institution or is described in section 509(a)(3) with respect to such institution for the taxable year, assets and net investment income which are not intended or available for the use or benefit of the educational institution shall not be taken into account.

"(2) RELATED ORGANIZATION.—For purposes of this subsection, the term 'related organization' means, with respect to an educational institution, any organization which—

"(A) controls, or is controlled by, such institution,

"(B) is controlled by 1 or more persons which also control such institution, or

"(C) is a supported organization (as defined in section 509(f)(3)), or an organization described in section 509(a)(3), during the taxable year with respect to such institution.".

(b) CLERICAL AMENDMENT.—The table of subchapters for chapter 42 is amended by adding at the end the following new item:

"SUBCHAPTER H—EXCISE TAX BASED ON INVESTMENT INCOME OF PRIVATE COLLEGES AND UNIVERSITIES".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 13702. UNRELATED BUSINESS TAXABLE INCOME SEPARATELY COMPUTED FOR EACH TRADE OR BUSINESS ACTIVITY.

(a) IN GENERAL.—Subsection (a) of section 512 is amended by adding at the end the following new paragraph:

"(6) SPECIAL RULE FOR ORGANIZATION WITH MORE THAN 1 UNRELATED TRADE OR BUSINESS.—In the case of any organization with more than 1 unrelated trade or business—

"(A) unrelated business taxable income, including for purposes of determining any net operating loss deduction, shall be computed separately with respect to each such trade or business and without regard to subsection (b)(12),

"(B) the unrelated business taxable income of such organization shall be the sum of the unrelated business taxable income so computed with respect to each such trade or business, less a specific deduction under subsection (b)(12), and

"(C) for purposes of subparagraph (B), unrelated business taxable income with respect to

any such trade or business shall not be less than zero.".

(b) EFFECTIVE DATE.—

(1) IN GENERAL.—Except to the extent provided in paragraph (2), the amendment made by this section shall apply to taxable years beginning after December 31, 2017.

(2) CARRYOVERS OF NET OPERATING LOSSES.—If any net operating loss arising in a taxable year beginning before January 1, 2018, is carried over to a taxable year beginning on or after such date—

(A) subparagraph (A) of section 512(a)(6) of the Internal Revenue Code of 1986, as added by this Act, shall not apply to such net operating loss, and

(B) the unrelated business taxable income of the organization, after the application of subparagraph (B) of such section, shall be reduced by the amount of such net operating loss.

SEC. 13703. UNRELATED BUSINESS TAXABLE INCOME INCREASED BY AMOUNT OF CERTAIN FRINGE BENEFIT EXPENSES FOR WHICH DEDUCTION IS DISALLOWED.

(a) IN GENERAL.—Section 512(a), as amended by this Act, is further amended by adding at the end the following new paragraph:

"(7) INCREASE IN UNRELATED BUSINESS TAXABLE INCOME BY DISALLOWED FRINGE.—Unrelated business taxable income of an organization shall be increased by any amount for which a deduction is not allowable under this chapter by reason of section 274 and which is paid or incurred by such organization for any qualified transportation fringe (as defined in section 132(f)), any parking facility used in connection with qualified parking (as defined in section 132(f)(5)(C)), or any on-premises athletic facility (as defined in section 132(j)(4)(B)). The preceding sentence shall not apply to the extent the amount paid or incurred is directly connected with an unrelated trade or business which is regularly carried on by the organization. The Secretary shall issue such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this paragraph, including regulations or other guidance providing for the appropriate allocation of depreciation and other

costs with respect to facilities used for parking or for on-premises athletic facilities.''.

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to amounts paid or incurred after December 31, 2017.

SEC. 13704. REPEAL OF DEDUCTION FOR AMOUNTS PAID IN EXCHANGE FOR COLLEGE ATHLETIC EVENT SEATING RIGHTS.

(a) IN GENERAL.—Section 170(l) is amended—

(1) by striking paragraph (1) and inserting the following:

''(1) IN GENERAL.—No deduction shall be allowed under this section for any amount described in paragraph (2).'', and

(2) in paragraph (2)(B), by striking ''such amount would be allowable as a deduction under this section but for the fact that''.

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to contributions made in taxable years beginning after December 31, 2017.

SEC. 13705. REPEAL OF SUBSTANTIATION EXCEPTION IN CASE OF CONTRIBUTIONS REPORTED BY DONEE.

(a) IN GENERAL.—Section 170(f)(8) is amended by striking subparagraph (D) and by redesignating subparagraph (E) as subparagraph (D).

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to contributions made in taxable years beginning after December 31, 2016.

PART IX—OTHER PROVISIONS

Subpart A—Craft Beverage Modernization and Tax Reform

SEC. 13801. PRODUCTION PERIOD FOR BEER, WINE, AND DISTILLED SPIRITS.

(a) IN GENERAL.—Section 263A(f) is amended—

(1) by redesignating paragraph (4) as paragraph (5), and

(2) by inserting after paragraph (3) the following new paragraph:

"(4) EXEMPTION FOR AGING PROCESS OF BEER, WINE, AND DISTILLED SPIRITS.—

"(A) IN GENERAL.—For purposes of this subsection, the production period shall not include the aging period for—

"(i) beer (as defined in section 5052(a)),

"(ii) wine (as described in section 5041(a)), or

"(iii) distilled spirits (as defined in section 5002(a)(8)), except such spirits that are unfit for use for beverage purposes.

"(B) TERMINATION.—This paragraph shall not apply to interest costs paid or accrued after December 31, 2019.".

(b) CONFORMING AMENDMENT.—Paragraph (5)(B)(ii) of section 263A(f), as redesignated by this section, is amended by inserting "except as provided in paragraph (4)," before "ending on the date".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to interest costs paid or accrued in calendar years beginning after December 31, 2017.

SEC. 13802. REDUCED RATE OF EXCISE TAX ON BEER.

(a) IN GENERAL.—Paragraph (1) of section 5051(a) is amended to read as follows:

"(1) IN GENERAL.—

"(A) IMPOSITION OF TAX.—A tax is hereby imposed on all beer brewed or produced, and removed for consumption or sale, within the United States, or imported into the United States. Except as provided in paragraph (2), the

rate of such tax shall be the amount determined under this paragraph.

"(B) RATE.—Except as provided in subparagraph (C), the rate of tax shall be $18 for per barrel.

"(C) SPECIAL RULE.—In the case of beer removed after December 31, 2017, and before January 1, 2020, the rate of tax shall be—

"(i) $16 on the first 6,000,000 barrels of beer—

"(I) brewed by the brewer and removed during the calendar year for consumption or sale, or

"(II) imported by the importer into the United States during the calendar year, and

"(ii) $18 on any barrels of beer to which clause (i) does not apply.

"(D) BARREL.—For purposes of this section, a barrel shall contain not more than 31 gallons of beer, and any tax imposed under this section shall be applied at a like rate for any other quantity or for fractional parts of a barrel.".

(b) REDUCED RATE FOR CERTAIN DOMESTIC PRODUCTION.—Subparagraph (A) of section 5051(a)(2) is amended—

(1) in the heading, by striking "$7 A BARREL", and

(2) by inserting "($3.50 in the case of beer removed after December 31, 2017, and before January 1, 2020)" after "$7".

(c) APPLICATION OF REDUCED TAX RATE FOR FOREIGN MANUFACTURERS AND IMPORTERS.—Subsection (a) of section 5051 is amended—

(1) in subparagraph (C)(i)(II) of paragraph (1), as amended by subsection (a), by inserting "but only if the importer is an electing importer under paragraph (4) and the barrels have been assigned to the importer pursuant to such paragraph" after "during the calendar year", and

(2) by adding at the end the following new paragraph:

"(4) REDUCED TAX RATE FOR FOREIGN MANUFACTURERS AND IMPORTERS.—

"(A) IN GENERAL.—In the case of any barrels of beer which have been brewed or produced outside of the United States and imported into the United States, the rate of tax applicable

under clause (i) of paragraph (1)(C) (referred to in this paragraph as the 'reduced tax rate') may be assigned by the brewer (provided that the brewer makes an election described in subparagraph (B)(ii)) to any electing importer of such barrels pursuant to the requirements established by the Secretary under subparagraph (B).

"(B) ASSIGNMENT.—The Secretary shall, through such rules, regulations, and procedures as are determined appropriate, establish procedures for assignment of the reduced tax rate provided under this paragraph, which shall include—

"(i) a limitation to ensure that the number of barrels of beer for which the reduced tax rate has been assigned by a brewer—

"(I) to any importer does not exceed the number of barrels of beer brewed or produced by such brewer during the calendar year which were imported into the United States by such importer, and

"(II) to all importers does not exceed the 6,000,000 barrels to which the reduced tax rate applies,

"(ii) procedures that allow the election of a brewer to assign and an importer to receive the reduced tax rate provided under this paragraph,

"(iii) requirements that the brewer provide any information as the Secretary determines necessary and appropriate for purposes of carrying out this paragraph, and

"(iv) procedures that allow for revocation of eligibility of the brewer and the importer for the reduced tax rate provided under this paragraph in the case of any erroneous or fraudulent information provided under clause (iii) which the Secretary deems to be material to qualifying for such reduced rate.

"(C) CONTROLLED GROUP.—For purposes of this section, any importer making an election described in subparagraph (B)(ii) shall be deemed to be a member of the controlled group

of the brewer, as described under paragraph (5).".

(d) CONTROLLED GROUP AND SINGLE TAXPAYER RULES.—Subsection (a) of section 5051, as amended by this section, is amended—

(1) in paragraph (2)—

(A) by striking subparagraph (B), and

(B) by redesignating subparagraph (C) as subparagraph (B), and

(2) by adding at the end the following new paragraph:

"(5) CONTROLLED GROUP AND SINGLE TAXPAYER RULES.—

"(A) IN GENERAL.—Except as provided in subparagraph (B), in the case of a controlled group, the 6,000,000 barrel quantity specified in paragraph (1)(C)(i) and the 2,000,000 barrel quantity specified in paragraph (2)(A) shall be applied to the controlled group, and the 6,000,000 barrel quantity specified in paragraph (1)(C)(i) and the 60,000 barrel quantity specified in paragraph (2)(A) shall be apportioned among the brewers who are members of such group in such manner as the Secretary or their delegate shall by regulations prescribe. For pur-

poses of the preceding sentence, the term 'controlled group' has the meaning assigned to it by subsection (a) of section 1563, except that for such purposes the phrase 'more than 50 percent' shall be substituted for the phrase 'at least 80 percent' in each place it appears in such subsection. Under regulations prescribed by the Secretary, principles similar to the principles of the preceding two sentences shall be applied to a group of brewers under common control where one or more of the brewers is not a corporation.

"(B) FOREIGN MANUFACTURERS AND IMPORTERS.—For purposes of paragraph (4), in the case of a controlled group, the 6,000,000 barrel quantity specified in paragraph (1)(C)(i) shall be applied to the controlled group and apportioned among the members of such group in such manner as the Secretary shall by regulations prescribe. For purposes of the preceding sentence, the term 'controlled group' has the meaning given such term under subparagraph (A). Under regulations prescribed by the Secretary, principles similar to the principles of the preceding two sentences shall be applied to a

group of brewers under common control where one or more of the brewers is not a corporation.

"(C) SINGLE TAXPAYER.—Pursuant to rules issued by the Secretary, two or more entities (whether or not under common control) that produce beer marketed under a similar brand, license, franchise, or other arrangement shall be treated as a single taxpayer for purposes of the application of this subsection.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to beer removed after December 31, 2017.

SEC. 13803. TRANSFER OF BEER BETWEEN BONDED FACILITIES.

(a) IN GENERAL.—Section 5414 is amended—

(1) by striking "Beer may be removed" and inserting "(a) IN GENERAL—Beer may be removed", and

(2) by adding at the end the following:

"(b) TRANSFER OF BEER BETWEEN BONDED FACILITIES.—

"(1) IN GENERAL.—Beer may be removed from one bonded brewery to another bonded brewery, without payment of tax, and may be mingled with beer at the receiving brewery, subject to such conditions, including payment of the tax, and in such containers,

as the Secretary by regulations shall prescribe, which shall include—

"(A) any removal from one brewery to another brewery belonging to the same brewer,

"(B) any removal from a brewery owned by one corporation to a brewery owned by another corporation when—

"(i) one such corporation owns the controlling interest in the other such corporation, or

"(ii) the controlling interest in each such corporation is owned by the same person or persons, and

"(C) any removal from one brewery to another brewery when—

"(i) the proprietors of transferring and receiving premises are independent of each other and neither has a proprietary interest, directly or indirectly, in the business of the other, and

"(ii) the transferor has divested itself of all interest in the beer so transferred and the transferee has accepted responsibility for payment of the tax.

"(2) TRANSFER OF LIABILITY FOR TAX.—For purposes of paragraph (1)(C), such relief from liability shall be effective from the time of removal from the transferor's bonded premises, or from the time of divestment of interest, whichever is later.

"(3) TERMINATION.—This subsection shall not apply to any calendar quarter beginning after December 31, 2019.".

(b) REMOVAL FROM BREWERY BY PIPELINE.—Section 5412 is amended by inserting "pursuant to section 5414 or" before "by pipeline".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to any calendar quarters beginning after December 31, 2017.

SEC. 13804. REDUCED RATE OF EXCISE TAX ON CERTAIN WINE.

(a) IN GENERAL.—Section 5041(c) is amended by adding at the end the following new paragraph:

"(8) SPECIAL RULE FOR 2018 AND 2019.—

"(A) IN GENERAL.—In the case of wine removed after December 31, 2017, and before January 1, 2020, paragraphs (1) and (2) shall not apply and there shall be allowed as a credit against any tax imposed by this title (other than

chapters 2, 21, and 22) an amount equal to the sum of—

"(i) $1 per wine gallon on the first 30,000 wine gallons of wine, plus

"(ii) 90 cents per wine gallon on the first 100,000 wine gallons of wine to which clause (i) does not apply, plus

"(iii) 53.5 cents per wine gallon on the first 620,000 wine gallons of wine to which clauses (i) and (ii) do not apply,

which are produced by the producer and removed during the calendar year for consumption or sale, or which are imported by the importer into the United States during the calendar year.

"(B) ADJUSTMENT OF CREDIT FOR HARD CIDER.—In the case of wine described in subsection (b)(6), subparagraph (A) of this paragraph shall be applied—

"(i) in clause (i) of such subparagraph, by substituting '6.2 cents' for '$1',

"(ii) in clause (ii) of such subparagraph, by substituting '5.6 cents' for '90 cents', and

"(iii) in clause (iii) of such subparagraph, by substituting '3.3 cents' for '53.5 cents'.",

(b) CONTROLLED GROUP AND SINGLE TAXPAYER RULES.—Paragraph (4) of section 5041(c) is amended by striking "section 5051(a)(2)(B)" and inserting "section 5051(a)(5)".

(c) ALLOWANCE OF CREDIT FOR FOREIGN MANUFACTURERS AND IMPORTERS.—Subsection (c) of section 5041, as amended by subsection (a), is amended—

(1) in subparagraph (A) of paragraph (8), by inserting "but only if the importer is an electing importer under paragraph (9) and the wine gallons of wine have been assigned to the importer pursuant to such paragraph" after "into the United States during the calendar year", and

(2) by adding at the end the following new paragraph:

"(9) ALLOWANCE OF CREDIT FOR FOREIGN MANUFACTURERS AND IMPORTERS.—

"(A) IN GENERAL.—In the case of any wine gallons of wine which have been produced outside of the United States and imported into the United States, the credit allowable under paragraph (8) (referred to in this paragraph as the

'tax credit') may be assigned by the person who produced such wine (referred to in this paragraph as the 'foreign producer'), provided that such person makes an election described in subparagraph (B)(ii), to any electing importer of such wine gallons pursuant to the requirements established by the Secretary under subparagraph (B).

"(B) ASSIGNMENT.—The Secretary shall, through such rules, regulations, and procedures as are determined appropriate, establish procedures for assignment of the tax credit provided under this paragraph, which shall include—

"(i) a limitation to ensure that the number of wine gallons of wine for which the tax credit has been assigned by a foreign producer—

"(I) to any importer does not exceed the number of wine gallons of wine produced by such foreign producer during the calendar year which were imported into the United States by such importer, and

"(II) to all importers does not exceed the 750,000 wine gallons of wine to which the tax credit applies,

"(ii) procedures that allow the election of a foreign producer to assign and an importer to receive the tax credit provided under this paragraph,

"(iii) requirements that the foreign producer provide any information as the Secretary determines necessary and appropriate for purposes of carrying out this paragraph, and

"(iv) procedures that allow for revocation of eligibility of the foreign producer and the importer for the tax credit provided under this paragraph in the case of any erroneous or fraudulent information provided under clause (iii) which the Secretary deems to be material to qualifying for such credit.

"(C) CONTROLLED GROUP.—For purposes of this section, any importer making an election described in subparagraph (B)(ii) shall be deemed to be a member of the controlled group

of the foreign producer, as described under paragraph (4).".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to wine removed after December 31, 2017.

SEC. 13805. ADJUSTMENT OF ALCOHOL CONTENT LEVEL FOR APPLICATION OF EXCISE TAX RATES.

(a) IN GENERAL.—Paragraphs (1) and (2) of section 5041(b) are each amended by inserting "(16 percent in the case of wine removed after December 31, 2017, and before January 1, 2020" after "14 percent".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to wine removed after December 31, 2017.

SEC. 13806. DEFINITION OF MEAD AND LOW ALCOHOL BY VOLUME WINE.

(a) IN GENERAL.—Section 5041 is amended—

(1) in subsection (a), by striking "Still wines" and inserting "Subject to subsection (h), still wines", and

(2) by adding at the end the following new subsection:

"(h) MEAD AND LOW ALCOHOL BY VOLUME WINE.—

"(1) IN GENERAL.—For purposes of subsections (a) and (b)(1), mead and low alcohol by volume wine

shall be deemed to be still wines containing not more than 16 percent of alcohol by volume.

"(2) DEFINITIONS.—

"(A) MEAD.—For purposes of this section, the term 'mead' means a wine—

"(i) containing not more than 0.64 gram of carbon dioxide per hundred milliliters of wine, except that the Secretary shall by regulations prescribe such tolerances to this limitation as may be reasonably necessary in good commercial practice,

"(ii) which is derived solely from honey and water,

"(iii) which contains no fruit product or fruit flavoring, and

"(iv) which contains less than 8.5 percent alcohol by volume.

"(B) LOW ALCOHOL BY VOLUME WINE.—For purposes of this section, the term 'low alcohol by volume wine' means a wine—

"(i) containing not more than 0.64 gram of carbon dioxide per hundred milliliters of wine, except that the Secretary shall by regulations prescribe such toler-

ances to this limitation as may be reasonably necessary in good commercial practice,

"(ii) which is derived—

"(I) primarily from grapes, or

"(II) from grape juice concentrate and water,

"(iii) which contains no fruit product or fruit flavoring other than grape, and

"(iv) which contains less than 8.5 percent alcohol by volume.

"(3) TERMINATION.—This subsection shall not apply to wine removed after December 31, 2019.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to wine removed after December 31, 2017.

SEC. 13807. REDUCED RATE OF EXCISE TAX ON CERTAIN DISTILLED SPIRITS.

(a) IN GENERAL.—Section 5001 is amended by redesignating subsection (c) as subsection (d) and by inserting after subsection (b) the following new subsection:

"(c) REDUCED RATE FOR 2018 AND 2019.—

"(1) IN GENERAL.—In the case of a distilled spirits operation, the otherwise applicable tax rate under subsection (a)(1) shall be—

"(A) $2.70 per proof gallon on the first 100,000 proof gallons of distilled spirits, and

"(B) $13.34 per proof gallon on the first 22,130,000 of proof gallons of distilled spirits to which subparagraph (A) does not apply,

which have been distilled or processed by such operation and removed during the calendar year for consumption or sale, or which have been imported by the importer into the United States during the calendar year.

"(2) CONTROLLED GROUPS.—

"(A) IN GENERAL.—In the case of a controlled group, the proof gallon quantities specified under subparagraphs (A) and (B) of paragraph (1) shall be applied to such group and apportioned among the members of such group in such manner as the Secretary or their delegate shall by regulations prescribe.

"(B) DEFINITION.—For purposes of subparagraph (A), the term 'controlled group' shall have the meaning given such term by subsection (a) of section 1563, except that 'more than 50 percent' shall be substituted for 'at least 80 percent' each place it appears in such subsection.

"(C) RULES FOR NON-CORPORATIONS.—Under regulations prescribed by the Secretary, principles similar to the principles of subparagraphs (A) and (B) shall be applied to a group under common control where one or more of the persons is not a corporation.

"(D) SINGLE TAXPAYER.—Pursuant to rules issued by the Secretary, two or more entities (whether or not under common control) that produce distilled spirits marketed under a similar brand, license, franchise, or other arrangement shall be treated as a single taxpayer for purposes of the application of this subsection.

"(3) TERMINATION.—This subsection shall not apply to distilled spirits removed after December 31, 2019.".

(b) CONFORMING AMENDMENT.—Section 7652(f)(2) is amended by striking "section 5001(a)(1)" and inserting "subsection (a)(1) of section 5001, determined as if subsection (c)(1) of such section did not apply".

(c) APPLICATION OF REDUCED TAX RATE FOR FOREIGN MANUFACTURERS AND IMPORTERS.—Subsection (c) of section 5001, as added by subsection (a), is amended—

(1) in paragraph (1), by inserting "but only if the importer is an electing importer under paragraph

(3) and the proof gallons of distilled spirits have been assigned to the importer pursuant to such paragraph" after "into the United States during the calendar year", and

(2) by redesignating paragraph (3) as paragraph (4) and by inserting after paragraph (2) the following new paragraph:

"(3) REDUCED TAX RATE FOR FOREIGN MANUFACTURERS AND IMPORTERS.—

"(A) IN GENERAL.—In the case of any proof gallons of distilled spirits which have been produced outside of the United States and imported into the United States, the rate of tax applicable under paragraph (1) (referred to in this paragraph as the 'reduced tax rate') may be assigned by the distilled spirits operation (provided that such operation makes an election described in subparagraph (B)(ii)) to any electing importer of such proof gallons pursuant to the requirements established by the Secretary under subparagraph (B).

"(B) ASSIGNMENT.—The Secretary shall, through such rules, regulations, and procedures as are determined appropriate, establish procedures for assignment of the reduced tax rate pro-

vided under this paragraph, which shall include—

"(i) a limitation to ensure that the number of proof gallons of distilled spirits for which the reduced tax rate has been assigned by a distilled spirits operation—

"(I) to any importer does not exceed the number of proof gallons produced by such operation during the calendar year which were imported into the United States by such importer, and

"(II) to all importers does not exceed the 22,230,000 proof gallons of distilled spirits to which the reduced tax rate applies,

"(ii) procedures that allow the election of a distilled spirits operation to assign and an importer to receive the reduced tax rate provided under this paragraph,

"(iii) requirements that the distilled spirits operation provide any information as the Secretary determines necessary and appropriate for purposes of carrying out this paragraph, and

"(iv) procedures that allow for revocation of eligibility of the distilled spirits operation and the importer for the reduced tax rate provided under this paragraph in the case of any erroneous or fraudulent information provided under clause (iii) which the Secretary deems to be material to qualifying for such reduced rate.

"(C) CONTROLLED GROUP.—

"(i) IN GENERAL.—For purposes of this section, any importer making an election described in subparagraph (B)(ii) shall be deemed to be a member of the controlled group of the distilled spirits operation, as described under paragraph (2).

"(ii) APPORTIONMENT.—For purposes of this paragraph, in the case of a controlled group, rules similar to section 5051(a)(5)(B) shall apply.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to distilled spirits removed after December 31, 2017.

SEC. 13808. BULK DISTILLED SPIRITS.

(a) IN GENERAL.—Section 5212 is amended by adding at the end the following sentence: "In the case of distilled

spirits transferred in bond after December 31, 2017, and before January 1, 2020, this section shall be applied without regard to whether distilled spirits are bulk distilled spirits.".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply distilled spirits transferred in bond after December 31, 2017.

Subpart B—Miscellaneous Provisions

SEC. 13821. MODIFICATION OF TAX TREATMENT OF ALASKA NATIVE CORPORATIONS AND SETTLEMENT TRUSTS.

(a) EXCLUSION FOR ANCSA PAYMENTS ASSIGNED TO ALASKA NATIVE SETTLEMENT TRUSTS.—

(1) IN GENERAL.—Part III of subchapter B of chapter 1 is amended by inserting before section 140 the following new section:

"SEC. 139G. ASSIGNMENTS TO ALASKA NATIVE SETTLEMENT TRUSTS.

"(a) IN GENERAL.—In the case of a Native Corporation, gross income shall not include the value of any payments that would otherwise be made, or treated as being made, to such Native Corporation pursuant to, or as required by, any provision of the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.), including any payment that would otherwise be made to a Village Corporation

pursuant to section 7(j) of the Alaska Native Claims Settlement Act (43 U.S.C. 1606(j)), provided that any such payments—

"(1) are assigned in writing to a Settlement Trust, and

"(2) were not received by such Native Corporation prior to the assignment described in paragraph (1).

"(b) INCLUSION IN GROSS INCOME.—In the case of a Settlement Trust which has been assigned payments described in subsection (a), gross income shall include such payments when received by such Settlement Trust pursuant to the assignment and shall have the same character as if such payments were received by the Native Corporation.

"(c) AMOUNT AND SCOPE OF ASSIGNMENT.—The amount and scope of any assignment under subsection (a) shall be described with reasonable particularity and may either be in a percentage of one or more such payments or in a fixed dollar amount.

"(d) DURATION OF ASSIGNMENT; REVOCABILITY.—Any assignment under subsection (a) shall specify—

"(1) a duration either in perpetuity or for a period of time, and

"(2) whether such assignment is revocable.

"(e) PROHIBITION ON DEDUCTION.—Notwithstanding section 247, no deduction shall be allowed to a Native Corporation for purposes of any amounts described in subsection (a).

"(f) DEFINITIONS.—For purposes of this section, the terms 'Native Corporation' and 'Settlement Trust' have the same meaning given such terms under section 646(h).".

(2) CONFORMING AMENDMENT.—The table of sections for part III of subchapter B of chapter 1 is amended by inserting before the item relating to section 140 the following new item:

"Sec. 139G. Assignments to Alaska Native Settlement Trusts.".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to taxable years beginning after December 31, 2016.

(b) DEDUCTION OF CONTRIBUTIONS TO ALASKA NATIVE SETTLEMENT TRUSTS.—

(1) IN GENERAL.—Part VIII of subchapter B of chapter 1 is amended by inserting before section 248 the following new section:

"SEC. 247. CONTRIBUTIONS TO ALASKA NATIVE SETTLEMENT TRUSTS.

"(a) IN GENERAL.—In the case of a Native Corporation, there shall be allowed a deduction for any contributions made by such Native Corporation to a Settlement Trust (regardless of whether an election under section 646

is in effect for such Settlement Trust) for which the Native Corporation has made an annual election under subsection (e).

"(b) AMOUNT OF DEDUCTION.—The amount of the deduction under subsection (a) shall be equal to—

"(1) in the case of a cash contribution (regardless of the method of payment, including currency, coins, money order, or check), the amount of such contribution, or

"(2) in the case of a contribution not described in paragraph (1), the lesser of—

"(A) the Native Corporation's adjusted basis in the property contributed, or

"(B) the fair market value of the property contributed.

"(c) LIMITATION AND CARRYOVER.—

"(1) IN GENERAL.—Subject to paragraph (2), the deduction allowed under subsection (a) for any taxable year shall not exceed the taxable income (as determined without regard to such deduction) of the Native Corporation for the taxable year in which the contribution was made.

"(2) CARRYOVER.—If the aggregate amount of contributions described in subsection (a) for any taxable year exceeds the limitation under paragraph (1),

such excess shall be treated as a contribution described in subsection (a) in each of the 15 succeeding years in order of time.

"(d) DEFINITIONS.—For purposes of this section, the terms 'Native Corporation' and 'Settlement Trust' have the same meaning given such terms under section 646(h).

"(e) MANNER OF MAKING ELECTION.—

"(1) IN GENERAL.—For each taxable year, a Native Corporation may elect to have this section apply for such taxable year on the income tax return or an amendment or supplement to the return of the Native Corporation, with such election to have effect solely for such taxable year.

"(2) REVOCATION.—Any election made by a Native Corporation pursuant to this subsection may be revoked pursuant to a timely filed amendment or supplement to the income tax return of such Native Corporation.

"(f) ADDITIONAL RULES.—

"(1) EARNINGS AND PROFITS.—Notwithstanding section 646(d)(2), in the case of a Native Corporation which claims a deduction under this section for any taxable year, the earnings and profits of such Native Corporation for such taxable year shall be reduced by the amount of such deduction.

"(2) GAIN OR LOSS.—No gain or loss shall be recognized by the Native Corporation with respect to a contribution of property for which a deduction is allowed under this section.

"(3) INCOME.—Subject to subsection (g), a Settlement Trust shall include in income the amount of any deduction allowed under this section in the taxable year in which the Settlement Trust actually receives such contribution.

"(4) PERIOD.—The holding period under section 1223 of the Settlement Trust shall include the period the property was held by the Native Corporation.

"(5) BASIS.—The basis that a Settlement Trust has for which a deduction is allowed under this section shall be equal to the lesser of—

"(A) the adjusted basis of the Native Corporation in such property immediately before such contribution, or

"(B) the fair market value of the property immediately before such contribution.

"(6) PROHIBITION.—No deduction shall be allowed under this section with respect to any contributions made to a Settlement Trust which are in violation of subsection (a)(2) or (c)(2) of section 39 of the

Alaska Native Claims Settlement Act (43 U.S.C. 1629e).

"(g) ELECTION BY SETTLEMENT TRUST TO DEFER INCOME RECOGNITION.—

"(1) IN GENERAL.—In the case of a contribution which consists of property other than cash, a Settlement Trust may elect to defer recognition of any income related to such property until the sale or exchange of such property, in whole or in part, by the Settlement Trust.

"(2) TREATMENT.—In the case of property described in paragraph (1), any income or gain realized on the sale or exchange of such property shall be treated as—

"(A) for such amount of the income or gain as is equal to or less than the amount of income which would be included in income at the time of contribution under subsection (f)(3) but for the taxpayer's election under this subsection, ordinary income, and

"(B) for any amounts of the income or gain which are in excess of the amount of income which would be included in income at the time of contribution under subsection (f)(3) but for the taxpayer's election under this subsection, having

the same character as if this subsection did not apply.

"(3) ELECTION.—

"(A) IN GENERAL.—For each taxable year, a Settlement Trust may elect to apply this subsection for any property described in paragraph (1) which was contributed during such year. Any property to which the election applies shall be identified and described with reasonable particularity on the income tax return or an amendment or supplement to the return of the Settlement Trust, with such election to have effect solely for such taxable year.

"(B) REVOCATION.—Any election made by a Settlement Trust pursuant to this subsection may be revoked pursuant to a timely filed amendment or supplement to the income tax return of such Settlement Trust.

"(C) CERTAIN DISPOSITIONS.—

"(i) IN GENERAL.—In the case of any property for which an election is in effect under this subsection and which is disposed of within the first taxable year subsequent to the taxable year in which such property was contributed to the Settlement Trust—

"(I) this section shall be applied as if the election under this subsection had not been made,

"(II) any income or gain which would have been included in the year of contribution under subsection (f)(3) but for the taxpayer's election under this subsection shall be included in income for the taxable year of such contribution, and

"(III) the Settlement Trust shall pay any increase in tax resulting from such inclusion, including any applicable interest, and increased by 10 percent of the amount of such increase with interest.

"(ii) ASSESSMENT.—Notwithstanding section 6501(a), any amount described in subclause (III) of clause (i) may be assessed, or a proceeding in court with respect to such amount may be initiated without assessment, within 4 years after the date on which the return making the election under this subsection for such property was filed.".

(2) CONFORMING AMENDMENT.—The table of sections for part VIII of subchapter B of chapter 1 is amended by inserting before the item relating to section 248 the following new item:

"Sec. 247. Contributions to Alaska Native Settlement Trusts.".

(3) EFFECTIVE DATE.—

(A) IN GENERAL.—The amendments made by this subsection shall apply to taxable years for which the period of limitation on refund or credit under section 6511 of the Internal Revenue Code of 1986 has not expired.

(B) ONE-YEAR WAIVER OF STATUTE OF LIMITATIONS.—If the period of limitation on a credit or refund resulting from the amendments made by paragraph (1) expires before the end of the 1-year period beginning on the date of the enactment of this Act, refund or credit of such overpayment (to the extent attributable to such amendments) may, nevertheless, be made or allowed if claim therefor is filed before the close of such 1-year period.

(c) INFORMATION REPORTING FOR DEDUCTIBLE CONTRIBUTIONS TO ALASKA NATIVE SETTLEMENT TRUSTS.—

(1) IN GENERAL.—Section 6039H is amended—

*(A) in the heading, by striking "**SPONSORING**", and*

(B) by adding at the end the following new subsection:

"(e) DEDUCTIBLE CONTRIBUTIONS BY NATIVE CORPORATIONS TO ALASKA NATIVE SETTLEMENT TRUSTS.—

"(1) IN GENERAL.—Any Native Corporation (as defined in subsection (m) of section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. 1602(m))) which has made a contribution to a Settlement Trust (as defined in subsection (t) of such section) to which an election under subsection (e) of section 247 applies shall provide such Settlement Trust with a statement regarding such election not later than January 31 of the calendar year subsequent to the calendar year in which the contribution was made.

"(2) CONTENT OF STATEMENT.—The statement described in paragraph (1) shall include—

"(A) the total amount of contributions to which the election under subsection (e) of section 247 applies,

"(B) for each contribution, whether such contribution was in cash,

"(C) for each contribution which consists of property other than cash, the date that such property was acquired by the Native Corporation and the adjusted basis and fair market value of

such property on the date such property was contributed to the Settlement Trust,

"(D) the date on which each contribution was made to the Settlement Trust, and

"(E) such information as the Secretary determines to be necessary or appropriate for the identification of each contribution and the accurate inclusion of income relating to such contributions by the Settlement Trust.".

(2) CONFORMING AMENDMENT.—The item relating to section 6039H in the table of sections for subpart A of part III of subchapter A of chapter 61 is amended to read as follows:

"Sec. 6039H. Information With Respect to Alaska Native Settlement Trusts and Native Corporations.".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to taxable years beginning after December 31, 2016.

SEC. 13822. AMOUNTS PAID FOR AIRCRAFT MANAGEMENT SERVICES.

(a) IN GENERAL.—Subsection (e) of section 4261 is amended by adding at the end the following new paragraph:

"(5) AMOUNTS PAID FOR AIRCRAFT MANAGEMENT SERVICES.—

"(A) IN GENERAL.—No tax shall be imposed by this section or section 4271 on any amounts

paid by an aircraft owner for aircraft management services related to—

"(i) maintenance and support of the aircraft owner's aircraft, or

"(ii) flights on the aircraft owner's aircraft.

"(B) AIRCRAFT MANAGEMENT SERVICES.—For purposes of subparagraph (A), the term 'aircraft management services' includes—

"(i) assisting an aircraft owner with administrative and support services, such as scheduling, flight planning, and weather forecasting,

"(ii) obtaining insurance,

"(iii) maintenance, storage and fueling of aircraft,

"(iv) hiring, training, and provision of pilots and crew,

"(v) establishing and complying with safety standards, and

"(vi) such other services as are necessary to support flights operated by an aircraft owner.

"(C) LESSEE TREATED AS AIRCRAFT OWNER.—

"(i) IN GENERAL.—For purposes of this paragraph, the term 'aircraft owner' includes a person who leases the aircraft other than under a disqualified lease.

"(ii) DISQUALIFIED LEASE.—For purposes of clause (i), the term 'disqualified lease' means a lease from a person providing aircraft management services with respect to such aircraft (or a related person (within the meaning of section 465(b)(3)(C)) to the person providing such services), if such lease is for a term of 31 days or less.

"(D) PRO RATA ALLOCATION.—In the case of amounts paid to any person which (but for this subsection) are subject to the tax imposed by subsection (a), a portion of which consists of amounts described in subparagraph (A), this paragraph shall apply on a pro rata basis only to the portion which consists of amounts described in such subparagraph.".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to amounts paid after the date of the enactment of this Act.

SEC. 13823. OPPORTUNITY ZONES.

(a) IN GENERAL.—Chapter 1 is amended by adding at the end the following:

"Subchapter Z—Opportunity Zones

"SEC. 1400Z–1. DESIGNATION.

"(a) QUALIFIED OPPORTUNITY ZONE DEFINED.—For the purposes of this subchapter, the term 'qualified opportunity zone' means a population census tract that is a low-income community that is designated as a qualified opportunity zone.

"(b) DESIGNATION.—

"(1) IN GENERAL.—For purposes of subsection (a), a population census tract that is a low-income community is designated as a qualified opportunity zone if—

"(A) not later than the end of the determination period, the chief executive officer of the State in which the tract is located—

"(i) nominates the tract for designation as a qualified opportunity zone, and

"(ii) notifies the Secretary in writing of such nomination, and

"(B) the Secretary certifies such nomination and designates such tract as a qualified op-

portunity zone before the end of the consideration period.

"(2) EXTENSION OF PERIODS.—A chief executive officer of a State may request that the Secretary extend either the determination or consideration period, or both (determined without regard to this subparagraph), for an additional 30 days.

"(c) OTHER DEFINITIONS.—For purposes of this subsection—

"(1) LOW-INCOME COMMUNITIES.—The term 'low-income community' has the same meaning as when used in section 45D(e).

"(2) DEFINITION OF PERIODS.—

"(A) CONSIDERATION PERIOD.—The term 'consideration period' means the 30-day period beginning on the date on which the Secretary receives notice under subsection (b)(1)(A)(ii), as extended under subsection (b)(2).

"(B) DETERMINATION PERIOD.—The term 'determination period' means the 90-day period beginning on the date of the enactment of the Tax Cuts and Jobs Act, as extended under subsection (b)(2).

"(3) STATE.—For purposes of this section, the term 'State' includes any possession of the United States.

"(d) NUMBER OF DESIGNATIONS.—

"(1) IN GENERAL.—Except as provided by paragraph (2), the number of population census tracts in a State that may be designated as qualified opportunity zones under this section may not exceed 25 percent of the number of low-income communities in the State.

"(2) EXCEPTION.—If the number of low-income communities in a State is less than 100, then a total of 25 of such tracts may be designated as qualified opportunity zones.

"(e) DESIGNATION OF TRACTS CONTIGUOUS WITH LOW-INCOME COMMUNITIES.—

"(1) IN GENERAL.—A population census tract that is not a low-income community may be designated as a qualified opportunity zone under this section if—

"(A) the tract is contiguous with the low-income community that is designated as a qualified opportunity zone, and

"(B) the median family income of the tract does not exceed 125 percent of the median family

income of the low-income community with which the tract is contiguous.

"(2) LIMITATION.—Not more than 5 percent of the population census tracts designated in a State as a qualified opportunity zone may be designated under paragraph (1).

"(f) PERIOD FOR WHICH DESIGNATION IS IN EFFECT.—A designation as a qualified opportunity zone shall remain in effect for the period beginning on the date of the designation and ending at the close of the 10th calendar year beginning on or after such date of designation.

"SEC. 1400Z–2. SPECIAL RULES FOR CAPITAL GAINS INVESTED IN OPPORTUNITY ZONES.

"(a) IN GENERAL.—

"(1) TREATMENT OF GAINS.—In the case of gain from the sale to, or exchange with, an unrelated person of any property held by the taxpayer, at the election of the taxpayer—

"(A) gross income for the taxable year shall not include so much of such gain as does not exceed the aggregate amount invested by the taxpayer in a qualified opportunity fund during the 180-day period beginning on the date of such sale or exchange,

"(B) the amount of gain excluded by subparagraph (A) shall be included in gross income as provided by subsection (b), and

"(C) subsection (c) shall apply.

"(2) ELECTION.—No election may be made under paragraph (1)—

"(A) with respect to a sale or exchange if an election previously made with respect to such sale or exchange is in effect, or

"(B) with respect to any sale or exchange after December 31, 2026.

"(b) DEFERRAL OF GAIN INVESTED IN OPPORTUNITY ZONE PROPERTY.—

"(1) YEAR OF INCLUSION.—Gain to which subsection (a)(1)(B) applies shall be included in income in the taxable year which includes the earlier of—

"(A) the date on which such investment is sold or exchanged, or

"(B) December 31, 2026.

"(2) AMOUNT INCLUDIBLE.—

"(A) IN GENERAL.—The amount of gain included in gross income under subsection (a)(1)(A) shall be the excess of—

"(i) the lesser of the amount of gain excluded under paragraph (1) or the fair

market value of the investment as determined as of the date described in paragraph (1), over

"(ii) the taxpayer's basis in the investment.

"(B) DETERMINATION OF BASIS.—

"(i) IN GENERAL.—Except as otherwise provided in this clause or subsection (c), the taxpayer's basis in the investment shall be zero.

"(ii) INCREASE FOR GAIN RECOGNIZED UNDER SUBSECTION (a)(1)(B).—The basis in the investment shall be increased by the amount of gain recognized by reason of subsection (a)(1)(B) with respect to such property.

"(iii) INVESTMENTS HELD FOR 5 YEARS.—In the case of any investment held for at least 5 years, the basis of such investment shall be increased by an amount equal to 10 percent of the amount of gain deferred by reason of subsection (a)(1)(A).

"(iv) INVESTMENTS HELD FOR 7 YEARS.—In the case of any investment held by the taxpayer for at least 7 years, in ad-

dition to any adjustment made under clause (iii), the basis of such property shall be increased by an amount equal to 5 percent of the amount of gain deferred by reason of subsection (a)(1)(A).

"(c) SPECIAL RULE FOR INVESTMENTS HELD FOR AT LEAST 10 YEARS.—In the case of any investment held by the taxpayer for at least 10 years and with respect to which the taxpayer makes an election under this clause, the basis of such property shall be equal to the fair market value of such investment on the date that the investment is sold or exchanged.

"(d) QUALIFIED OPPORTUNITY FUND.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified opportunity fund' means any investment vehicle which is organized as a corporation or a partnership for the purpose of investing in qualified opportunity zone property (other than another qualified opportunity fund) that holds at least 90 percent of its assets in qualified opportunity zone property, determined by the average of the percentage of qualified opportunity zone property held in the fund as measured—

"(A) on the last day of the first 6-month period of the taxable year of the fund, and

"(B) on the last day of the taxable year of the fund.

"(2) QUALIFIED OPPORTUNITY ZONE PROPERTY.—

"(A) IN GENERAL.—The term 'qualified opportunity zone property' means property which is—

"(i) qualified opportunity zone stock,

"(ii) qualified opportunity zone partnership interest, or

"(iii) qualified opportunity zone business property.

"(B) QUALIFIED OPPORTUNITY ZONE STOCK.—

"(i) IN GENERAL.—Except as provided in clause (ii), the term 'qualified opportunity zone stock' means any stock in a domestic corporation if—

"(I) such stock is acquired by the qualified opportunity fund after December 31, 2017, at its original issue (directly or through an underwriter) from the corporation solely in exchange for cash,

"(II) as of the time such stock was issued, such corporation was a qualified opportunity zone business (or, in the case of a new corporation, such corporation was being organized for purposes of being a qualified opportunity zone business), and

"(III) during substantially all of the qualified opportunity fund's holding period for such stock, such corporation qualified as a qualified opportunity zone business.

"(ii) REDEMPTIONS.—A rule similar to the rule of section 1202(c)(3) shall apply for purposes of this paragraph.

"(C) QUALIFIED OPPORTUNITY ZONE PARTNERSHIP INTEREST.—The term 'qualified opportunity zone partnership interest' means any capital or profits interest in a domestic partnership if—

"(i) such interest is acquired by the qualified opportunity fund after December 31, 2017, from the partnership solely in exchange for cash,

"(ii) as of the time such interest was acquired, such partnership was a qualified opportunity zone business (or, in the case of a new partnership, such partnership was being organized for purposes of being a qualified opportunity zone business), and

"(iii) during substantially all of the qualified opportunity fund's holding period for such interest, such partnership qualified as a qualified opportunity zone business.

"(D) QUALIFIED OPPORTUNITY ZONE BUSINESS PROPERTY.—

"(i) IN GENERAL.—The term 'qualified opportunity zone business property' means tangible property used in a trade or business of the qualified opportunity fund if—

"(I) such property was acquired by the qualified opportunity fund by purchase (as defined in section 179(d)(2)) after December 31, 2017,

"(II) the original use of such property in the qualified opportunity zone commences with the qualified opportunity fund or the qualified oppor-

tunity fund substantially improves the property, and

"(III) during substantially all of the qualified opportunity fund's holding period for such property, substantially all of the use of such property was in a qualified opportunity zone.

"(ii) SUBSTANTIAL IMPROVEMENT.—For purposes of subparagraph (A)(ii), property shall be treated as substantially improved by the qualified opportunity fund only if, during any 30-month period beginning after the date of acquisition of such property, additions to basis with respect to such property in the hands of the qualified opportunity fund exceed an amount equal to the adjusted basis of such property at the beginning of such 30-month period in the hands of the qualified opportunity fund.

"(iii) RELATED PARTY.—For purposes of subparagraph (A)(i), the related person rule of section 179(d)(2) shall be applied pursuant to paragraph (8) of this subsection in lieu of the application of such rule in section 179(d)(2)(A).

"(3) QUALIFIED OPPORTUNITY ZONE BUSINESS.—

"(A) IN GENERAL.—The term 'qualified opportunity zone business' means a trade or business—

"(i) in which substantially all of the tangible property owned or leased by the taxpayer is qualified opportunity zone business property (determined by substituting 'qualified opportunity zone business' for 'qualified opportunity fund' each place it appears in paragraph (2)(D)),

"(ii) which satisfies the requirements of paragraphs (2), (4), and (8) of section 1397C(b), and

"(iii) which is not described in section 144(c)(6)(B).

"(B) SPECIAL RULE.—For purposes of subparagraph (A), tangible property that ceases to be a qualified opportunity zone business property shall continue to be treated as a qualified opportunity zone business property for the lesser of—

"(i) 5 years after the date on which such tangible property ceases to be so qualified, or

"(ii) the date on which such tangible property is no longer held by the qualified opportunity zone business.

"(e) APPLICABLE RULES.—

"(1) TREATMENT OF INVESTMENTS WITH MIXED FUNDS.—In the case of any investment in a qualified opportunity fund only a portion of which consists of investments of gain to which an election under subsection (a) is in effect—

"(A) such investment shall be treated as 2 separate investments, consisting of—

"(i) one investment that only includes amounts to which the election under subsection (a) applies, and

"(ii) a separate investment consisting of other amounts, and

"(B) subsections (a), (b), and (c) shall only apply to the investment described in subparagraph (A)(i).

"(2) RELATED PERSONS.—For purposes of this section, persons are related to each other if such persons are described in section 267(b) or 707(b)(1), de-

termined by substituting '20 percent' for '50 percent' each place it occurs in such sections.

"(3) DECEDENTS.—In the case of a decedent, amounts recognized under this section shall, if not properly includible in the gross income of the decedent, be includible in gross income as provided by section 691.

"(4) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary or appropriate to carry out the purposes of this section, including—

"(A) rules for the certification of qualified opportunity funds for the purposes of this section,

"(B) rules to ensure a qualified opportunity fund has a reasonable period of time to reinvest the return of capital from investments in qualified opportunity zone stock and qualified opportunity zone partnership interests, and to reinvest proceeds received from the sale or disposition of qualified opportunity zone property, and

"(C) rules to prevent abuse.

"(f) FAILURE OF QUALIFIED OPPORTUNITY FUND TO MAINTAIN INVESTMENT STANDARD.—

"(1) IN GENERAL.—If a qualified opportunity fund fails to meet the 90-percent requirement of subsection (c)(1), the qualified opportunity fund shall pay a penalty for each month it fails to meet the requirement in an amount equal to the product of—

"(A) the excess of—

"(i) the amount equal to 90 percent of its aggregate assets, over

"(ii) the aggregate amount of qualified opportunity zone property held by the fund, multiplied by

"(B) the underpayment rate established under section 6621(a)(2) for such month.

"(2) SPECIAL RULE FOR PARTNERSHIPS.—In the case that the qualified opportunity fund is a partnership, the penalty imposed by paragraph (1) shall be taken into account proportionately as part of the distributive share of each partner of the partnership.

"(3) REASONABLE CAUSE EXCEPTION.—No penalty shall be imposed under this subsection with respect to any failure if it is shown that such failure is due to reasonable cause.".

(b) BASIS ADJUSTMENTS.—Section 1016(a) is amended by striking "and" at the end of paragraph (36), by striking the period at the end of paragraph (37) and inserting

", and", and by inserting after paragraph (37) the following:

"(38) to the extent provided in subsections (b)(2) and (c) of section 1400Z–2.".

(c) CLERICAL AMENDMENT.—The table of subchapters for chapter 1 is amended by adding at the end the following new item:

"SUBCHAPTER Z. OPPORTUNITY ZONES".

(d) EFFECTIVE DATE.—The amendments made by this section shall take effect on the date of the enactment of this Act.

Subtitle D—International Tax Provisions

PART I—OUTBOUND TRANSACTIONS

Subpart A—Establishment of Participation Exemption System for Taxation of Foreign Income

SEC. 14101. DEDUCTION FOR FOREIGN-SOURCE PORTION OF DIVIDENDS RECEIVED BY DOMESTIC CORPORATIONS FROM SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATIONS.

(a) IN GENERAL.—Part VIII of subchapter B of chapter 1 is amended by inserting after section 245 the following new section:

"SEC. 245A. DEDUCTION FOR FOREIGN SOURCE-PORTION OF DIVIDENDS RECEIVED BY DOMESTIC CORPORATIONS FROM SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATIONS.

"(a) IN GENERAL.—In the case of any dividend received from a specified 10-percent owned foreign corporation by a domestic corporation which is a United States shareholder with respect to such foreign corporation, there shall be allowed as a deduction an amount equal to the foreign-source portion of such dividend.

"(b) SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATION.—For purposes of this section—

"(1) IN GENERAL.—The term 'specified 10-percent owned foreign corporation' means any foreign corporation with respect to which any domestic corporation is a United States shareholder with respect to such corporation.

"(2) EXCLUSION OF PASSIVE FOREIGN INVESTMENT COMPANIES.—Such term shall not include any corporation which is a passive foreign investment company (as defined in section 1297) with respect to the shareholder and which is not a controlled foreign corporation.

"(c) FOREIGN-SOURCE PORTION.—For purposes of this section—

"(1) IN GENERAL.—The foreign-source portion of any dividend from a specified 10-percent owned foreign corporation is an amount which bears the same ratio to such dividend as—

"(A) the undistributed foreign earnings of the specified 10-percent owned foreign corporation, bears to

"(B) the total undistributed earnings of such foreign corporation.

"(2) UNDISTRIBUTED EARNINGS.—The term 'undistributed earnings' means the amount of the earnings and profits of the specified 10-percent owned foreign corporation (computed in accordance with sections 964(a) and 986)—

"(A) as of the close of the taxable year of the specified 10-percent owned foreign corporation in which the dividend is distributed, and

"(B) without diminution by reason of dividends distributed during such taxable year.

"(3) UNDISTRIBUTED FOREIGN EARNINGS.—The term 'undistributed foreign earnings' means the portion of the undistributed earnings which is attributable to neither—

"(A) income described in subparagraph (A) of section 245(a)(5), nor

"(B) dividends described in subparagraph (B) of such section (determined without regard to section 245(a)(12)).

"(d) DISALLOWANCE OF FOREIGN TAX CREDIT, ETC.—

"(1) IN GENERAL.—No credit shall be allowed under section 901 for any taxes paid or accrued (or treated as paid or accrued) with respect to any dividend for which a deduction is allowed under this section.

"(2) DENIAL OF DEDUCTION.—No deduction shall be allowed under this chapter for any tax for which credit is not allowable under section 901 by reason of paragraph (1) (determined by treating the taxpayer as having elected the benefits of subpart A of part III of subchapter N).

"(e) SPECIAL RULES FOR HYBRID DIVIDENDS.—

"(1) IN GENERAL.—Subsection (a) shall not apply to any dividend received by a United States shareholder from a controlled foreign corporation if the dividend is a hybrid dividend.

"(2) HYBRID DIVIDENDS OF TIERED CORPORATIONS.—If a controlled foreign corporation with respect to which a domestic corporation is a United States shareholder receives a hybrid dividend from any other controlled foreign corporation with respect

to which such domestic corporation is also a United States shareholder, then, notwithstanding any other provision of this title—

"(A) the hybrid dividend shall be treated for purposes of section 951(a)(1)(A) as subpart F income of the receiving controlled foreign corporation for the taxable year of the controlled foreign corporation in which the dividend was received, and

"(B) the United States shareholder shall include in gross income an amount equal to the shareholder's pro rata share (determined in the same manner as under section 951(a)(2)) of the subpart F income described in subparagraph (A).

"(3) DENIAL OF FOREIGN TAX CREDIT, ETC.—The rules of subsection (d) shall apply to any hybrid dividend received by, or any amount included under paragraph (2) in the gross income of, a United States shareholder.

"(4) HYBRID DIVIDEND.—The term 'hybrid dividend' means an amount received from a controlled foreign corporation—

"(A) for which a deduction would be allowed under subsection (a) but for this subsection, and

"(B) for which the controlled foreign corporation received a deduction (or other tax benefit) with respect to any income, war profits, or excess profits taxes imposed by any foreign country or possession of the United States.

"(f) SPECIAL RULE FOR PURGING DISTRIBUTIONS OF PASSIVE FOREIGN INVESTMENT COMPANIES.—Any amount which is treated as a dividend under section 1291(d)(2)(B) shall not be treated as a dividend for purposes of this section.

"(g) REGULATIONS.—The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section, including regulations for the treatment of United States shareholders owning stock of a specified 10 percent owned foreign corporation through a partnership.".

(b) APPLICATION OF HOLDING PERIOD REQUIREMENT.—Subsection (c) of section 246 is amended—

(1) by striking "or 245" in paragraph (1) and inserting "245, or 245A", and

(2) by adding at the end the following new paragraph:

"(5) SPECIAL RULES FOR FOREIGN SOURCE PORTION OF DIVIDENDS RECEIVED FROM SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATIONS.—

"(A) 1-YEAR HOLDING PERIOD REQUIREMENT.—For purposes of section 245A—

"(i) paragraph (1)(A) shall be applied—

"(I) by substituting '365 days' for '45 days' each place it appears, and

"(II) by substituting '731-day period' for '91-day period', and

"(ii) paragraph (2) shall not apply.

"(B) STATUS MUST BE MAINTAINED DURING HOLDING PERIOD.—For purposes of applying paragraph (1) with respect to section 245A, the taxpayer shall be treated as holding the stock referred to in paragraph (1) for any period only if—

"(i) the specified 10-percent owned foreign corporation referred to in section 245A(a) is a specified 10-percent owned foreign corporation at all times during such period, and

"(ii) the taxpayer is a United States shareholder with respect to such specified

10-percent owned foreign corporation at all times during such period.".

(c) APPLICATION OF RULES GENERALLY APPLICABLE TO DEDUCTIONS FOR DIVIDENDS RECEIVED.—

(1) TREATMENT OF DIVIDENDS FROM CERTAIN CORPORATIONS.—Paragraph (1) of section 246(a) is amended by striking "and 245" and inserting "245, and 245A".

(2) COORDINATION WITH SECTION 1059.—Subparagraph (B) of section 1059(b)(2) is amended by striking "or 245" and inserting "245, or 245A".

(d) COORDINATION WITH FOREIGN TAX CREDIT LIMITATION.—Subsection (b) of section 904 is amended by adding at the end the following new paragraph:

"(5) TREATMENT OF DIVIDENDS FOR WHICH DEDUCTION IS ALLOWED UNDER SECTION 245A.—For purposes of subsection (a), in the case of a domestic corporation which is a United States shareholder with respect to a specified 10-percent owned foreign corporation, such shareholder's taxable income from sources without the United States (and entire taxable income) shall be determined without regard to—

"(A) the foreign-source portion of any dividend received from such foreign corporation, and

"(B) any deductions properly allocable or apportioned to—

"(i) income (other than amounts includible under section 951(a)(1) or 951A(a)) with respect to stock of such specified 10-percent owned foreign corporation, or

"(ii) such stock to the extent income with respect to such stock is other than amounts includible under section 951(a)(1) or 951A(a).

Any term which is used in section 245A and in this paragraph shall have the same meaning for purposes of this paragraph as when used in such section.".

(e) CONFORMING AMENDMENTS.—

(1) Subsection (b) of section 951 is amended by striking "subpart" and inserting "title".

(2) Subsection (a) of section 957 is amended by striking "subpart" in the matter preceding paragraph (1) and inserting "title".

(3) The table of sections for part VIII of subchapter B of chapter 1 is amended by inserting after the item relating to section 245 the following new item:

"Sec. 245A. Deduction for foreign source-portion of dividends received by domestic corporations from certain 10-percent owned foreign corporations.".

(f) EFFECTIVE DATE.—The amendments made by this section shall apply to distributions made after (and, in the case of the amendments made by subsection (d), deductions with respect to taxable years ending after) December 31, 2017.

SEC. 14102. SPECIAL RULES RELATING TO SALES OR TRANSFERS INVOLVING SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATIONS.

(a) SALES BY UNITED STATES PERSONS OF STOCK.—

(1) IN GENERAL.—Section 1248 is amended by redesignating subsection (j) as subsection (k) and by inserting after subsection (i) the following new subsection:

"(j) COORDINATION WITH DIVIDENDS RECEIVED DEDUCTION.—In the case of the sale or exchange by a domestic corporation of stock in a foreign corporation held for 1 year or more, any amount received by the domestic corporation which is treated as a dividend by reason of this section shall be treated as a dividend for purposes of applying section 245A.".

(2) EFFECTIVE DATE.—The amendments made by this subsection shall apply to sales or exchanges after December 31, 2017.

(b) BASIS IN SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATION REDUCED BY NONTAXED PORTION OF DIVIDEND FOR PURPOSES OF DETERMINING LOSS.—

(1) IN GENERAL.—Section 961 is amended by adding at the end the following new subsection:

"(d) BASIS IN SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATION REDUCED BY NONTAXED PORTION OF DIVIDEND FOR PURPOSES OF DETERMINING LOSS.—If a domestic corporation received a dividend from a specified 10-percent owned foreign corporation (as defined in section 245A) in any taxable year, solely for purposes of determining loss on any disposition of stock of such foreign corporation in such taxable year or any subsequent taxable year, the basis of such domestic corporation in such stock shall be reduced (but not below zero) by the amount of any deduction allowable to such domestic corporation under section 245A with respect to such stock except to the extent such basis was reduced under section 1059 by reason of a dividend for which such a deduction was allowable.".

(2) EFFECTIVE DATE.—The amendments made by this subsection shall apply to distributions made after December 31, 2017.

(c) SALE BY A CFC OF A LOWER TIER CFC.—

(1) IN GENERAL.—Section 964(e) is amended by adding at the end the following new paragraph:

"(4) COORDINATION WITH DIVIDENDS RECEIVED DEDUCTION.—

"(A) IN GENERAL.—If, for any taxable year of a controlled foreign corporation beginning after December 31, 2017, any amount is treated as a dividend under paragraph (1) by reason of a sale or exchange by the controlled foreign corporation of stock in another foreign corporation held for 1 year or more, then, notwithstanding any other provision of this title—

"(i) the foreign-source portion of such dividend shall be treated for purposes of section 951(a)(1)(A) as subpart F income of the selling controlled foreign corporation for such taxable year,

"(ii) a United States shareholder with respect to the selling controlled foreign corporation shall include in gross income for the taxable year of the shareholder with or within which such taxable year of the controlled foreign corporation ends an amount equal to the shareholder's pro rata share (determined in the same manner as under section 951(a)(2)) of the amount treated as subpart F income under clause (i), and

"(iii) the deduction under section 245A(a) shall be allowable to the United States shareholder with respect to the subpart F income included in gross income under clause (ii) in the same manner as if such subpart F income were a dividend received by the shareholder from the selling controlled foreign corporation.

"(B) APPLICATION OF BASIS OR SIMILAR ADJUSTMENT.—For purposes of this title, in the case of a sale or exchange by a controlled foreign corporation of stock in another foreign corporation in a taxable year of the selling controlled foreign corporation beginning after December 31, 2017, rules similar to the rules of section 961(d) shall apply.

"(C) FOREIGN-SOURCE PORTION.—For purposes of this paragraph, the foreign-source portion of any amount treated as a dividend under paragraph (1) shall be determined in the same manner as under section 245A(c).".

(2) EFFECTIVE DATE.—The amendments made by this subsection shall apply to sales or exchanges after December 31, 2017.

(d) TREATMENT OF FOREIGN BRANCH LOSSES TRANSFERRED TO SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATIONS.—

(1) IN GENERAL.—Part II of subchapter B of chapter 1 is amended by adding at the end the following new section:

"SEC. 91. CERTAIN FOREIGN BRANCH LOSSES TRANSFERRED TO SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATIONS.

"(a) IN GENERAL.—If a domestic corporation transfers substantially all of the assets of a foreign branch (within the meaning of section 367(a)(3)(C), as in effect before the date of the enactment of the Tax Cuts and Jobs Act) to a specified 10-percent owned foreign corporation (as defined in section 245A) with respect to which it is a United States shareholder after such transfer, such domestic corporation shall include in gross income for the taxable year which includes such transfer an amount equal to the transferred loss amount with respect to such transfer.

"(b) TRANSFERRED LOSS AMOUNT.—For purposes of this section, the term 'transferred loss amount' means, with respect to any transfer of substantially all of the assets of a foreign branch, the excess (if any) of—

"(1) the sum of losses—

"(A) which were incurred by the foreign branch after December 31, 2017, and before the transfer, and

"(B) with respect to which a deduction was allowed to the taxpayer, over

"(2) the sum of—

"(A) any taxable income of such branch for a taxable year after the taxable year in which the loss was incurred and through the close of the taxable year of the transfer, and

"(B) any amount which is recognized under section 904(f)(3) on account of the transfer.

"(c) REDUCTION FOR RECOGNIZED GAINS.—The transferred loss amount shall be reduced (but not below zero) by the amount of gain recognized by the taxpayer on account of the transfer (other than amounts taken into account under subsection (b)(2)(B)).

"(d) SOURCE OF INCOME.—Amounts included in gross income under this section shall be treated as derived from sources within the United States.

"(e) BASIS ADJUSTMENTS.—Consistent with such regulations or other guidance as the Secretary shall prescribe, proper adjustments shall be made in the adjusted basis of the taxpayer's stock in the specified 10-percent owned foreign corporation to which the transfer is made, and in the

transferee's adjusted basis in the property transferred, to reflect amounts included in gross income under this section.".

(2) CLERICAL AMENDMENT.—The table of sections for part II of subchapter B of chapter 1 is amended by adding at the end the following new item:

"Sec. 91. Certain foreign branch losses transferred to specified 10-percent owned foreign corporations.".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to transfers after December 31, 2017.

(4) TRANSITION RULE.—The amount of gain taken into account under section 91(c) of the Internal Revenue Code of 1986, as added by this subsection, shall be reduced by the amount of gain which would be recognized under section 367(a)(3)(C) (determined without regard to the amendments made by subsection (e)) with respect to losses incurred before January 1, 2018.

(e) REPEAL OF ACTIVE TRADE OR BUSINESS EXCEPTION UNDER SECTION 367.—

(1) IN GENERAL.—Section 367(a) is amended by striking paragraph (3) and redesignating paragraphs (4), (5), and (6) as paragraphs (3), (4), and (5), respectively.

(2) CONFORMING AMENDMENTS.—Section 367(a)(4), as redesignated by paragraph (1), is amended—

(A) by striking "Paragraphs (2) and (3)" and inserting "Paragraph (2)", and

(B) by striking "PARAGRAPHS (2) AND (3)" in the heading and inserting "PARAGRAPH (2)".

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to transfers after December 31, 2017.

SEC. 14103. TREATMENT OF DEFERRED FOREIGN INCOME UPON TRANSITION TO PARTICIPATION EXEMPTION SYSTEM OF TAXATION.

(a) IN GENERAL.—Section 965 is amended to read as follows:

"SEC. 965. TREATMENT OF DEFERRED FOREIGN INCOME UPON TRANSITION TO PARTICIPATION EXEMPTION SYSTEM OF TAXATION.

"(a) TREATMENT OF DEFERRED FOREIGN INCOME AS SUBPART F INCOME.—In the case of the last taxable year of a deferred foreign income corporation which begins before January 1, 2018, the subpart F income of such foreign corporation (as otherwise determined for such taxable year under section 952) shall be increased by the greater of—

"(1) the accumulated post-1986 deferred foreign income of such corporation determined as of November 2, 2017, or

"(2) the accumulated post-1986 deferred foreign income of such corporation determined as of December 31, 2017.

"(b) REDUCTION IN AMOUNTS INCLUDED IN GROSS INCOME OF UNITED STATES SHAREHOLDERS OF SPECIFIED FOREIGN CORPORATIONS WITH DEFICITS IN EARNINGS AND PROFITS.—

"(1) IN GENERAL.—In the case of a taxpayer which is a United States shareholder with respect to at least one deferred foreign income corporation and at least one E&P deficit foreign corporation, the amount which would (but for this subsection) be taken into account under section 951(a)(1) by reason of subsection (a) as such United States shareholder's pro rata share of the subpart F income of each deferred foreign income corporation shall be reduced by the amount of such United States shareholder's aggregate foreign E&P deficit which is allocated under paragraph (2) to such deferred foreign income corporation.

"(2) ALLOCATION OF AGGREGATE FOREIGN E&P DEFICIT.—The aggregate foreign E&P deficit of any United States shareholder shall be allocated among

the deferred foreign income corporations of such United States shareholder in an amount which bears the same proportion to such aggregate as—

"(A) such United States shareholder's pro rata share of the accumulated post-1986 deferred foreign income of each such deferred foreign income corporation, bears to

"(B) the aggregate of such United States shareholder's pro rata share of the accumulated post-1986 deferred foreign income of all deferred foreign income corporations of such United States shareholder.

"(3) DEFINITIONS RELATED TO E&P DEFICITS.—For purposes of this subsection—

"(A) AGGREGATE FOREIGN E&P DEFICIT.—

"(i) IN GENERAL.—The term 'aggregate foreign E&P deficit' means, with respect to any United States shareholder, the lesser of—

"(I) the aggregate of such shareholder's pro rata shares of the specified E&P deficits of the E&P deficit foreign corporations of such shareholder, or

"(II) the amount determined under paragraph (2)(B).

"(ii) ALLOCATION OF DEFICIT.—If the amount described in clause (i)(II) is less than the amount described in clause (i)(I), then the shareholder shall designate, in such form and manner as the Secretary determines—

"(I) the amount of the specified E&P deficit which is to be taken into account for each E&P deficit corporation with respect to the taxpayer, and

"(II) in the case of an E&P deficit corporation which has a qualified deficit (as defined in section 952), the portion (if any) of the deficit taken into account under subclause (I) which is attributable to a qualified deficit, including the qualified activities to which such portion is attributable.

"(B) E&P DEFICIT FOREIGN CORPORATION.—The term 'E&P deficit foreign corporation' means, with respect to any taxpayer, any specified foreign corporation with respect to which such taxpayer is a United States shareholder, if, as of November 2, 2017—

"(i) such specified foreign corporation has a deficit in post-1986 earnings and profits,

"(ii) such corporation was a specified foreign corporation, and

"(iii) such taxpayer was a United States shareholder of such corporation.

"(C) SPECIFIED E&P DEFICIT.—The term 'specified E&P deficit' means, with respect to any E&P deficit foreign corporation, the amount of the deficit referred to in subparagraph (B).

"(4) TREATMENT OF EARNINGS AND PROFITS IN FUTURE YEARS.—

"(A) REDUCED EARNINGS AND PROFITS TREATED AS PREVIOUSLY TAXED INCOME WHEN DISTRIBUTED.—For purposes of applying section 959 in any taxable year beginning with the taxable year described in subsection (a), with respect to any United States shareholder of a deferred foreign income corporation, an amount equal to such shareholder's reduction under paragraph (1) which is allocated to such deferred foreign income corporation under this subsection shall be treated as an amount which was in-

cluded in the gross income of such United States shareholder under section 951(a).

"(B) E&P DEFICITS.—For purposes of this title, with respect to any taxable year beginning with the taxable year described in subsection (a), a United States shareholder's pro rata share of the earnings and profits of any E&P deficit foreign corporation under this subsection shall be increased by the amount of the specified E&P deficit of such corporation taken into account by such shareholder under paragraph (1), and, for purposes of section 952, such increase shall be attributable to the same activity to which the deficit so taken into account was attributable.

"(5) NETTING AMONG UNITED STATES SHAREHOLDERS IN SAME AFFILIATED GROUP.—

"(A) IN GENERAL.—In the case of any affiliated group which includes at least one E&P net surplus shareholder and one E&P net deficit shareholder, the amount which would (but for this paragraph) be taken into account under section 951(a)(1) by reason of subsection (a) by each such E&P net surplus shareholder shall be reduced (but not below zero) by such share-

holder's applicable share of the affiliated group's aggregate unused E&P deficit.

"(B) E&P NET SURPLUS SHAREHOLDER.—For purposes of this paragraph, the term 'E&P net surplus shareholder' means any United States shareholder which would (determined without regard to this paragraph) take into account an amount greater than zero under section 951(a)(1) by reason of subsection (a).

"(C) E&P NET DEFICIT SHAREHOLDER.—For purposes of this paragraph, the term 'E&P net deficit shareholder' means any United States shareholder if—

"(i) the aggregate foreign E&P deficit with respect to such shareholder (as defined in paragraph (3)(A) without regard to clause (i)(II) thereof), exceeds

"(ii) the amount which would (but for this subsection) be taken into account by such shareholder under section 951(a)(1) by reason of subsection (a).

"(D) AGGREGATE UNUSED E&P DEFICIT.—For purposes of this paragraph—

"(i) IN GENERAL.—The term 'aggregate unused E&P deficit' means, with respect to any affiliated group, the lesser of—

"(I) the sum of the excesses described in subparagraph (C), determined with respect to each E&P net deficit shareholder in such group, or

"(II) the amount determined under subparagraph (E)(ii).

"(ii) REDUCTION WITH RESPECT TO E&P NET DEFICIT SHAREHOLDERS WHICH ARE NOT WHOLLY OWNED BY THE AFFILIATED GROUP.—If the group ownership percentage of any E&P net deficit shareholder is less than 100 percent, the amount of the excess described in subparagraph (C) which is taken into account under clause (i)(I) with respect to such E&P net deficit shareholder shall be such group ownership percentage of such amount.

"(E) APPLICABLE SHARE.—For purposes of this paragraph, the term 'applicable share' means, with respect to any E&P net surplus shareholder in any affiliated group, the amount

which bears the same proportion to such group's aggregate unused E&P deficit as—

"(i) the product of—

"(I) such shareholder's group ownership percentage, multiplied by

"(II) the amount which would (but for this paragraph) be taken into account under section 951(a)(1) by reason of subsection (a) by such shareholder, bears to

"(ii) the aggregate amount determined under clause (i) with respect to all E&P net surplus shareholders in such group.

"(F) GROUP OWNERSHIP PERCENTAGE.—For purposes of this paragraph, the term 'group ownership percentage' means, with respect to any United States shareholder in any affiliated group, the percentage of the value of the stock of such United States shareholder which is held by other includible corporations in such affiliated group. Notwithstanding the preceding sentence, the group ownership percentage of the common parent of the affiliated group is 100 percent. Any term used in this subparagraph which is

also used in section 1504 shall have the same meaning as when used in such section.

"(c) APPLICATION OF PARTICIPATION EXEMPTION TO INCLUDED INCOME.—

"(1) IN GENERAL.—In the case of a United States shareholder of a deferred foreign income corporation, there shall be allowed as a deduction for the taxable year in which an amount is included in the gross income of such United States shareholder under section 951(a)(1) by reason of this section an amount equal to the sum of—

"(A) the United States shareholder's 8 percent rate equivalent percentage of the excess (if any) of—

"(i) the amount so included as gross income, over

"(ii) the amount of such United States shareholder's aggregate foreign cash position, plus

"(B) the United States shareholder's 15.5 percent rate equivalent percentage of so much of the amount described in subparagraph (A)(ii) as does not exceed the amount described in subparagraph (A)(i).

"(2) 8 AND 15.5 PERCENT RATE EQUIVALENT PERCENTAGES.—For purposes of this subsection—

"(A) 8 PERCENT RATE EQUIVALENT PERCENTAGE.—The term '8 percent rate equivalent percentage' means, with respect to any United States shareholder for any taxable year, the percentage which would result in the amount to which such percentage applies being subject to a 8 percent rate of tax determined by only taking into account a deduction equal to such percentage of such amount and the highest rate of tax specified in section 11 for such taxable year. In the case of any taxable year of a United States shareholder to which section 15 applies, the highest rate of tax under section 11 before the effective date of the change in rates and the highest rate of tax under section 11 after the effective date of such change shall each be taken into account under the preceding sentence in the same proportions as the portion of such taxable year which is before and after such effective date, respectively.

"(B) 15.5 PERCENT RATE EQUIVALENT PERCENTAGE.—The term '15.5 percent rate equivalent percentage' means, with respect to any

United States shareholder for any taxable year, the percentage determined under subparagraph (A) applied by substituting '15.5 percent rate of tax' for '8 percent rate of tax'.

"(3) AGGREGATE FOREIGN CASH POSITION.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'aggregate foreign cash position' means, with respect to any United States shareholder, the greater of—

"(i) the aggregate of such United States shareholder's pro rata share of the cash position of each specified foreign corporation of such United States shareholder determined as of the close of the last taxable year of such specified foreign corporation which begins before January 1, 2018, or

"(ii) one half of the sum of—

"(I) the aggregate described in clause (i) determined as of the close of the last taxable year of each such specified foreign corporation which ends before November 2, 2017, plus

"(II) the aggregate described in clause (i) determined as of the close of the taxable year of each such specified

foreign corporation which precedes the taxable year referred to in subclause (I).

"(B) CASH POSITION.—For purposes of this paragraph, the cash position of any specified foreign corporation is the sum of—

"(i) cash held by such foreign corporation,

"(ii) the net accounts receivable of such foreign corporation, plus

"(iii) the fair market value of the following assets held by such corporation:

"(I) Personal property which is of a type that is actively traded and for which there is an established financial market.

"(II) Commercial paper, certificates of deposit, the securities of the Federal government and of any State or foreign government.

"(III) Any foreign currency.

"(IV) Any obligation with a term of less than one year.

"(V) Any asset which the Secretary identifies as being economically

equivalent to any asset described in this subparagraph.

''(C) NET ACCOUNTS RECEIVABLE.—For purposes of this paragraph, the term 'net accounts receivable' means, with respect to any specified foreign corporation, the excess (if any) of—

''(i) such corporation's accounts receivable, over

''(ii) such corporation's accounts payable (determined consistent with the rules of section 461).

''(D) PREVENTION OF DOUBLE COUNTING.—Cash positions of a specified foreign corporation described in clause (ii), (iii)(I), or (iii)(IV) of subparagraph (B) shall not be taken into account by a United States shareholder under subparagraph (A) to the extent that such United States shareholder demonstrates to the satisfaction of the Secretary that such amount is so taken into account by such United States shareholder with respect to another specified foreign corporation.

''(E) CASH POSITIONS OF CERTAIN NON-CORPORATE ENTITIES TAKEN INTO ACCOUNT.—

An entity (other than a corporation) shall be treated as a specified foreign corporation of a United States shareholder for purposes of determining such United States shareholder's aggregate foreign cash position if any interest in such entity is held by a specified foreign corporation of such United States shareholder (determined after application of this subparagraph) and such entity would be a specified foreign corporation of such United States shareholder if such entity were a foreign corporation.

"(F) ANTI-ABUSE.—If the Secretary determines that a principal purpose of any transaction was to reduce the aggregate foreign cash position taken into account under this subsection, such transaction shall be disregarded for purposes of this subsection.

"(d) DEFERRED FOREIGN INCOME CORPORATION; ACCUMULATED POST-1986 DEFERRED FOREIGN INCOME.—For purposes of this section—

"(1) DEFERRED FOREIGN INCOME CORPORATION.—The term 'deferred foreign income corporation' means, with respect to any United States shareholder, any specified foreign corporation of such United States shareholder which has accumulated post-1986

deferred foreign income (as of the date referred to in paragraph (1) or (2) of subsection (a)) greater than zero.

"(2) ACCUMULATED POST-1986 DEFERRED FOREIGN INCOME.—The term 'accumulated post-1986 deferred foreign income' means the post-1986 earnings and profits except to the extent such earnings—

"(A) are attributable to income of the specified foreign corporation which is effectively connected with the conduct of a trade or business within the United States and subject to tax under this chapter, or

"(B) in the case of a controlled foreign corporation, if distributed, would be excluded from the gross income of a United States shareholder under section 959.

To the extent provided in regulations or other guidance prescribed by the Secretary, in the case of any controlled foreign corporation which has shareholders which are not United States shareholders, accumulated post-1986 deferred foreign income shall be appropriately reduced by amounts which would be described in subparagraph (B) if such shareholders were United States shareholders.

"(3) POST-1986 EARNINGS AND PROFITS.—The term 'post-1986 earnings and profits' means the earnings and profits of the foreign corporation (computed in accordance with sections 964(a) and 986, and by only taking into account periods when the foreign corporation was a specified foreign corporation) accumulated in taxable years beginning after December 31, 1986, and determined—

"(A) as of the date referred to in paragraph (1) or (2) of subsection (a), whichever is applicable with respect to such foreign corporation, and

"(B) without diminution by reason of dividends distributed during the taxable year described in subsection (a) other than dividends distributed to another specified foreign corporation.

"(e) SPECIFIED FOREIGN CORPORATION.—

"(1) IN GENERAL.—For purposes of this section, the term 'specified foreign corporation' means—

"(A) any controlled foreign corporation, and

"(B) any foreign corporation with respect to which one or more domestic corporations is a United States shareholder.

"(2) APPLICATION TO CERTAIN FOREIGN CORPORATIONS.—For purposes of sections 951 and 961, a foreign corporation described in paragraph (1)(B) shall be treated as a controlled foreign corporation solely for purposes of taking into account the subpart F income of such corporation under subsection (a) (and for purposes of applying subsection (f)).

"(3) EXCLUSION OF PASSIVE FOREIGN INVESTMENT COMPANIES.—Such term shall not include any corporation which is a passive foreign investment company (as defined in section 1297) with respect to the shareholder and which is not a controlled foreign corporation.

"(f) DETERMINATIONS OF PRO RATA SHARE.—

"(1) IN GENERAL.—For purposes of this section, the determination of any United States shareholder's pro rata share of any amount with respect to any specified foreign corporation shall be determined under rules similar to the rules of section 951(a)(2) by treating such amount in the same manner as subpart F income (and by treating such specified foreign corporation as a controlled foreign corporation).

"(2) SPECIAL RULES.—The portion which is included in the income of a United States shareholder under section 951(a)(1) by reason of subsection (a)

which is equal to the deduction allowed under subsection (c) by reason of such inclusion—

"(A) shall be treated as income exempt from tax for purposes of sections 705(a)(1)(B) and 1367(a)(1)(A), and

"(B) shall not be treated as income exempt from tax for purposes of determining whether an adjustment shall be made to an accumulated adjustment account under section 1368(e)(1)(A).

"(g) DISALLOWANCE OF FOREIGN TAX CREDIT, ETC.—

"(1) IN GENERAL.—No credit shall be allowed under section 901 for the applicable percentage of any taxes paid or accrued (or treated as paid or accrued) with respect to any amount for which a deduction is allowed under this section.

"(2) APPLICABLE PERCENTAGE.—For purposes of this subsection, the term 'applicable percentage' means the amount (expressed as a percentage) equal to the sum of—

"(A) 0.771 multiplied by the ratio of—

"(i) the excess to which subsection (c)(1)(A) applies, divided by

"(ii) the sum of such excess plus the amount to which subsection (c)(1)(B) applies, plus

"(B) 0.557 multiplied by the ratio of—

"(i) the amount to which subsection (c)(1)(B) applies, divided by

"(ii) the sum described in subparagraph (A)(ii).

"(3) DENIAL OF DEDUCTION.—No deduction shall be allowed under this chapter for any tax for which credit is not allowable under section 901 by reason of paragraph (1) (determined by treating the taxpayer as having elected the benefits of subpart A of part III of subchapter N).

"(4) COORDINATION WITH SECTION 78.—With respect to the taxes treated as paid or accrued by a domestic corporation with respect to amounts which are includible in gross income of such domestic corporation by reason of this section, section 78 shall apply only to so much of such taxes as bears the same proportion to the amount of such taxes as—

"(A) the excess of—

"(i) the amounts which are includible in gross income of such domestic corporation by reason of this section, over

"(ii) the deduction allowable under subsection (c) with respect to such amounts, bears to

"(B) such amounts.

"(h) ELECTION TO PAY LIABILITY IN INSTALLMENTS.—

"(1) IN GENERAL.—In the case of a United States shareholder of a deferred foreign income corporation, such United States shareholder may elect to pay the net tax liability under this section in 8 installments of the following amounts:

"(A) 8 percent of the net tax liability in the case of each of the first 5 of such installments,

"(B) 15 percent of the net tax liability in the case of the 6th such installment,

"(C) 20 percent of the net tax liability in the case of the 7th such installment, and

"(D) 25 percent of the net tax liability in the case of the 8th such installment.

"(2) DATE FOR PAYMENT OF INSTALLMENTS.—If an election is made under paragraph (1), the first installment shall be paid on the due date (determined without regard to any extension of time for filing the return) for the return of tax for the taxable year described in subsection (a) and each succeeding installment shall be paid on the due date (as so determined) for the return of tax for the taxable year following the

taxable year with respect to which the preceding installment was made.

"(3) ACCELERATION OF PAYMENT.—If there is an addition to tax for failure to timely pay any installment required under this subsection, a liquidation or sale of substantially all the assets of the taxpayer (including in a title 11 or similar case), a cessation of business by the taxpayer, or any similar circumstance, then the unpaid portion of all remaining installments shall be due on the date of such event (or in the case of a title 11 or similar case, the day before the petition is filed). The preceding sentence shall not apply to the sale of substantially all the assets of a taxpayer to a buyer if such buyer enters into an agreement with the Secretary under which such buyer is liable for the remaining installments due under this subsection in the same manner as if such buyer were the taxpayer.

"(4) PRORATION OF DEFICIENCY TO INSTALLMENTS.—If an election is made under paragraph (1) to pay the net tax liability under this section in installments and a deficiency has been assessed with respect to such net tax liability, the deficiency shall be prorated to the installments payable under paragraph (1). The part of the deficiency so prorated to any in-

stallment the date for payment of which has not arrived shall be collected at the same time as, and as a part of, such installment. The part of the deficiency so prorated to any installment the date for payment of which has arrived shall be paid upon notice and demand from the Secretary. This subsection shall not apply if the deficiency is due to negligence, to intentional disregard of rules and regulations, or to fraud with intent to evade tax.

"(5) ELECTION.—Any election under paragraph (1) shall be made not later than the due date for the return of tax for the taxable year described in subsection (a) and shall be made in such manner as the Secretary shall provide.

"(6) NET TAX LIABILITY UNDER THIS SECTION.—For purposes of this subsection—

"(A) IN GENERAL.—The net tax liability under this section with respect to any United States shareholder is the excess (if any) of—

"(i) such taxpayer's net income tax for the taxable year in which an amount is included in the gross income of such United States shareholder under section 951(a)(1) by reason of this section, over

"(ii) such taxpayer's net income tax for such taxable year determined—

"(I) without regard to this section, and

"(II) without regard to any income or deduction properly attributable to a dividend received by such United States shareholder from any deferred foreign income corporation.

"(B) NET INCOME TAX.—The term 'net income tax' means the regular tax liability reduced by the credits allowed under subparts A, B, and D of part IV of subchapter A.

"(i) SPECIAL RULES FOR S CORPORATION SHAREHOLDERS.—

"(1) IN GENERAL.—In the case of any S corporation which is a United States shareholder of a deferred foreign income corporation, each shareholder of such S corporation may elect to defer payment of such shareholder's net tax liability under this section with respect to such S corporation until the shareholder's taxable year which includes the triggering event with respect to such liability. Any net tax liability payment of which is deferred under the preceding sentence shall be assessed on the return of tax

as an addition to tax in the shareholder's taxable year which includes such triggering event.

"(2) TRIGGERING EVENT.—

"(A) IN GENERAL.—In the case of any shareholder's net tax liability under this section with respect to any S corporation, the triggering event with respect to such liability is whichever of the following occurs first:

"(i) Such corporation ceases to be an S corporation (determined as of the first day of the first taxable year that such corporation is not an S corporation).

"(ii) A liquidation or sale of substantially all the assets of such S corporation (including in a title 11 or similar case), a cessation of business by such S corporation, such S corporation ceases to exist, or any similar circumstance.

"(iii) A transfer of any share of stock in such S corporation by the taxpayer (including by reason of death, or otherwise).

"(B) PARTIAL TRANSFERS OF STOCK.—In the case of a transfer of less than all of the taxpayer's shares of stock in the S corporation, such transfer shall only be a triggering event with re-

spect to so much of the taxpayer's net tax liability under this section with respect to such S corporation as is properly allocable to such stock.

"(C) TRANSFER OF LIABILITY.—A transfer described in clause (iii) of subparagraph (A) shall not be treated as a triggering event if the transferee enters into an agreement with the Secretary under which such transferee is liable for net tax liability with respect to such stock in the same manner as if such transferee were the taxpayer.

"(3) NET TAX LIABILITY.—A shareholder's net tax liability under this section with respect to any S corporation is the net tax liability under this section which would be determined under subsection (h)(6) if the only subpart F income taken into account by such shareholder by reason of this section were allocations from such S corporation.

"(4) ELECTION TO PAY DEFERRED LIABILITY IN INSTALLMENTS.—In the case of a taxpayer which elects to defer payment under paragraph (1)—

"(A) subsection (h) shall be applied separately with respect to the liability to which such election applies,

"(B) an election under subsection (h) with respect to such liability shall be treated as timely made if made not later than the due date for the return of tax for the taxable year in which the triggering event with respect to such liability occurs,

"(C) the first installment under subsection (h) with respect to such liability shall be paid not later than such due date (but determined without regard to any extension of time for filing the return), and

"(D) if the triggering event with respect to any net tax liability is described in paragraph (2)(A)(ii), an election under subsection (h) with respect to such liability may be made only with the consent of the Secretary.

"(5) JOINT AND SEVERAL LIABILITY OF S CORPORATION.—If any shareholder of an S corporation elects to defer payment under paragraph (1), such S corporation shall be jointly and severally liable for such payment and any penalty, addition to tax, or additional amount attributable thereto.

"(6) EXTENSION OF LIMITATION ON COLLECTION.—Any limitation on the time period for the collection of a liability deferred under this subsection

shall not be treated as beginning before the date of the triggering event with respect to such liability.

"(7) ANNUAL REPORTING OF NET TAX LIABILITY.—

"(A) IN GENERAL.—Any shareholder of an S corporation which makes an election under paragraph (1) shall report the amount of such shareholder's deferred net tax liability on such shareholder's return of tax for the taxable year for which such election is made and on the return of tax for each taxable year thereafter until such amount has been fully assessed on such returns.

"(B) DEFERRED NET TAX LIABILITY.—For purposes of this paragraph, the term 'deferred net tax liability' means, with respect to any taxable year, the amount of net tax liability payment of which has been deferred under paragraph (1) and which has not been assessed on a return of tax for any prior taxable year.

"(C) FAILURE TO REPORT.—In the case of any failure to report any amount required to be reported under subparagraph (A) with respect to any taxable year before the due date for the return of tax for such taxable year, there shall be

assessed on such return as an addition to tax 5 percent of such amount.

"(8) ELECTION.—Any election under paragraph (1)—

"(A) shall be made by the shareholder of the S corporation not later than the due date for such shareholder's return of tax for the taxable year which includes the close of the taxable year of such S corporation in which the amount described in subsection (a) is taken into account, and

"(B) shall be made in such manner as the Secretary shall provide.

"(j) REPORTING BY S CORPORATION.—Each S corporation which is a United States shareholder of a specified foreign corporation shall report in its return of tax under section 6037(a) the amount includible in its gross income for such taxable year by reason of this section and the amount of the deduction allowable by subsection (c). Any copy provided to a shareholder under section 6037(b) shall include a statement of such shareholder's pro rata share of such amounts.

"(k) EXTENSION OF LIMITATION ON ASSESSMENT.—Notwithstanding section 6501, the limitation on the time period for the assessment of the net tax liability under this

section (as defined in subsection (h)(6)) shall not expire before the date that is 6 years after the return for the taxable year described in such subsection was filed.

"(l) RECAPTURE FOR EXPATRIATED ENTITIES.—

"(1) IN GENERAL.—If a deduction is allowed under subsection (c) to a United States shareholder and such shareholder first becomes an expatriated entity at any time during the 10-year period beginning on the date of the enactment of the Tax Cuts and Jobs Act (with respect to a surrogate foreign corporation which first becomes a surrogate foreign corporation during such period), then—

"(A) the tax imposed by this chapter shall be increased for the first taxable year in which such taxpayer becomes an expatriated entity by an amount equal to 35 percent of the amount of the deduction allowed under subsection (c), and

"(B) no credits shall be allowed against the increase in tax under subparagraph (A).

"(2) EXPATRIATED ENTITY.—For purposes of this subsection, the term 'expatriated entity' has the same meaning given such term under section 7874(a)(2), except that such term shall not include an entity if the surrogate foreign corporation with re-

spect to the entity is treated as a domestic corporation under section 7874(b).

"(3) SURROGATE FOREIGN CORPORATION.—For purposes of this subsection, the term 'surrogate foreign corporation' has the meaning given such term in section 7874(a)(2)(B).

"(m) SPECIAL RULES FOR UNITED STATES SHAREHOLDERS WHICH ARE REAL ESTATE INVESTMENT TRUSTS.—

"(1) IN GENERAL.—If a real estate investment trust is a United States shareholder in 1 or more deferred foreign income corporations—

"(A) any amount required to be taken into account under section 951(a)(1) by reason of this section shall not be taken into account as gross income of the real estate investment trust for purposes of applying paragraphs (2) and (3) of section 856(c) to any taxable year for which such amount is taken into account under section 951(a)(1), and

"(B) if the real estate investment trust elects the application of this subparagraph, notwithstanding subsection (a), any amount required to be taken into account under section 951(a)(1) by reason of this section shall, in lieu of the taxable

year in which it would otherwise be included in gross income (for purposes of the computation of real estate investment trust taxable income under section 857(b)), be included in gross income as follows:

"(i) 8 percent of such amount in the case of each of the taxable years in the 5-taxable year period beginning with the taxable year in which such amount would otherwise be included.

"(ii) 15 percent of such amount in the case of the 1st taxable year following such period.

"(iii) 20 percent of such amount in the case of the 2nd taxable year following such period.

"(iv) 25 percent of such amount in the case of the 3rd taxable year following such period.

"(2) RULES FOR TRUSTS ELECTING DEFERRED INCLUSION.—

"(A) ELECTION.—Any election under paragraph (1)(B) shall be made not later than the due date for the first taxable year in the 5-taxable year period described in clause (i) of para-

graph (1)(B) and shall be made in such manner as the Secretary shall provide.

"(B) SPECIAL RULES.—If an election under paragraph (1)(B) is in effect with respect to any real estate investment trust, the following rules shall apply:

"(i) APPLICATION OF PARTICIPATION EXEMPTION.—For purposes of subsection (c)(1)—

"(I) the aggregate amount to which subparagraph (A) or (B) of subsection (c)(1) applies shall be determined without regard to the election,

"(II) each such aggregate amount shall be allocated to each taxable year described in paragraph (1)(B) in the same proportion as the amount included in the gross income of such United States shareholder under section 951(a)(1) by reason of this section is allocated to each such taxable year.

"(III) NO INSTALLMENT PAYMENTS.—The real estate investment trust may not make an election under

subsection (g) for any taxable year described in paragraph (1)(B).

"(ii) ACCELERATION OF INCLUSION.—If there is a liquidation or sale of substantially all the assets of the real estate investment trust (including in a title 11 or similar case), a cessation of business by such trust, or any similar circumstance, then any amount not yet included in gross income under paragraph (1)(B) shall be included in gross income as of the day before the date of the event and the unpaid portion of any tax liability with respect to such inclusion shall be due on the date of such event (or in the case of a title 11 or similar case, the day before the petition is filed).

"(n) ELECTION NOT TO APPLY NET OPERATING LOSS DEDUCTION.—

"(1) IN GENERAL.—If a United States shareholder of a deferred foreign income corporation elects the application of this subsection for the taxable year described in subsection (a), then the amount described in paragraph (2) shall not be taken into account—

"(A) in determining the amount of the net operating loss deduction under section 172 of such shareholder for such taxable year, or

"(B) in determining the amount of taxable income for such taxable year which may be reduced by net operating loss carryovers or carrybacks to such taxable year under section 172.

"(2) AMOUNT DESCRIBED.—The amount described in this paragraph is the sum of—

"(A) the amount required to be taken into account under section 951(a)(1) by reason of this section (determined after the application of subsection (c)), plus

"(B) in the case of a domestic corporation which chooses to have the benefits of subpart A of part III of subchapter N for the taxable year, the taxes deemed to be paid by such corporation under subsections (a) and (b) of section 960 for such taxable year with respect to the amount described in subparagraph (A) which are treated as a dividends under section 78.

"(3) ELECTION.—Any election under this subsection shall be made not later than the due date (including extensions) for filing the return of tax for the

taxable year and shall be made in such manner as the Secretary shall prescribe.

"(o) REGULATIONS.—The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section, including—

"(1) regulations or other guidance to provide appropriate basis adjustments, and

"(2) regulations or other guidance to prevent the avoidance of the purposes of this section, including through a reduction in earnings and profits, through changes in entity classification or accounting methods, or otherwise.".

(b) CLERICAL AMENDMENT.—The table of sections for subpart F of part III of subchapter N of chapter 1 is amended by striking the item relating to section 965 and inserting the following:

"Sec. 965. Treatment of deferred foreign income upon transition to participation exemption system of taxation.".

Subpart B—Rules Related to Passive and Mobile Income

CHAPTER 1—TAXATION OF FOREIGN-DERIVED INTANGIBLE INCOME AND GLOBAL INTANGIBLE LOW-TAXED INCOME

SEC. 14201. CURRENT YEAR INCLUSION OF GLOBAL INTANGIBLE LOW-TAXED INCOME BY UNITED STATES SHAREHOLDERS.

(a) IN GENERAL.—Subpart F of part III of subchapter N of chapter 1 is amended by inserting after section 951 the following new section:

"SEC. 951A. GLOBAL INTANGIBLE LOW-TAXED INCOME INCLUDED IN GROSS INCOME OF UNITED STATES SHAREHOLDERS.

"(a) IN GENERAL.—Each person who is a United States shareholder of any controlled foreign corporation for any taxable year of such United States shareholder shall include in gross income such shareholder's global intangible low-taxed income for such taxable year.

"(b) GLOBAL INTANGIBLE LOW-TAXED INCOME.—For purposes of this section—

"(1) IN GENERAL.—The term 'global intangible low-taxed income' means, with respect to any United States shareholder for any taxable year of such United States shareholder, the excess (if any) of—

"(A) such shareholder's net CFC tested income for such taxable year, over

"(B) such shareholder's net deemed tangible income return for such taxable year.

"(2) NET DEEMED TANGIBLE INCOME RETURN.—The term 'net deemed tangible income return' means, with respect to any United States shareholder for any taxable year, the excess of—

"(A) 10 percent of the aggregate of such shareholder's pro rata share of the qualified business asset investment of each controlled foreign corporation with respect to which such shareholder is a United States shareholder for such taxable year (determined for each taxable year of each such controlled foreign corporation which ends in or with such taxable year of such United States shareholder), over

"(B) the amount of interest expense taken into account under subsection (c)(2)(A)(ii) in determining the shareholder's net CFC tested income for the taxable year to the extent the interest income attributable to such expense is not taken into account in determining such shareholder's net CFC tested income.

"(c) NET CFC TESTED INCOME.—For purposes of this section—

"(1) IN GENERAL.—The term 'net CFC tested income' means, with respect to any United States shareholder for any taxable year of such United States shareholder, the excess (if any) of—

"(A) the aggregate of such shareholder's pro rata share of the tested income of each controlled foreign corporation with respect to which such shareholder is a United States shareholder for such taxable year of such United States shareholder (determined for each taxable year of such controlled foreign corporation which ends in or with such taxable year of such United States shareholder), over

"(B) the aggregate of such shareholder's pro rata share of the tested loss of each controlled foreign corporation with respect to which such shareholder is a United States shareholder for such taxable year of such United States shareholder (determined for each taxable year of such controlled foreign corporation which ends in or with such taxable year of such United States shareholder).

"(2) TESTED INCOME; TESTED LOSS.—For purposes of this section—

"(A) TESTED INCOME.—The term 'tested income' means, with respect to any controlled foreign corporation for any taxable year of such controlled foreign corporation, the excess (if any) of—

"(i) the gross income of such corporation determined without regard to—

"(I) any item of income described in section 952(b),

"(II) any gross income taken into account in determining the subpart F income of such corporation,

"(III) any gross income excluded from the foreign base company income (as defined in section 954) and the insurance income (as defined in section 953) of such corporation by reason of section 954(b)(4),

"(IV) any dividend received from a related person (as defined in section 954(d)(3)), and

"(V) any foreign oil and gas extraction income (as defined in section 907(c)(1)) of such corporation, over

"(ii) the deductions (including taxes) properly allocable to such gross income under rules similar to the rules of section 954(b)(5) (or to which such deductions would be allocable if there were such gross income).

"(B) TESTED LOSS.—

"(i) IN GENERAL.—The term 'tested loss' means, with respect to any controlled foreign corporation for any taxable year of such controlled foreign corporation, the excess (if any) of the amount described in subparagraph (A)(ii) over the amount described in subparagraph (A)(i).

"(ii) COORDINATION WITH SUBPART F TO DENY DOUBLE BENEFIT OF LOSSES.—Section 952(c)(1)(A) shall be applied by increasing the earnings and profits of the controlled foreign corporation by the tested loss of such corporation.

"(d) QUALIFIED BUSINESS ASSET INVESTMENT.—For purposes of this section—

"(1) IN GENERAL.—The term 'qualified business asset investment' means, with respect to any controlled foreign corporation for any taxable year, the average of such corporation's aggregate adjusted bases as of the close of each quarter of such taxable year in specified tangible property—

"(A) used in a trade or business of the corporation, and

"(B) of a type with respect to which a deduction is allowable under section 167.

"(2) SPECIFIED TANGIBLE PROPERTY.—

"(A) IN GENERAL.—The term 'specified tangible property' means, except as provided in subparagraph (B), any tangible property used in the production of tested income.

"(B) DUAL USE PROPERTY.—In the case of property used both in the production of tested income and income which is not tested income, such property shall be treated as specified tangible property in the same proportion that the gross income described in subsection (c)(1)(A) produced with respect to such property bears to the total gross income produced with respect to such property.

"(3) DETERMINATION OF ADJUSTED BASIS.—For purposes of this subsection, notwithstanding any provision of this title (or any other provision of law) which is enacted after the date of the enactment of this section, the adjusted basis in any property shall be determined—

"(A) by using the alternative depreciation system under section 168(g), and

"(B) by allocating the depreciation deduction with respect to such property ratably to each day during the period in the taxable year to which such depreciation relates.

"(3) PARTNERSHIP PROPERTY.—For purposes of this subsection, if a controlled foreign corporation holds an interest in a partnership at the close of such taxable year of the controlled foreign corporation, such controlled foreign corporation shall take into account under paragraph (1) the controlled foreign corporation's distributive share of the aggregate of the partnership's adjusted bases (determined as of such date in the hands of the partnership) in tangible property held by such partnership to the extent such property—

"(A) is used in the trade or business of the partnership,

"(B) is of a type with respect to which a deduction is allowable under section 167, and

"(C) is used in the production of tested income (determined with respect to such controlled foreign corporation's distributive share of income with respect to such property).

For purposes of this paragraph, the controlled foreign corporation's distributive share of the adjusted basis of any property shall be the controlled foreign corporation's distributive share of income with respect to such property.

"(4) REGULATIONS.—The Secretary shall issue such regulations or other guidance as the Secretary determines appropriate to prevent the avoidance of the purposes of this subsection, including regulations or other guidance which provide for the treatment of property if—

"(A) such property is transferred, or held, temporarily, or

"(B) the avoidance of the purposes of this paragraph is a factor in the transfer or holding of such property.

"(e) DETERMINATION OF PRO RATA SHARE, ETC.—For purposes of this section—

"(1) IN GENERAL.—The pro rata shares referred to in subsections (b), (c)(1)(A), and (c)(1)(B), respectively, shall be determined under the rules of section 951(a)(2) in the same manner as such section applies to subpart F income and shall be taken into account in the taxable year of the United States shareholder in which or with which the taxable year of the controlled foreign corporation ends.

"(2) TREATMENT AS UNITED STATES SHAREHOLDER.—A person shall be treated as a United States shareholder of a controlled foreign corporation for any taxable year of such person only if such person owns (within the meaning of section 958(a)) stock in such foreign corporation on the last day in the taxable year of such foreign corporation on which such foreign corporation is a controlled foreign corporation.

"(3) TREATMENT AS CONTROLLED FOREIGN CORPORATION.—A foreign corporation shall be treated as a controlled foreign corporation for any taxable year if such foreign corporation is a controlled foreign corporation at any time during such taxable year.

"(f) TREATMENT AS SUBPART F INCOME FOR CERTAIN PURPOSES.—

"(1) IN GENERAL.—

"(A) APPLICATION.—Except as provided in subparagraph (B), any global intangible low-taxed income included in gross income under subsection (a) shall be treated in the same manner as an amount included under section 951(a)(1)(A) for purposes of applying sections 168(h)(2)(B), 535(b)(10), 851(b), 904(h)(1), 959, 961, 962, 993(a)(1)(E), 996(f)(1), 1248(b)(1), 1248(d)(1), 6501(e)(1)(C), 6654(d)(2)(D), and 6655(e)(4).

"(B) EXCEPTION.—The Secretary shall provide rules for the application of subparagraph (A) to other provisions of this title in any case in which the determination of subpart F income is required to be made at the level of the controlled foreign corporation.

"(2) ALLOCATION OF GLOBAL INTANGIBLE LOW-TAXED INCOME TO CONTROLLED FOREIGN CORPORATIONS.—For purposes of the sections referred to in paragraph (1), with respect to any controlled foreign corporation any pro rata amount from which is taken into account in determining the global intangible low-taxed income included in gross income of a United States shareholder under subsection (a), the portion of such global intangible low-taxed income which is

treated as being with respect to such controlled foreign corporation is—

"(A) in the case of a controlled foreign corporation with no tested income, zero, and

"(B) in the case of a controlled foreign corporation with tested income, the portion of such global intangible low-taxed income which bears the same ratio to such global intangible low-taxed income as—

"(i) such United States shareholder's pro rata amount of the tested income of such controlled foreign corporation, bears to

"(ii) the aggregate amount described in subsection (c)(1)(A) with respect to such United States shareholder.".

(b) FOREIGN TAX CREDIT.—

(1) APPLICATION OF DEEMED PAID FOREIGN TAX CREDIT.—Section 960 is amended adding at the end the following new subsection:

"(d) DEEMED PAID CREDIT FOR TAXES PROPERLY ATTRIBUTABLE TO TESTED INCOME.—

"(1) IN GENERAL.—For purposes of subpart A of this part, if any amount is includible in the gross income of a domestic corporation under section 951A, such domestic corporation shall be deemed to have

paid foreign income taxes equal to 80 percent of the product of—

"(A) such domestic corporation's inclusion percentage, multiplied by

"(B) the aggregate tested foreign income taxes paid or accrued by controlled foreign corporations.

"(2) INCLUSION PERCENTAGE.—For purposes of paragraph (1), the term 'inclusion percentage' means, with respect to any domestic corporation, the ratio (expressed as a percentage) of—

"(A) such corporation's global intangible low-taxed income (as defined in section 951A(b)), divided by

"(B) the aggregate amount described in section 951A(c)(1)(A) with respect to such corporation.

"(3) TESTED FOREIGN INCOME TAXES.—For purposes of paragraph (1), the term 'tested foreign income taxes' means, with respect to any domestic corporation which is a United States shareholder of a controlled foreign corporation, the foreign income taxes paid or accrued by such foreign corporation which are properly attributable to the tested income

of such foreign corporation taken into account by such domestic corporation under section 951A.".

(2) APPLICATION OF FOREIGN TAX CREDIT LIMITATION.—

(A) SEPARATE BASKET FOR GLOBAL INTANGIBLE LOW-TAXED INCOME.—Section 904(d)(1) is amended by redesignating subparagraphs (A) and (B) as subparagraphs (B) and (C), respectively, and by inserting before subparagraph (B) (as so redesignated) the following new subparagraph:

"(A) any amount includible in gross income under section 951A (other than passive category income),".

(B) EXCLUSION FROM GENERAL CATEGORY INCOME.—Section 904(d)(2)(A)(ii) is amended by inserting "income described in paragraph (1)(A) and" before "passive category income".

(C) NO CARRYOVER OR CARRYBACK OF EXCESS TAXES.—Section 904(c) is amended by adding at the end the following: "This subsection shall not apply to taxes paid or accrued with respect to amounts described in subsection (d)(1)(A).".

(c) CLERICAL AMENDMENT.—The table of sections for subpart F of part III of subchapter N of chapter 1 is amended by inserting after the item relating to section 951 the following new item:

"Sec. 951A. Global intangible low-taxed income included in gross income of United States shareholders.".

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end.

SEC. 14202. DEDUCTION FOR FOREIGN-DERIVED INTANGIBLE INCOME AND GLOBAL INTANGIBLE LOW-TAXED INCOME.

(a) IN GENERAL.—Part VIII of subchapter B of chapter 1 is amended by adding at the end the following new section:

"SEC. 250. FOREIGN-DERIVED INTANGIBLE INCOME AND GLOBAL INTANGIBLE LOW-TAXED INCOME.

"(a) ALLOWANCE OF DEDUCTION.—

"(1) IN GENERAL.—In the case of a domestic corporation for any taxable year, there shall be allowed as a deduction an amount equal to the sum of—

"(A) 37.5 percent of the foreign-derived intangible income of such domestic corporation for such taxable year, plus

"(B) 50 percent of—

"(i) the global intangible low-taxed income amount (if any) which is included in the gross income of such domestic corporation under section 951A for such taxable year, and

"(ii) the amount treated as a dividend received by such corporation under section 78 which is attributable to the amount described in clause (i).

"(2) LIMITATION BASED ON TAXABLE INCOME.—

"(A) IN GENERAL.—If, for any taxable year—

"(i) the sum of the foreign-derived intangible income and the global intangible low-taxed income amount otherwise taken into account by the domestic corporation under paragraph (1), exceeds

"(ii) the taxable income of the domestic corporation (determined without regard to this section),

then the amount of the foreign-derived intangible income and the global intangible low-taxed income amount so taken into account shall be reduced as provided in subparagraph (B).

"(B) REDUCTION.—For purposes of subparagraph (A)—

"(i) foreign-derived intangible income shall be reduced by an amount which bears the same ratio to the excess described in subparagraph (A) as such foreign-derived intangible income bears to the sum described in subparagraph (A)(i), and

"(ii) the global intangible low-taxed income amount shall be reduced by the remainder of such excess.

"(3) REDUCTION IN DEDUCTION FOR TAXABLE YEARS AFTER 2025.—In the case of any taxable year beginning after December 31, 2025, paragraph (1) shall be applied by substituting—

"(A) '21.875 percent' for '37.5 percent' in subparagraph (A), and

"(B) '37.5 percent' for '50 percent' in subparagraph (B).

"(b) FOREIGN-DERIVED INTANGIBLE INCOME.—For purposes of this section—

"(1) IN GENERAL.—The foreign-derived intangible income of any domestic corporation is the amount which bears the same ratio to the deemed intangible income of such corporation as—

"(A) the foreign-derived deduction eligible income of such corporation, bears to

"(B) the deduction eligible income of such corporation.

"(2) DEEMED INTANGIBLE INCOME.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'deemed intangible income' means the excess (if any) of—

"(i) the deduction eligible income of the domestic corporation, over

"(ii) the deemed tangible income return of the corporation.

"(B) DEEMED TANGIBLE INCOME RETURN.—The term 'deemed tangible income return' means, with respect to any corporation, an amount equal to 10 percent of the corporation's qualified business asset investment (as defined in section 951A(d), determined by substituting 'deduction eligible income' for 'tested income' in paragraph (2) thereof and without regard to

whether the corporation is a controlled foreign corporation).

"(3) DEDUCTION ELIGIBLE INCOME.—

"(A) IN GENERAL.—The term 'deduction eligible income' means, with respect to any domestic corporation, the excess (if any) of—

"(i) gross income of such corporation determined without regard to—

"(I) any amount included in the gross income of such corporation under section 951(a)(1),

"(II) the global intangible low-taxed income included in the gross income of such corporation under section 951A,

"(III) any financial services income (as defined in section 904(d)(2)(D)) of such corporation,

"(IV) any dividend received from a corporation which is a controlled foreign corporation of such domestic corporation,

"(V) any domestic oil and gas extraction income of such corporation, and

"(VI) any foreign branch income (as defined in section 904(d)(2)(J)), over

"(ii) the deductions (including taxes) properly allocable to such gross income.

"(B) DOMESTIC OIL AND GAS EXTRACTION INCOME.—For purposes of subparagraph (A), the term 'domestic oil and gas extraction income' means income described in section 907(c)(1), determined by substituting 'within the United States' for 'without the United States'.

"(4) FOREIGN-DERIVED DEDUCTION ELIGIBLE INCOME.—The term 'foreign-derived deduction eligible income' means, with respect to any taxpayer for any taxable year, any deduction eligible income of such taxpayer which is derived in connection with—

"(A) property—

"(i) which is sold by the taxpayer to any person who is not a United States person, and

"(ii) which the taxpayer establishes to the satisfaction of the Secretary is for a foreign use, or

"(B) services provided by the taxpayer which the taxpayer establishes to the satisfaction

of the Secretary are provided to any person, or with respect to property, not located within the United States.

"(5) RULES RELATING TO FOREIGN USE PROPERTY OR SERVICES.—For purposes of this subsection—

"(A) FOREIGN USE.—The term 'foreign use' means any use, consumption, or disposition which is not within the United States.

"(B) PROPERTY OR SERVICES PROVIDED TO DOMESTIC INTERMEDIARIES.—

"(i) PROPERTY.—If a taxpayer sells property to another person (other than a related party) for further manufacture or other modification within the United States, such property shall not be treated as sold for a foreign use even if such other person subsequently uses such property for a foreign use.

"(ii) SERVICES.—If a taxpayer provides services to another person (other than a related party) located within the United States, such services shall not be treated as described in paragraph (4)(B) even if such

other person uses such services in providing services which are so described.

"(C) SPECIAL RULES WITH RESPECT TO RELATED PARTY TRANSACTIONS.—

"(i) SALES TO RELATED PARTIES.—If property is sold to a related party who is not a United States person, such sale shall not be treated as for a foreign use unless—

"(I) such property is ultimately sold by a related party, or used by a related party in connection with property which is sold or the provision of services, to another person who is an unrelated party who is not a United States person, and

"(II) the taxpayer establishes to the satisfaction of the Secretary that such property is for a foreign use.

For purposes of this clause, a sale of property shall be treated as a sale of each of the components thereof.

"(ii) SERVICE PROVIDED TO RELATED PARTIES.—If a service is provided to a related party who is not located in the United States, such service shall not be treated de-

scribed in subparagraph (A)(ii) unless the taxpayer established to the satisfaction of the Secretary that such service is not substantially similar to services provided by such related party to persons located within the United States.

"(D) RELATED PARTY.—For purposes of this paragraph, the term 'related party' means any member of an affiliated group as defined in section 1504(a), determined—

"(i) by substituting 'more than 50 percent' for 'at least 80 percent' each place it appears, and

"(ii) without regard to paragraphs (2) and (3) of section 1504(b).

Any person (other than a corporation) shall be treated as a member of such group if such person is controlled by members of such group (including any entity treated as a member of such group by reason of this sentence) or controls any such member. For purposes of the preceding sentence, control shall be determined under the rules of section 954(d)(3).

"(E) SOLD.—For purposes of this subsection, the terms 'sold', 'sells', and 'sale' shall

include any lease, license, exchange, or other disposition.

"(c) REGULATIONS.—The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section.".

(b) CONFORMING AMENDMENTS.—

(1) Section 172(d), as amended by this Act, is amended by adding at the end the following new paragraph:

"(9) DEDUCTION FOR FOREIGN-DERIVED INTANGIBLE INCOME.—The deduction under section 250 shall not be allowed.".

(2) Section 246(b)(1) is amended—

(A) by striking "and subsection (a) and (b) of section 245" the first place it appears and inserting ", subsection (a) and (b) of section 245, and section 250",

(B) by striking "and subsection (a) and (b) of section 245" the second place it appears and inserting "subsection (a) and (b) of section 245, and 250".

(3) Section 469(i)(3)(F)(iii) is amended by striking "and 222" and inserting "222, and 250".

(4) The table of sections for part VIII of subchapter B of chapter 1 is amended by adding at the end the following new item:

"Sec. 250. Foreign-derived intangible income and global intangible low-taxed income.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

CHAPTER 2—OTHER MODIFICATIONS OF SUBPART F PROVISIONS

SEC. 14211. ELIMINATION OF INCLUSION OF FOREIGN BASE COMPANY OIL RELATED INCOME.

(a) REPEAL.—Subsection (a) of section 954 is amended—

(1) by inserting "and" at the end of paragraph (2),

(2) by striking the comma at the end of paragraph (3) and inserting a period, and

(3) by striking paragraph (5).

(b) CONFORMING AMENDMENTS.—

(1) Section 952(c)(1)(B)(iii) is amended by striking subclause (I) and redesignating subclauses (II) through (V) as subclauses (I) through (IV), respectively.

(2) Section 954(b) is amended—

(A) by striking the second sentence of paragraph (4),

(B) by striking "the foreign base company services income, and the foreign base company oil related income" in paragraph (5) and inserting "and the foreign base company services income", and

(C) by striking paragraph (6).

(3) Section 954 is amended by striking subsection (g).

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders with or within which such taxable years of foreign corporations end.

SEC. 14212. REPEAL OF INCLUSION BASED ON WITHDRAWAL OF PREVIOUSLY EXCLUDED SUBPART F INCOME FROM QUALIFIED INVESTMENT.

(a) IN GENERAL.—Subpart F of part III of subchapter N of chapter 1 is amended by striking section 955.

(b) CONFORMING AMENDMENTS.—

(1)(A) Section 951(a)(1)(A) is amended to read as follows:

"(A) his pro rata share (determined under paragraph (2)) of the corporation's subpart F income for such year, and".

(B) Section 851(b) is amended by striking "section 951(a)(1)(A)(i)" in the flush language at the end and inserting "section 951(a)(1)(A)".

(C) Section 952(c)(1)(B)(i) is amended by striking "section 951(a)(1)(A)(i)" and inserting "section 951(a)(1)(A)".

(D) Section 953(c)(1)(C) is amended by striking "section 951(a)(1)(A)(i)" and inserting "section 951(a)(1)(A)".

(2) Section 951(a) is amended by striking paragraph (3).

(3) Section 953(d)(4)(B)(iv)(II) is amended by striking "or amounts referred to in clause (ii) or (iii) of section 951(a)(1)(A)".

(4) Section 964(b) is amended by striking ", 955,".

(5) Section 970 is amended by striking subsection (b).

(6) The table of sections for subpart F of part III of subchapter N of chapter 1 is amended by striking the item relating to section 955.

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders in which or with which such taxable years of foreign corporations end.

SEC. 14213. MODIFICATION OF STOCK ATTRIBUTION RULES FOR DETERMINING STATUS AS A CONTROLLED FOREIGN CORPORATION.

(a) IN GENERAL.—Section 958(b) is amended—

(1) by striking paragraph (4), and

(2) by striking "Paragraphs (1) and (4)" in the last sentence and inserting "Paragraph (1)".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to—

(1) the last taxable year of foreign corporations beginning before January 1, 2018, and each subsequent taxable year of such foreign corporations, and

(2) taxable years of United States shareholders in which or with which such taxable years of foreign corporations end.

SEC. 14214. MODIFICATION OF DEFINITION OF UNITED STATES SHAREHOLDER.

(a) IN GENERAL.—Section 951(b) is amended by inserting ", or 10 percent or more of the total value of shares

of all classes of stock of such foreign corporation" after "such foreign corporation".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders with or within which such taxable years of foreign corporations end.

SEC. 14215. ELIMINATION OF REQUIREMENT THAT CORPORATION MUST BE CONTROLLED FOR 30 DAYS BEFORE SUBPART F INCLUSIONS APPLY.

(a) IN GENERAL.—Section 951(a)(1) is amended by striking "for an uninterrupted period of 30 days or more" and inserting "at any time".

(b) EFFECTIVE DATE.—The amendment made by this section shall apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years of United States shareholders with or within which such taxable years of foreign corporations end.

CHAPTER 3—PREVENTION OF BASE EROSION

SEC. 14221. LIMITATIONS ON INCOME SHIFTING THROUGH INTANGIBLE PROPERTY TRANSFERS.

(a) DEFINITION OF INTANGIBLE ASSET.—Section 936(h)(3)(B) is amended—

(1) by striking "or" at the end of clause (v),

(2) by striking clause (vi) and inserting the following:

"(vi) any goodwill, going concern value, or workforce in place (including its composition and terms and conditions (contractual or otherwise) of its employment); or

"(vii) any other item the value or potential value of which is not attributable to tangible property or the services of any individual.", and

(3) by striking the flush language after clause (vii), as added by paragraph (2).

(b) CLARIFICATION OF ALLOWABLE VALUATION METHODS.—

(1) FOREIGN CORPORATIONS.—Section 367(d)(2) is amended by adding at the end the following new subparagraph:

"(D) REGULATORY AUTHORITY.—For purposes of the last sentence of subparagraph (A), the Secretary shall require—

"(i) the valuation of transfers of intangible property, including intangible property transferred with other property or services, on an aggregate basis, or

"(ii) the valuation of such a transfer on the basis of the realistic alternatives to such a transfer,

if the Secretary determines that such basis is the most reliable means of valuation of such transfers.".

(2) ALLOCATION AMONG TAXPAYERS.—Section 482 is amended by adding at the end the following: "For purposes of this section, the Secretary shall require the valuation of transfers of intangible property (including intangible property transferred with other property or services) on an aggregate basis or the valuation of such a transfer on the basis of the realistic alternatives to such a transfer, if the Secretary determines that such basis is the most reliable means of valuation of such transfers.".

(c) EFFECTIVE DATE.—

(1) IN GENERAL.—The amendments made by this section shall apply to transfers in taxable years beginning after December 31, 2017.

(2) NO INFERENCE.—Nothing in the amendment made by subsection (a) shall be construed to create any inference with respect to the application of section 936(h)(3) of the Internal Revenue Code of 1986, or the authority of the Secretary of the Treasury to

provide regulations for such application, with respect to taxable years beginning before January 1, 2018.

SEC. 14222. CERTAIN RELATED PARTY AMOUNTS PAID OR ACCRUED IN HYBRID TRANSACTIONS OR WITH HYBRID ENTITIES.

(a) IN GENERAL.—Part IX of subchapter B of chapter 1 is amended by inserting after section 267 the following:

"SEC. 267A. CERTAIN RELATED PARTY AMOUNTS PAID OR ACCRUED IN HYBRID TRANSACTIONS OR WITH HYBRID ENTITIES.

"(a) IN GENERAL.—No deduction shall be allowed under this chapter for any disqualified related party amount paid or accrued pursuant to a hybrid transaction or by, or to, a hybrid entity.

"(b) DISQUALIFIED RELATED PARTY AMOUNT.—For purposes of this section—

"(1) DISQUALIFIED RELATED PARTY AMOUNT.—The term 'disqualified related party amount' means any interest or royalty paid or accrued to a related party to the extent that—

"(A) such amount is not included in the income of such related party under the tax law of the country of which such related party is a resident for tax purposes or is subject to tax, or

"(B) such related party is allowed a deduction with respect to such amount under the tax law of such country.

Such term shall not include any payment to the extent such payment is included in the gross income of a United States shareholder under section 951(a).

"(2) RELATED PARTY.—The term 'related party' means a related person as defined in section 954(d)(3), except that such section shall be applied with respect to the person making the payment described in paragraph (1) in lieu of the controlled foreign corporation otherwise referred to in such section.

"(c) HYBRID TRANSACTION.—For purposes of this section, the term 'hybrid transaction' means any transaction, series of transactions, agreement, or instrument one or more payments with respect to which are treated as interest or royalties for purposes of this chapter and which are not so treated for purposes the tax law of the foreign country of which the recipient of such payment is resident for tax purposes or is subject to tax.

"(d) HYBRID ENTITY.—For purposes of this section, the term 'hybrid entity' means any entity which is either—

"(1) treated as fiscally transparent for purposes of this chapter but not so treated for purposes of the

tax law of the foreign country of which the entity is resident for tax purposes or is subject to tax, or

"(2) treated as fiscally transparent for purposes of such tax law but not so treated for purposes of this chapter.

"(e) REGULATIONS.—The Secretary shall issue such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section, including regulations or other guidance providing for—

"(1) rules for treating certain conduit arrangements which involve a hybrid transaction or a hybrid entity as subject to subsection (a),

"(2) rules for the application of this section to branches or domestic entities,

"(3) rules for treating certain structured transactions as subject to subsection (a),

"(4) rules for treating a tax preference as an exclusion from income for purposes of applying subsection (b)(1) if such tax preference has the effect of reducing the generally applicable statutory rate by 25 percent or more,

"(5) rules for treating the entire amount of interest or royalty paid or accrued to a related party as a disqualified related party amount if such amount is subject to a participation exemption sys-

tem or other system which provides for the exclusion or deduction of a substantial portion of such amount,

"(6) rules for determining the tax residence of a foreign entity if the entity is otherwise considered a resident of more than one country or of no country,

"(7) exceptions from subsection (a) with respect to—

"(A) cases in which the disqualified related party amount is taxed under the laws of a foreign country other than the country of which the related party is a resident for tax purposes, and

"(B) other cases which the Secretary determines do not present a risk of eroding the Federal tax base,

"(8) requirements for record keeping and information reporting in addition to any requirements imposed by section 6038A.".

(b) CONFORMING AMENDMENT.—The table of sections for part IX of subchapter B of chapter 1 is amended by inserting after the item relating to section 267 the following new item:

"Sec. 267A. Certain related party amounts paid or accrued in hybrid transactions or with hybrid entities.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 14223. SHAREHOLDERS OF SURROGATE FOREIGN CORPORATIONS NOT ELIGIBLE FOR REDUCED RATE ON DIVIDENDS.

(a) IN GENERAL.—Section 1(h)(11)(C)(iii) is amended—

(1) by striking "shall not include any foreign corporation" and inserting "shall not include—

"(I) any foreign corporation",

(2) by striking the period at the end and inserting ", and", and

(3) by adding at the end the following new subclause:

"(II) any corporation which first becomes a surrogate foreign corporation (as defined in section 7874(a)(2)(B)) after the date of the enactment of this subclause, other than a foreign corporation which is treated as a domestic corporation under section 7874(b).".

(b) EFFECTIVE DATE.—The amendments made by this section shall apply to dividends received after the date of the enactment of this Act.

Subpart C—Modifications Related to Foreign Tax Credit System

SEC. 14301. REPEAL OF SECTION 902 INDIRECT FOREIGN TAX CREDITS; DETERMINATION OF SECTION 960 CREDIT ON CURRENT YEAR BASIS.

(a) REPEAL OF SECTION 902 INDIRECT FOREIGN TAX CREDITS.—Subpart A of part III of subchapter N of chapter 1 is amended by striking section 902.

(b) DETERMINATION OF SECTION 960 CREDIT ON CURRENT YEAR BASIS.—Section 960, as amended by section 14201, is amended—

(1) by striking subsection (c), by redesignating subsection (b) as subsection (c), by striking all that precedes subsection (c) (as so redesignated) and inserting the following:

"SEC. 960. DEEMED PAID CREDIT FOR SUBPART F INCLUSIONS.

"(a) IN GENERAL.—For purposes of subpart A of this part, 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.

"(b) SPECIAL RULES FOR DISTRIBUTIONS FROM PREVIOUSLY TAXED EARNINGS AND PROFITS.—For purposes of subpart A of this part—

"(1) IN GENERAL.—If any portion of a distribution from a controlled foreign corporation to a domestic corporation which is a United States shareholder with respect to such controlled foreign corporation is excluded from gross income under section 959(a), such domestic corporation shall be deemed to have paid so much of such foreign corporation's foreign income taxes as—

"(A) are properly attributable to such portion, and

"(B) have not been deemed to have to been paid by such domestic corporation under this section for the taxable year or any prior taxable year.

"(2) TIERED CONTROLLED FOREIGN CORPORATIONS.—If section 959(b) applies to any portion of a distribution from a controlled foreign corporation to another controlled foreign corporation, such controlled foreign corporation shall be deemed to have paid so much of such other controlled foreign corporation's foreign income taxes as—

"(A) are properly attributable to such portion, and

"(B) have not been deemed to have been paid by a domestic corporation under this section for the taxable year or any prior taxable year.",

(2) and by adding after subsection (d) (as added by section 14201) the following new subsections:

"(e) FOREIGN INCOME TAXES.—The term 'foreign income taxes' means any income, war profits, or excess profits taxes paid or accrued to any foreign country or possession of the United States.

"(f) REGULATIONS.—The Secretary shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the provisions of this section.".

(c) CONFORMING AMENDMENTS.—

(1) Section 78 is amended to read as follows:

"SEC. 78. GROSS UP FOR DEEMED PAID FOREIGN TAX CREDIT.

"If a domestic corporation chooses to have the benefits of subpart A of part III of subchapter N (relating to foreign tax credit) for any taxable year, an amount equal to the taxes deemed to be paid by such corporation under subsections (a), (b), and (d) of section 960 (determined without regard to the phrase '80 percent of' in subsection (d)(1)

thereof) for such taxable year shall be treated for purposes of this title (other than sections 245 and 245A) as a dividend received by such domestic corporation from the foreign corporation.".

(2) Paragraph (4) of section 245(a) is amended to read as follows:

"(4) POST-1986 UNDISTRIBUTED EARNINGS.—The term 'post-1986 undistributed earnings' means the amount of the earnings and profits of the foreign corporation (computed in accordance with sections 964(a) and 986) accumulated in taxable years beginning after December 31, 1986—

"(A) as of the close of the taxable year of the foreign corporation in which the dividend is distributed, and

"(B) without diminution by reason of dividends distributed during such taxable year.".

(3) Section 245(a)(10)(C) is amended by striking "902, 907, and 960" and inserting "907 and 960".

(4) Sections 535(b)(1) and 545(b)(1) are each amended by striking "section 902(a) or 960(a)(1)" and inserting "section 960".

(5) Section 814(f)(1) is amended—

(A) by striking subparagraph (B), and

(B) by striking all that precedes "No income" and inserting the following:

"(1) TREATMENT OF FOREIGN TAXES.—".

(6) Section 865(h)(1)(B) is amended by striking "902, 907," and inserting "907".

(7) Section 901(a) is amended by striking "sections 902 and 960" and inserting "section 960".

(8) Section 901(e)(2) is amended by striking "but is not limited to—" and all that follows through "that portion" and inserting "but is not limited to that portion".

(9) Section 901(f) is amended by striking "sections 902 and 960" and inserting "section 960".

(10) Section 901(j)(1)(A) is amended by striking "902 or".

(11) Section 901(j)(1)(B) is amended by striking "sections 902 and 960" and inserting "section 960".

(12) Section 901(k)(2) is amended by striking ", 902,".

(13) Section 901(k)(6) is amended by striking "902 or".

(14) Section 901(m)(1)(B) is amended to read as follows:

"(B) in the case of a foreign income tax paid by a foreign corporation, shall not be taken into account for purposes of section 960.".

(15) Section 904(d)(2)(E) is amended—

(A) by amending clause (i) to read as follows:

"(i) NONCONTROLLED 10-PERCENT OWNED FOREIGN CORPORATION.—The term 'noncontrolled 10-percent owned foreign corporation' means any foreign corporation which is—

"(I) a specified 10-percent owned foreign corporation (as defined in section 245A(b)), or

"(II) a passive foreign investment company (as defined in section 1297(a)) with respect to which the taxpayer meets the stock ownership requirements of section 902(a) (or, for purposes of applying paragraphs (3) and (4), the requirements of section 902(b)).

A controlled foreign corporation shall not be treated as a noncontrolled 10-percent owned foreign corporation with respect to any dis-

tribution out of its earnings and profits for periods during which it was a controlled foreign corporation. Any reference to section 902 in this clause shall be treated as a reference to such section as in effect before its repeal.", and

(B) by striking "non-controlled section 902 corporation" in clause (ii) and inserting "non-controlled 10-percent owned foreign corporation".

(16) Section 904(d)(4) is amended—

(A) by striking "noncontrolled section 902 corporation" each place it appears and inserting "noncontrolled 10-percent owned foreign corporation",

(B) by striking "NONCONTROLLED SECTION 902 CORPORATIONS" in the heading thereof and inserting "NONCONTROLLED 10-PERCENT OWNED FOREIGN CORPORATIONS".

(17) Section 904(d)(6)(A) is amended by striking "902, 907," and inserting "907".

(18) Section 904(h)(10)(A) is amended by striking "sections 902, 907, and 960" and inserting "sections 907 and 960".

(19) Section 904(k) is amended to read as follows:

"(k) CROSS REFERENCES.—For increase of limitation under subsection (a) for taxes paid with respect to amounts received which were included in the gross income of the taxpayer for a prior taxable year as a United States shareholder with respect to a controlled foreign corporation, see section 960(c).".

(20) Section 905(c)(1) is amended by striking the last sentence.

(21) Section 905(c)(2)(B)(i) is amended to read as follows:

"(i) shall be taken into account for the taxable year to which such taxes relate, and".

(22) Section 906(a) is amended by striking "(or deemed, under section 902, paid or accrued during the taxable year)".

(23) Section 906(b) is amended by striking paragraphs (4) and (5).

(24) Section 907(b)(2)(B) is amended by striking "902 or".

(25) Section 907(c)(3)(A) is amended—

(A) by striking subparagraph (A) and inserting the following:

"(A) interest, to the extent the category of income of such interest is determined under section 904(d)(3),", and

(B) by striking "section 960(a)" in subparagraph (B) and inserting "section 960".

(26) Section 907(c)(5) is amended by striking "902 or".

(27) Section 907(f)(2)(B)(i) is amended by striking "902 or".

(28) Section 908(a) is amended by striking "902 or".

(29) Section 909(b) is amended—

(A) by striking "section 902 corporation" in the matter preceding paragraph (1) and inserting "specified 10-percent owned foreign corporation (as defined in section 245A(b) without regard to paragraph (2) thereof)",

(B) by striking "902 or" in paragraph (1),

(C) by striking "by such section 902 corporation" and all that follows in the matter following paragraph (2) and inserting "by such specified 10-percent owned foreign corporation or a domestic corporation which is a United States shareholder with respect to such specified 10-percent owned foreign corporation.", and

(D) by striking "SECTION 902 CORPORATIONS" in the heading thereof and inserting "SPECIFIED 10-PERCENT OWNED FOREIGN CORPORATIONS".

(30) Section 909(d) is amended by striking paragraph (5).

(31) Section 958(a)(1) is amended by striking "960(a)(1)" and inserting "960".

(32) Section 959(d) is amended by striking "Except as provided in section 960(a)(3), any" and inserting "Any".

(33) Section 959(e) is amended by striking "section 960(b)" and inserting "section 960(c)".

(34) Section 1291(g)(2)(A) is amended by striking "any distribution—" and all that follows through "but only if" and inserting "any distribution, any withholding tax imposed with respect to such distribution, but only if".

(35) Section 1293(f) is amended by striking "and" at the end of paragraph (1), by striking the period at the end of paragraph (2) and inserting ", and", and by adding at the end the following new paragraph:

"(3) a domestic corporation which owns (or is treated under section 1298(a) as owning) stock of a

qualified electing fund shall be treated in the same manner as a United States shareholder of a controlled foreign corporation (and such qualified electing fund shall be treated in the same manner as such controlled foreign corporation) if such domestic corporation meets the stock ownership requirements of subsection (a) or (b) of section 902 (as in effect before its repeal) with respect to such qualified electing fund.''.

(36) Section 6038(c)(1)(B) is amended by striking ''sections 902 (relating to foreign tax credit for corporate stockholder in foreign corporation) and 960 (relating to special rules for foreign tax credit)'' and inserting ''section 960''.

(37) Section 6038(c)(4) is amended by striking subparagraph (C).

(38) The table of sections for subpart A of part III of subchapter N of chapter 1 is amended by striking the item relating to section 902.

(39) The table of sections for subpart F of part III of subchapter N of chapter 1 is amended by striking the item relating to section 960 and inserting the following:

''Sec. 960. Deemed paid credit for subpart F inclusions.''.

(d) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years of foreign corporations beginning after December 31, 2017, and to taxable years

of United States shareholders in which or with which such taxable years of foreign corporations end.

SEC. 14302. SEPARATE FOREIGN TAX CREDIT LIMITATION BASKET FOR FOREIGN BRANCH INCOME.

(a) IN GENERAL.—Section 904(d)(1), as amended by section 14201, is amended by redesignating subparagraphs (B) and (C) as subparagraphs (C) and (D), respectively, and by inserting after subparagraph (A) the following new subparagraph:

"(B) foreign branch income,".

(b) FOREIGN BRANCH INCOME.—

(1) IN GENERAL.—Section 904(d)(2) is amended by inserting after subparagraph (I) the following new subparagraph:

"(J) FOREIGN BRANCH INCOME.—

"(i) IN GENERAL.—The term 'foreign branch income' means the business profits of such United States person which are attributable to 1 or more qualified business units (as defined in section 989(a)) in 1 or more foreign countries. For purposes of the preceding sentence, the amount of business profits attributable to a qualified business unit shall be determined under rules established by the Secretary.

"(ii) EXCEPTION.—Such term shall not include any income which is passive category income.".

(2) CONFORMING AMENDMENT.—Section 904(d)(2)(A)(ii), as amended by section 14201, is amended by striking "income described in paragraph (1)(A) and" and inserting "income described in paragraph (1)(A), foreign branch income, and".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 14303. SOURCE OF INCOME FROM SALES OF INVENTORY DETERMINED SOLELY ON BASIS OF PRODUCTION ACTIVITIES.

(a) IN GENERAL.—Section 863(b) is amended by adding at the end the following: "Gains, profits, and income from the sale or exchange of inventory property described in paragraph (2) shall be allocated and apportioned between sources within and without the United States solely on the basis of the production activities with respect to the property.".

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

SEC. 14304. ELECTION TO INCREASE PERCENTAGE OF DOMESTIC TAXABLE INCOME OFFSET BY OVERALL DOMESTIC LOSS TREATED AS FOREIGN SOURCE.

(a) IN GENERAL.—Section 904(g) is amended by adding at the end the following new paragraph:

"(5) ELECTION TO INCREASE PERCENTAGE OF TAXABLE INCOME TREATED AS FOREIGN SOURCE.—

"(A) IN GENERAL.—If any pre-2018 unused overall domestic loss is taken into account under paragraph (1) for any applicable taxable year, the taxpayer may elect to have such paragraph applied to such loss by substituting a percentage greater than 50 percent (but not greater than 100 percent) for 50 percent in subparagraph (B) thereof.

"(B) PRE-2018 UNUSED OVERALL DOMESTIC LOSS.—For purposes of this paragraph, the term 'pre-2018 unused overall domestic loss' means any overall domestic loss which—

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

"(ii) has not been used under paragraph (1) for any taxable year beginning before such date.

"(C) APPLICABLE TAXABLE YEAR.—For purposes of this paragraph, the term 'applicable taxable year' means any taxable year of the taxpayer beginning after December 31, 2017, and before January 1, 2028.".

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

PART II—INBOUND TRANSACTIONS

SEC. 14401. BASE EROSION AND ANTI-ABUSE TAX.

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

"PART VII—BASE EROSION AND ANTI-ABUSE TAX

"SEC. 59A. TAX ON BASE EROSION PAYMENTS OF TAXPAYERS WITH SUBSTANTIAL GROSS RECEIPTS.

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

"(b) BASE EROSION MINIMUM TAX AMOUNT.—For purposes of this section—

"(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), the term 'base erosion minimum tax amount' means, with respect to any applicable taxpayer for any taxable year, the excess (if any) of—

"(A) an amount equal to 10 percent (5 percent in the case of taxable years beginning in calendar year 2018) of the modified taxable income of such taxpayer for the taxable year, over

"(B) an amount equal to the regular tax liability (as defined in section 26(b)) of the taxpayer for the taxable year, reduced (but not below zero) by the excess (if any) of—

"(i) the credits allowed under this chapter against such regular tax liability, over

"(ii) the sum of—

"(I) the credit allowed under section 38 for the taxable year which is properly allocable to the research credit determined under section 41(a), plus

"(II) the portion of the applicable section 38 credits not in excess of 80 percent of the lesser of the amount of such credits or the base erosion min-

imum tax amount (determined without regard to this subclause).

"(2) MODIFICATIONS FOR TAXABLE YEARS BEGINNING AFTER 2025.—In the case of any taxable year beginning after December 31, 2025, paragraph (1) shall be applied—

"(A) by substituting '12.5 percent' for '10 percent' in subparagraph (A) thereof, and

"(B) by reducing (but not below zero) the regular tax liability (as defined in section 26(b)) for purposes of subparagraph (B) thereof by the aggregate amount of the credits allowed under this chapter against such regular tax liability rather than the excess described in such subparagraph.

"(3) INCREASED RATE FOR CERTAIN BANKS AND SECURITIES DEALERS.—

"(A) IN GENERAL.—In the case of a taxpayer described in subparagraph (B) who is an applicable taxpayer for any taxable year, the percentage otherwise in effect under paragraphs (1)(A) and (2)(A) shall each be increased by one percentage point.

"(B) TAXPAYER DESCRIBED.—A taxpayer is described in this subparagraph if such tax-

payer is a member of an affiliated group (as defined in section 1504(a)(1)) which includes—

"(i) a bank (as defined in section 581), or

"(ii) a registered securities dealer under section 15(a) of the Securities Exchange Act of 1934.

"(4) APPLICABLE SECTION 38 CREDITS.—For purposes of paragraph (1)(B)(ii)(II), the term 'applicable section 38 credits' means the credit allowed under section 38 for the taxable year which is properly allocable to—

"(A) the low-income housing credit determined under section 42(a),

"(B) the renewable electricity production credit determined under section 45(a), and

"(C) the investment credit determined under section 46, but only to the extent properly allocable to the energy credit determined under section 48.

"(c) MODIFIED TAXABLE INCOME.—For purposes of this section—

"(1) IN GENERAL.—The term 'modified taxable income' means the taxable income of the taxpayer

computed under this chapter for the taxable year, determined without regard to—

"(A) any base erosion tax benefit with respect to any base erosion payment, or

"(B) the base erosion percentage of any net operating loss deduction allowed under section 172 for the taxable year.

"(2) BASE EROSION TAX BENEFIT.—

"(A) IN GENERAL.—The term 'base erosion tax benefit' means—

"(i) any deduction described in subsection (d)(1) which is allowed under this chapter for the taxable year with respect to any base erosion payment,

"(ii) in the case of a base erosion payment described in subsection (d)(2), any deduction allowed under this chapter for the taxable year for depreciation (or amortization in lieu of depreciation) with respect to the property acquired with such payment,

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

"(I) any reduction under section 803(a)(1)(B) in the gross amount of premiums and other consideration on

insurance and annuity contracts for premiums and other consideration arising out of indemnity insurance, and

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

"(iv) in the case of a base erosion payment described in subsection (d)(4), any reduction in gross receipts with respect to such payment in computing gross income of the taxpayer for the taxable year for purposes of this chapter.

"(B) TAX BENEFITS DISREGARDED IF TAX WITHHELD ON BASE EROSION PAYMENT.—

"(i) IN GENERAL.—Except as provided in clause (ii), any base erosion tax benefit attributable to any base erosion payment—

"(I) on which tax is imposed by section 871 or 881, and

"(II) with respect to which tax has been deducted and withheld under section 1441 or 1442,

shall not be taken into account in computing modified taxable income under paragraph (1)(A) or the base erosion percentage under paragraph (4).

"(ii) EXCEPTION.—The amount not taken into account in computing modified taxable income by reason of clause (i) shall be reduced under rules similar to the rules under section 163(j)(5)(B) (as in effect before the date of the enactment of the Tax Cuts and Jobs Act).

"(3) SPECIAL RULES FOR DETERMINING INTEREST FOR WHICH DEDUCTION ALLOWED.—For purposes of applying paragraph (1), in the case of a taxpayer to which section 163(j) applies for the taxable year, the reduction in the amount of interest for which a deduction is allowed by reason of such subsection shall be treated as allocable first to interest paid or accrued to persons who are not related parties with respect to the taxpayer and then to such related parties.

"(4) BASE EROSION PERCENTAGE.—For purposes of paragraph (1)(B)—

"(A) IN GENERAL.—The term 'base erosion percentage' means, for any taxable year, the percentage determined by dividing—

"(i) the aggregate amount of base erosion tax benefits of the taxpayer for the taxable year, by

"(ii) the sum of—

"(I) the aggregate amount of the deductions (including deductions described in clauses (i) and (ii) of paragraph (2)(A)) allowable to the taxpayer under this chapter for the taxable year, plus

"(II) the base erosion tax benefits described in clauses (iii) and (iv) of paragraph (2)(A) allowable to the taxpayer for the taxable year.

"(B) CERTAIN ITEMS NOT TAKEN INTO ACCOUNT.—The amount under subparagraph (A)(ii) shall be determined by not taking into account—

"(i) any deduction allowed under section 172, 245A, or 250 for the taxable year,

"(ii) any deduction for amounts paid or accrued for services to which the exception under subsection (d)(5) applies, and

"(iii) any deduction for qualified derivative payments which are not treated as a base erosion payment by reason of subsection (h).

"(d) BASE EROSION PAYMENT.—For purposes of this section—

"(1) IN GENERAL.—The term 'base erosion payment' means any amount paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer and with respect to which a deduction is allowable under this chapter.

"(2) PURCHASE OF DEPRECIABLE PROPERTY.—Such term shall also include any amount paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer in connection with the acquisition by the taxpayer from such person of property of a character subject to the allowance for depreciation (or amortization in lieu of depreciation).

"(3) REINSURANCE PAYMENTS.—Such term shall also include any premium or other consideration paid or accrued by the taxpayer to a foreign person which is a related party of the taxpayer for any reinsurance

payments which are taken into account under sections 803(a)(1)(B) or 832(b)(4)(A).

"(4) CERTAIN PAYMENTS TO EXPATRIATED ENTITIES.—

"(A) IN GENERAL.—Such term shall also include any amount paid or accrued by the taxpayer with respect to a person described in subparagraph (B) which results in a reduction of the gross receipts of the taxpayer.

"(B) PERSON DESCRIBED.—A person is described in this subparagraph if such person is a—

"(i) surrogate foreign corporation which is a related party of the taxpayer, but only if such person first became a surrogate foreign corporation after November 9, 2017, or

"(ii) foreign person which is a member of the same expanded affiliated group as the surrogate foreign corporation.

"(C) DEFINITIONS.—For purposes of this paragraph—

"(i) SURROGATE FOREIGN CORPORATION.—The term 'surrogate foreign corporation' has the meaning given such term by

section 7874(a)(2)(B) but does not include a foreign corporation treated as a domestic corporation under section 7874(b).

"(ii) EXPANDED AFFILIATED GROUP.—The term 'expanded affiliated group' has the meaning given such term by section 7874(c)(1).

"(5) EXCEPTION FOR CERTAIN AMOUNTS WITH RESPECT TO SERVICES.—Paragraph (1) shall not apply to any amount paid or accrued by a taxpayer for services if—

"(A) such services are services which meet the requirements for eligibility for use of the services cost method under section 482 (determined without regard to the requirement that the services not contribute significantly to fundamental risks of business success or failure), and

"(B) such amount constitutes the total services cost with no markup component.

"(e) APPLICABLE TAXPAYER.—For purposes of this section—

"(1) IN GENERAL.—The term 'applicable taxpayer' means, with respect to any taxable year, a taxpayer—

"(A) which is a corporation other than a regulated investment company, a real estate investment trust, or an S corporation,

"(B) the average annual gross receipts of which for the 3-taxable-year period ending with the preceding taxable year are at least $500,000,000, and

"(C) the base erosion percentage (as determined under subsection (c)(4)) of which for the taxable year is 3 percent (2 percent in the case of a taxpayer described in subsection (b)(3)(B)) or higher.

"(2) GROSS RECEIPTS.—

"(A) SPECIAL RULE FOR FOREIGN PERSONS.—In the case of a foreign person the gross receipts of which are taken into account for purposes of paragraph (1)(B), only gross receipts which are taken into account in determining income which is effectively connected with the conduct of a trade or business within the United States shall be taken into account. In the case of a taxpayer which is a foreign person, the preceding sentence shall not apply to the gross receipts of any United States person which are ag-

gregated with the taxpayer's gross receipts by reason of paragraph (3).

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

"(3) AGGREGATION RULES.—All persons treated as a single employer under subsection (a) of section 52 shall be treated as 1 person for purposes of this subsection and subsection (c)(4), except that in applying section 1563 for purposes of section 52, the exception for foreign corporations under section 1563(b)(2)(C) shall be disregarded.

"(f) FOREIGN PERSON.—For purposes of this section, the term 'foreign person' has the meaning given such term by section 6038A(c)(3).

"(g) RELATED PARTY.—For purposes of this section—

"(1) IN GENERAL.—The term 'related party' means, with respect to any applicable taxpayer—

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

"(B) any person who is related (within the meaning of section 267(b) or 707(b)(1)) to the taxpayer or any 25-percent owner of the taxpayer, and

"(C) any other person who is related (within the meaning of section 482) to the taxpayer.

"(2) 25-PERCENT OWNER.—The term '25-percent owner' means, with respect to any corporation, any person who owns at least 25 percent of—

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

"(B) the total value of all classes of stock of such corporation.

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

"(A) '10 percent' shall be substituted for '50 percent' in section 318(a)(2)(C), and

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

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

"(1) IN GENERAL.—Except as provided in paragraph (3), any qualified derivative payment shall not be treated as a base erosion payment.

"(2) QUALIFIED DERIVATIVE PAYMENT.—

"(A) IN GENERAL.—The term 'qualified derivative payment' means any payment made by a taxpayer pursuant to a derivative with respect to which the taxpayer—

"(i) recognizes gain or loss as if such derivative were sold for its fair market value on the last business day of the taxable year (and such additional times as required by this title or the taxpayer's method of accounting),

"(ii) treats any gain or loss so recognized as ordinary, and

"(iii) treats the character of all items of income, deduction, gain, or loss with respect to a payment pursuant to the derivative as ordinary.

"(B) REPORTING REQUIREMENT.—No payments shall be treated as qualified derivative payments under subparagraph (A) for any taxable year unless the taxpayer includes in the information required to be reported under section 6038B(b)(2) with respect to such taxable year such information as is necessary to identify the payments to be so treated and such other infor-

mation as the Secretary determines necessary to carry out the provisions of this subsection.

"(3) EXCEPTIONS FOR PAYMENTS OTHERWISE TREATED AS BASE EROSION PAYMENTS.—This subsection shall not apply to any qualified derivative payment if—

"(A) the payment would be treated as a base erosion payment if it were not made pursuant to a derivative, including any interest, royalty, or service payment, or

"(B) in the case of a contract which has derivative and nonderivative components, the payment is properly allocable to the nonderivative component.

"(4) DERIVATIVE DEFINED.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'derivative' means any contract (including any option, forward contract, futures contract, short position, swap, or similar contract) the value of which, or any payment or other transfer with respect to which, is (directly or indirectly) determined by reference to one or more of the following:

"(i) Any share of stock in a corporation.

"(ii) Any evidence of indebtedness.

"(iii) Any commodity which is actively traded.

"(iv) Any currency.

"(v) Any rate, price, amount, index, formula, or algorithm.

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

"(B) TREATMENT OF AMERICAN DEPOSITORY RECEIPTS AND SIMILAR INSTRUMENTS.—Except as otherwise provided by the Secretary, for purposes of this part, American depository receipts (and similar instruments) with respect to shares of stock in foreign corporations shall be treated as shares of stock in such foreign corporations.

"(C) EXCEPTION FOR CERTAIN CONTRACTS.—Such term shall not include any insurance, annuity, or endowment contract issued by an insurance company to which subchapter L applies (or issued by any foreign corporation to which such subchapter would apply if such foreign corporation were a domestic corporation).

"(i) REGULATIONS.—The Secretary shall prescribe such regulations or other guidance as may be necessary or

appropriate to carry out the provisions of this section, including regulations—

"(1) providing for such adjustments to the application of this section as are necessary to prevent the avoidance of the purposes of this section, including through—

"(A) the use of unrelated persons, conduit transactions, or other intermediaries, or

"(B) transactions or arrangements designed, in whole or in part—

"(i) to characterize payments otherwise subject to this section as payments not subject to this section, or

"(ii) to substitute payments not subject to this section for payments otherwise subject to this section and

"(2) for the application of subsection (g), including rules to prevent the avoidance of the exceptions under subsection (g)(3).".

(b) REPORTING REQUIREMENTS AND PENALTIES.—

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

"(b) REQUIRED INFORMATION.—

"(1) IN GENERAL.—For purposes of subsection (a), the information described in this subsection is

such information as the Secretary prescribes by regulations relating to—

"(A) the name, principal place of business, nature of business, and country or countries in which organized or resident, of each person which—

"(i) is a related party to the reporting corporation, and

"(ii) had any transaction with the reporting corporation during its taxable year,

"(B) the manner in which the reporting corporation is related to each person referred to in subparagraph (A), and

"(C) transactions between the reporting corporation and each foreign person which is a related party to the reporting corporation.

"(2) ADDITIONAL INFORMATION REGARDING BASE EROSION PAYMENTS.—For purposes of subsection (a) and section 6038C, if the reporting corporation or the foreign corporation to whom section 6038C applies is an applicable taxpayer, the information described in this subsection shall include—

"(A) such information as the Secretary determines necessary to determine the base erosion minimum tax amount, base erosion payments,

and base erosion tax benefits of the taxpayer for purposes of section 59A for the taxable year, and

"(B) such other information as the Secretary determines necessary to carry out such section.

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

(2) INCREASE IN PENALTY.—Paragraphs (1) and (2) of section 6038A(d) are each amended by striking "$10,000" and inserting "$25,000".

(c) DISALLOWANCE OF CREDITS AGAINST BASE EROSION TAX.—Paragraph (2) of section 26(b) is amended by inserting after subparagraph (A) the following new subparagraph:

"(B) section 59A (relating to base erosion and anti-abuse tax),".

(d) CONFORMING AMENDMENTS.—

(1) The table of parts for subchapter A of chapter 1 is amended by adding after the item relating to part VI the following new item:

"PART VII. BASE EROSION AND ANTI-ABUSE TAX".

(2) Paragraph (1) of section 882(a), as amended by this Act, is amended by inserting " or 59A," after "section 11,".

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

"(A) the sum of—

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

"(ii) the tax imposed by section 59A, over".

(4)(A) Subparagraph (A) of section 6655(g)(1), as amended by sections 12001 and 13001, is amended by striking "plus" at the end of clause (i), by redesignating clause (ii) as clause (iii), and by inserting after clause (i) the following new clause:

"(ii) the tax imposed by section 59A, plus".

(B) Subparagraphs (A)(i) and (B)(i) of section 6655(e)(2), as amended by sections 12001 and 13001, are each amended by inserting "and modified taxable income" after "taxable income".

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

"(iii) MODIFIED TAXABLE INCOME.—The term 'modified taxable income' has the

meaning given such term by section 59A(c)(1).".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply to base erosion payments (as defined in section 59A(d) of the Internal Revenue Code of 1986, as added by this section) paid or accrued in taxable years beginning after December 31, 2017.

PART III—OTHER PROVISIONS

SEC. 14501. RESTRICTION ON INSURANCE BUSINESS EXCEPTION TO PASSIVE FOREIGN INVESTMENT COMPANY RULES.

(a) IN GENERAL.—Section 1297(b)(2)(B) is amended to read as follows:

"(B) derived in the active conduct of an insurance business by a qualifying insurance corporation (as defined in subsection (f)),".

(b) QUALIFYING INSURANCE CORPORATION DEFINED.—Section 1297 is amended by adding at the end the following new subsection:

"(f) QUALIFYING INSURANCE CORPORATION.—For purposes of subsection (b)(2)(B)—

"(1) IN GENERAL.—The term 'qualifying insurance corporation' means, with respect to any taxable year, a foreign corporation—

"(A) which would be subject to tax under subchapter L if such corporation were a domestic corporation, and

"(B) the applicable insurance liabilities of which constitute more than 25 percent of its total assets, determined on the basis of such liabilities and assets as reported on the corporation's applicable financial statement for the last year ending with or within the taxable year.

"(2) ALTERNATIVE FACTS AND CIRCUMSTANCES TEST FOR CERTAIN CORPORATIONS.—If a corporation fails to qualify as a qualified insurance corporation under paragraph (1) solely because the percentage determined under paragraph (1)(B) is 25 percent or less, a United States person that owns stock in such corporation may elect to treat such stock as stock of a qualifying insurance corporation if—

"(A) the percentage so determined for the corporation is at least 10 percent, and

"(B) under regulations provided by the Secretary, based on the applicable facts and circumstances—

"(i) the corporation is predominantly engaged in an insurance business, and

"(ii) such failure is due solely to run-off-related or rating-related circumstances involving such insurance business.

"(3) APPLICABLE INSURANCE LIABILITIES.—For purposes of this subsection—

"(A) IN GENERAL.—The term 'applicable insurance liabilities' means, with respect to any life or property and casualty insurance business—

"(i) loss and loss adjustment expenses, and

"(ii) reserves (other than deficiency, contingency, or unearned premium reserves) for life and health insurance risks and life and health insurance claims with respect to contracts providing coverage for mortality or morbidity risks.

"(B) LIMITATIONS ON AMOUNT OF LIABILITIES.—Any amount determined under clause (i) or (ii) of subparagraph (A) shall not exceed the lesser of such amount—

"(i) as reported to the applicable insurance regulatory body in the applicable financial statement described in paragraph

(4)(A) (or, if less, the amount required by applicable law or regulation), or

"(ii) as determined under regulations prescribed by the Secretary.

"(4) OTHER DEFINITIONS AND RULES.—For purposes of this subsection—

"(A) APPLICABLE FINANCIAL STATEMENT.—The term 'applicable financial statement' means a statement for financial reporting purposes which—

"(i) is made on the basis of generally accepted accounting principles,

"(ii) is made on the basis of international financial reporting standards, but only if there is no statement that meets the requirement of clause (i), or

"(iii) except as otherwise provided by the Secretary in regulations, is the annual statement which is required to be filed with the applicable insurance regulatory body, but only if there is no statement which meets the requirements of clause (i) or (ii).

"(B) APPLICABLE INSURANCE REGULATORY BODY.—The term 'applicable insurance regulatory body' means, with respect to any insur-

ance business, the entity established by law to license, authorize, or regulate such business and to which the statement described in subparagraph (A) is provided.".

(c) EFFECTIVE DATE.—The amendments made by this section shall apply to taxable years beginning after December 31, 2017.

SEC. 14502. REPEAL OF FAIR MARKET VALUE METHOD OF INTEREST EXPENSE APPORTIONMENT.

(a) IN GENERAL.—Paragraph (2) of section 864(e) is amended to read as follows:

"(2) GROSS INCOME AND FAIR MARKET VALUE METHODS MAY NOT BE USED FOR INTEREST.—All allocations and apportionments of interest expense shall be determined using the adjusted bases of assets rather than on the basis of the fair market value of the assets or gross income.".

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

TITLE II

SEC. 20001. OIL AND GAS PROGRAM.

(a) DEFINITIONS.—In this section:

(1) COASTAL PLAIN.—The term "Coastal Plain" means the area identified as the 1002 Area on the

plates prepared by the United States Geological Survey entitled "ANWR Map – Plate 1" and "ANWR Map – Plate 2", dated October 24, 2017, and on file with the United States Geological Survey and the Office of the Solicitor of the Department of the Interior.

(2) SECRETARY.—The term "Secretary" means the Secretary of the Interior, acting through the Bureau of Land Management.

(b) OIL AND GAS PROGRAM.—

(1) IN GENERAL.—Section 1003 of the Alaska National Interest Lands Conservation Act (16 U.S.C. 3143) shall not apply to the Coastal Plain.

(2) ESTABLISHMENT.—

(A) IN GENERAL.—The Secretary shall establish and administer a competitive oil and gas program for the leasing, development, production, and transportation of oil and gas in and from the Coastal Plain.

(B) PURPOSES.—Section 303(2)(B) of the Alaska National Interest Lands Conservation Act (Public Law 96–487; 94 Stat. 2390) is amended—

(i) in clause (iii), by striking "and" at the end;

(ii) in clause (iv), by striking the period at the end and inserting "; and"; and

(iii) by adding at the end the following:

"(v) to provide for an oil and gas program on the Coastal Plain.".

(3) MANAGEMENT.—Except as otherwise provided in this section, the Secretary shall manage the oil and gas program on the Coastal Plain in a manner similar to the administration of lease sales under the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C. 6501 et seq.) (including regulations).

(4) ROYALTIES.—Notwithstanding the Mineral Leasing Act (30 U.S.C. 181 et seq.), the royalty rate for leases issued pursuant to this section shall be 16.67 percent.

(5) RECEIPTS.—Notwithstanding the Mineral Leasing Act (30 U.S.C. 181 et seq.), of the amount of adjusted bonus, rental, and royalty receipts derived from the oil and gas program and operations on Federal land authorized under this section—

(A) 50 percent shall be paid to the State of Alaska; and

(B) the balance shall be deposited into the Treasury as miscellaneous receipts.

(c) 2 LEASE SALES WITHIN 10 YEARS.—

(1) REQUIREMENT.—

(A) IN GENERAL.—Subject to subparagraph (B), the Secretary shall conduct not fewer than 2 lease sales area-wide under the oil and gas program under this section by not later than 10 years after the date of enactment of this Act.

(B) SALE ACREAGES; SCHEDULE.—

(i) ACREAGES.—The Secretary shall offer for lease under the oil and gas program under this section—

(I) not fewer than 400,000 acres area-wide in each lease sale; and

(II) those areas that have the highest potential for the discovery of hydrocarbons.

(ii) SCHEDULE.—The Secretary shall offer—

(I) the initial lease sale under the oil and gas program under this section not later than 4 years after the date of enactment of this Act; and

(II) a second lease sale under the oil and gas program under this section

not later than 7 years after the date of enactment of this Act.

(2) RIGHTS-OF-WAY.—The Secretary shall issue any rights-of-way or easements across the Coastal Plain for the exploration, development, production, or transportation necessary to carry out this section.

(3) SURFACE DEVELOPMENT.—In administering this section, the Secretary shall authorize up to 2,000 surface acres of Federal land on the Coastal Plain to be covered by production and support facilities (including airstrips and any area covered by gravel berms or piers for support of pipelines) during the term of the leases under the oil and gas program under this section.

SEC. 20002. LIMITATIONS ON AMOUNT OF DISTRIBUTED QUALIFIED OUTER CONTINENTAL SHELF REVENUES.

Section 105(f)(1) of the Gulf of Mexico Energy Security Act of 2006 (43 U.S.C. 1331 note; Public Law 109–432) is amended by striking "exceed $500,000,000 for each of fiscal years 2016 through 2055." and inserting the following: "exceed—

"(A) $500,000,000 for each of fiscal years 2016 through 2019;

"(B) $650,000,000 for each of fiscal years 2020 and 2021; and

"(C) $500,000,000 for each of fiscal years 2022 through 2055.".

SEC. 20003. STRATEGIC PETROLEUM RESERVE DRAWDOWN AND SALE.

(a) DRAWDOWN AND SALE.—

(1) IN GENERAL.—Notwithstanding section 161 of the Energy Policy and Conservation Act (42 U.S.C. 6241), except as provided in subsections (b) and (c), the Secretary of Energy shall draw down and sell from the Strategic Petroleum Reserve 7,000,000 barrels of crude oil during the period of fiscal years 2026 through 2027.

(2) DEPOSIT OF AMOUNTS RECEIVED FROM SALE.—Amounts received from a sale under paragraph (1) shall be deposited in the general fund of the Treasury during the fiscal year in which the sale occurs.

(b) EMERGENCY PROTECTION.—The Secretary of Energy shall not draw down and sell crude oil under subsection (a) in a quantity that would limit the authority to sell petroleum products under subsection (h) of section 161 of the Energy Policy and Conservation Act (42 U.S.C. 6241) in the full quantity authorized by that subsection.

(c) LIMITATION.—The Secretary of Energy shall not drawdown or conduct sales of crude oil under subsection (a) after the date on which a total of $600,000,000 has been deposited in the general fund of the Treasury from sales authorized under that subsection.

Attest:

Secretary.

115TH CONGRESS
1ST SESSION

H.R. 1

SENATE AMENDMENT

Do This, Not That!

MODERATOR:
Scott B. Silverberg, Esq.

PRESENTED BY:
Jeffrey A. Asher, Esq.
Judith Nolfo McKenna, Esq.

ELDER LAW AND SPECIAL NEEDS ANNUAL MEETING

DO THIS, NOT THAT!

January 23, 2018

BY:

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I. INTRODUCTION

Estate planning and long-term care planning can be complicated and difficult, depending on the circumstances. The drafting of documents, the devising of strategies, and the formulating of plans can be fraught with pitfalls and peril, for the inexperienced and uneducated. The concern of every good estate planning practitioner and elder law practitioner should be not being the reason why an otherwise happy family is disputing over their loved one's plan.

Presented below are some common estate planning mistakes made by attorneys who mostly practice in the area of elder law and common elder law mistakes made by less experienced elder law attorneys and attorneys who mostly practice in the area of trusts and estates.

A. Powers of Attorney and Statutory Gifts Rider

The qualified Elder Law attorney knows that, sometimes, the path to a successful long-term care plan is through the use of a valid and effective Power of Attorney. Reality dictates that sometimes the client we assist with long-term care does not always have the independent capacity to make decisions for him or herself. As such, having the necessary and

appropriate authority within a valid Power of Attorney will assist the agent/family member/decision-maker make the decisions to put the plan together and put it in place.

In 2009, the New York State legislature enacted a new statutory short form durable power of attorney, codified in General Obligations Law 5-1501 to 5-1514, effective September 1, 2009, and revised by Chapter 340 in 2010. The new law, as revised in 2010, provided a statutory form far lengthier than many wills and trust documents, and revised language in a new statutory gifts rider to include statutory powers and a section for the specific modification of powers, the appointment of monitors as potential "watchdogs" of the agent and the agent's actions, and specific authorization for gifting. Prior to 2009, a power of attorney form was generally concise and easier for the general practitioner to understand and execute. Certain stationary stores sold generic power of attorney forms which were no more than the front and back of a legal-size page. It is important to remember all power of attorneys properly executed prior to the new law remain effective and may still being utilized.

The 2009 power of attorney, as revised in 2010, requires two notarized signatures of the principal, one at the end of the power of attorney (GOL 5-1501B(b)) and one at the end of the statutory gifts rider (GOL 5-1514(9)(b)), but requires the documents to be executed simultaneously and be read as a single document (GOL 5-1514(9)(d)). As such, some general practitioners did not fully comprehend the new forms, and what was necessary to execute and enhance to make the new form suitable for the individual client requesting this document.

When a client asks what events precipitated the need for this new form and format, often containing language completely inapplicable to their needs, we can cite to **In re Estate of Ferrara,** 7 N.Y.3d 244 (2006). What follows is a summary to reacquaint our members of the case often cited as the trigger for the overhaul of the General Obligations Law Article 5, Title 15, Sections 5-1501 to 5-1514.

On June 10, 1999, George J. Ferrara, a single, childless, retired New York financial broker living in Florida, executed his Last Will and Testament bequeathing his entire estate to the Salvation Army of Daytona Beach, Florida. George's distributees were a brother and a sister, and their children. In December of 1999, George was hospitalized in Florida, and his brother John and John's son Dominick Ferrara were notified. Dominick went to Florida,

and in January of 2000, traveled back to New York with George. In New York, decedent executed a New York Durable Power of Attorney, after moving into an assisted living facility, naming John and Dominick as attorneys-in-fact, with the power to act separately. The Power of Attorney was initialed next to the former subdivisions (A) through (O), including (M), which authorized gifts to his descendants, not to exceed $10,000.00 per year. However, a typed addition to the Power of Attorney form enabled the attorneys-in-fact (John and Dominick) to make unlimited gifts to themselves. Dominick alleged George wanted Dominick to have all his assets. This Power of Attorney was prepared by an attorney in New York City. George passed away on February 12, 2000, approximately three weeks after executing the New York Durable Power of Attorney. During the three weeks between the execution of the Power of Attorney and George's passing, Dominick transferred assets in excess of $800,000.00 to himself. Meanwhile, in Florida, the Salvation Army contacted George's Florida attorney about his Last Will and Testament., and commenced a proceeding against Dominick Ferrara in New York. The Rockland County Surrogate dismissed the Salvation Army's petition, and the Appellate Division affirmed. The Salvation Army appealed the case to the Court of Appeals, and the decision was reversed on June 29, 2006. The Court of Appeals reversal held that the gift-giving authority under the statutory power of attorney requires the attorney-in-fact to make gifts pursuant to the principal's best interest, even if the Power of Attorney contained additional language enhancing the gift giving authority.

1. Execution of the Power of Attorney/Statutory Gift Rider

The current form requires the principal and the agent to sign and date the power of attorney form, and the power of attorney is only effective when the agent signs. GOL 5-1501B requires the principal and the agent to sign and date the form, and their signatures must be notarized. Some practitioners are unaware of the requirement that the instrument must be dated by both the principal and the agent, and prepare the document with the date already completed. This is technically incorrect, pursuant to GOL 5-1501B(1)(b) and (c). Moreover, because the statutory form fails to provide a line for the agent(s) to date, many agents do not date the form. This is also technically incorrect, pursuant to GOL 5-1501(B)(1)(c).

a. From an Estate Planning/Elder Law POV.

For both the Estate Planning attorney and the Elder Law attorney, attention must be given to the execution requirements of the power of attorney and statutory gifts rider.

2. Modifications in the Authority Granted to the Agent.

a. Power of Attorney.

GOL 5-1503 provides for the modifications of the statutory short form power of attorney and of the statutory gifts rider. This subsection has been in existence for many years, and was used on a power of attorney prior to 2009 when there was added language to the prior statutory subsections, such as in the ***Ferrara*** case. So often in our practice, a client comes to us with a power of attorney drafted by an attorney not familiar with the need for modifications, and the modifications section on both parts of the form is unused. This is a lost opportunity to tailor the form to a clients' specific need to expand and enhance (or contract) the authority of their appointed agent(s). GOL 5-1502A through 5-1502N provide construction language for each of the proposed authorities granted to the agent in the fourteen statutory subdivisions. 5-1502N provides the general subdivision "all other matters". The principal can initial subdivision P on the statutory form to grant the agent authority for each of the matters identified by the following letters; A, B, C, etc. Without a completed modifications sections, the powers of the agents are limited.

What modifications should be included in the appropriate section of the power of attorney and statutory gifts rider? The answer is not generic; the modifications should be tailored to your client and their needs. Below are sample modifications you may wish to include for certain clients:

As a new technologically competent generation ages, their assets include online passwords, email accounts, access to bank and financial accounts, registrations, licenses, websites, domain names, music, photos and other information. It is essential the agent have access to this information. A sample modification in the power of attorney for access to the principal's digital assets:

(__) My agent shall have the power to (a) access, use, and control my digital devices, to include but not limited to, desktop and laptop computers, tablets, storage devices, mobile telephones and smartphones, and any similar digital device which currently exists or may exist as technology develops for the purpose of accessing, modifying, deleting, controlling, or transferring my digital assets, (b) access, modify, delete, control, and transfer my digital assets, wherever located and to include but not limited to, email accounts including all e-mails, digital music, digital photographs and videos, digital books and spreadsheets, software licenses, social network accounts, file sharing accounts, photo sharing accounts, (c) access online and digital financial accounts, banking accounts, domain registrations, web hosting accounts, tax preparation service accounts, online store accounts, affiliate programs, any and all other online accounts, and similar digital items which currently exist or may exist as technology develops, and (c) the power to obtain, access, modify, delete, and control my passwords, security questions and other electronic credentials associated with my digital devices and digital assets described above. This authority is intended to constitute "lawful consent" to a service provider to divulge the contents of any communication under The Stored Communications Act (currently codified as 18 U.S.C. §§ 2701 et seq.), to the extent such lawful consent is required, and an agent acting hereunder shall be considered as an authorized user for purposes of any and all computer-fraud and unauthorized-computer-access laws.

Clients with pets are often as concerned about the care of their pet as they would be for a child or other family member. Many clients are relieved when they know their agent will have the authority to care for their pet, take them to the vet, find a temporary foster family, and use the principal's funds for these purposes. A sample provision in the power of attorney modifications section to authorize agents to care for and/or delegate care for principal's pets:

(___) My agent shall have the authority to care for and provide food, shelter and medical care for any domestic animal living in my home, or within any real property I own. My agent shall be authorized to utilize my assets to pay for any and all ordinary and necessary

expenses for food, medicine, supplies, veterinary care, grooming, bathing, boarding, walking, and recreational activities, including day care expenses. If necessary, my agent shall have the authority to take emergency and temporary possession and custody of any such animals, so that all such animals will receive the same standard of health, care and welfare as would be provided under my care. This agency also authorizes all licensed animal health care practitioners, veterinarians, and other persons who are providing care to such animals to discuss any confidential communication with my agent. Such provider shall also provide complete patient records, including health and vaccination history, examination and test results, reports, or other information to my agent;

When we have a client who can no longer take care of his or her financial affairs, we often invoke the power of attorney to allow the agent to act for the client/principal. However, in the absence of a valid, properly executed power of attorney, filing for an Article 81 guardianship of the property may be necessary. Even with a power of attorney, there are occasions when an Article 81 guardianship is necessary. Section 81.17 of the Mental Hygiene Law authorizes a person to nominate their choice of a guardian through a written statement. If this is the case, a modification authorizing the agent to do is as follows:

(___) My agent shall have the power serve as the guardian of my person and property, or to appoint or designate another individual to serve as the guardian of my person and property, and such individual shall serve without bond, in the event that I shall be declared unable to manage my affairs pursuant to Article 81 of the Mental Hygiene Law of the State of New York or any statute corresponding thereto;

Another important modification is the agent's authority to determine the principal's domicile and intent to return to their home, the right to refuse or disclaim an inheritance, and the right to exercise a spousal refusal, especially for Medicaid purposes.

(___) My agent shall have the power to change or maintain my domicile and/or residency for any and all purposes and take any and all actions to effectuate the foregoing (including but not limited to the power to execute a Statement of Intent to Return Home) , and shall have the power to enter into a contract with an independent living community, assisted living facility, skilled nursing facility, or nursing home to provide for my residence in any such place, and the power to terminate said contract and move me to another facility or back home, and to make any statutory waivers, elections or disclaimers, including the power to disclaim or refuse to accept an inheritance or life insurance proceeds, the right to exercise and elect a spousal refusal, and to exercise any special power of appointment held by the principal;

Both the health care agent and agent under the power of attorney may need the authority serve as a "qualified person" and a "personal representative" under the current HIPAA federal and state statutes. A modification in the power of attorney should address the health care information needed by the agents as such:

(___) In addition to other powers granted by me in this document, my agent shall have the power and authority to serve as a "qualified person" pursuant to New York State Public Health Law 18 and a "personal representative" for all purposes of the Health Insurance Portability and Accountability Act ("HIPAA"), Confidentiality of Alcohol and Drug Abuse Patient Records, Confidentiality of Mental Health Records, New York Public Health Law section 2782 (confidentiality of HIV related information) or any amendments or similar legislation later enacted. My agent is authorized to execute any and all releases and other documents necessary in order to obtain, review and photocopy any or all of my patient records and any other health or medical information, reports, statements, medical and health care bills, records for any past, present or future medical or mental health condition or treatment. This authority shall supersede any prior agreement I have made with any health care provider to restrict access to or disclosure of any health information.

b. Statutory Gifts Rider.

The modifications section of the statutory gifts rider also should include some very important modifications to ensure the agent has the authority to act for the principal's assets and estate. GOL 5-1502(I)(14) is cause for particular concern for those principals who do not simultaneously execute a statutory gifts rider. This subsection provides the agent authority "to continue gifts that the principal customarily made to individuals and charitable organizations prior to the creation of the agency, provided that in any one calendar year all such gifts shall not exceed five hundred dollars in the aggregate".

If a principal correctly initials this section of the form, but chooses not to execute the statutory gifts rider, the agent is now limited to combined gifts on behalf of the principal of five hundred dollars per year. For many purposes, including Medicaid planning and lifetime gifting, this amount is wholly insufficient. For example, if the principal needs skilled nursing care and has a community spouse, gifts can be made by the agent to the community spouse, and under Medicaid laws, these gifts are considered exempt for Medicaid penalty purposes.[1]

Practice Tip: If client states they do not wish to execute the statutory gifts rider, it is prudent to have written, informed refusal, signed by the principal, outlining your explanation of the relevance of the gifts rider for future needs, including Medicaid planning. Keep the original on file, and give the client a copy. If authorized by the principal you may decide to include a copy to the agent, to place the agent on notice of the principal's intention.

Another alternative if the principal is wary about simultaneously executing the gifts rider, the principal could always include a springing provision for gifting to commence at a certain time or event. Modification language in the power of attorney may authorize the agent to act under the power of attorney only if the principal is declared incapacitated, for example;

[1] Social Services Law Section 360-4.4(c)(1)(ii)(b)(1).

(___) This Power of Attorney shall have no force or effect until I am certified as incapacitated as provided hereunder. All authority granted in this Power of Attorney shall be subject to establishment of incapacity as provided hereunder. After this Power of Attorney becomes effective, it shall not be affected by any subsequent incapacity which I may hereafter suffer or the passage of time. For purposes of establishing incapacity, whenever two (2) licensed, practicing medical doctors who have personally examined me (one of whom shall be my primary care or attending physician) who are not related to me or to any beneficiary or heir at law by blood or marriage certify in writing that I am unable to manage my financial affairs because of mental or physical infirmity and the certificates are personally served upon me, then the agent(s) named herein shall assume all powers granted in this Power of Attorney. However, even after receipt of the doctors' certificates, I retain the right to revoke this Power of Attorney at any time.

Modifications for gifting purposes may have certain language both in the power of attorney and statutory gifts rider modification sections, however, the gifts rider modifications section is the appropriate venue for gifting instructions and should include essential powers to arrange the principal's assets and estate as needed for a major change in life circumstances, including the relocation of the principal to a skilled nursing facility:

(___) My agent shall have the authority to make gifts to my spouse, my children and their issue (hereinafter referred to as "my permissible donees") or to a trust for the benefit of any of my permissible donees, including the power for my agent to create and fund an intervivos trust or trusts.

(___) My agent shall have the authority to open, close, modify, transfer or alter any bank account, financial account, annuity, life insurance policy, stock or security, mutual fund, bond or bond fund in the best interest of the principal, including adding a joint tenant to any account, adding, changing or removing any named beneficiary from such account;

(___) My agent shall have the authority to add, modify, change or remove any named beneficiary of any pension plan, deferred compensation plan, life insurance policy, bank

account or financial account, annuity, individual retirement account, qualified or unqualified retirement account or death benefit owned by or for the benefit of such principal in the principal's best interest.

Powers of attorney serve a useful function, when used appropriately. The power of attorney may be a wonderful tool at our clients' disposal to make sure their property, financial, and/or legal decisions are made effectively and efficiently by the party(ies) they trust and to whom they have delegated the responsibility for making these important decisions.

Occasionally, you may need the agent to complete an affidavit that the power of attorney being offered to a third-party bank or financial institution is still in effect, or if you are recording a deed executed by an agent under a power of attorney;

STATE OF NEW YORK

COUNTY OF _____

AFFIDAVIT OF FULL FORCE AND EFFECT FOR POWER OF ATTORNEY

I, _____ (name of agent), being duly sworn, deposes and states:

I am the agent for (name of principal). The principal executed the attached power of attorney on (date), naming me as agent.

As agent for the principal and under this power of attorney, I have executed this affidavit on (date). As of this date, I have no knowledge or information that the attached power of attorney has been revoked, altered, modified or terminated in such a way that would alter or terminate my authority to engage in this transaction.

On this date, the principal of this power of attorney is alive, and to the best of my knowledge, I represent he/she has not revoked this power of attorney, and that this power of attorney is in full force and effect.

This affidavit has been made to induce (name of third party or institution) to accept delivery of this power of attorney, as executed by me as the agent under such power of attorney and with the full knowledge that the (third party name) is relying on this affidavit when accepting this power of attorney.

_____

Signature of Agent

NOTARY PUBLIC

c. <u>Granting Authority to the Agent</u>.

1. <u>From an Estate Planning POV</u>.

A qualified Estate Planning attorney knows that part of his or her client's concerns in connection with his or her estate planning is losing control. Many clients – and attorneys – are concerned with the grant of too much authority in the Power of Attorney, and especially in the Statutory Gifts Rider ("SGR"), because they see it as giving away too much control.

2. <u>From an Elder Law POV</u>.

The typical estate plan mostly covers what might happen when the client passes away. How will the client's estate be distributed to his/her loved ones? Who is going to be in control of the process? What issues will the family be left with or have to face? This type of planning may be short-sighted. A full and comprehensive plan should contemplate what might happen to the client in the event of his mental and/or physical disability. The well-reasoned and well-provisioned Power of Attorney will assist the client in this circumstance. If the powers are too narrow and the client suffers a mental incapacity, then the Power of Attorney may become useless.

The qualified Elder Law attorney knows that, sometimes, the path to a successful long-term care plan is through the use of a valid and effective Power of Attorney. Reality dictates that sometimes the client we assist with long-term care does not always have the independent capacity to make decisions for him or herself. As such, having the necessary and appropriate authority within a valid Power of Attorney will assist the agent/family member/decision-maker make the decisions to put the plan together and put it in place.

Leaving off the SGR will potentially subject the client to greater difficulty in the future. If the client eventually needs the SGR, under current law, the client will have to execute a new Power of Attorney to add the SGR. Moreover, if the client needs the SGR in his or her Power of Attorney, but suffers a mental incapacity, it will be too late to fix the Power of Attorney.

d. A Dangerous Financial Weapon.

1. From an Estate Planning POV.

The Power of Attorney can be a dangerous weapon in the hands of an agent who is not trustworthy and does not act in the best interest of the principal.

2. From an Elder Law POV.

If the client is worried about the rogue agent, the fault may lie in the choice of agent or the effective date of the Power of Attorney, more than the powers themselves.

C. Medicaid Irrevocable Income-Only Trusts. The Medicaid Irrevocable Income-Only Trust (or otherwise called the Medicaid Asset Protection Trust or Medicaid Trust) is a legal instrument which allows individuals with assets and income over the institutional care program limits qualify for institutional care services or for home and community based services assistance.

1. Too Much Control.

a. From an Estate Planning POV.

Hypothetically, the Grantor transfers his or her available resources to the Medicaid Trust and retains only the right to income. From an Estate Planning point-of-view, this is a drastic shift of control from the Grantor to the Trustees of the Medicaid Trust.

For many clients, the assets being contributed to the Medicaid Trust were obtained over years of hard work. The accumulation of those assets represents independence versus dependence, control over choice versus desperation, self-effectuation versus resignation. Now, for planning purposes, an Elder Law attorney might suggest contributing those assets to a Medicaid Trust which the client cannot control nor have any right over or entitlement to the principal. The Elder Law attorney would be wrong to not take the aforementioned considerations into account in the attorney's planning recommendations.

b. From an Elder Law POV.

The Medicaid Trust is a precise tool for qualifying an individual for Medicaid benefits. The drafter must be careful not to be liberal or too generous with discretionary provisions in a Medicaid Trust without first and foremost thinking of the Medicaid qualification ramifications. For example, drafting the Medicaid Trust so as to give the Grantor a right to the principal of the Medicaid Trust, even if at the discretion of the Trustee, will expose the principal of the Medicaid Trust as an available resource for Medicaid purposes. The Estate Planning attorney would be wrong to be liberal with the Trustee's discretion over principal distributions to any beneficiary.

2. Funding.

a. From an Estate Planning POV.

For long-term care planning purposes, the Elder Law practitioner will advise creating and funding the Medicaid Trust as soon as possible so as to minimize and, potentially, avoid problems with a potential look-back period. However, clients may not be comfortable with such a permanent loss of control over the principal transferred to the Medicaid Trust. From an Estate Planning point-of-view, it may be better to do long-term care planning when the client needs long-term care.

b. From an Elder Law POV.

All practitioners must avoid not following through with a plan. The Medicaid Trust cannot protect assets that are not owned by it. Moreover, the purpose of the Medicaid Trust is to protect the assets transferred to it and, in essence, "begin" the look-back period. The look-back period may be drastically affected by postponing the funding of the Medicaid Trust.

3. Budget planning.

a. From an Estate Planning POV.

Planning with the Medicaid Trust contemplates the Grantor having to live within a budget of sorts. After all, a fully-funded Medicaid Trust means the Grantor

contributed his/her available resources to the Medicaid Trust and no longer has a right to receive or enjoy the principal thereof. For many Grantors who rely on being able to dip into their savings now and then, this may be problematic. The Elder Law attorney does not always appreciate this nuance in the planning.

b. From an Elder Law POV.

There are three (3) general ways to pay for long-term care: (1) long-term care and other insurance benefits, if the client thought ahead and purchased this type of insurance; (2) the client's own income and/or assets; and (3) to the extent the client does not have insurance and does not want to use his or her income and/or assets, government benefits. Medicaid benefits, for one, are intended only for those who qualify. To qualify for Medicaid benefits, for example, an applicant cannot have more than the threshold amount in available resources. Moreover, to qualify for Medicaid benefits, an applicant who has available resources in excess of the threshold levels, must properly plan with the available resources he or she has. This may require changes in the applicant's budget planning. For many Estate Planning attorneys, a compromise may be to partially fund the Medicaid Trust in the interim and contribute the remaining assets when long-term care is needed. However, this type of planning postpones the full funding of the Medicaid Trust, the eligibility for Medicaid benefits, and the "start" of the look-back period.

D. The Homestead and other Real Property. Generally, a homestead is exempt as long as it is the applicant's primary residence. When the applicant-recipient is absent from his/her homestead, the homestead is evaluated to determine if it is a countable resource. For 2017, the home equity limit for Medicaid purposes is $840,000.00.

1. Medicaid's Right of Recovery.

a. From an Estate Planning POV.

If the primary residence is exempt because its equity value is $840,000.00 or less, then there is nothing more to do. The home can be left to the client's loved ones in his or her Will or through intestacy. Right?

b. From an Elder Law POV.

Yes, but not quite.

Even if the primary residence has an equity value of $840,000.00 or less, when the applicant-recipient is absent from his/her homestead and not reasonably expected to return, with limited exceptions, a lien may be placed on the homestead. So, it is not always sufficient to rely on the home equity exemption. Additional planning may be appropriate to avoid the imposition of a lien or other negative effects.

Additionally, Medicaid has the statutory right after death to recover Medicaid benefits paid to someone over the age of 55, but only from his or her probate or intestate estate. This means that Medicaid's right of recovery is limited to a person's assets that pass under his or her valid Last Will and Testament or by the laws of intestacy, but does not include any property that passes to someone without the court's involvement in a probate or administration proceeding or "by operation of law", such as through a beneficiary designation or other non-probatable form of property ownership. Allowing the applicant-recipient's homestead to pass pursuant to his or her Will, thus subjecting the asset to probate, may expose the homestead to Medicaid's right of recovery against the applicant-recipient's estate. On the other hand, contributing the homestead to a properly drafted Revocable Trust (a/k/a Revocable Living Trust) should (a) avoid probate of the homestead, (b) mirror the dispositive provisions the applicant-recipient would otherwise have in his or her Will, and (c) not affect the applicant-recipient's eligibility for Medicaid benefits.

2. Retaining the Right to Live in the Premises.

As stated above, the homestead is excluded as an available resource when and if its equity value is less than $840,000. However, what happens if the equity value is greater than $840,000? Or, even if the equity is below $840,000, what happens if the applicant-recipient wants to transfer the homestead? In those events, there are a few options when dealing with the homestead. Such as: (a) selling the homestead, (b) deeding/transferring the homestead and retaining a life estate, (b) deeding/transferring the homestead without retaining a life estate, (c) contributing the homestead to a Medicaid Trust (discussed above). However, each of these

situations has its own pitfalls and perils so each has to be reviewed and analyzed for its advantages and relevancy.

If the applicant-recipient sells the homestead, he or she may (a) need a new place to live, (b) have an income tax issue if the homestead is sold at a capital gain in excess of the present capital gain exclusion[2], (c) have net sales proceeds that will disqualify him or her for Medicaid eligibility, subject to subsequent planning with the net sales proceeds and a possible penalty period.

If the applicant-recipient deeds/transfers the homestead and retains a life estate, while the value of the retained life estate will not be an available resource, the gift of the remainder interest will be a disqualifying transfer. Moreover, if the homestead is sold during the applicant-recipient's life, the net sales proceeds allocated to the value of the applicant-recipient's life estate (calculated in accordance with Medicaid's tables) will be deemed an available resource. On the other hand, if the homestead is retained by the applicant-recipient until his/her death, then the homestead will receive a "step-up" in basis allowing the applicant-recipient's loved ones to sell the homestead for potentially no capital gain following the death of the applicant-recipient.

If the applicant-recipient transfers the homestead outright, then the gift of the entire value of the homestead will be a disqualifying transfer and the calculation of the penalty period, if any, will be based on the fair market value of the homestead at the time of the transfer.[3] The donee(s) of the homestead takes the applicant-recipient's basis in the homestead and a subsequent sale of the homestead may result in a capital gain, subject to the donee(s) eligibility for the IRC § 121 capital gain exclusion.

If the applicant-recipient contributes the homestead to a Medicaid Trust (discussed above), then the applicant-recipient still has an issue dealing with the transfer of the homestead being a disqualifying transfer for Medicaid purposes, potentially subject to a penalty

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[2] If a taxpayer has a capital gain from the sale of his/her primary residence, he/she may qualify for an exclusion of up to $250,000 (married couples filing a joint return may qualify for an exclusion of up to $500,000) of that gain from the taxpayer's income. IRC § 121.

[3] Subject to the "caretaker child" exemption to the Medicaid transfer penalty rules.

period. However, because the Medicaid Trust is included in the applicant-recipient's taxable estate upon his/her death (because of his/her retention of the right to income in the Medicaid Trust agreement), then the Medicaid Trust/beneficiary(ies) of the Medicaid Trust will be entitled to a "step-up" in the basis of the homestead for capital gain purposes. Additionally, while the income from the Medicaid Trust will be included in the applicant-recipient's budget for Medicaid purposes, it will not disqualify the applicant-recipient for Medicaid. Moreover, unlike the sale of a homestead subject to the applicant-recipient's life estate, a sale of the homestead will not affect the applicant-recipient's qualification for Medicaid. And, a sale of the homestead in a properly drafted Medicaid Trust should still get the benefit of the applicant-recipient's IRC § 121 capital gain exclusion.

a. <u>From an Estate Planning POV</u>.

If the primary residence is exempt because its equity value is less than $840,000.00, and we do not want to allow the homestead to pass through the client's Will or through intestacy, then we should figure out what transfer makes the most sense. However, clients (and their loved ones) are often worried about whether or not a transfer of the homestead triggers a "due on sale" clause in the mortgage, as well as basis and tax issues, including being able to deduct property taxes and mortgage interest. So, whatever planning option is contemplated, we need to make sure we are not over-complicating the issue and/or the applicant-recipient's ownership of the homestead, nor ruining any future tax ownership or benefit.

b. <u>From an Elder Law POV</u>.

From an Elder Law point-of-view, we need to take into account all of the issues expressed from an Estate Planning point-of-view but also make sure we are maximizing the client's Medicaid eligibility/qualification.

E. <u>Wills and Testamentary Trusts</u>. Wills are by far the most used method of transferring property from one generation to the next. In practice, we see wills from other states, homemade wills and internet wills. Many general practitioners, without the requisite experience,

draft wills without proper execution requirements or requisite legalities, and without the options a knowledgeable draftsperson would include.

1. <u>Minor Child Provisions for Guardian</u>. If your client is a parent to a minor child, you will want to include a paragraph nominating the person or persons to be the guardian of your client's minor child or children. Clients often ask if they have to pick someone from their family. The answer, of course, is no. Often, parents live a great distance from their blood relatives, and if the parent or parents pass away, they may not want their children to suffer the loss of their parent(s) and of their school and social community. The older the children are, the more likely they would prefer to stay in their school and their community. Whoever the parent(s) chooses, they should discuss their choice to ensure the nominated guardian is willing and able to accept this responsibility.

In the event I die before any of my children are of majority age, I appoint _____, as the Guardian of the person and property of my minor children, subject to the trust provisions and the appointed Trustee for my children in this Last Will and Testament contained in ____. If ____ ceases to qualify or fails to act, I appoint _____, as the Guardian of the person and property of my minor children, subject to the trust provisions and the appointed Trustee for my children in this Last Will and Testament contained in ____. I direct that no bond or other security shall be required for my Guardian in any jurisdiction for the faithful performance of the Guardian's duties.

a. <u>From an Estate Planning POV</u>.

Nominating the desired guardian in the client's will is not sufficient, as the will has no force until after it is probated.

b. <u>From an Elder Law POV</u>.

The guardian language in the will should be supplemented by also executing a Standby Guardianship (in substantially the form below) to allow the minor children to reside with the named guardian until the will is probated and the courts can name a permanent guardian:

Designation of Standby Guardian

(Note: As used in this form, the term "parent" shall include a parent, a court-appointed guardian of an infants' person or property, a legal custodian or a primary caretaker, and the term "children" shall include the dependent infant of a parent, court-appointed guardian, legal custodian or primary caretaker).

I, _____, residing at _____, hereby designate _____, residing at _____, as the Standby Guardian of the person and property of my minor daughter, _____.

The Standby Guardian's authority shall take effect (1) if my doctor concludes in writing that I am mentally incapacitated and thus unable to care for my children; (2) if my doctor concludes in writing that I am physically debilitated and thus unable to care for my children and I consent in writing, before two witnesses, to the Standby Guardian's authority taking effect; or (3) upon my death.

I also understand that my Standby Guardian's authority will cease sixty days after commencing unless by such date they petition the court for appointment as guardian.

I understand that I retain full parental, guardianship, custodial or caretaker rights even after the commencement of the Standby Guardian's authority, and may revoke the Standby Guardianship at any time.

I have made this Designation of Standby Guardian on _____ in the presence of these two witnesses.

_____
Parent

_____
Witness:

_____
Witness:

**** If the client is not the only parent of the minor child, there should be references to the other parent of the minor child in both the will paragraph and the standby guardianship form.**

2. Minor child trust provisions. Another important component of drafting documents for clients with minor children is the opportunity to control when the children will receive funds from the estate. One commonly used method is a testamentary minor trust built into the will. There are a few frequently used types of testamentary minor trusts. If property is paid to a minor through a will without instructions in the will, and the amount exceeds $10,000.00, the money should be distributed to the minor's property guardian. The property may also be given to a custodian under the Uniform Gifts to Minors Act under EPTL 7-6.3.

a. From an Estate Planning POV.

Parents planning for the distribution of their estate to their children often agree to drafting mandatory age distributions. For example, the testamentary minor trust may mandate the trustee pay 1/3 of the trust at age 25, 1/3 at 30, and 1/3 at 35.

b. From an Elder Law POV.

Mandatory age distributions are fraught with uncertainty. What if the child, at 25, has an addiction or has serious financial problems? They may still be in school and need to qualify for financial aid, but the mandatory distribution will result in the elimination of any future aid.

Rather, if the testator trusts the trustee to distribute the trust pursuant to the trustee's discretion, these issues could be avoided. The trustee could still contribute toward other expenses while the child is continuing their education. If the trustee distributes as she or he deems appropriate, they may wait until there is an event or need for a wise principal distribution, such as attending graduate school, purchasing a residence or investing in a business.

In the same will, there should be a trustee named for the testamentary minor trust who has a cooperative and positive relationship with the person named as guardian so that the two fiduciaries can interact. Often, these may be the same individuals.

3. <u>Testamentary Special Power of Appointment</u>. Often in trust documents, practitioners grant the Grantor a testamentary power of appointment to change the beneficiaries of a trust. The testamentary power of appointment is included in the trust language, and often directs the trustees to wait for the Grantor's will to be offered for probate. The practitioner simultaneously drafts a will for the same client, stating the client executed a trust document and thereby exercises his or her power of appointment over the trust property (or some portion thereof).

a. <u>From an Estate Planning POV</u>.

From an estate planning point-of-view, this may be unnecessary or, at least, unclear why a Grantor of a trust may need to appoint such property in his or her will.

b. <u>From an Elder Law POV</u>.

EPTL 7-1.9 effectively states that the grantor of an irrevocable trust may amend (or revoke) the trust upon the consent of "all persons beneficially interested".[4] The courts have said that minor beneficiaries cannot give legal consent to an amendment/revocation (nor can their guardians).[5] However, the Court of Appeals has said that a beneficiary's consent is unnecessary if the amendment is clearly favorable to him or her.[6] However, lower courts have subsequently decided that the Court of Appeal's decision will prevail only when the amendment is an obvious benefit to the minor, and conversely, if the amendment does not benefit the minor, the courts will not allow it.

If a trust includes minor beneficiaries, then it cannot be revoked under EPTL 7-1.9. So, what are the client's options? The client could leave out minor

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[4] EPTL §7-1.9.

[5] See **<u>Whittemore v. Equitable Trust Co.</u>**, 250 N.Y. 298 (1929) ("All the adult parties to the deed of trust have consented to the revocation; the children of the settlors, however, being minors, have not and could not consent."). See also **<u>Matter of Dodge</u>**, 25 N.Y.2d 273 (1969).

[6] See **<u>In re Cord</u>**, 58 N.Y.2d 539 (1983) ("[T]hough an irrevocable trust ordinarily cannot be modified except by consent of all those who may be adversely affected thereby, that did not prevent the settlor-testatrix here from undertaking to pay trust tax obligations out of a different fund. The product of this action could only have added to and not cut down on the benefits available to the beneficiaries.").

beneficiaries, thus preserving the option to revoke the trust under EPTL 7-1.9. However, this would not be appropriate for the client who wants to include his or her minor loved ones as beneficiaries of the trust.

To resolve this conundrum, the trust language could give the Grantor the power to appoint the trust property in the Grantor's will. The will could then exercise this power of appointment to mirror the Grantor's dispositive plan, including the minor beneficiaries (or trusts for their benefit). Here is a sample paragraph from a MIIT:

The Grantor has the limited power to appoint the remainder of this trust to the Grantor's descendants. This power shall be exercisable by the Grantor's Will and the power granted must be specifically referred to in the Grantor's Will in order to be exercised. This appointment may be outright or in further trust, and need not be equal or proportionate. If the Trustees have not received actual notice of the existence of the Grantor's Will, within ninety (90) days of the Grantor's death, and if no Will has been offered for probate in the appropriate Court of the county and state of the Grantor's residence at death, then this trust may be finally distributed as if the Grantor had not exercised the power of appointment granted in this trust, and the Trustees will be released from any liability for distributing and terminating the trust. Such powers may not be exercised in favor of the Grantor, her estate, her creditors, or the creditors of her estate.

In the will of the same Grantor, language to exercise the power of appointment could read as follows:

By Article__, Section ___ of the CLIENT IRREVOCABLE TRUST, executed contemporaneously with the execution of this Will, I retained a limited power of appointment and I direct that the property subject to such power shall be distributed to my issue, per stirpes.

Additionally, in the representation of a client who wishes to execute a will for their disposition of their property, it is important to discuss how their estate plan should be amended should they ever require Medicaid assistance. If and when the client requires Medicaid, most attorneys experienced in Medicaid planning would advise the client, if they are competent, or the client's representative, to avoid using the will for the distribution of the client's property, as the property passed through the will would be subject to estate recovery in New York. If such a client, or his or her representative, was advised to modify the titling of the remaining assets to assure they were jointly held or passed directly to a beneficiary, and not to the estate, the beneficiaries would receive the asset without the reach of estate recovery by Medicaid. It is important for practitioners to revisit the estate plan of any client who has been accepted by Medicaid not only to assure their estate plan no longer contains assets which would pass through a will, but that the client is no longer a beneficiary of assets passing to them from family members, including insurance policies, annuities or other assets which would pass to the Medicaid recipient by operation of law and trigger a penalty period for the client.

4. <u>Supplemental Needs Trusts</u>. A Supplemental Needs Trust is a trust established for the benefit of a person with a severe and chronic or persistent disability and which *supplements*, but does not *supplant*, impair, or diminish the government benefits or assistance for which the beneficiary may otherwise be eligible or which the beneficiary may be receiving. Such benefits may include Supplemental Security Income (SSI), Medicaid, vocational rehabilitation, subsidized housing, and other benefits based upon need.

These benefits often consider the resources and income of an individual for purposes of determining eligibility for assistance and the level of such assistance. With a Supplemental Needs Trust, however, the disabled person or another person, such as a family member, may establish a trust for a disabled individual without jeopardizing the beneficiary's eligibility for Medicaid and other government benefits.

a. <u>From an Estate Planning POV</u>.

A Revocable Living Trust is a trust created by the Grantor during his or her lifetime which, by its terms, gives the Grantor the right to revoke, amend, and/or modify the trust agreement. The Revocable Living Trust is intended to be an alternative to a Last Will and Testament for estate planning purposes. A Revocable Living Trust is intended to offer better protection in three general situations: (i) as a vehicle for asset management while a person is alive and well. If all of the client's assets are owned by his/her Revocable Living Trust and he/she is the Trustee, then the client will have centralized management of his/her assets. (ii) in the event the client becomes mentally disabled. Because the Revocable Living Trust provides centralized management over the assets owned by the Revocable Living Trust, beginning on the date of first funding, in the event the Grantor (or one of the Grantors) suffers a mental disability, then control over the Trust passes from the Grantor to the "Disability Trustee". If the Grantor regains mental ability, then control reverts to the Grantor. The Revocable Living Trust also contains provisions for how assets are to be used for the Grantor's benefit during any period of mental disability. And, (iii) a Revocable Living Trust is intended to avoid probate. A Will guarantees probate -- the process by which the Court is asked to validate the form of the Will, approve its provisions, and control the distributions pursuant to the terms.

a. <u>From an Estate Planning POV</u>.

If appropriate, a will should include language to protect a beneficiary spouse's public benefits should that spouse become disabled. If such language is added in a will, in order for the testamentary trust to qualify as a statutory Supplemental Needs Trust, it must meet the requirements of EPTL 7-1.12.

For some estate planning clients, the Revocable Living Trust is preferred because of its non-probate nature. However, sometimes the same client(s) want to create a Supplemental Needs Trust for his or her spouse. The inexperienced Estate Planning attorney may think nothing of creating a Supplemental Needs Trust for the benefit of the client's spouse in the client's Revocable Living Trust.

b. <u>From an Elder Law POV</u>.

A Supplemental Needs Trust cannot be created in an inter-vivos trust, such as a Revocable Living Trust, for the benefit of the Grantor's spouse.[7]

F. **<u>Designations of Guardian</u>**. Mental Hygiene Law ("MHL") Section 81.17 provides, in pertinent part, "in a written instrument duly executed, acknowledged, and filed in the proceeding before the appointment of a guardian, the person alleged to be incapacitated may nominate a guardian.".

A Designation of Guardian is the client's written instrument nominating the individual or individuals whom the client wants as his/her guardian of the person and/or property, in the event such an appointment is necessary. Obviously, the appointment of such guardian(s) still requires an application for guardianship before the courts, however this allows the client to set forth his/her wishes at a time when he/she presumably has capacity to make such an appointment.

1. **<u>From an Estate Planning POV</u>.**

A typical estate plan will include a power of attorney, a health care proxy, and even a living will. A guardianship should not be necessary if the client has a properly drafted and executed power of attorney, health care proxy, and living will.

2. **<u>From an Elder Law POV</u>.**

Likely scenarios where it might be helpful to have the client sign a Designation of Guardian even if he/she has a power of attorney, health care proxy, or living will: hospital/nursing home is not getting any assistance from the health care decision-maker and/or the financial decision-maker and seeks the appointment of a guardian to handle medical and/or financial issues; nursing home that has not been paid and is unaware of the resident's financial situation may seek the appointment of a guardian to help with bill payment or to get Medicaid benefits; child or other loved one disagrees with how the health care agent or financial agent is managing their loved one's affairs so brings a guardianship proceeding seeking the revocation of the advance directives and the appointment of a guardian; the issues facing the decision-maker are more complicate and more intricate than can be decided under the client's existing

[7] EPTL 7-1.12(a)(5)(iv).

documents; for whatever reason, the client's existing documents are insufficient (e.g., the power of attorney does not include a Statutory Gifts Rider, or fails to include authority to create trusts, or the gift-giving authority is limited to annual exclusion gifts). In each of these instances, even though none were contemplated when the client executed his/her power of attorney, health care proxy, and/or living will, it would be helpful if the client made known his/her wishes for who should be appointed as his/her guardian.

The Revised Aspirational Ethical Standards in Song and Show

PRESENTED BY:
Roberta K. Flowers, Esq.

Aspirational Standards for the Practice of Elder Law and Special Needs Law with Commentaries

Second Edition, April 24, 2017

The Commentaries accompanying each Aspirational Standard explain and illustrate the meaning and purpose of the Standard. They are intended as guides to interpretation and are not part of the Standards themselves.

Developed by the Professionalism and Ethics Committee of the National Academy of Elder Law Attorneys

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Contents

PREAMBLE

The National Academy of Elder Law Attorneys (NAELA) was founded in 1987 to support attorneys in meeting the complex legal needs of elderly individuals and individuals with disabilities. These Aspirational Standards for the Practice of Elder Law and Special Needs Law are core to NAELA's mission. NAELA requires all members to support these Standards. This condition of membership distinguishes NAELA from all other legal associations.

Given the dynamic and evolving nature of elder law and special needs law, attorneys should and often must represent their clients "holistically," adapting and applying information and insight obtained from a wide range of legal and social disciplines. When assisting clients with planning or the implementation of plans, elder law and special needs law attorneys often will represent clients who have diminished or lack of capacity. Family members and other persons with fiduciary responsibilities also may be involved. The client-attorney relationship in elder law and special needs law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, "who is the client?" present issues not regularly faced by attorneys in other fields. These Standards are designed to assist attorneys to provide high quality counsel, advocacy, and guidance to clients in this unique and specialized area.

These Aspirational Standards:

- Assist attorneys to navigate the many difficult ethical issues that often arise when representing elderly individuals and individuals with disabilities;
- Raise the level of professionalism in the practice of elder law and special needs law; and
- Assist attorneys to effectively meet the needs of their clients.

This second edition of the Aspirational Standards is the product of three years of study and deliberation by NAELA's Professionalism and Ethics Committee. While each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses, the Aspirational Standards build upon and supplement those rules.

These Standards do not define or establish a legal or community standard nor are they intended to be used to support a cause of action, create a presumption of a breach of a legal duty, or form a basis for civil liability. Those matters are governed by the statutes and rules of professional responsibility of the state in which the attorney practices.

Following these Aspirational Standards helps attorneys to make the lives of clients better. As Clifton Kruse, Past NAELA President and member of the Professionalism and Ethics Committee at the time the Committee drafted the first edition of the Standards, so aptly said:

…clients are hesitant to share without invitation. There is a threshold that we must assure them that we want them to cross. And we do this with questions. And we do it as lawyers. We are the elders' lifeline…. Our licenses make this possible. They give us status and credibility, and after meeting us- hopefully, trust. The legal answers are comparatively easy- the job we are called in to do is done- but along the way, the more important, the more valuable service occurs as well. We listen. We invite a monologue. We establish this by our demeanor and by our questions that invite unloading- and in the process we extend the joy that elders' memories bring. And on those days, we earn the accolade- professional- one who serves others. That is our privileged role as lawyers; we can make others' lives, if even for a few moments, better than they were before. (For further reading on the legacy of Clifton Kruse NAELA News December 2009/January 2010)

A. HOLISTIC APPROACH

The Elder Law and Special Needs Law Attorney:

1. In applying a holistic approach to legal problems, the elder law and special needs planning attorney works to consider the larger context, both other legal consequences, as well as the extra-legal context in which the problems exist and must be solved.

Comment:

The elder law and special needs law practice is unique. It often involves individuals with a health or mental condition requiring special care, attention and protection because the client may have a memory, mobility or other disabling impairment, chronic condition or other illness. While elder law and special needs law include traditional estate planning, many times the focus of an elder law or special needs representation is the "life needs" of the person whose interests are being promoted in the legal representation. The principal "life needs" may include, but are not limited to, the following present or future needs:

- Access to high quality healthcare
- Access to high quality long-term care services and supports in the least restrictive housing setting that is safe for the client
- Advocacy to promote independence and autonomy
- Advocacy for accessibility to accommodate disabilities
- Advocacy in promoting freedom from discrimination due to age or disability
- Access to education and training for those with disabilities
- Access to public benefits
- Access to insurance solutions for health and long-term care
- Planning to promote family harmony and minimize conflicts
- Protection from exploitation, abuse and neglect
- Planning for end-of-life care and life support decision-making
- Tax planning

The holistic approach requires the attorney, when appropriate, to address these and other issues in the legal representation. An attorney who practices holistically however still follows the client's wishes and discusses with the client the multitude of ways to accomplish the client's wishes. Additionally, the attorney recognizes that the client may not be knowledgeable in the variety of issues the client is facing or will be facing as they age. Therefore, the attorney is prepared to address with the client issues the client may not even be aware of that are related to the representation.

Example: An attorney is engaged to prepare powers of attorney and an estate plan for a home-bound client who has suffered a significant decline in vision and lost the ability to walk. In addition to preparing the legal documents requested by the client, the attorney should offer advice on the issues of how to arrange for home care services, assisted living or nursing home and pay for such services

and living arrangements, and what measures the client may wish to consider to prevent financial exploitation

2. May consider using non-legal services to accomplish the goals of the representation where appropriate and the client consents.

Comment:

Since the holistic approach may go beyond traditional legal services, the guidance of non-legal professionals may be useful in accomplishing the holistic approach. Examples of non-legal services (other common names for non-legal services are "ancillary services" or "law-related services" (as described in MRPC 5.7) may include advocacy by a healthcare professional, capacity screening by a psychologist or neurologist, residential placement by a social worker, medication management by a nurse, tax preparation and asset organization by an accounting professional, investment advice by a financial planner, and real property appraisal services by a licensed appraiser.

A lawyer, consistent with the state ethics rules, may provide non-legal services through (1) an employee of the attorney's law firm; (2) an independent contractor; (3) a separate entity not affiliated with the lawyer; or (4) a separate entity owned by the lawyer or law firm. Regardless of how the attorney provides these non-legal services, the attorney should exercise caution to comply with the attorney's duties of confidentiality, loyalty, independent judgment, and state bar rules of professional responsibility (see Section J Non-Legal Services)

3. Encourages the use of family members and other third parties to support the client in the legal representation where appropriate and the client consents.

Comment:

In the elder law and special needs law practice, the assistance of non-client family members and other third parties is often appropriate and useful, especially when the capacity of the person being served in the legal representation is diminished. The attorney needs to confirm that (1) non-clients who are involved in the legal representation understand who the attorney's client is and are not unduly influencing the client and (2) the client has authorized the involvement of the non-client in the process, preferably in writing. (See Standard #3 Section B Client Identification, and Section E Confidentiality Standard #6 Section G Client Capacity).

4. Explains to the client seeking estate planning services how conflicts among family members may develop and, if desired by the client, recommends harmony-enhancing measures consistent

with the client's estate planning goals to minimize these conflicts.

Comment:

Family harmony is often an important goal for clients in implementing an estate plan, and should not be neglected in the estate planning process. The attorney should assess the importance of family harmony to the client, dynamics of the client's family and the risk of disharmony when the client will experience a decline in capacity and later death.

Subsequent family conflicts may frustrate the client's estate planning goals, significantly increase legal fees and other costs of administering an estate or trust, and, if the conflicts occur during the client's lifetime, will cause the client unnecessary stress. For example, an attorney should point out to the client the risk of disharmony in the client's selection of healthcare and financial fiduciaries. The attorney should suggest proactive planning measures to minimize the risk of disharmony, such as incorporating conflict resolution provisions in advance directives, wills, trusts which are consistent with other important client goals. Additionally, the attorney should document the client's specific goal of family harmony.

5. When conflict between family members or other interested parties arise, the attorney evaluates if non-judicial conflict resolution is appropriate, and encourages non-court resolution where appropriate.

Comment:

Conflicts among a client's family members or other interested parties may occur even if preventative measures are taken. For example, a client may have more than one family member or other trusted person to choose from when selecting a healthcare or financial fiduciary. The client's selection of one person as a fiduciary may create resentment among the other persons not selected. This resentment may later fuel or create conflicts, and can potentially lead to a probate guardianship proceeding to remove the appointed fiduciary, or, after the client's death, to a court challenge by the client's family members out-of-power to the client's appointed trustee or executor. In order to help preserve the client's stated goal of family harmony, the attorney may recommend that the disputing parties resolve their conflicts by non-court mediation or other collaborative settlement process, if available and practical (see the ABA Standing Committee on Ethics and Professional Responsibility in ABA Formal Opinion 07-447 (2007).

In recommending conflict resolution solutions, the attorney should be careful not to violate ethical obligations to the client or former client if he or she has died,

such as whether the proposed action creates a conflict of interest, whether the attorney has authorization from the client to take the proposed action and whether such an action results in a disclosure of the client's confidential information. When recommending non-court mediation or collaborative settlement, it is helpful to have the client's instructions permitting the attorney's role in making such recommendations to non-clients (See Standard #3 Section D Conflicts of Interest)

6. Takes actions to help prevent current or future financial exploitation, abuse or neglect of the client.

Comment:

The elder law and special needs law attorney is often confronted with issues of financial exploitation, physical and emotional abuse and neglect when the person whose interests are served in the legal representation has diminished capacity or has a disability. Attorneys should make an effort to be educated and trained in detecting and preventing exploitation, abuse and neglect. Attorneys should recommend to the client the use of planning measures into the representation that will minimize the risk of exploitation, abuse and neglect, including but not limited to the education of the client and family members on the risks. Attorneys might consider encouraging clients to: 1) sign a written pre-consent form authorizing the attorney to take protective action if the attorney discovers exploitation, abuse or neglect; 2) encourage the client to place the client's assets into a living trust; 3) give a trustworthy family member access to the client's bank account in order for such trusted party to be able to act as a protector by checking on expenditures (see sample authorized disclosure form below) (also see Standard #4-#7 Section G Capacity) which discusses the obligations of an attorney to take protective action when a client has diminished capacity.)

Clients Authorized Disclosures12.6.13.pd

Resource 1Client's Authorized Disclosures Sample Form

B. CLIENT IDENTIFICATION

The Elder Law and Special Needs Law Attorney:

1. Identifies the client and the individuals who will assist the client at the earliest stage of the representation, obtains the client's agreement to these identifications, and communicates this information to the persons involved.

Comment:

It is to the client that attorneys owe the professional duties of competence, communication, diligence, loyalty, and confidentiality. In order to determine to whom the attorney owes these duties, the first step is to answer the question: "Who is the client?"

In elder law and special needs law, identifying the client is challenging because the individual whose welfare and interests are to be protected in the proposed representation may not be present or may be accompanied by family members, appointed fiduciaries, or other trusted third parties. Usually, the client is the individual whose property and interests are to be protected. Alternatively, a family member, fiduciary, or other person seeking to protect or assist another person can be the client.

In a traditional client-attorney relationship, a prospective client who has capacity engages the attorney after an initial private consultation, and thus identifying the client is straightforward.

This Standard provides guidance on the foundational issue of client identification. In following this guidance, different attorneys with the same set of facts may identify different individuals as the client, and each result is equally appropriate. One thing is certain: regardless of who the client is, the attorney should be vigilant in protecting the individual.

Throughout these Standards, the term "protected individual" refers to the individual whose personal and property interests are the subject of the representation.

The attorney should establish methods for when and how to determine the identity of the client. Intake forms can help determine the identity of the client. The form may ask: "Who is seeking legal advice and services?" or "For whom or for whose interests are legal services requested?" When several people are present at the initial client meeting, the attorney may ask: "Who is my client?" Where more than one person at the meeting believes the attorney to be representing him or her, the attorney should take additional steps to clarify the identity of the client. The identity of the client should be resolved at the earliest stage so that the client, the attorney, and other involved persons understand:

- Whose interests are to be protected in the legal planning and representation process;
- To whom the attorney owes the professional duties of competence, communication, diligence, loyalty, and confidentiality;
- The steps that may or may not be taken after the initial consultation if the client or protected individual is not present at that meeting; and
- That the attorney will arrange at the earliest practicable time to communicate privately with the person who is expected to be the client.

The attorney should ensure that all involved persons understand which individual is the client and that the others are not clients. The attorney also should determine whether the client authorizes the attorney to communicate with another person, such as a fiduciary or family member, and obtain the client's written consent to such authorized involvement.

2. Recognizes the unique challenges of identifying the client when a fiduciary is acting on behalf of a protected individual

Comment:

In identifying the client, when a fiduciary will actively represent the protected individual, the attorney will face these and other questions such as:

May the protected individual be the client, even though they may lack the capacity to act as a traditional client and a fiduciary actively represents the principal?

May the fiduciary be the client when the protected individual is not able to act as a traditional client?

May both the protected individual and the fiduciary be joint clients?

When an individual has appointed an agent through a power of attorney to act as his or her fiduciary, the attorney may identify the protected person, even though incapacitated, as the client even though the fiduciary retains the attorney. Alternatively, the attorney may treat the fiduciary as the client. Some state statutes, cases and bar opinions state that an attorney hired by a fiduciary represents and owes a duty only to the fiduciary. When a fiduciary is involved, client identification should be clarified in the engagement agreement between the attorney and party with the authority to enter into the engagement agreement. (see Section C-Engagement Agreements and Document Drafting).

The attorney should specify this election in the engagement agreement.

IMPORTANT NOTE: See, e.g., New Hampshire Rev. Stat. Ann. §§ 564-B:2-205 (trusts) and 556:31 (wills) (attorney-client privilege applies to communications between the fiduciary and the lawyer for the fiduciary); Ohio Rev. Code §

5815.16 (2007); Nev. Rev. Stat. Ann. § 162.310 (2015) ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal." "Principal" is "any person to whom a fiduciary as such owes an obligation."); ABA Formal Opinion 94-380; Goldberg v. Frey, 217 Cal. App. 3d 1258 (Cal. Ct. App. 1990), Linth v. Gay, 190 Wn. App. 331, 360 P.3d 844 (2015) (citing Trask v. Butler, 872 P.2d 1080 (1994)): "[A] duty is not owed from an attorney hired by the personal representative of an estate to the estate or the estate beneficiaries."); Roberts v. Feary, 986 P.2d 690 (Ore. 1999).

Example 1: Prospective clients, husband 88 and wife 87 years of age, have been married for 60 years. The husband is incapacitated, needs long term care, and has appointed his wife as agent under his POA. The wife meets with the attorney for Medicaid advice. It may be appropriate for the attorney to represent only the wife. Alternatively, the attorney may represent both spouses as joint clients, if the attorney determines that they share the same goals and have no apparent conflict of interest between them. A conflict of interest may arise when there are children from prior marriages, the spouses have kept their assets separate, or their estate planning goals differ significantly. If a conflict exists, it may be appropriate to represent only one party and the attorney may suggest that the other party obtain separate legal counsel.

Example 2: Prospective clients are a widow, 90 years of age, and her son who has been appointed as agent under her POA. The mother has lost capacity and the son would like to admit her to a nursing home. The son meets with the attorney for Medicaid advice. The attorney learns that when she had capacity, the mother expressed a preference to stay at home if she needed long-term care. Here, the son's preference to admit his mother to a nursing home conflicts with the mother's stated preference to stay at home. It may be appropriate for the attorney to represent either the son or the mother separately but not to represent the son and the mother jointly due to the conflict of interest between them on the issue of placement.

3. Meets with the prospective client in private at the earliest practicable time to help the attorney identify the client and assess the prospective client's capacity and wishes as well as the presence of any undue influence.

Comment:

A private meeting with the prospective client helps the attorney identify the client and assess the prospective client's capacity and understand his or her wishes, unencumbered and uninfluenced by others. This Standard addresses three common situations confronted by the attorney: a) when the prospective client does not have an involved fiduciary, b) when an agent under a power of attorney (POA) assists a principal and c) when a guardian or conservator assists a ward.

When the prospective client does not have an involved fiduciary. If the prospective client does not have a fiduciary actively assisting the prospective

client, such as an agent under POA or a guardian, the attorney should endeavor to meet with the prospective client privately before commencing the representation. The attorney should carefully explain to the prospective client and other parties involved, including family, a future agent under POA, and other parties why a private meeting is important. (See *Understanding the Four C's of Elder Law Ethics)*

If the attorney requests a private meeting with the prospective client and the prospective client expresses reservations about meeting privately, the attorney should reemphasize how important it is for the attorney to understand the prospective client's wishes in a confidential setting. The attorney should clarify who the client is and that other persons who assist the client are not clients. If the prospective client turns down the request to meet privately and insists that one or more persons be present, the attorney should honor the prospective client's decision unless the attorney determines that doing so could jeopardize the attorney's ability to protect the prospective client's interests. The attorney should consider and explain to the prospective client the potential effect that the presence of other non-clients may have on waiving the attorney-client evidentiary privilege.

When an agent under POA assists the principal. When an agent under POA actively assists the principal, the attorney may be asked to represent the principal, the principal and the agent jointly, or the agent only in the agent's role as a fiduciary. Depending on the circumstances in the case, the attorney may determine whether a private meeting with the principal is warranted. If the agent opposes such a private meeting, the attorney should consider declining the representation or withdrawing from the representation. When meeting with the principal the attorney should clarify who the client is.

When a guardian or conservator assists the ward. If the attorney is asked to represent the guardian or conservator in a court-supervised guardianship or conservatorship for a ward, the attorney will not usually privately meet with the ward.

Assessing the Presence of Undue Influence. As part of the client identification process, the attorney should carefully assess the level of influence other involved persons have on a prospective client and whether such influence may be considered undue. The attorney should document any indication of discomfort on the part of the prospective client, the content and tenor of comments, how supportive or dominating the family members or other persons appear to be, and how consistent or inconsistent the prospective client's stated objectives are with his or her estate planning documents or other expressions of intent. Based on the attorney's assessment of these factors, the attorney may decide to limit or decline representation.

For example, the attorney's vigilance should be heightened if a prospective client states, "I want to do whatever my son wants." The attorney should be especially cautious when an asset transfer is proposed and even more cautious when the recipient of the transfer is the person requesting the transfer, or when the

transfer benefits one family member over others. If the attorney determines that undue influence is present, the attorney should decline representation unless the attorney determines that the prospective client will be able to, perhaps with assistance from the attorney, overcome the impact of such undue influence. Under some circumstance the attorney may decide to take further protective action, and in some states, the attorney may be required to do so.

C. ENGAGEMENT AGREEMENTS AND DOCUMENT DRAFTING

The Elder Law and Special Needs Law Attorney:

1. Utilizes an engagement agreement, letter, or other writing(s) that will:

- **a) Identify the client(s);**
- **b) Describe the scope and objectives of the representation;**
- **c) Disclose potential material conflicts between the attorney and client;**
- **d) Explain the lawyer's obligation of confidentiality;**
- **e) Confirm, when there are joint clients, that the lawyer will share information and confidences among them and may withdraw if one client requests that the attorney not disclose a secret to the other client or if the clients cannot agree how to proceed;**
- **f) Disclose potential material conflicts among joint clients;**
- **g) Address (and possibly waive) non-material conflicts between joint clients;**
- **h) Confirm, when representing a fiduciary, the fiduciary's obligations to the protected individual, clarify whether the attorney may speak directly to the protected individual, and state that the attorney may withdraw if the fiduciary violates a fiduciary or other duty to the protected individual and does not timely take corrective action;**
- **i) Set out fee arrangements (hourly, fixed fee, or contingent); and**
- **j) Explain when and how the attorney-client relationship may end.**

The attorney should inform their clients about confidentiality and other components of the engagement. A clear written engagement agreement is the best way to communicate these matters to the client and others involved. It is imperative that the client and any involved others understand this agreement.

When an attorney represents both spouses or other joint clients, a joint representation letter or agreement should be utilized. This is especially important if the clients have blended families. Such agreements should provide for the waiver of confidences between the attorney and each jointly represented client, clarify that all information is available to all joint clients, and address actions the attorney should take if a material conflict arises between joint clients.

2. Drafts documents reflecting the client's intentions and informed choices that:

a) A client-attorney relationship already has been established (except in certain exigent circumstances described below in Standard #4(a);
b) The client has sufficient capacity to sign the documents;
c) The documents reflect the client's intentions and informed choices as opposed to the choices of others; and
d) If the client is a fiduciary, the fiduciary appears to have authority and that the proposed documents either reflect the choices of the protected individual if known or, if not known, are in the protected individual's best interests."

3. Recognizes the unique challenges in drafting documents at the request of a fiduciary.

Comment:

A fiduciary, such as the agent under a power of attorney or a guardian/conservator, may request the attorney to draft documents to be signed by the fiduciary on behalf of the protected individual or to assist the fiduciary or others, under carefully limited circumstances, with the transfer of the protected individual's assets. Before acting on the fiduciary's request, the attorney should:

(i) Confirm that the fiduciary has the authority to act under a valid durable power of attorney, court-ordered letters of authority, or state law.
(ii) Confirm that the proposed action is consistent with the protected individual's past estate planning documents or, if there are none, then with the individual's known goals, wishes, and best interests.
(iii) Consider meeting privately with the protected individual to ensure that the individual desires the proposed action, especially if the proposed action personally benefits the fiduciary.
(iv) Refuse to act on the fiduciary's request, if the proposed action represents a change in the individual's existing documents that is inconsistent with the individual's best interests

Example. A protected individual who lacks capacity has an agent under a durable power of attorney and a will. The agent requests the attorney to draft a revocable trust to avoid probate. The proposed trust names the same beneficiaries as the will. The attorney can draft the trust.

4. Exercises caution when drafting documents a) in exigent circumstances, b) at the request of a third party client, c) to be signed by non-clients, and d) when drafting a special needs trust.

Comment:

The attorney will draft documents differently depending on the identity of the client and the circumstances, including challenging situations such as the following:

a) Drafting documents in exigent circumstances for a prospective client before the client-attorney relationship is established.

The attorney usually should not draft documents before the client-attorney relationship is established. However, in certain limited exigent circumstances, it may be appropriate to prepare documents prior to the client-attorney relationship being established. An example of such exigent circumstances is when a client who has a terminal illness and is homebound or hospitalized needs documents. In such a case, it may be appropriate for the attorney to bring certain documents, such as medical directives and powers of attorney, to the first meeting with the terminally ill prospective client.

When drafting documents before establishing a client-attorney relationship, the attorney should consider the following:

(i) Whether the potential client has sufficient capacity to understand and execute the documents;
(ii) Whether the potential client is terminally ill, at risk of an imminent decline in health, or in potential need of protective action due to diminished capacity;
(iii) Whether the potential client is a possible victim of financial or physical abuse;
(iv) Whether the potential client is homebound or institutionalized in a hospital or nursing home;
(v) Whether there are family conflicts that may require urgency;
(vi) Whether the document is a medical directive, living will, or power of attorney, which requires less explanation than a will or living trust; and
(vii) Whether the attorney has the ability to make more than one visit within a short time period.

b) Drafting documents for a new client at the request of an existing or former client related to the new client.

The attorney may be asked by an existing or former client to draft documents for a family member, a new client. Because of the potential for a conflict of interest, the attorney should proceed with caution. The attorney should meet privately with the new client, assess capacity, establish a client-attorney relationship with the new client, confirm that there is no material conflict between the two clients and inform the referring client that the attorney's relationship with the new client is a separate representation which excludes the referring family member. The attorney should consider obtaining a waiver of any non-material conflict between the two clients before proceeding with document drafting for the new client.

c) Drafting a special needs trust for a person with a disability.

In drafting a special needs trust for a person with a disability, that person may or may not have the capacity to engage the attorney and sign the trust agreement. If the person with a disability lacks capacity to take these actions, the attorney should only draft such a trust at the request of a fiduciary who has the authority to engage the attorney. In drafting such trusts, the attorney should ensure that anyone involved with the special needs trust understands whom the attorney represents.

d) Drafting documents to be signed by non-clients.

In elder law and special needs law, it sometimes is appropriate to draft documents to be signed by a family member of the client or

other third-party in order to further the legal representation. An example is an agreement to be signed by the client's agent under POA in which the agent agrees not to act against the client's best interest. Another example is an asset protection trust to be signed by the client's child as trustee. When drafting such documents, the attorney should resolve whether the person being asked to sign the document is the attorney's client and, if not, advise that person to seek independent legal counsel before signing the document.

5. Ensure(s) that documents are executed properly.

Comment:

The attorney is responsible for ensuring that documents are properly executed. The attorney or trained staff should personally oversee and supervise the execution of documents. Only if it is not feasible for the attorney or a staff member to personally oversee and supervise the execution of the documents, should the attorney furnish the client with detailed explicit instructions to ensure that documents are properly executed. The attorney should confirm in the attorney's file the proper execution of the documents and the capacity of the person signing the documents and should note the contact information for the persons who witnessed or notarized the signing.

D. CONFLICTS OF INTEREST

The Elder Law and Special Needs Law Attorney:

1. In the initial meeting when multiple prospective clients are present, ensures that the prospective clients understand whether the representation will be *individual, concurrent or joint*.

Comment:

Attorneys are frequently approached by families seeking counsel or representation on behalf of one or more family members. As used in these Standards, an individual representation is one in which the attorney represents one person. When more than one person is represented, the representation is either concurrent or joint. A concurrent representation means representing two or more persons in related matters where confidences are not shared whereas in a joint representation of two or more persons confidences among the parties are fully shared.

While an individual representation of one person is preferred, a joint representation may be appropriate when there is no material conflict of interest between the parties, they have shared goals and a common interest, and joint representation will further family harmony, economic efficiency, consistency of action and serve the best interest of the client(s). Concurrent representation should only be undertaken with great care as the disclosure by one client of confidences may interfere with the attorney's duties of loyalty and impartiality towards the other client.

This Standard addresses a common situation when prospective clients request the attorney to represent multiple family members in either related or distinct matters. Because these situations may easily lead to misunderstandings among family members, the attorney should ensure that prospective clients are educated about the differences among individual, concurrent, and joint representation.

Example 1: Husband and Wife have been married for twenty years but they each have two children from prior marriages. All their assets are jointly owned, they have good relations with all four children and want each of their four children to share equally in the estate plan. Since Husband and Wife have no apparent conflict goals, it may be appropriate for them to select an attorney to represent them in a joint representation. The attorney should prepare a detailed joint representation agreement that provides for full disclosure of communicated information and that the attorney may be required to withdraw if a conflict between Husband and Wife develops (See Representing Both Spouses: The New Section Recommendations, 7 Probate & Property 26 (July/August 1993) by Malcolm A. Moore & Anne K. Hilker)

Example 2: An attorney is asked by Husband and Wife to prepare their mirror-image estate plans and simultaneously asked by their two adult children (who are the beneficiaries of their estates) to prepare their respective estate

plans. The attorney must undertake the conflict-of-interest analysis that is required by his or her state conflicts rules. Assuming multiple-representation is permissible, different arrangements of joint, concurrent or individual representation may be appropriate with the client's consent. For example, one arrangement may be that the attorney represents Husband and Wife jointly and, additionally, represents each of the children concurrently. Another may be that all four are represented jointly, as might be appropriate if the estate plan involved a closely held family business in which all four were principals. The attorney should take reasonable steps to ensure that all the clients understand how different types of representation impose different duties on the attorney with different consequences for the clients and confirm this understanding in well-drafted engagement agreements and written waivers. (See Standard #1 Section C Engagement Agreements and Document Drafting)

2. Undertakes joint or concurrent representation, as permitted by relevant state rules of professional conduct and these Aspirational Standards, only after obtaining the consent of the parties and having reviewed with them the advantages and disadvantages of such representation, including the relevant foreseeable conflicts of interest and risks of such representation, in a manner that will be best understood by each person to be represented.

Comment:

This Standard presumes compliance with applicable state professional responsibility rules regarding requirements for communicating adequate information in order to obtain clients' informed consent as a prerequisite to joint or concurrent representation. The attorney's approach in communicating this information should reflect the fact that clients in elder law and special needs planning matters may have widely differing strengths and limitations in decision-making abilities or styles.

In carrying out this responsibility, the attorney should consider private, direct and personal communications with the potential clients separately, as this may allow each of them to be more candid and to more freely ask questions of the attorney regarding the implications of joint, concurrent or individual representation (See Standard #3 Section B Client Identification). For example, separate meetings may be advisable in multi-generational representation or with clients who have blended families. In cases of joint or concurrent representation, the consent of the parties should be confirmed in writing with signed waivers.

In the event a conflict arises between or among joint or concurrent clients, the attorney should consider ceasing representation of all the parties because the attorney possesses confidential information about all the parties. Although some state ethics rules may allow for continued representation based on written consent of the parties, such continued representation is risky and should be carefully considered before proceeding.

3. Treats family members who are not clients as unrepresented persons and accords them involvement in the client's representation only to the extent the client consents to their involvement with a signed waiver or, if the client no longer has the capacity to consent, to the extent their involvement is consistent with the client's wishes and values, if known, and if not known, then the client's best interests.

Comment:

This Standard addresses the common situation where a client's family members or trusted third parties, who themselves are not clients of the attorney, are intimately involved with the client's affairs, often in a supportive and facilitating capacity. Even though these non-clients may appear to have the client's wishes, values and best interests in mind and be highly involved with the client, the attorney should be aware of the ethical challenges presented by these situations. The attorney should not give legal advice to any non-clients.

The attorney should exercise care to observe signs of undue influence. Where circumstances suggest undue influence, the attorney should take steps to ensure that the vulnerable person is protected. Meeting alone with the client or prospective client, as discussed in the comment to Standard #3 Section B Client Identification), becomes especially important to protect against undue influence.

4. Accepts payment of client fees by a third party only after:

a) Determining that payment by the third party will not influence the attorney's independent professional judgment on behalf of the client;
b) Securing the client's informed consent to the payment by the third party in writing; and
c) Ensuring that all the parties understand and agree to the ethical ground rules for third-party payment.

Comment:

Third-party payment for client work occurs frequently in elder law and special needs law representation. The third-party payer is often a family member who may or may not also be one of the attorney's clients. The attorney must not agree to accept payment from any third party unless the attorney has determined that this arrangement will not interfere with the attorney's exercise of independent professional judgment on behalf of the client. Additionally, if the third-party payer is also a client, the attorney must be satisfied that the representation of one of the clients will not be materially limited by the attorney's responsibility to the other client. The attorney must fully communicate to both

the client and the third-party payer the requirements of this Standard, which include that the payer will not interfere with the representation of the client and that the payer is not entitled to any confidential information of the client. The attorney should obtain the client's written consent to the third-party payment and confirm in writing with the third-party payer the ground rules relating to confidentiality of information and representation of the client.

Acceptance of payment from a third party does not create a client-attorney relationship between the attorney and the payer. When a party who is paying the fees for client services is actually using the client's own money to pay the fees, the attorney should ensure that the third party understands the need for lawful authority to use the client's money to do so.

Example 1: An adult son, who is the attorney's client, arranges for his mother to consult with the attorney about her estate planning needs. The son tells the attorney that he will pay for the attorney's services to his mother. The attorney must engage in a conflict of interest analysis to ensure that representation of the mother will not be materially limited by responsibilities to the son and vice versa. The attorney must explain to the son that for the purposes of the mother's estate planning services, the attorney's client is the mother even though the son is paying the attorney's fee. The attorney should also ensure that the mother understands the ramifications of this arrangement and obtain the mother's informed consent in writing. The son should not be allowed to participate in the attorney's representation of the mother or be entitled to any confidential information gained in the course of representing the mother unless the mother consents in writing to the son's involvement and sharing of information.

Example 2: A daughter is her mother's agent under a power of attorney and thus is authorized to use her mother's money for her mother's benefit. The daughter arranges for the mother to consult with the attorney about her estate planning needs. The daughter uses the mother's money to pay for estate planning services for the mother. Because the daughter is authorized to use the mother's money to benefit the mother and because the client is the mother, the daughter's payment of the attorney's fee is appropriate. This is not a situation in which the attorney's fee is being paid by a third party.

Example 3: A daughter hires the attorney to have her mother declared incapacitated and to have herself appointed as her mother's guardian. The daughter has signature authority on the mother's checking account but has no ownership interest in the funds that are in the account. The daughter is not the mother's agent under a power of attorney, nor does she stand in any other fiduciary relationship with the mother. The daughter tells the attorney that she plans to pay the attorney's fees for preparing the guardianship petition from the mother's checking account. This may not be a typical third-party payment, but rather is a situation in which the daughter is attempting to use her mother's money to pay for an action that is potentially adverse to her mother's wishes. Absent a state statute or rule that allows a proposed ward's funds to be used

without court order to pay for the filing of a guardianship petition, the attorney should not accept payment from the mother's account.

5. Subject to state regulations, may serve as a fiduciary for a client upon the request of a client who has capacity, if it is in the client's best interest and if the client gives written informed consent after full disclosure.

Comment:

Clients with capacity are free to appoint whomever they choose to serve as their fiduciaries under wills, powers of attorney, trusts or other documents. Sometimes, the attorney preparing the document is asked to serve as the fiduciary. These requests may raise concerns about undue influence, overreaching, the attorney's financial self-interest, and the best interests of the client.

The attorney should not promote his/her appointment as fiduciary. The attorney must determine that the appointment is in the best interest of the client and justify how his/her appointment furthers the client's best interest. Before obtaining client consent, the attorney should explain to the client the fiduciary role, any conflicts of interest, the options to using the attorney as fiduciary, and the pros and cons of alternatives. The client's decision should be made in light of all the facts and circumstances of the particular case.

If the dual role of attorney and fiduciary is ethically appropriate in a given case, another question that arises concerns the propriety of dual compensation as attorney and as fiduciary. While this Standard does not address this question directly, the issue was addressed in 2001 Wingspan – Second National Guardianship Conference, Recommendations #64.

> *"The attorney should be mindful of the potential for conflict of interest where the client requests the attorney serve as a fiduciary in any capacity and where appropriate refer the client to independent counsel with regard to this particular transaction. Upon the request of a court or other party with authority, the attorney may also serve as a fiduciary for a client who does not have capacity, if it is in the client's best interest and if this does not present a significant risk of a conflict of interest."*

There may be situations in which a court or other appropriate authority appoints the attorney as fiduciary for a client who does not have capacity. Before accepting such appointment, the attorney should ensure that the appointment is in the client's best interest and that the appointment will not result in a conflict of interest in which the attorney's duties to others materially limit the attorney's responsibilities to the client. For example, the attorney who is appointed successor trustee of a trust established by the client while she had capacity may

find that the fiduciary duty as trustee to the beneficiaries of the trust may interfere with the duty as the settlor's attorney to protect the settlor's interests.

E. CONFIDENTIALITY

The Elder Law and Special Needs Law Attorney:

1. Carefully explains to the client and others involved, as early in the representation as possible, the attorney's duty of confidentiality to the client in order to avoid misunderstandings and to ascertain and respect the client's wishes regarding the disclosure of confidential information.

Comment:

Confidentiality of client information is a core, fundamental principle of the client-attorney relationship and the attorney must guard against the disclosure of the client's protected confidential information.

The attorney should begin every initial conference with an explanation of the confidentiality rules and, if possible, address confidentiality before the initial meeting, so the client can decide who should attend. The explanation should make clear that the client is the only one protected and authorized to waive the protection.

The confidentiality rules apply not only to matters that the client communicates to the attorney in confidence but also to all information that the attorney acquires from other sources, such as the client's family members, health care providers, tax preparer or assigned case worker employed by a government agency.

The attorney should keep in mind that clients and others involved in the representation generally will have a vague and limited understanding of the special role that confidentiality plays in legal representation. Such a vague and limited understanding may lead individuals to believe that the attorney has discretion to disclose confidential client information even when instructed otherwise.

Example: Wife retains attorney. At the time, wife was alone and declared to attorney that she was to represent her only. Wife further instructed attorney to say nothing to her husband or their children. Attorney agrees to the client/attorney representation, and executes with wife a written legal services agreement. Wife goes on to explain that her husband had been diagnosed with Alzheimer's disease several years earlier and had declined drastically in the last year. Wife discloses to attorney that she and her husband already saw another attorney a year earlier, executing advance directives and mirror- wills. Wife states that while acting as her husband's attorney-in-fact she transferred all assets out of her husband's name into hers. She further acknowledges that she has placed him in an assisted living facility over his objection.

Wife instructs attorney to create a new will for her, deleting husband as a devisee, leaving their children, and adding her non-marital child unknown to her husband. Wife also informs attorney that she has engaged yet another attorney to initiate a divorce action against her husband.

Attorney begins providing the legal services as wife has instructed.

Attorney has known wife and her husband for many years, and has attended church with their children. Because of gossip in the community, wife's children approach attorney, begging for information about what is going on with their mother, Attorney despairs over the children's anguish and concern, knowing that the information she received from wife, her client, could ease their troubles and anxieties and bring them a degree of comfort.

Analysis: Client identification is not at issue; neither is joint client representation. The example, focused on confidentiality, is simple and the analysis easy because there is but one client. Attorney has a duty of loyalty only to wife. Attorney has no duty to wife's husband or her children. These facts do not rise to any level that would warrant attorney's exercise of discretion under Rule 1.6 (b). In fact, she has been specifically instructed otherwise by her client. No matter how much the information would help husband and the children, attorney must maintain wife's secrets, honoring his duty of confidentiality to his only client.

However, following that which elder law and special needs attorneys aspire to do, attorney should counsel wife, inviting her to consider ways by which she might develop a person-centered plan for her husband; and involve her children in ways that would calm their fears while still reaching her goals. Attorney might suggest that the situation could turn adversarial if the children engage their own attorney to intervene, and wife could be immersed in litigation that would take significant amounts of time and money, and overwhelm her emotionally.

2. Explains how the rules of confidentiality are applied to different forms of representation, including individual representation and joint representation.

Comment:

Due to the nature of elder law and special needs law, the attorney often is involved with several individuals, including clients and non-clients. When there are multiple individuals involved in the representation, the identity of the client and consequent duty of confidentiality may not initially be clear to everyone. Before the client decides which form of representation to use, the attorney should ensure the client understands how the confidentiality rules apply to each form of representation (See Standard #1 Section B Client Identification).

When the attorney represents more than one client in a matter, there is greater complexity when applying state professional responsibility rules of confidentiality. Similar complexity arises when the client chooses to involve and share

information with trusted third parties who are not joint clients in the representation. The attorney should ensure that all persons involved understand how confidentiality applies in each representation.

Example: Mr. A's daughter contacts the attorney seeking assistance for her father to arrange his legal affairs before he enters an assisted living facility. At the initial consultation, the attorney and Mr. A agree that Mr. A is the client. In the process of formalizing the client-attorney relationship, the attorney confirms that Mr. A wants the attorney to communicate with his daughter. The engagement agreement should make clear that only Mr. A is the client and that the attorney is authorized to communicate with Mr. A's daughter.

Since the daughter is *not* represented, the attorney should communicate that: (1) Mr. A is the client and the attorney's ethical duty is to protect Mr. A's interests only, (2) the attorney is authorized to provide information to daughter regarding tasks undertaken only to the extent that Mr. A either authorizes such disclosure, or such disclosure is impliedly authorized in order to carry out the representation, and (3) daughter should consult her own legal counsel regarding the impact of her father's estate planning on her own affairs.

3. Establishes as a prerequisite to joint representation, a clear understanding and agreement that the attorney will keep no client secrets from any other client in that joint representation.

Comment:

Often attorneys will represent more than one client in a matter such as representing a married couple in an estate plan. (See Standard #2 Section D Conflicts of Interest).

Before undertaking joint representation of clients, the attorney should ensure that the clients understand the attorney's ethical obligation to disclose information learned from one joint client to the other joint client and the consequences of such disclosure. The engagement agreement should make clear the attorney's obligation to keep no secrets. If the attorney obtains information from one joint client that is unknown to the other joint client(s) and the attorney fails to persuade the client to share the information with the other joint client(s), the attorney should share the information with the joint client(s) and/or withdraw from the representation pursuant to state professional responsibility rules. In some states, the attorney need not explain the reason for the withdrawal. State professional responsibility rules vary widely on confidentiality among joint clients, and the attorney should act in accordance with those state rules.

Example 1: An attorney is engaged to prepare estate planning documents and develop an asset preservation plan for a husband and wife. The initial consultation and engagement agreement fails to provide for sharing confidential information between the spouses. During the representation, the wife tells the

attorney that she has a child unknown to her husband to whom she plans to divert a portion of the couple's assets and directs the attorney to not disclose this to her husband. Because the information is relevant to the representation of the husband, the attorney should tell the wife that this information must be disclosed to the husband or the attorney must withdraw. The attorney may have avoided this situation had the sharing of confidential information been explained at the beginning of the representation.

Example 2: The lawyer who represents a husband and wife in estate planning matters might conclude that information imparted by one spouse (for example, a past act of marital infidelity) need not be communicated to the other spouse. On the other hand, the lawyer might conclude that some action must be taken with respect to a confidential communication concerning a matter that threatens the interests of the other client or could impair the lawyer's ability to represent the other client effectively (e.g., "After she signs the trust agreement I intend to leave her"; or, "All the insurance policies on my life that name her as beneficiary have lapsed"). Without the informed consent of the other client, the lawyer should not take any action on behalf of the communicating client, such as drafting a codicil or new will, that might damage the other client's interests or otherwise violate the lawyer's duty of loyalty to the other client (see ACTEC Commentary on MRPC 1.6 (Fifth Edition 2016)).

4. Strictly preserves client confidences, especially in situations that involve frequent contacts with family members, caregivers, or other trusted third parties who are not clients.

Comment:

Many elder law and special needs law matters are non-adversarial, and these matters may involve the help of family members and other trusted third parties. In cases where an individual needs assistance from others, the individuals providing the assistance may believe that they, too, are clients of the attorney. In some cases, these non-clients will be involved consistently and extensively on a day-to-day basis. The client and non-client may even have shared goals or combined property interests. In such cases, there may be an initial expectation that the attorney represents both the client and the others involved. It is the attorney's duty to ensure that individuals who are unrepresented understand that they are not clients of the attorney.

There may be occasions when the attorney needs to communicate with non-clients who are trusted third parties working closely with the client. In doing so, the attorney must use care in communicating with the unrepresented individuals, and may not disclose confidential information without the client's consent.

Example: Father makes an appointment with an attorney on behalf of Son who has serious physical disabilities and other challenges but does not lack capacity. Son comes to the appointment accompanied by Mother and Father. Son's mother and father manage Son's finances and provide personal care to

him. Many aspects of their lives are intertwined, but Son is the sole client unless the parties enter into a joint representation engagement. If Son is the sole client, the attorney may not disclose Son's confidential information to his parents without Son's consent, unless otherwise authorized. (See Standard #4 Section D Conflicts of Interest)

5. Ascertains the wishes of the client as to whom, if anyone, the attorney may disclose confidential information, and explains the potential consequences of such disclosure.

Comment:

In situations when the client requests disclosure, the attorney should be mindful of the consequences and ensure that the client understands the possible risks and implications of such disclosure (See NAELA Journal Volume 4, Number 2, *Ethical Issues in Representing Seniors, Persons With Disabilities and Their Families, by Stuart D. Zimring, Appendix A*). The attorney should explain to the client the options regarding the type of information to be disclosed, the method of disclosure, and to whom the information is disclosed. The attorney should also explain that the non-client's presence may waive the client-attorney privilege (See NAELA Journal Volume 2, No. 1, *To Speak or Not to Speak: Effect of Third Party Presence on Attorney Client Privilege, , by Roberta K. Flowers, Esq*), unless such individual's presence is necessary to assist in the representation (See United States v. Kovel, 296 F.2d 918, 922 (1961)). The same steps should be taken if the attorney or others ask the client to approve disclosure. A client who decides to waive confidentiality and direct the release of confidential information should do so with a written waiver specifying the scope of information to be disclosed, and to whom (See Standard #1 Section B Client Identification).

Example: Mr. A signs a waiver because he wants his daughter to be aware of the planning options that he may consider. The attorney should also explain to Mr. A that the disclosure of confidential information to his daughter will waive his client-attorney privilege with respect to the disclosed information, and may cause additional issues regarding his client-attorney privilege.

The attorney should recognize that there may be changes in the client's circumstances during the representation and that the client's disclosure preferences may change. The attorney should ensure the client knows that there is authority to change disclosure preferences throughout the representation. In all instances, the client should be informed that the consent is optional and also revocable by the client at any time.

The attorney's duty of confidentiality continues after termination of the client-attorney relationship, and any disclosure of confidential information must be in accordance with a signed waiver or court order. In some cases, it is beneficial for the attorney to discuss with the client the option of signing a waiver that authorizes the attorney to disclose specific confidential information after the

termination of the relationship. This waiver may ensure the client's estate planning wishes and intent are upheld.

6. Carefully maintains client confidentiality to the extent possible while also meeting the requirements of laws, regulations or court orders imposing a duty to disclose.

Comment:

The professional responsibility rules permit an attorney to disclose a client's confidential information without the client's express consent when disclosure is reasonably necessary to comply with a law, court order or another professional responsibility rule. In making such a disclosure without the client's express consent, the attorney should be cautious to disclose only enough information that is required to comply with the law, court order or other professional responsibility rule that requires disclosure.

An example of a state laws that may require an attorney or a health care professional employed by the attorney to make disclosures without the client's express consent are the mandatory reporting of abuse laws of many states. For this reason, the attorney should discuss with the client how such reporting laws may affect the attorney's duty to maintain the client's confidences. The client may wish to sign an agreement to disclose future suspected abuse without the client's express consent in order to protect the client from abuse. (See Standard #6 Section A Holistic Approach).

Another example of laws that may affect the attorney's duty to maintain a client's confidences is the transparency provision from the Uniform Trust Code, provisions of the Uniform Probate Code and other state trust laws that protect the rights of trust beneficiaries to receive trust records and financial reports. However, when an attorney is retained by a trustee to assist with trust administration, the attorney's client is the trustee rather than the trust's beneficiaries (See Standard #2 Section B Client Identification). It is the attorney's duty to make sure that the trustee understands the trustee's duties as a fiduciary including the trustee's duty to disclose all trust information that is required by law and the trust agreement. If the trustee refuses to make disclosures to the beneficiaries as directed by the attorney, the attorney should consider withdrawing from the representation, and if ordered by a court, the attorney must disclose information that may evidence the trustee's breach of duties without the trustee's consent.

When drafting trusts that are subject to disclosure laws, the attorney should ensure the grantor client understands the implications of such laws, and should advise the grantor to consider carefully the competing interests of primary and remainder beneficiaries, and to analyze ways in which to protect the privacy interests of beneficiaries while meeting the disclosure duties owed to beneficiaries. Similar considerations apply when the client is establishing joint

accounts or preparing beneficiary designation forms for assets such as retirement accounts, life insurance policies, transfer on death account, etc.

Where a grantor requests, the attorney may be able to draft provisions in trusts to reduce the disclosure dilemmas that trustees may face. The attorney should determine whether clients are concerned about a trust beneficiary's confidentiality, not only with respect to the primary beneficiary but also remainder beneficiaries. When the trust has already been created, the attorney should inform the client of the rights of and duties to remainder beneficiaries so the client can determine the impact on their objectives for the primary beneficiary.

For example, medical expense records may address personal matters that a trust beneficiary considers confidential. The trustee may need detailed information in order to determine whether to pay certain bills. This information becomes part of the trust's records. Such access could result in exposure of an individual trust beneficiary's private information. When advising trustee clients or grantors, or when acting as trustee, the attorney must balance these competing duties, especially when the primary beneficiary is a vulnerable person who has significant care and other personal needs. Trust provisions may authorize trustees to develop systems for balancing confidentiality and disclosure duties, with the goal of avoiding future costly disputes. MRPC Rule 1.14(c) provides a limited implied exception to the confidentiality rule when a client's capacity is diminished and protective action is needed in order to prevent physical, financial or other harm to the client (See Standard 4 Section G Client Capacity). In those circumstances, the attorney should take the least restrictive action possible, and only disclose the confidential information that is reasonably necessary to protect the client.

In some narrow instances, the attorney may reveal confidential information, without first obtaining the informed consent of the client, if the disclosure of such information is impliedly authorized to carry out the representation.

F. COMPETENT AND DILIGENT REPRESENTATION

The Elder Law and Special Needs Law Attorney:

1. Has a wide range of professional skills unique to the practice of Elder and Special Needs Law and continually demonstrates a commitment to addressing the individual needs of each client.

Comment:

The elder law and special needs law attorney must be educated in the practice areas of elder and special needs law by attending professional education seminars, studying written materials or associating with an attorney who has established competence in the field, and the attorney must continually ensure that he or she has the legal knowledge, skill, thoroughness and preparation necessary to practice in this area of law and to hold himself or herself out as an elder law and special needs planning attorney.

Elder law and special needs law issues are often complex and may involve multiple areas of the law. The elder law and special needs law attorney must recognize and understand these various legal issues that often impact the representation. For example, if a client wishes to transfer his house to his children, the attorney should recognize that this transaction may require the application of several areas of the law, including real property, tax, Medicaid and estate planning.

The attorney should be candid with the client regarding the attorney's level of competence and any need for additional research and preparation in order to ensure the attorney can accomplish the agreed-upon representation. If there is an area of law in which the attorney lacks the requisite knowledge and skill, the attorney should associate with, co-counsel, or refer the client to an attorney of established competence in that area.

The elder law and special needs law attorney recognizes that there is no "one size fits all" approach to this area of practice and, as a result, when using forms, customizes them as needed to meet each client's individual circumstances. Improper use of standard forms may result in violations of the state professional responsibility rules and may harm the client's legal and financial interests. The elder law and special needs law attorney identifies the unique needs of each client and prepares documents and plans tailored to those specific needs. Many elder law and special needs law issues require expertise in technical and complex areas of law, such as special needs trusts, public benefits, taxation and the like.

Example: "A" has practiced law for eight years, and elder law for the last two. In the last two years, he prepared special needs trusts (SNT) for four different clients, and left three other SNTs unfinished for more than eight months although his flat fees were paid in advance.

While "A" kept up with CLE courses, none of them were on SNTs. He learned about SNTs through searching the Internet and found an SNT form in a trust book in the local court law library, therefore saw no need to call one of the well-known SNT experts in his area. The form that "A" used to write SNTs was titled, "The John Doe Irrevocable Special Needs Trust with d4A language, including mandatory payback".

"A" used the form in two SNTs that were included in wills as testamentary trusts, in one SNT that was a third-party intervivos trust and in one SNT that had a beneficiary over the age of sixty-five. In each case, "A" required that another attorney in the firm be named trustee, contending that no family members or individuals were qualified to be trustee and that banking and financial trustees would be too expensive.

After the documents were signed, neither "A" nor the attorney acting as trustee provided the clients with further instruction or informed the state Medicaid office or the Social Security Administration where necessary.

Elder law and special needs law attorneys often move beyond basic services and documents that serve their clients. An example is the beneficial and sometimes integral use of the special needs trust for many of those clients. Before any lawyer attempts to draft a complex special needs trust, he or she must possess the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. While standards of practice setting a threshold of competence for those holding themselves out as SNT practitioners have yet to be developed, lawyers should measure their ability to be SNT practitioners against such basic criteria (see NAELA Journal, Volume 1 No. 1, at 65-66 *Revised ABA Model Rules of Professional Conduct Applied in Elder Law: The Basics Framed in Core Values Get Complicated Fast – MRCP 1.0 – 1.6 by A. Frank Johns, CELA*).

2. Diligently and competently handles all client matters.

Comment:

The elder law and special needs law attorney manages his or her caseload to ensure all clients are assisted in a timely manner. This includes promptly addressing the issues of each case as well as only undertaking new cases the attorney knows he or she has the time to handle.

The age and disability issues inherent in many elder law and special needs law cases make reasonable diligence an especially important consideration for the elder law and special needs law attorney. For example, if the attorney is approached by a potential client who wishes to immediately change his or her estate plan because death is imminent, the attorney should take the case only if the attorney knows he or she can expediently assist the client without affecting the attorney's other cases. The elder law and special needs law attorney is

mindful that the client's interests often can be adversely affected by the passage of time or the change of conditions. Similarly, the elder law and special needs law attorney must be ready to respond quickly when requested to assist with the drafting of a First Party Trust to receive a settlement from another action when the money is already in the PI attorney's client trust (IOLTA) Account.

3. Regularly pursues continuing professional education and peer collaboration in Elder Law and Special Needs Law and related subjects, including the physical, cognitive, social and psychological challenges of aging and special needs and the skills needed to serve individuals facing those challenges.

Comment:

The elder law and special needs law attorney should maintain competence by keeping up-to-date with changes in the laws and practices that affect the attorney's clients and should regularly seek opportunities for continuing education. The attorney should aspire to not merely grow in knowledge of the law but also to improve and enhance his or her understanding of the client's unique needs and the skills needed to meet them.

For example, the elder law and special needs law attorney should consider attending continuing education seminars, studying online, and reading written materials on subjects affecting elders and individuals with special needs such as health, social science, gerontology and public policy or disability advocacy. Networking with colleagues also offers informal but essential continuing education.

Attending seminars conducted by a variety of aging and special needs professionals will enhance the holistic approach to the practice of elder law and special needs law. (See Section A Holistic Approach). Programs given by legal and non-legal organizations will help the elder law and special needs law attorney to better understand the issues faced by aging clients and clients with special needs and to attain the skills needed to serve those clients.

To stay current, the attorney should incorporate relevant technology into his or her practice. Appropriate safeguards should be instituted to protect against disclosure of confidential information.

4. Adequately trains and supervises legal and non-legal staff to ensure they have the knowledge and skills needed to best serve individuals facing the challenges associated with aging and special needs.

Comment:

The elder law and special needs law attorney must train and supervise all staff to ensure the client receives competent and diligent representation at all times. The staff members should be educated and appropriately trained to assist clients facing the challenges and needs unique to an elder law and special needs law practice. The attorney should provide staff with appropriate instruction and supervision concerning ethical aspects of their work and the application of these Standards. Such training can be done by in-house staff or through invited speakers or professional education seminars. In all instances, the attorney should supervise and retain responsibility for the work of the attorney's staff. The procedures to supervise non-lawyers should take into account the fact that they do not have legal training and are not subject to professional discipline.

G. CLIENT CAPACITY

The Elder Law and Special Needs Law Attorney:

1. Continues to respect the right to self-determination and confidentiality of a client with diminished capacity.

Comment:

Attorneys have special ethical responsibilities when representing clients whose capacity for making decisions may be diminished. Clients with diminished capacity are entitled to respect and attention throughout their representation. It is therefore important that attorneys understand that capacity exists on a continuum, and is normally not an all-or-nothing proposition. If the client's diminishing or changing capacity results in the need for increasing levels of assistance, preservation of the client's right to self-determination and confidentiality remain. The attorney should provide the client a clear explanation of the risks and consequences of the involvement of other parties. Throughout the representation, the attorney should adopt strategies to improve and preserve the comprehension and decision-making ability of the client with diminished capacity. For example, if a third party is present for support, the attorney should continue to communicate directly with the client, including the third party only as the client authorizes (See Standard #4 Section E Confidentiality). Moreover, even if the client has authorized or instructed the attorney to communicate with a third party, the attorney still should keep the client informed by providing the client with copies either of communications or by speaking directly with the client.

2. Develops and utilizes appropriate skills and processes for making and documenting preliminary assessments of client capacity to undertake the specific legal matters at hand.

Comment:

Attorneys often represent clients who have some degree of diminished capacity. The attorney should develop strategies and skills to understand and communicate with such clients by using a variety of interviewing techniques. (See Standard#3 for specific suggestions).

The law recognizes different thresholds for capacity depending on the act to be undertaken. Capacity is task-specific and as different tasks require different degrees of capacity, the client may have sufficient capacity to perform some tasks, but not others. For example, a higher threshold of capacity may be required to make a contract, especially a complex contract, than to make a will. Hence, the attorney needs to determine whether the client has sufficient capacity to perform the task.

Example: Client visits Attorney to draft a new will and health care directive. During the interview, Attorney notices that Client seems unfocused and wanders from topic to topic. Attorney believes that Client understands to whom he wants his property to go at his death, but seems confused about the meaning of the health care directive. Attorney should ask additional questions to determine whether Client understands the health care directive. If Attorney has concerns about Client's capacity, Attorney may still decide to draft both documents and resolve prior to their execution whether Client understands the documents at the time Client signs them.

Attorneys should presume capacity until the facts and circumstances override that presumption. Where capacity is questionable, the attorney should follow a consistent and deliberate process to preliminarily screen clients for capacity. The attorney should document the observations that support the attorney's conclusion that the client does or does not have capacity. A number of different methods may be used to evaluate the client's decision-making abilities. The attorney's screening and evaluation process should be followed and documented in every file. (See *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* by ABA Commission on Law and Aging and the American Psychological Association (2005)).

Although the attorney should consider any medical opinions regarding the client's capacity, the attorney should evaluate client capacity by a legal standard, considering factors, such as

- The variability of the client's state of mind;
- The client's ability to appreciate the consequences of his or her decision;
- The irreversibility of any decision;
- The substantive fairness of any decision;
- The consistency of any decision with lifetime commitments of the client.
- The kind of decisions to be made by the client and the applicable legal standard.
- The client's ability to articulate reasoning behind his or her decision;

(See *Special Issue Ethical Issues in Representing Older Clients,* Foreword by Bruce A. Green and Nancy Coleman, Fordham Law Review, Volume LXII Number 5, March 1994 and MRPC 1.14 comment 6 (2014))

The attorney should ask the client questions specific to the task to be undertaken to evaluate the above factors with regard to that task. For example, if the client is seeking a durable power of attorney, then the attorney should ask questions about the person the client has selected as attorney-in-fact and why such selection was made. The attorney could ask the client to talk about his/her relationship to that person, including how long the client has known that person and what the client knows about that person's financial situation. The attorney also might ask hypothetical questions about specific decisions the attorney-in-

fact might make for the client and whether the client wants that person to have that decision-making power.

The attorney also should distinguish between incapacity and the inability to remember. The fact that a client does not remember a decision does not mean that the client did not have the capacity to make the decision at the time it was made.

3. Adapts the interview environment, timing of meetings, communications, and decision-making process to maximize the client's ability to understand and participate in light of the client's capacity and circumstances.

Comment:

Elder law and special needs law attorneys should develop strategies and skills to understand and communicate with their clients by using different interview techniques and strategies. The attorney should be proactive and creative, utilizing strategies and techniques that suit the client's current physical, emotional, and mental abilities. The following is a nonexclusive list of interviewing techniques and strategies:

- Changing the time and location of the meetings;
- Conducting the interview in the client's home or at a time of day the client is most alert;
- Gradual counseling (a series of shorter interviews to be conducted over a period of time);
- Varying communication styles;
- Using appropriate visual aids and hearing enhancements;
- Conducting the interview in the client's primary language or with an interpreter of that language; and
- Providing other reasonable accommodations requested by the client.

4. Takes appropriate measures to protect the client when the attorney reasonably believes that the client: (1) has diminished capacity, (2) is at risk of substantial physical, financial or other harm unless action is taken, and (3) cannot adequately act in the client's own interest.

Comment:

The above three factors are model rules, (see MRPC 1.14) however, state laws vary significantly regarding permitted protective actions (see attached chart below). Attorneys must have a clear and thorough understanding of the responsibilities and restrictions placed on them by the state law and rules in their jurisdiction. For example, some states place a mandatory reporting requirement on attorneys who learn of elder abuse or exploitation.

The mere fact that a client has diminished capacity does not warrant protective action. The client also must be at substantial risk if the attorney does not act and be incapable of protecting herself. The attorney must determine whether the attorney's ability to continue to advocate for the client and the client's wishes and values has become impossible because of the impairment and if the client is at serious risk of harm. If possible, the attorney initially should attempt to support the client to make decisions that protect the client from the perceived harm. For example, if the client is in need of support to handle finances, the attorney should help the client implement a mechanism, such as a trust or power of attorney arrangement, by which to handle finances before the attorney takes protective action without the knowledge or consent of the client.

In appropriate situations, and when permitted or mandated by state law, the attorney should take protective action. However, the attorney should carefully consider the impact of protective action on the client-attorney relationship, the client's autonomy and well-being, and the client's relationship to third parties.

5. Appropriate measures to protect the client should: 1) be guided by the wishes and values of the client if known or, if not known, the client's best interests; 2) minimize intrusion into the client's decision-making autonomy; 3) respect the client's family and social connections; and 4) consider a range of supportive actions other than court proceedings and adult protective services.

Comment:

When the attorney is aware of the client's expressed wishes, any protective action should be consistent with those expressed wishes. However, when a client has diminished capacity and the attorney does not know the client's wishes, the attorney should act in accordance with the client's known values.

When the attorney is representing a client with diminished capacity and is unable to determine the client's particular wishes and values, then the attorney must advocate for the client's best interests. (See *UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform, The* by Lawrence A. Frolik University of Pittsburgh School of Law and Linda S. Whitton Valparaiso University School of Law University of Michigan Journal of Law Volume 45, Issue 4)

In determining what is in the client's best interest, the attorney should consider the client's rights, remedies, economic interests and extent to which the attorney can preserve the client's self-determination while still protecting the client.

Attorneys should be aware of the potential conflict between the client's best interests and the attorney's duty to advocate for the client's wishes (for example, when the client wishes to age in place and it is in the client's best interest to be placed in long-term care). This conflict often occurs when the client has diminished capacity and needs protection, thus requiring the attorney to choose between advocating for the client's wishes or acting against those wishes in order to protect the client. Determining the appropriate protective action for the client is very fact specific and requires the balancing of a number of factors and the use of sound legal judgment. Attorneys may consider including as part of the engagement process an acknowledgment or consent provision allowing the attorney to take protective action under specified circumstances allowed or required by state law.

The attorney should consider several factors, including the type of representation sought by the client, the forum in which the attorney's services are to be provided, and the involvement of other parties. Ultimately, the attorney should balance the client's need for decision-making assistance with the client's other interests. These other interests include the client's autonomy, safety, independence, financial well-being, health care, and personal liberty. The decision should not be merely what the attorney thinks is best or would do herself. There is no bright line rule and, as MRPC Rule 1.14 acknowledges, the "lawyer's position in such cases is an unavoidably difficult one."

The client's family, social, and community networks may contribute information about alternatives to protective action. Having support networks that are geographically close to the client may also provide a level of protection for the client and result in a lesser intervention.

When taking protective action, the attorney should do no more than necessary to protect the client. Any protective action should be the least restrictive alternative, tailored to the degree of the client's incapacity and, if possible, reflect the wishes and values of the client as well as the client's best interests. A number of protective actions may be more effective, less restrictive, and less intrusive than court proceedings or adult protective services. Protective actions may include a cooling-off period, family involvement, and the creation and utilization of planning documents. (See Comment 5 to MRPC *Rule 1.14*.)

Example 1: A 79-year-old client has begun to decline and appears somewhat confused. In their last several meetings, the attorney noticed that she had fresh bruises, which the client said were from falling. The attorney concludes that some kind of protective action is needed. The client is estranged from her son and has not notified him about her problems. She is very close to a group of women at her church, and her church may be able to provide support. To the extent possible, the attorney should discuss with the client different protective

alternatives that take into account her son, friends and church. Any additional protective action without the consent of the client must be consistent with the attorney's state law and rules.

Example 2: An attorney is approached by a 22-year-old client to discuss his special needs trust, which was created five years ago by another attorney, with funds derived from a personal injury judgment. The client now desires to control money himself and "play the market." He asks the attorney to help him dissolve the trust. The attorney is concerned about the impact such a decision would have on the client's eligibility for continuing and future public benefits. In addition, as the attorney discusses this matter, it becomes clear that the client has diminished capacity and could be at risk of substantial financial harm if the trust is dissolved. In this situation, the attorney should consider ways to help the client achieve independence without incurring financial harm. For example, if the attorney determines that the client has capacity, the attorney might suggest meeting with the trustee and, if one has been appointed, investment advisor. The meeting would allow the client to discuss any concerns he has with the trust's investment policy. Concurrently, the attorney should review the trust and consider potential strategies to appoint a successor trustee. Finally, the attorney should assess the possible need for a guardian ad litem if court action becomes appropriate.

6. Preserves client confidences to the extent possible by only divulging that information necessary or appropriate for protective action

Comment:

The core principles of the client-attorney relationship are the duties of loyalty and confidentiality. Yet, where the client suffers from diminished capacity and needs protection, the attorney may need to disclose confidential information to a third party. Many state bar rules provide for limited disclosure; however, such disclosures must be made with care because of the potential of harm to the client (see MRPC 1.6 and 1.14(c). The attorney must seriously consider whether the individuals or entities to whom confidential information is disclosed will use that information against the client's interests. Even where the attorney is authorized to divulge confidential information to take protective action, the attorney may disclose only that information necessary for the protective action. The type of protective action will dictate the nature and amount of information that needs to be disclosed (See Standard #6 Section E Confidentiality)

The most drastic protective action, seeking the appointment of a guardian or conservator, may be appropriate in certain cases. However, since such action undermines client confidentiality and may pose a direct conflict with the client, lesser restrictive alternatives should be considered and pursued first. Any disclosure, even limited, can have serious negative consequences for the client

and should be taken only after other alternatives have been considered or tried without success.

Example 1. An attorney has represented a client for a number of years on various matters, including estate planning. The client has previously involved her son and daughter in meetings with the attorney. The client brings in a recent bank statement to complain about non-sufficient funds (NSF) check charges. The attorney notices large repetitive checks written to the client's housekeeper. Upon questioning by the attorney, the client seems confused and has no explanation. The attorney may call the son or daughter to alert them to the problem, if the client has previously consented or if state law or rule permits protective action. Another protective action permitted in some states allows the attorney to file a request for an investigation with the local Adult Protective Services (APS) office. An APS inquiry should be considered only if all less restrictive protective actions have been considered.

Example 2: In a situation similar to **Example 1**, the son is appointed as the client's financial agent under a durable power of attorney (POA) and the repetitive checks are written to the son with the son signing as agent. The attorney may request the client's consent to discuss these checks with the son to determine whether there is a reasonable explanation and, if not, alert the client's daughter and/or file an inquiry with APS. (See discussion under Standard #3 Section E Confidentiality concerning the benefit to include in the retainer agreement the names of people to whom the attorney may disclose information under circumstances specified in the agreement).

Example 3: Prior to the client in **Example 1** contacting the attorney, the attorney receives a call from the son who states that the client may call complaining about NSF checks. The son says that, acting as his mother's agent under the financial POA, he is instructing the attorney to disregard the complaint because the mother is "just imagining" things. If the attorney doubts the son's honesty and truthfulness, the attorney should contact the client and may request documentation from the son to support the son's claim. If the son fails to provide adequate documentation, or the attorney continues to be concerned after speaking with the client, the attorney may alert the client's daughter and/or file an inquiry with APS.

7. Seeks guardianship or conservatorship only when no other viable alternatives exist.

Comment:

Guardianship and conservatorship are actions of last resort. If guardianship or conservatorship becomes necessary to protect the client's safety, well-being, or finances, the attorney still should pursue the least restrictive alternative within the protective proceedings (see Comment 5 to MRPC 1.14). Prior to choosing a course of action, consideration should be given to the client's wishes and values

(to the extent known); the consequences of intruding into the client's decision-making autonomy; and the potential impact on the client's family and social relationships.

H. COMMUNICATION AND ADVOCACY

The Elder Law and Special Needs Law Attorney:

1. Works to minimize barriers to effective communication with clients.

Comment:

Elder law and special needs law attorneys must facilitate effective communication with their clients. The issues affecting elderly individuals and individuals with disabilities span a broad range of legal, social and personal matters. While most clients do not have serious functional limitations, some clients will experience physical, sensory, and cognitive impairments that may result in barriers to effective communication. Barriers to effective communication may include cognitive barriers, physical barriers, situational stress, complex family and financial issues, dependence on others, and concern about legal fees.

Removing barriers to effective communication is essential to the practice of the elder law and special needs law attorney. Enhancing communication requires knowledge, skill, and persistence on the part of the attorney. The attorney should be mindful of the requirements of the Americans with Disabilities Act and comply with its requirements to maximize communication with clients who need or request accommodations.

Example 1: If the client has visual impairments, the attorney should ensure that all documents are readable by the client. This may be accomplished by using large fonts in the documents, having magnifying glasses available, and using task lighting or glare-free lighting.

Example 2: If the client has an auditory disability, the attorney may use hearing-assistive technology; many devices are inexpensive. Also, the attorney may arrange seating so that the attorney is closer to the client.

Example 3: In explaining options to the client, the attorney should avoid "legalese" and terms of art, instead, using plain language and employing examples to which the client is able to relate in real life situations.

2. Maintains direct communication with the client(s), whether in person by telephone or through correspondence, even when the client chooses to involve others (including an agent under a durable power of attorney).

Comment:

Maintaining direct communication with the client is a critical component of effective representation, particularly when the client is making major life decisions that may alter the client's options for long term services and supports. Direct communication may be difficult when the client has a physical or mental impairment. The attorney may also face challenges when the client has others involved. Often the client will direct the attorney to communicate with a third party, either in a formal agency relationship, or informally through a family member. Even though the client may have authorized the attorney to communicate directly with the third party, the attorney still should include the client in communications. In addition, the attorney still must maintain the duties of loyalty and confidentiality to the client. Subject to exceptions for persons necessary to communication with the client, such as a translator or an attorney-in-fact, client-attorney privilege may not protect communications made in the presence of non-client third parties (See Standard #5 Section E Confidentiality).

Example: The client signs an authorization allowing the attorney to communicate directly with her son about the client's legal matter. Even though the attorney may communicate primarily with the son, the attorney still should keep the client informed, where practical and appropriate, through means such as providing the client with copies of correspondence or documents. At the client's direction, the attorney may retain confidential documents or send them to a third party if the client is unable to secure the documents.

3. In order to obtain informed consent, advises clients of their options, explaining the possible consequences of each option.

Comment:

The attorney has an ethical obligation to keep clients informed and to explain matters in a manner that enables clients to make informed decisions. A number of factors, including the complexity of the matter, clients' ability to understand, and the expected impact of the information on clients, should govern how the attorney provides information to clients.

In describing possible courses of action and options to clients, the attorney should explain the consequences plainly and succinctly; outlining the advantages and disadvantages of each option. When explaining possible outcomes, the attorney should provide as much relevant information as possible in order for the client to make an informed choice.

However, in certain limited circumstances, the attorney may not be required to fully inform the client if doing so would harm the client or cause the client to react inappropriately (see MRPC 1.14 comments (2005)).

All attorneys advise clients about their options and each client brings a different set of circumstances and challenges. Elder law and special needs law attorneys may, however, encounter especially complex combinations of factors. Elder law and special needs cases may include a complex array of legal, social, medical,

and personal dilemmas. Clients may be unfamiliar with the choices they face and further, be in crisis. Clients may need guidance and assistance to identify problems as well as options, both with the non-legal and the legal aspects of their cases. Attorneys should strive to assist clients facing complex problems during emotional and/or medical crises by identifying and prioritizing the problems as well as by developing and comparing the relevant options.

Example: At the attorney's request, the client undergoes a capacity assessment from a Geriatric Psychiatrist to determine whether or not the client has testamentary capacity. The Psychiatrist sends the assessment to the attorney. In the assessment the Psychiatrist states that the client lacks contractual capacity but has testamentary capacity. She further states that because the client suffers from severe depression the negative assessment regarding contractual capacity should not be disclosed to the client at this time. Under these circumstances the attorney may withhold the negative assessment since it is not directly relevant to the matter at hand (i.e. testamentary capacity), but should consider counseling the client about seeking further psychological or psychiatric treatment."

4. Advocates for the courses of action chosen by the client.

Comment:

Elder law and special needs law attorneys, like all attorneys, owe a duty of loyalty to their clients and must zealously advocate for their clients, consistent with state rules of professional responsibility (see MRPC 1.3 (2005)).

Where the client's chosen course of action is logical and appropriate, the attorney is bound by the client's decisions setting the objectives of the representation (see MRPC 1.2(a) (2005)).

However, where the client decides to pursue an unusual course of action that appears contrary to the client's best interests, the attorney should inquire into the client's decision making process and, if appropriate, counsel the client against such action. If the client suffers from diminished capacity, protective action may be indicated. Attorneys should consult with their state rules to determine the next steps possible, advisable, and/or required.

5. When developing a plan to secure and pay for long term supports and services should:

a) Strive to determine the client's wishes and values in order to achieve the client's objectives concerning living options, health care, loved ones, and property;

endeavor to preserve and promote the client's dignity, self- determination, and quality of life.

b) Counsel the client about the full range of long-term service options, risks, consequences, and relevant costs;

c) Counsel the client as appropriate in light of the client's needs, personal values, wishes, best interests, and the alternatives available; and

d) Counsel the client as to the estate planning and tax implications that the client's choices for long term service options will have on his or her property.

Comment:

At all times during the representation, the attorney should be mindful of MRPC 2.1 which states the *"lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation*." Attorneys in general, and elder law and special needs law attorneys in particular, often are called upon to assist clients in times of crisis. In elder law and special needs law practices, such crises often involve the death, disability, or the long-term illness of, or transitions in living arrangements for, a client or loved one. Counseling clients in these times of crisis requires compassion and the ability to clearly analyze the client's circumstances and options, assess risks, present options, and make recommendations. The attorney should be mindful that the client's goals should guide the actions of the attorney. Offering a solution to the client's problem is inappropriate when the steps and objectives conflict with the client's values.

I. MARKETING AND ADVERTISING

The Elder Law and Special Needs Law Attorney:

1. Should consider marketing and advertising as an opportunity to educate the public and promote the profession of elder law and special needs planning.

Comment:

In addition to promoting one's practice, marketing can serve an educational function.

While it is important to let the public know the types of services being offered by the firm, it is more important to do so in a manner that educates the public about substantive areas of law without using fear or high pressure communications to do so.

2. Ensures that no materially false or misleading information is communicated in connection with a seminar, presentation, marketing or any advertising activity.

Comment:

Truthfulness in all communications to the public is a fundamental obligation of all attorneys. The attorney is prohibited from making false or misleading statements in an attempt to attract clients. A statement is false if any part of it is not true, and a statement is misleading if it creates a false impression.

A "marketing communication" is any communication to any segment of the public that promotes or offers the services of the attorney. It includes advertising, public relations, direct marketing, websites, blogs, online profiles, and other forms of social media. Law firm brochures, seminars, and event announcements are marketing communications. Marketing communications should include clear and understandable disclaimers (See MRPC 7.3(c)).

Seminars, presentations, and similar activities may constitute marketing. Attorneys who organize or speak at seminars and other forums should ensure that no false or misleading information is given and no pressure is exerted (including pressure to make an appointment with the attorney).
For example, to state that a particular course of action is appropriate for everyone, i.e., "one size fits all", or to exaggerate the benefits or minimize the detriments of a particular course of action or procedure is misleading.

Attorneys should use accurate adjectives to describe a legal concept, procedure, program, or technique. For example, advertisers often use words such as "new",

"unique", or "secret" to stimulate interest in a product or service. Any procedure or technique commonly used by attorneys is not "secret" or "unique," and attorneys should not use these or similar terms.

3. Should communicate in a manner that considers the target audience's potential lack of sophistication or vulnerability to overly aggressive or fear-based marketing communications.

Comment:

Whether a communication is misleading depends, in part, on the likely perceptions and vulnerabilities of the intended audience.

For example, marketing techniques designed to pressure a potential client who is vulnerable or lacks financial sophistication, such as offering a "special discount" if the potential client engages the attorney immediately, are inappropriate. The attorney never should attempt to instill fear or panic in a potential client or discourage the potential client from consulting with her spouse or other third party prior to making the financial commitment to retain the attorney.

4. Communicates the attorney's education and experience to distinguish the attorney's practice and refrains from suggesting the attorney's superiority to or advantage over other attorneys.

Comment:

To avoid deceiving the public and potential clients, attorneys should make comparative statements based only on fact. Fact-based statements may result from third-party certification, licensing or evaluation, as permitted by state rules

For example, claims that an attorney has more experience, a greater level of expertise, or a higher "success" rate than other attorneys require supporting empirical data.

5. Uses endorsements and testimonials in a truthful, non-deceptive, and transparent manner.

Comment:

When the opinion of a current or former client is used in a marketing communication, that opinion should be based on actual experience. Atypical results should be identified as such.

If the attorney requests a person to directly communicate a testimonial or other expression of approval through a website, blog, or other media, the relationship

between the attorney and that person should be disclosed in the communication.

Suggested Reading:

https://lawyerist.com/3299/legal-marketing-ethics-web-2-0/

http://www.attorneyatwork.com/lawyer-advertising-and-marketing-ethics-today-an-overview/

http://www.americanbar.org/content/dam/aba/publications/law_practice_today/navigating-the-uncharted-waters-of-social-media-marketing-and-ethics.authcheckdam.pdf

http://blogs.findlaw.com/strategist/2015/04/top-5-ethical-issues-with-attorney-advertising.html

J. NON-LEGAL SERVICES

The Elder Law and Special Needs Law Attorney:

1. May consider using non-legal services to accomplish the goals of the representation with the client's informed written consent and ensures that the client's rights and attorney's ethical duties are maintained.

Comment:

In addition to the need for legal services, the elder law and special needs law attorney often is confronted with a client experiencing non-legal issues requiring medical care, long-term care services and supports, public benefits, insurance coverage, protection from exploitation and neglect, and end-of-life care planning.

The attorney embracing the holistic approach (discussed in Section A) is encouraged, but not required, to provide assistance through non-legal services if the attorney has the experience and expertise to do so. Alternatively, the attorney may utilize non-attorneys to provide such non-legal services (also known as ancillary services).

Common examples of professionals who provide non-legal services in elder law and special needs law include a professional care manager, nurse, life care planner, social worker, physician, psychologist, tax preparer, appraiser, or investment advisor.

The attorney who provides non-legal services must ensure that the client's rights derived from the client-attorney relationship, such as confidentiality, loyalty, communication, competent representation, diligence and avoidance of conflicts of interests, are maintained. When implementing non-legal services, the attorney should develop procedures with the selected non-attorneys that preserve the client's rights. Such procedures may include training non-attorneys on the attorney's duties to the client and having the non-attorney agree in writing to maintain client confidences and disclose any potential conflicts of interest. The attorney also should ensure that any non-legal services are specifically tailored to the client's individual needs.

Before involving a non-attorney in a client representation, the attorney should fully disclose to the client why the proposed service is recommended, the additional cost, if any, and how the attorney will ensure that the client's rights will be preserved. The attorney also should obtain the client's written informed consent to the non-legal services and should be advised if the non-legal service provider has any licensing or other obligations which could conflict with the attorney's duties. For example, a nurse could be a mandatory reporter of abuse, and exercise of this obligation could conflict with the attorney's duty of confidentiality in some states.

2. Considers alternative ways to deliver non-legal services.

Comment:

Non-attorneys often provide valuable services which are non-legal in nature. When a non-attorney is needed to assist with the legal representation, the attorney may:

- Utilize a non-attorney in-house employee; or
- Refer the non-legal services to an independent contractor.

Before providing a non-legal service, especially through an in-house employee, the attorney should consider seeking the approval of the attorney's state bar ethics counsel and disclosing such service to the attorney's malpractice carrier.

3. Discloses in writing and obtains the client's informed written consent to any relationship between the provider of the non-legal service and the attorney, the attorney's law firm and the attorney's immediate family members.

Comment:

The attorney may provide non-legal services through a separate entity related to the attorney or the attorney's law firm provided the attorney complies with the attorney's state bar ethics rules.

These rules typically require that the attorney:

- Ensure that the client's rights be preserved throughout the provision of the non-legal service;
- Disclose to the client any relationship and any financial interest the attorney may have with the non-legal service;
- Advise the client of the availability of similar non-legal services in the locality;
- Advise the client of the client's right to seek independent legal advice; and
- Obtain the client's written informed consent to the non-legal services.

Example: The attorney's client who has advanced dementia could benefit from a geriatric care manager in order to live in the least restrictive setting. The attorney owns a 25% interest in a local geriatric care management company which could provide the services the client needs. Before referring the client to this company, the attorney should comply with the disclosure and consent requirements of the attorney's state bar ethics rules.

4. Maintains appropriate licenses and complies with state bar ethics rules when selling insurance and investment products.

Comment:

The attorney may practice law and simultaneously engage in another occupation, including the selling of insurance or investment products, provided the attorney exercises adequate caution and complies with state bar ethics rules.

As a result of the client-attorney relationship, the client trusts the attorney. This trust permits the attorney to influence the client. The attorney may not pressure the client to buy an insurance or investment product.

Most state bar ethics rules consider the attorney selling an insurance or investment product to a client to be a business transaction with a client that imposes certain requirements on the attorney.

State bar rules typically require that: (1) the proposed sale be fair and reasonable to the client, (2) the terms of the sale be fully disclosed to the client in writing, (3) the client consent in writing thereto, and (4) the client have a reasonable opportunity to seek the advice of independent legal counsel. Some state bar rules impose greater requirements on the attorney and some lesser.

Example: The attorney is asked to provide estate and asset protection planning for the client. The client is in good health and has a $400,000 IRA that the client wants to protect if nursing home admission occurs. Long-term insurance may be appropriate to protect the client's IRA. The attorney is licensed to sell long-term care insurance. Provided that the attorney's state bar ethics rules permit, the attorney fully complies with those rules, and the attorney is not pressuring the client, the attorney may sell the client long-term care insurance.

K. PRO BONO LEGAL REPRESENTATION AND PUBLIC SERVICE

The Elder Law and Special Needs Law Attorney:

1. Recognizes the need for pro bono legal representation, provides pro bono representation to elderly individuals and individuals with disabilities who cannot afford to pay, and participates in and supports pro bono referral programs.

Comment:

Many elderly individuals and individuals with disabilities cannot afford essential legal representation. Because of their specific training and expertise, elder law and special needs law attorneys should take the lead in providing pro bono representation to those individuals, and should provide on average at least fifty hours of pro bono legal representation per year to individuals of limited means.

2. Financially supports organizations that meet the needs of elderly individuals and individuals with disabilities.

Comment:

In addition to providing direct legal representation to clients of limited means, elder law and special needs law attorneys should contribute financially to organizations that provide direct legal representation to elderly individuals or individuals with disabilities who have limited means and to organizations that meet the needs of such individuals.

3. Participates actively in, and provides ongoing leadership for, efforts to improve the law to meet the changing needs of elderly individuals and individuals with disabilities.

Comment:

Elder law and special needs law attorneys possess unique knowledge of the laws affecting elderly individuals and individuals with disabilities and have firsthand insight into the needs of these individuals. Therefore, elder law and special needs law attorneys should continually assess trends and factors that affect these needs and support efforts to improve these laws. They should use their knowledge and skills to lead these efforts to better the lives of elderly individuals and individuals with disabilities, consistent with employment obligations.