• 2010, Health Care and Education Reconciliation Act of 2010 (P.L. 111-152)

P.L. 111-152, §1001(a)(2)(A)-(B):

Amended Code Sec. 36B, as added by section 1401 and amended by section 10105 of the Patient Protection and Affordable Care Act (P.L. 111-148), by striking "9.8 percent" in clauses (i)(II) and (iv) of subsection (c)(2)(C) and inserting "9.5 percent", and by striking "(b)(3)(A)(iii)" in clause (iv) of subsection (c)(2)(C) and inserting "(b)(3)(A)(ii)". **Effective** 3-30-2010.

• 2010, Patient Protection and Affordable Care Act (P.L. 111-148)

P.L. 111-148, §10105(b):

Amended Code Sec. 36B(c)(1)(A), as added by Act Sec. 1401(a), by inserting "equals or" before "exceeds". **Effective** 3-23-2010.

P.L. 111-148, §10105(c):

Amended Code Sec. 36B(c)(2)(C)(iv), as added by Act Sec. 1401(a), by striking "subsection (b)(3)(A)(ii)" and inserting "subsection (b)(3)(A)(iii)". **Effective** 3-23-2010.

P.L. 111-148, §10108(h)(1):

Amended Code Sec. 36B(c)(2), as added by Act Sec. 1401, by adding at the end a new subparagraph (D). **Effective** for tax years beginning after 12-31-2013.

[Sec. 36B(d)]

(d) TERMS RELATING TO INCOME AND FAMILIES.—For purposes of this section—

(1) FAMILY SIZE.—The family size involved with respect to any taxpayer shall be equal to the number of individuals for whom the taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year.

(2) HOUSEHOLD INCOME.—

(A) HOUSEHOLD INCOME.—The term "household income" means, with respect to any taxpayer, an amount equal to the sum of—

(i) the modified adjusted gross income of the taxpayer, plus

(ii) the aggregate modified adjusted gross incomes of all other individuals who—

(I) were taken into account in determining the taxpayer's family size under paragraph (1), and

(II) were required to file a return of tax imposed by section 1 for the taxable year.

(B) MODIFIED ADJUSTED GROSS INCOME.—The term "modified adjusted gross income" means adjusted gross income increased by—

(i) any amount excluded from gross income under section 911,

(ii) any amount of interest received or accrued by the taxpayer during the taxable year which is exempt from tax, and

(iii) an amount equal to the portion of the taxpayer's social security benefits (as defined in section 86(d)) which is not included in gross income under section 86 for the taxable year.

(3) POVERTY LINE.—

(A) IN GENERAL.—The term "poverty line" has the meaning given that term in section 2110(c)(5) of the Social Security Act (42 U.S.C. 1397jj(c)(5)).

(B) POVERTY LINE USED.—In the case of any qualified health plan offered through an Exchange for coverage during a taxable year beginning in a calendar year, the poverty line used shall be the most recently published poverty line as of the 1st day of the regular enrollment period for coverage during such calendar year.

Amendments

• 2011, (P.L. 112-56)

P.L. 112-56, §401(a):

Amended Code Sec. 36B(d)(2)(B) by striking "and" at the end of clause (i), by striking the period at the end of clause (ii) and inserting ", and", and by adding at the end a new clause (iii). **Effective** 11-21-2011.

• 2010, Health Care and Education Reconciliation Act of 2010 (P.L. 111-152)

P.L. 111-152, §1004(a)(1)(A):

Amended Code Sec. 36B(d)(2)(A)(i)-(ii), as added by section 1401 of the Patient Protection and Affordable Care Act (P.L. 111-148), by striking "modified gross" each place it appears and inserting "modified adjusted gross". **Effective** 3-30-2010.

P.L. 111-152, §1004(a)(2)(A):

Amended Code Sec. 36B(d)(2)(B), as added by section 1401 of the Patient Protection and Affordable Care Act (P.L. 111-148). **Effective** 3-30-2010. Prior to amendment, Code Sec. 36B(d)(2)(B) read as follows:

(B) MODIFIED GROSS INCOME.—The term "modified gross income" means gross income—

(i) decreased by the amount of any deduction allowable under paragraph (1), (3), (4), or (10) of section 62(a),

(ii) increased by the amount of interest received or accrued during the taxable year which is exempt from tax imposed by this chapter, and

(iii) determined without regard to sections 911, 931, and 933.

[Sec. 36B(e)]

(e) RULES FOR INDIVIDUALS NOT LAWFULLY PRESENT.—

(1) IN GENERAL.—If 1 or more individuals for whom a taxpayer is allowed a deduction under section 151 (relating to allowance of deduction for personal exemptions) for the taxable year (including the taxpayer or his spouse) are individuals who are not lawfully present—

(A) the aggregate amount of premiums otherwise taken into account under clauses (i) and (ii) of subsection (b)(2)(A) shall be reduced by the portion (if any) of such premiums which is attributable to such individuals, and

(B) for purposes of applying this section, the determination as to what percentage a taxpayer's household income bears to the poverty level for a family of the size involved shall be made under one of the following methods:

(i) A method under which—

(I) the taxpayer's family size is determined by not taking such individuals into account, and

(II) the taxpayer's household income is equal to the product of the taxpayer's household income (determined without regard to this subsection) and a fraction—

(aa) the numerator of which is the poverty line for the taxpayer's family size determined after application of subclause (I), and

(bb) the denominator of which is the poverty line for the taxpayer's family size determined without regard to subclause (I).

(ii) A comparable method reaching the same result as the method under clause (i).

(2) LAWFULLY PRESENT.—For purposes of this section, an individual shall be treated as lawfully present only if the individual is, and is reasonably expected to be for the entire period of enrollment for which the credit under this section is being claimed, a citizen or national of the United States or an alien lawfully present in the United States.

(3) SECRETARIAL AUTHORITY.—The Secretary of Health and Human Services, in consultation with the Secretary, shall prescribe rules setting forth the methods by which calculations of family size and household income are made for purposes of this subsection. Such rules shall be designed to ensure that the least burden is placed on individuals enrolling in qualified health plans through an Exchange and taxpayers eligible for the credit allowable under this section.

[Sec. 36B(f)]

(f) RECONCILIATION OF CREDIT AND ADVANCE CREDIT.—

(1) IN GENERAL.—The amount of the credit allowed under this section for any taxable year shall be reduced (but not below zero) by the amount of any advance payment of such credit under section 1412 of the Patient Protection and Affordable Care Act.

(2) EXCESS ADVANCE PAYMENTS.—

(A) IN GENERAL.—If the advance payments for a taxpayer under section 1412 of the Patient Protection and Affordable Care Act for a taxable year exceed the credit allowed by this section (determined without regard to paragraph (1)), the tax imposed by this chapter for the taxable year shall be increased by the amount of such excess.

(B) LIMITATION ON INCREASE.—

(i) IN GENERAL.—In the case of a taxpayer whose household income is less than 400 percent of the poverty line for the size of the family involved for the taxable year, the amount of the increase under subparagraph (A) shall in no event exceed the applicable dollar amount determined in accordance with the following table (one-half of such amount in the case of a taxpayer whose tax is determined under section 1(c) for the taxable year):

If the household income (expressed as a percent of poverty line) is:	The applicable dollar amount is:
Less than 200%	$600
At least 200% but less than 300%	$1,500
At least 300% but less than 400%	$2,500.

(ii) INDEXING OF AMOUNT.—In the case of any calendar year beginning after 2014, each of the dollar amounts in the table contained under clause (i) 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, determined by substituting "calendar year 2013" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

(3) INFORMATION REQUIREMENT.—Each Exchange (or any person carrying out 1 or more responsibilities of an Exchange under section 1311(f)(3) or 1321(c) of the Patient Protection and Affordable Care Act) shall provide the following information to the Secretary and to the taxpayer with respect to any health plan provided through the Exchange:

(A) The level of coverage described in section 1302(d) of the Patient Protection and Affordable Care Act and the period such coverage was in effect.

(B) The total premium for the coverage without regard to the credit under this section or cost-sharing reductions under section 1402 of such Act.

(C) The aggregate amount of any advance payment of such credit or reductions under section 1412 of such Act.

(D) The name, address, and TIN of the primary insured and the name and TIN of each other individual obtaining coverage under the policy.

(E) Any information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit.

(F) Information necessary to determine whether a taxpayer has received excess advance payments.

Amendments

• 2011, Comprehensive 1099 Taxpayer Protection and Repayment of Exchange Subsidy Overpayments Act of 2011 (P.L. 112-9)

P.L. 112-9, §4(a):

Amended Code Sec. 36B(f)(2)(B)(i). **Effective** for tax years ending after 12-31-2013. Prior to amendment, Code Sec. 36B(f)(2)(B)(i) read as follows:

(i) IN GENERAL.—In the case of a taxpayer whose household income is less than 500 percent of the poverty line for the size of the family involved for the taxable year, the amount of the increase under subparagraph (A) shall in no event exceed the applicable dollar amount determined in accordance with the following table (one-half of such amount in the case of a taxpayer whose tax is determined under section 1(c) for the taxable year):

If the household income (expressed as a percentage of poverty line) is:	The applicable dollar amount is:
Less than 200%	$600
At least 200% but less than 250%	$1,000
At least 250% but less than 300%	$1,500
At least 300% but less than 350%	$2,000
At least 350% but less than 400%	$2,500
At least 400% but less than 450%	$3,000
At least 450% but less than 500%	$3,500

• 2010, Medicare and Medicaid Extenders Act of 2010 (P.L. 111-309)

P.L. 111-309, §208(a):

Amended Code Sec. 36B(f)(2)(B). **Effective** for tax years beginning after 12-31-2013. Prior to amendment by P.L. 111-309, Code Sec. 36B(f)(2)(B) read as follows:

(B) LIMITATION ON INCREASE WHERE INCOME LESS THAN 400 PERCENT OF POVERTY LINE.—

(i) IN GENERAL.—In the case of an applicable taxpayer whose household income is less than 400 percent of the poverty line for the size of the family involved for the taxable year, the amount of the increase under subparagraph (A) shall in no event exceed $400 ($250 in the case of a taxpayer whose tax is determined under section 1(c) for the taxable year).

(ii) INDEXING OF AMOUNT.—In the case of any calendar year beginning after 2014, each of the dollar amounts under clause (i) 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, determined by substituting "calendar year 2013" for "calendar year 1992" in subparagraph (B) thereof.

If the amount of any increase under clause (i) is not a multiple of $50, such increase shall be rounded to the next lowest multiple of $50.

P.L. 111-309, §208(b):

Amended Code Sec. 36B(f)(2)(B)(ii) by inserting "in the table contained" after "each of the dollar amounts". **Effective** for tax years beginning after 12-31-2013.

• 2010, Health Care and Education Reconciliation Act of 2010 (P.L. 111-152)

P.L. 111-152, §1004(c):

Amended Code Sec. 36B(f), as added by section 1401(a) of the Patient Protection and Affordable Care Act (P.L. 111-148), by adding at the end a new paragraph (3). **Effective** 3-30-2010.

[Sec. 36B(g)]

(g) REGULATIONS.—The Secretary shall prescribe such regulations as may be necessary to carry out the provisions of this section, including regulations which provide for—

(1) the coordination of the credit allowed under this section with the program for advance payment of the credit under section 1412 of the Patient Protection and Affordable Care Act, and

(2) the application of subsection (f) where the filing status of the taxpayer for a taxable year is different from such status used for determining the advance payment of the credit.

Amendments

• 2010, Patient Protection and Affordable Care Act (P.L. 111-148)

P.L. 111-148, §1401(a):

Amended subpart C of part IV of subchapter A of chapter 1 by inserting after Code Sec. 36A a new Code Sec. 36B. **Effective** for tax years ending after 12-31-2013.

[Sec. 36—Repealed]

Amendments

• 1977, Tax Reduction and Simplification Act of 1977 (P.L. 95-30)

P.L. 95-30, §101(d)(3):

Repealed Code Sec. 36. **Effective** for tax years beginning after 12-31-76. Prior to repeal, Sec. 36 read as follows:

SEC. 36. CREDITS NOT ALLOWED TO INDIVIDUALS TAKING STANDARD DEDUCTION.

If an individual elects under section 144 to take the standard deduction, the credits provided by section 32 shall not be allowed.

• 1976, Tax Reform Act of 1976 (P.L. 94-455)

P.L. 94-455, §§501(b)(2), 1011(c) (as amended by P.L. 95-30, §302), and 1901(b)(1)(A):

Amended Code Sec. 36 by striking out "PAYING OPTIONAL TAX OR" in the heading; and by striking out "elects to pay the optional tax imposed by section 3, or if he" after "individual". **Effective** for tax years beginning after 12-31-75.

Substituted "sections 32 and" for "sections 32, 33, and" in Code Sec. 36. **Effective** for tax years beginning after

12-31-75. However, P.L. 95-30, §302, changed this effective date to tax years beginning after 12-31-76.

Substituted "section 32" for "sections 32 and 35" in Code Sec. 36. **Effective** for tax years beginning after 12-31-76.

[Sec. 37]

SEC. 37. OVERPAYMENTS OF TAX.

For credit against the tax imposed by this subtitle for overpayments of tax, see section 6401.

Amendments

• 2008, Housing Assistance Tax Act of 2008 (P.L. 110-289)

P.L. 110-289, §3011(a):

Amended subpart C of part IV of subchapter A of chapter 1 by redesignating Code Sec. 36 as Code Sec. 37. **Effective** for residences purchased on or after 4-9-2008, in tax years ending on or after such date.

• 2002, Trade Act of 2002 (P.L. 107-210)

P.L. 107-210, §201(a):

Amended subpart C of part IV of subchapter A of chapter 1 by redesignating Code Sec. 35 as Code Sec. 36. **Effective** for tax years beginning after 12-31-2001.

• 1984, Deficit Reduction Act of 1984 (P.L. 98-369)

P.L. 98-369, §471(c)(1):

Redesignated Code Sec. 45 as Code Sec. 35. **Effective** for tax years beginning after 12-31-83, and to carrybacks from such years.

• 1975, Tax Reduction Act of 1975 (P.L. 94-12)

P.L. 94-12, §§203(a), 204(a), 208(a):

Prior to amendment by P.L. 94-12, Code Sec. 45 was formerly numbered Code Sec. 42. **Effective** 3-29-75.

• 1971, Revenue Act of 1971 (P.L. 92-178)

P.L. 92-178 §601(a):

Redesignated Code Sec. 40 as Code Sec. 42.

• 1965, Excise Reduction Act of 1965 (P.L. 89-44)

P.L. 89-44, §809(c):

Redesignated Code Sec. 39 as Code Sec. 40.

• 1962, Revenue Act of 1962 (P.L. 87-834)

P.L. 87-834, §2:

Redesignated Code Sec. 38 as Code Sec. 39.

Subpart D—Business Related Credits

[Sec. 38]

SEC. 38. GENERAL BUSINESS CREDIT.

[Sec. 38(a)]

(a) ALLOWANCE OF CREDIT.—There shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to the sum of—

(1) the business credit carryforwards carried to such taxable year,

(2) the amount of the current year business credit, plus

(3) the business credit carrybacks carried to such taxable year.

[Sec. 38(b)]

(b) CURRENT YEAR BUSINESS CREDIT.—For purposes of this subpart, the amount of the current year business credit is the sum of the following credits determined for the taxable year:

(1) the investment credit determined under section 46,
(2) the work opportunity credit determined under section 51(a),
(3) the alcohol fuels credit determined under section 40(a),
(4) the research credit determined under section 41(a),
(5) the low-income housing credit determined under section 42(a),
(6) the enhanced oil recovery credit under section 43(a),
(7) in the case of an eligible small business (as defined in section 44(b)), the disabled access credit determined under section 44(a),
(8) the renewable electricity production credit under section 45(a),
(9) the empowerment zone employment credit determined under section 1396(a),
(10) the Indian employment credit as determined under section 45A(a),
(11) the employer social security credit determined under section 45B(a),
(12) the orphan drug credit determined under section 45C(a),
(13) the new markets tax credit determined under section 45D(a),
(14) in the case of an eligible employer (as defined in section 45E(c)), the small employer pension plan startup cost credit determined under section 45E(a),
(15) the employer-provided child care credit determined under section 45F(a),
(16) the railroad track maintenance credit determined under section 45G(a),
(17) the biodiesel fuels credit determined under section 40A(a),
(18) the low sulfur diesel fuel production credit determined under section 45H(a),
(19) the marginal oil and gas well production credit determined under section 45I(a),
(20) the distilled spirits credit determined under section 5011(a),
(21) the advanced nuclear power facility production credit determined under section 45J(a),
(22) the nonconventional source production credit determined under section 45K(a),
(23) the new energy efficient home credit determined under section 45L(a),
(24) the energy efficient appliance credit determined under section 45M(a),
(25) the portion of the alternative motor vehicle credit to which section 30B(g)(1) applies,
(26) the portion of the alternative fuel vehicle refueling property credit to which section 30C(d)(1) applies,
(27) the Hurricane Katrina housing credit determined under section 1400P(b),
(28) the Hurricane Katrina employee retention credit determined under section 1400R(a),
(29) the Hurricane Rita employee retention credit determined under section 1400R(b),
(30) the Hurricane Wilma employee retention credit determined under section 1400R(c),
(31) the mine rescue team training credit determined under section 45N(a),
(32) in the case of an eligible agricultural business (as defined in section 45O(e)), the agricultural chemicals security credit determined under section 45O(a),
(33) the differential wage payment credit determined under section 45P(a),
(34) the carbon dioxide sequestration credit determined under section 45Q(a)[,]
(35) the portion of the new qualified plug-in electric drive motor vehicle credit to which section 30D(c)(1) applies, plus
(36) the small employer health insurance credit determined under section 45R.

Amendments

• 2014, Tax Technical Corrections Act of 2014 (P.L. 113-295)

P.L. 113-295, §209(f)(1), Div. A:

Amended Code Sec. 38(b) by striking "plus" at the end of paragraph (35), by redesignating paragraph (36) as paragraph (37), and by inserting after paragraph (35) a new paragraph (36). **Effective** as if included in the provision of the American Recovery and Reinvestment Tax Act of 2009 (P.L. 111-5) to which it relates [**effective** for vehicles acquired after 12-31-2009.—CCH].

P.L. 113-295, §221(a)(2)(B), Div. A:

Amended Code Sec. 38(b), as amended by Act Sec. 209(f)(1), by inserting "plus" at the end of paragraph (35), by striking paragraph (36), and by redesignating paragraph (37) as paragraph (36). **Effective** generally 12-19-2014. For a special rule, see Act Sec. 221(b)(2), Div. A, below. Prior to being stricken, Code Sec. 38(b)(36), as added by Act Sec. 209(f)(1), read as follows:

(36) the portion of the qualified plug-in electric vehicle credit to which section 30(c)(1) applies, plus

P.L. 113-295, §221(b(2), Div. A, provides:

(2) SAVINGS PROVISION.—If—

(A) any provision amended or repealed by the amendments made by this section applied to—

(i) any transaction occurring before the date of the enactment of this Act,

(ii) any property acquired before such date of enactment, or

(iii) any item of income, loss, deduction, or credit taken into account before such date of enactment, and

(B) the treatment of such transaction, property, or item under such provision would (without regard to the amendments or repeals made by this section) affect the liability for tax for periods ending after date of enactment, nothing in the amendments or repeals made by this section shall be construed to affect the treatment of such transaction, property, or item for purposes of determining liability for tax for periods ending after such date of enactment.

• 2013, American Taxpayer Relief Act of 2012 (P.L. 112-240)

P.L. 112-240, §101(a)(1) and (3), provides:

SEC. 101. PERMANENT EXTENSION AND MODIFICATION OF 2001 TAX RELIEF.

(a) PERMANENT EXTENSION.—

(1) IN GENERAL.—The Economic Growth and Tax Relief Reconciliation Act of 2001 is amended by striking title IX.

* * *

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to taxable, plan, or limitation years beginning after December 31, 2012, and estates of decedents dying, gifts made, or generation skipping transfers after December 31, 2012.

• 2010, Patient Protection and Affordable Care Act (P.L. 111-148)

P.L. 111-148, §1421(b):

Amended Code Sec. 38(b) by striking "plus" at the end of paragraph (34), by striking the period at the end of paragraph (35) and inserting ", plus", and by inserting after paragraph (35) a new paragraph (36). **Effective** for amounts paid or incurred in tax years beginning after 12-31-2009 [**effective** date amended by Act Sec. 10105(e)(4).—CCH].

• 2010, Hiring Incentives to Restore Employment Act (P.L. 111-147)

P.L. 111-147, §102, provides:

SEC. 102. BUSINESS CREDIT FOR RETENTION OF CERTAIN NEWLY HIRED INDIVIDUALS IN 2010.

(a) IN GENERAL.—In the case of any taxable year ending after the date of the enactment of this Act, the current year business credit determined under section 38(b) of the Internal Revenue Code of 1986 for such taxable year shall be increased, with respect to each retained worker with respect to which subsection (b)(2) is first satisfied during such taxable year, by the lesser of—

(1) $1,000, or

(2) 6.2 percent of the wages (as defined in section 3401(a)) paid by the taxpayer to such retained worker during the 52 consecutive week period referred to in subsection (b)(2).

(b) RETAINED WORKER.—For purposes of this section, the term "retained worker" means any qualified individual (as defined in section 3111(d)(3) or section 3221(c)(3) of the Internal Revenue Code of 1986)—

(1) who was employed by the taxpayer on any date during the taxable year,

(2) who was so employed by the taxpayer for a period of not less than 52 consecutive weeks, and

(3) whose wages (as defined in section 3401(a)) for such employment during the last 26 weeks of such period equaled at least 80 percent of such wages for the first 26 weeks of such period.

(c) LIMITATION ON CARRYBACKS.—No portion of the unused business credit under section 38 of the Internal Revenue Code of 1986 for any taxable year which is attributable to the increase in the current year business credit under this section may be carried to a taxable year beginning before the date of the enactment of this section.

(d) TREATMENT OF POSSESSIONS.—

(1) PAYMENTS TO POSSESSIONS.—

(A) MIRROR CODE POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States with a mirror code tax system amounts equal to the loss to that possession by reason of the application of this section (other than this subsection). Such amounts shall be determined by the Secretary of the Treasury based on information provided by the government of the respective possession.

(B) OTHER POSSESSIONS.—The Secretary of the Treasury shall pay to each possession of the United States which does not have a mirror code tax system amounts estimated by the Secretary of the Treasury as being equal to the aggregate benefits that would have been provided to residents of such possession by reason of the application of this section (other than this subsection) if a mirror code tax system had been in effect in such possession. The preceding sentence shall not apply with respect to any possession of the United States unless such possession has a plan, which has been approved by the Secretary of the Treasury, under which such possession will promptly distribute such payments to the residents of such possession.

(2) COORDINATION WITH CREDIT ALLOWED AGAINST UNITED STATES INCOME TAXES.—No increase in the credit determined under section 38(b) of the Internal Revenue Code of 1986 against United States income taxes for any taxable year determined under subsection (a) shall be taken into account with respect to any person—

(A) to whom a credit is allowed against taxes imposed by the possession by reason of this section for such taxable year, or

(B) who is eligible for a payment under a plan described in paragraph (1)(B) with respect to such taxable year.

(3) DEFINITIONS AND SPECIAL RULES.—

(A) POSSESSION OF THE UNITED STATES.—For purposes of this subsection, the term "possession of the United States" includes the Commonwealth of Puerto Rico and the Commonwealth of the Northern Mariana Islands.

(B) MIRROR CODE TAX SYSTEM.—For purposes of this subsection, the term "mirror code tax system" means, with respect to any possession of the United States, the income tax system of such possession if the income tax liability of the residents of such possession under such system is determined by reference to the income tax laws of the United States as if such possession were the United States.

(C) TREATMENT OF PAYMENTS.—For purposes of section 1324(b)(2) of title 31, United States Code, rules similar to the rules of section 1001(b)(3)(C) of the American Recovery and Reinvestment Tax Act of 2009 shall apply.

• 2009, American Recovery and Reinvestment Tax Act of 2009 (P.L. 111-5)

P.L. 111-5, §1141(b)(2):

Amended Code Sec. 38(b)(35) by striking "30D(d)(1)" and inserting "30D(c)(1)". **Effective** for vehicles acquired after 12-31-2009.

• 2008, Energy Improvement and Extension Act of 2008 (P.L. 110-343)

P.L. 110-343, Div. B, §115(b):

Amended Code Sec. 38(b) by striking "plus" at the end of paragraph (32), by striking the period at the end of paragraph (33) and inserting "plus", and by adding at the end a new paragraph (34). **Effective** for carbon dioxide captured after 10-3-2008.

P.L. 110-343, Div. B, §205(c):

Amended Code Sec. 38(b), as amended by this Act, by striking "plus" at the end of paragraph (33), by striking the period at the end of paragraph (34) and inserting "[,] plus", and by adding at the end a new paragraph (35). **Effective** for tax years beginning after 12-31-2008.

• 2008, Heartland, Habitat, Harvest, and Horticulture Act of 2008 (P.L. 110-246)

P.L. 110-246, §15343(b):

Amended Code Sec. 38(b) by striking "plus" at the end of paragraph (30), by striking the period at the end of paragraph (31) and inserting ", plus", and by adding at the end a new paragraph (32). **Effective** for amounts paid or incurred after 5-22-2008.

• 2008, Heroes Earnings Assistance and Relief Tax Act of 2008 (P.L. 110-245)

P.L. 110-245, §111(b):

Amended Code Sec. 38(b) by striking "plus" at the end of paragraph (31), by striking the period at the end of paragraph (32) and inserting ", plus", and by adding at the end a new paragraph (33). **Effective** for amounts paid after 6-17-2008.

• 2007, Tax Technical Corrections Act of 2007 (P.L. 110-172)

P.L. 110-172, §11(a)(6)(A)-(C):

Amended Code Sec. 38(b) by striking "and" each place it appears at the end of any paragraph, by striking "plus" each place it appears at the end of any paragraph, and by inserting "plus" at the end of paragraph (30). [Note: Code Sec. 38(b) does not contain the word "and" at the end of any paragraph. Therefore, the amendment made by Act Sec. 11(a)(6)(A) cannot be made. Moreover, the word "plus" appears only at the end of paragraph (30).—CCH] **Effective** 12-29-2007.

• 2006, Tax Relief and Health Care Act of 2006 (P.L. 109-432)

P.L. 109-432, Div. A, §405(b):

Amended Code Sec. 38(b) by striking "and" at the end of paragraph (29), by striking the period at the end of paragraph (30) and inserting ", plus", and by adding at the end a new paragraph (31). **Effective** for tax years beginning after 12-31-2005.

• 2006, Pension Protection Act of 2006 (P.L. 109-280)

P.L. 109-280, §811, provides:

SEC. 811. PENSIONS AND INDIVIDUAL RETIREMENT ARRANGEMENT PROVISIONS OF ECONOMIC

GROWTH AND TAX RELIEF RECONCILIATION ACT OF 2001 MADE PERMANENT.

Title IX of the Economic Growth and Tax Relief Reconciliation Act of 2001 [P.L. 107-16] shall not apply to the provisions of, and amendments made by, subtitles A through F of title VI [§§601-666]of such Act (relating to pension and individual retirement arrangement provisions).

• 2005, Gulf Opportunity Zone Act of 2005 (P.L. 109-135)

P.L. 109-135, §103(b)(1):

Amended Code Sec. 38(b) by striking "and" at the end of paragraph (25), by striking the period at the end of paragraph (26) and inserting ", and", and by adding at the end a new paragraph (27). **Effective** 12-21-2005.

P.L. 109-135, §201(b)(1):

Amended Code Sec. 38(b) by striking "and" at the end of paragraph (26), by striking the period at the end of paragraph (27) and inserting a comma, and by adding at the end new paragraphs (28) through (30). **Effective** 12-21-2005.

• 2005, Katrina Emergency Tax Relief Act of 2005 (P.L. 109-73)

P.L. 109-73, §202 [repealed by P.L. 109-135, §201(b)(4)(B)], provides:

SEC. 202. EMPLOYEE RETENTION CREDIT FOR EMPLOYERS AFFECTED BY HURRICANE KATRINA.

(a) IN GENERAL.—In the case of an eligible employer, there shall be allowed as a credit against the tax imposed by chapter 1 of the Internal Revenue Code of 1986 for the taxable year an amount equal to 40 percent of the qualified wages with respect to each eligible employee of such employer for such taxable year. For purposes of the preceding sentence, the amount of qualified wages which may be taken into account with respect to any individual shall not exceed $6,000.

(b) DEFINITIONS.—For purposes of this section—

(1) ELIGIBLE EMPLOYER.—The term "eligible employer" means any employer—

(A) which conducted an active trade or business on August 28, 2005, in a core disaster area, and

(B) with respect to whom the trade or business described in subparagraph (A) is inoperable on any day after August 28, 2005, and before January 1, 2006, as a result of damage sustained by reason of Hurricane Katrina.

(2) ELIGIBLE EMPLOYEE.—The term "eligible employee" means with respect to an eligible employer an employee whose principal place of employment on August 28, 2005, with such eligible employer was in a core disaster area.

(3) QUALIFIED WAGES.—The term "qualified wages" means wages (as defined in section 51(c)(1) of such Code, but without regard to section 3306(b)(2)(B) of such Code) paid or incurred by an eligible employer with respect to an eligible employee on any day after August 28, 2005, and before January 1, 2006, which occurs during the period—

(A) beginning on the date on which the trade or business described in paragraph (1) first became inoperable at the principal place of employment of the employee immediately before Hurricane Katrina, and

(B) ending on the date on which such trade or business has resumed significant operations at such principal place of employment.

Such term shall include wages paid without regard to whether the employee performs no services, performs services at a different place of employment than such principal place of employment, or performs services at such principal place of employment before significant operations have resumed.

(c) CREDIT NOT ALLOWED FOR LARGE BUSINESSES.—The term "eligible employer" shall not include any trade or business for any taxable year if such trade or business employed an average of more than 200 employees on business days during the taxable year.

(d) CERTAIN RULES TO APPLY.—For purposes of this section, rules similar to the rules of sections 51(i)(1), 52, and 280C(a) of such Code shall apply.

(e) EMPLOYEE NOT TAKEN INTO ACCOUNT MORE THAN ONCE.—An employee shall not be treated as an eligible employee for purposes of this section for any period with respect to any employer if such employer is allowed a credit under section 51 of such Code with respect to such employee for such period.

(f) CREDIT TO BE PART OF GENERAL BUSINESS CREDIT.—The credit allowed under this section shall be added to the current year business credit under section 38(b) of such Code and shall be treated as a credit allowed under subpart D of part IV of subchapter A of chapter 1 of such Code.

• 2005, Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (P.L. 109-59)

P.L. 109-59, §11126(b):

Amended Code Sec. 38(b) by striking "plus" at the end of paragraph (18), by striking the period at the end of paragraph (19) and inserting ", plus", and by adding at the end a new paragraph (20). **Effective** for tax years beginning after 9-30-2005. For a special rule, see Act Sec. 11151(d)(2), below.

P.L. 109-59, §11151(d)(2), provides:

(2) If the Energy Policy Act of 2005 is enacted before the date of the enactment of this Act, for purposes of executing any amendments made by the Energy Policy Act of 2005 to section 38(b) of the Internal Revenue Code of 1986, the amendments made by section 1126(b) of this Act shall be treated as having been executed before such amendments made by the Energy Policy Act of 2005.

• 2005, Energy Tax Incentives Act of 2005 (P.L. 109-58)

P.L. 109-58, §1306(b), as amended by P.L. 109-59, §11151(d)(1):

Amended Code Sec. 38(b), as amended by the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, by striking "plus" at the end of paragraph (19), by striking the period at the end of paragraph (20) and inserting ", plus", and by adding at the end a new paragraph (21). **Effective** for production in tax years beginning after 8-8-2005. For a special rule, see P.L. 109-59, Act Sec. 11151(a)(2).

P.L. 109-58, §1322(a)(2):

Amended Code Sec. 38(b), as amended by this Act, by striking "plus" at the end of paragraph (20), by striking the period at the end of paragraph (21) and inserting ", plus", and by adding at the end a new paragraph (22). **Effective** for credits determined under the Internal Revenue Code of 1986 for tax years ending after 12-31-2005.

P.L. 109-58, §1332(b):

Amended Code Sec. 38(b), as amended by this Act, by striking "plus" at the end of paragraph (21), by striking the period at the end of paragraph (22) and inserting ", plus", and by adding at the end a new paragraph (23). **Effective** for qualified new energy efficient homes acquired after 12-31-2005, in tax years ending after such date.

P.L. 109-58, §1334(b):

Amended Code Sec. 38(b), as amended by this Act, by striking "plus" at the end of paragraph (22), by striking the period at the end of paragraph (23) and inserting ", plus", and by adding at the end a new paragraph (24). **Effective** for appliances produced after 12-31-2005.

P.L. 109-58, §1341(b)(1):

Amended Code Sec. 38(b), as amended by this Act, by striking "plus" at the end of paragraph (23), by striking the period at the end of paragraph (24) and inserting ", and", and by adding at the end a new paragraph (25). **Effective** for property placed in service after 12-31-2005, in tax years ending after such date.

P.L. 109-58, §1342(b)(1):

Amended Code Sec. 38(b), as amended by this Act, by striking "plus" at the end of paragraph (24), by striking the period at the end of paragraph (25) and inserting ", and", and by adding at the end a new paragraph (26). **Effective** for property placed in service after 12-31-2005, in tax years ending after such date.

• 2004, American Jobs Creation Act of 2004 (P.L. 108-357)

P.L. 108-357, §245(c)(1):

Amended Code Sec. 38(b) by striking "plus" at the end of paragraph (14), by striking the period at the end of paragraph (15) and inserting ", plus", and by adding at the end a new paragraph (16). **Effective** for tax years beginning after 12-31-2004.

[Sec. 147(b)]

(b) MATURITY MAY NOT EXCEED 120 PERCENT OF ECONOMIC LIFE.—

(1) GENERAL RULE.—Except as provided in subsection (h), a private activity bond shall not be a qualified bond if it is issued as part of an issue and—

(A) the average maturity of the bonds issued as part of such issue, exceeds

(B) 120 percent of the average reasonably expected economic life of the facilities being financed with the net proceeds of such issue.

(2) DETERMINATION OF AVERAGES.—For purposes of paragraph (1)—

(A) the average maturity of any issue shall be determined by taking into account the respective issue prices of the bonds issued as part of such issue, and

(B) the average reasonably expected economic life of the facilities being financed with any issue shall be determined by taking into account the respective cost of such facilities.

(3) SPECIAL RULES.—

(A) DETERMINATION OF ECONOMIC LIFE.—For purposes of this subsection, the reasonably expected economic life of any facility shall be determined as of the later of—

(i) the date on which the bonds are issued, or

(ii) the date on which the facility is placed in service (or expected to be placed in service).

(B) TREATMENT OF LAND.—

(i) LAND NOT TAKEN INTO ACCOUNT.—Except as provided in clause (ii), land shall not be taken into account under paragraph (1)(B).

(ii) ISSUES WHERE 25 PERCENT OR MORE OF PROCEEDS USED TO FINANCE LAND.—If 25 percent or more of the net proceeds of any issue is to be used to finance land, such land shall be taken into account under paragraph (1)(B) and shall be treated as having an economic life of 30 years.

(4) SPECIAL RULE FOR POOLED FINANCING OF 501(c)(3) ORGANIZATION.—

(A) IN GENERAL.—At the election of the issuer, a qualified 501(c)(3) bond shall be treated as meeting the requirements of paragraph (1) if such bond meets the requirements of subparagraph (B).

(B) REQUIREMENTS.—A qualified 501(c)(3) bond meets the requirements of this subparagraph if—

(i) 95 percent or more of the net proceeds of the issue of which such bond is a part are to be used to make or finance loans to 2 or more 501(c)(3) organizations or governmental units for acquisition of property to be used by such organizations,

(ii) each loan described in clause (i) satisfies the requirements of paragraph (1) (determined by treating each loan as a separate issue),

(iii) before such bond is issued, a demand survey was conducted which shows a demand for financing greater than an amount equal to 120 percent of the lendable proceeds of such issue, and

(iv) 95 percent or more of the net proceeds of such issue are to be loaned to 501(c)(3) organizations or governmental units within 1 year of issuance and, to the extent there are any unspent proceeds after such 1-year period, bonds issued as part of such issue are to be redeemed as soon as possible thereafter (and in no event later than 18 months after issuance).

A bond shall not meet the requirements of this subparagraph if the maturity date of any bond issued as part of such issue is more than 30 years after the date on which the bond was issued (or, in the case of a refunding or series of refundings, the date on which the original bond was issued).

(5) SPECIAL RULE FOR CERTAIN FHA INSURED LOANS.—Paragraph (1) shall not apply to any bond issued as part of an issue 95 percent or more of the net proceeds of which are to be used to finance mortgage loans insured under FHA 242 or under a similar Federal Housing Administration program (as in effect on the date of the enactment of the Tax Reform Act of 1986) where the loan term approved by such Administration plus the maximum maturity of debentures which could be issued by such Administration in satisfaction of its obligations exceeds the term permitted under paragraph (1).

[Sec. 147(c)]

(c) LIMITATION ON USE FOR LAND ACQUISITION.—

(1) IN GENERAL.—Except as provided in subsection (h), a private activity bond shall not be a qualified bond if—

(A) it is issued as part of an issue and 25 percent or more of the net proceeds of such issue are to be used (directly or indirectly) for the acquisition of land (or an interest therein), or

(B) any portion of the proceeds of such issue is to used (directly or indirectly) for the acquisition of land (or an interest therein) to be used for farming purposes.

(2) EXCEPTION FOR FIRST-TIME FARMERS.—

(A) IN GENERAL.—If the requirements of subparagraph (B) are met with respect to any land, paragraph (1) shall not apply to such land, and subsection (d) shall not apply to property to be used thereon for farming purposes, but only to the extent of expenditures (financed with the proceeds of the issue) not in excess of $450,000.

(B) ACQUISITION BY FIRST-TIME FARMERS.—The requirements of this subparagraph are met with respect to any land if—

(i) such land is to be used for farming purposes, and

(ii) such land is to be acquired by an individual who is a first-time farmer, who will be the principal user of such land, and who will materially and substantially participate on the farm of which such land is a part in the operation of such farm.

(C) FIRST-TIME FARMER.—For purposes of this paragraph—

(i) IN GENERAL.—The term "first-time farmer" means any individual if such individual—

(I) has not at any time had any direct or indirect ownership interest in substantial farmland in the operation of which such individual materially participated, and

(II) has not received financing under this paragraph in an amount which, when added to the financing to be provided under this paragraph, exceeds the amount in effect under subparagraph (A).

(ii) AGGREGATION RULES.—Any ownership or material participation, or financing received, by an individual's spouse or minor child shall be treated as ownership and material participation, or financing received, by the individual.

(iii) INSOLVENT FARMER.—For purposes of clause (i), farmland which was previously owned by the individual and was disposed of while such individual was insolvent shall be disregarded if section 108 applied to indebtedness with respect to such farmland.

(D) FARM.—For purposes of this paragraph, the term "farm" has the meaning given such term by section 6420(c)(2).

(E) SUBSTANTIAL FARMLAND.—For purposes of this paragraph, the term "substantial farmland" means any parcel of land unless such parcel is smaller than 30 percent of the median size of a farm in the county in which such parcel is located.

(F) USED EQUIPMENT LIMITATION.—For purposes of this paragraph, in no event may the amount of financing provided by reason of this paragraph to a first-time farmer for personal property—

(i) of a character subject to the allowance for depreciation,

(ii) the original use of which does not begin with such farmer, and

(iii) which is to be used for farming purposes,

exceed $62,500. A rule similar to the rule of subparagraph (C)(ii) shall apply for purposes of the preceding sentence.

(G) ACQUISITION FROM RELATED PERSON.—For purposes of this paragraph and section 144(a), the acquisition by a first-time farmer of land or personal property from a related person (within the meaning of section 144(a)(3)) shall not be treated as an acquisition from a related person, if—

(i) the acquisition price is for the fair market value of such land or property, and

(ii) subsequent to such acquisition, the related person does not have a financial interest in the farming operation with respect to which the bond proceeds are to be used.

(H) ADJUSTMENTS FOR INFLATION.—In the case of any calendar year after 2008, 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, determined by substituting "calendar year 2007"' for "calendar year 1992" in subparagraph (B) thereof.

If any amount as increased under the preceding sentence is not a multiple of $100, such amount shall be rounded to the nearest multiple of $100.

(3) EXCEPTION FOR CERTAIN LAND ACQUIRED FOR ENVIRONMENTAL PURPOSES, ETC.—Any land acquired by a governmental unit (or issuing authority) in connection with an airport, mass commuting facility, high-speed intercity rail facility, dock, or wharf shall not be taken into account under paragraph (1) if—

(A) such land is acquired for noise abatement or wetland preservation, or for future use as an airport, mass commuting facility, high-speed intercity rail facility, dock, or wharf, and

(B) there is not other significant use of such land.

Amendments

• 2008, Heartland, Habitat, Harvest, and Horticulture Act of 2008 (P.L. 110-246)

P.L. 110-246, §15341(a):

Amended Code Sec. 147(c)(2)(A) by striking "$250,000" and inserting "$450,000". Effective for bonds issued after 5-22-2008.

P.L. 110-246, §15341(b):

Amended Code Sec. 147(c)(2) by adding at the end a new subparagraph (H). Effective for bonds issued after 5-22-2008.

P.L. 110-246, §15341(c):

Amended Code Sec. 147(c)(2)(E) by striking "unless" and all that follows through the period and inserting "unless such parcel is smaller than 30 percent of the median size of a farm in the county in which such parcel is located". Effective for bonds issued after 5-22-2008. Prior to amendment, Code Sec. 147(c)(2)(E) read as follows:

(E) SUBSTANTIAL FARMLAND.—For purposes of this paragraph, the term "substantial farmland" means any parcel of land unless—

(i) such parcel is smaller than 30 percent of the median size of a farm in the county in which such parcel is located, and

(ii) the fair market value of the land does not at any time while held by the individual exceed $125,000.

P.L. 110-246, §15341(d):

Amended Code Sec. 147(c)(2)(C)(i)(II) by striking "$250,000" and inserting "the amount in effect under subparagraph (A)". Effective for bonds issued after 5-22-2008.

• 1996, Small Business Job Protection Act of 1996 (P.L. 104-188)

P.L. 104-188, §1117(a):

Amended Code Sec. 147(c)(2) by adding at the end a new subparagraph (G). Effective for bonds issued after 8-20-96. For a special rule, see Act Sec. 1804, below.

P.L. 104-188, §1117(b):

Amended Code Sec. 147(c)(2)(E)(i) by striking "15 percent" and inserting "30 percent". Effective for bonds issued after 8-20-96. For a special rule, see Act Sec. 1804, below.

P.L. 104-188, §1804, provides:

SEC. 1804. TAX-EXEMPT BONDS FOR SALE OF ALASKA POWER ADMINISTRATION FACILITY.

Sections 142(f)(3) (as added by section 1608) and 147(d) of the Internal Revenue Code of 1986 shall not apply in determining whether any private activity bond issued after the date of the enactment of this Act and used to finance the acquisition of the Snettisham hydroelectric project from the Alaska Power Administration is a qualified bond for purposes of such Code.

• 1989, Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239)

P.L. 101-239, §7816(s)(3):

Amended Code Sec. 147(c)(3) by inserting a comma after "mass commuting facility" each place it appears. Effective as if included in the provision of P.L. 100-647 to which it relates.

• 1988, Technical and Miscellaneous Revenue Act of 1988 (P.L. 100-647)

P.L. 100-647, §6180(b)(4):

Amended Code Sec. 147(c)(3) by inserting "high-speed intercity rail facility" after "mass commuting facility" each place it appears. Effective for bonds issued after 11-10-88.

[Sec. 147(d)]

(d) ACQUISITION OF EXISTING PROPERTY NOT PERMITTED.—

(1) IN GENERAL.—Except as provided in subsection (h), a private activity bond shall not be a qualified bond if issued as part of an issue and any portion of the net proceeds of such issue is to be used for the acquisition of any property (or an interest therein) unless the 1st use of such property is pursuant to such acquisition.

(2) EXCEPTION FOR CERTAIN REHABILITATIONS.—Paragraph (1) shall not apply with respect to any building (and the equipment therefor) if—

(A) the rehabilitation expenditures with respect to such building, equal or exceed

(B) 15 percent of the portion of the cost of acquiring such building (and equipment) financed with the net proceeds of the issue.

A rule similar to the rule of the preceding sentence shall apply in the case of structures other than a building except that subparagraph (B) shall be applied by substituting "100 percent" for "15 percent".

(3) REHABILITATION EXPENDITURES.—For purposes of this subsection—

(A) IN GENERAL.—Except as provided in this paragraph, the term "rehabilitation expenditures" means any amount properly chargeable to capital account which is incurred by the person acquiring the building for property (or additions or improvements to property) in connection with the rehabilitation of a building. In the case of an integrated operation contained in a building before its acquisition, such term includes rehabilitating existing equipment in such building or replacing it with equipment having substantially the same function. For purposes of this subparagraph, any amount incurred by a successor to the person acquiring the building or by the seller under a sales contract with such person shall be treated as incurred by such person.

(B) CERTAIN EXPENDITURES NOT INCLUDED.—The term "rehabilitation expenditures" does not include any expenditure described in section 47(c)(2)(B).

(C) PERIOD DURING WHICH EXPENDITURES MUST BE INCURRED.—The term "rehabilitation expenditures" shall not include any amount which is incurred after the date 2 years after the later of—

(i) the date on which the building was acquired, or

(ii) the date on which the bond was issued.

(4) SPECIAL RULE FOR CERTAIN PROJECTS.—In the case of a project involving 2 or more buildings, this subsection shall be applied on a project basis.

Amendments

• 1990, Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508)

P.L. 101-508, §11813(b)(8):

Amended Code Sec. 147(d)(3)(B) by striking "section 48(g)(2)(B)" and inserting "section 47(c)(2)(B)". **Effective**, generally, for property placed in service after 12-31-90. However, for exceptions, see Act Sec. 11813(c)(2), below.

P.L. 101-508, §11813(c)(2), provides:

(2) EXCEPTIONS.—The amendments made by this section shall not apply to—

(A) any transition property (as defined in section 49(e) of the Internal Revenue Code of 1986 (as in effect on the day before the date of the enactment of this Act),

(B) any property with respect to which qualified progress expenditures were previously taken into account under section 46(d) of such Code (as so in effect), and

(C) any property described in section 46(b)(2)(C) of such Code (as so in effect).

[Sec. 147(e)]

(e) NO PORTION OF BONDS MAY BE ISSUED FOR SKYBOXES, AIRPLANES, GAMBLING ESTABLISHMENTS, ETC.—A private activity bond shall not be a qualified bond if issued as part of an issue and any portion of the proceeds of such issue is to be used to provide any airplane, skybox or other private luxury box, health club facility, facility primarily used for gambling, or store the principal business of which is the sale of alcoholic beverages for consumption off premises. The preceding sentence shall not apply to any fixed-wing aircraft equipped for, and exclusively dedicated to providing, acute care emergency medical services (within the meaning of section 4261(g)(2)).

Amendments

• 2012, FAA Modernization and Reform Act of 2012 (P.L. 112-95)

P.L. 112-95, §1105(a):

Amended Code Sec. 147(e) by adding at the end a new sentence. **Effective** for obligations issued after 2-14-2012.

• 1988, Technical and Miscellaneous Revenue Act of 1988 (P.L. 100-647)

P.L. 100-647, §1013(a)(11):

Amended Code Sec. 147(e) by striking out "treated as" before the words "a qualified bond". **Effective** as if included in the provision of P.L. 99-514 to which it relates.

[Sec. 147(f)]

(f) PUBLIC APPROVAL REQUIRED FOR PRIVATE ACTIVITY BONDS.—

(1) IN GENERAL.—A private activity bond shall not be a qualified bond unless such bond satisfies the requirements of paragraph (2).

(2) PUBLIC APPROVAL REQUIREMENT.—

(A) IN GENERAL.—A bond shall satisfy the requirements of this paragraph if such bond is issued as a part of an issue which has been approved by—

(i) the governmental unit—

(I) which issued such bond, or

(II) on behalf of which such bond was issued, and

(ii) each governmental unit having jurisdiction over the area in which any facility, with respect to which financing is to be provided from the net proceeds of such issue, is located (except that if more than 1 governmental unit within a State has jurisdiction over the entire area within such State in which such facility is located, only 1 such unit need approve such issue).

(B) APPROVAL BY A GOVERNMENTAL UNIT.—For purposes of subparagraph (A), an issue shall be treated as having been approved by any governmental unit if such issue is approved—

(i) by the applicable elected representative of such governmental unit after a public hearing following reasonable public notice, or

(ii) by voter referendum of such governmental unit.

(C) SPECIAL RULES FOR APPROVAL OF FACILITY.—If there has been public approval under subparagraph (A) of the plan for financing a facility, such approval shall constitute approval under subparagraph (A) for any issue—

(i) which is issued pursuant to such plan within 3 years after the date of the 1st issue pursuant to the approval, and

(ii) all or substantially all of the proceeds of which are to be used to finance such facility or to refund previous financing under such plan.

(D) REFUNDING BONDS.—No approval under subparagraph (A) shall be necessary with respect to any bond which is issued to refund (other than to advance refund) a bond approved under subparagraph (A) (or treated as approved under subparagraph (C)) unless the average maturity date of the issue of which the refunding bond is a part is later than the average maturity date of the bonds to be refunded by such issue. For purposes of the preceding sentence, average maturity shall be determined in accordance with subsection (b)(2)(A).

(E) APPLICABLE ELECTED REPRESENTATIVE.—For purposes of this paragraph—

(i) IN GENERAL.—The term "applicable elected representative" means with respect to any governmental unit—

(I) an elected legislative body of such unit, or

(II) the chief elected executive officer, the chief elected State legal officer of the executive branch, or any other elected official of such unit designated for purposes of this paragraph by such chief elected executive officer or by State law.

If the office of any elected official described in subclause (II) is vacated and an individual is appointed by the chief elected executive officer of the governmental unit and confirmed by the elected legislative body of such unit (if any) to serve the remaining term of the elected official, the individual so appointed shall be treated as the elected official for such remaining term.

(ii) NO APPLICABLE ELECTED REPRESENTATIVE.—If (but for this clause) a governmental unit has no applicable elected representative, the applicable elected representative for purposes of clause (i) shall be the applicable elected representative of the governmental unit—

(I) which is the next higher governmental unit with such a representative, and

(II) from which the authority of the governmental unit with no such representative is derived.

(3) SPECIAL RULE FOR APPROVAL OF AIRPORTS OR HIGH-SPEED INTERCITY RAIL FACILITIES.—If—

(A) the proceeds of an issue are to be used to finance a facility or facilities located at an airport or high-speed intercity rail facilities, and

(B) the governmental unit issuing such bonds is the owner or operator of such airport or high-speed intercity rail facilities,

such governmental unit shall be deemed to be the only governmental unit having jurisdiction over such airport or high-speed intercity rail facilities for purposes of this subsection.

(4) SPECIAL RULES FOR SCHOLARSHIP FUNDING BOND ISSUES AND VOLUNTEER FIRE DEPARTMENT BOND ISSUES.—

(A) SCHOLARSHIP FUNDING BONDS.—In the case of a qualified scholarship funding bond, any governmental unit which made a request described in section 150(d)(2)(B) with respect to the issuer of such bond shall be treated for purposes of paragraph (2) of this subsection as the governmental unit on behalf of which such bond was issued. Where more than one governmental unit within a State has made a request described in section 150(d)(2)(B), the State may also be treated for purposes of paragraph (2) of this subsection as the governmental unit on behalf of which such bond was issued.

(B) VOLUNTEER FIRE DEPARTMENT BONDS.—In the case of a bond of a volunteer fire department which meets the requirements of section 150(e), the political subdivision described in section 150(e)(2)(B) with respect to such department shall be treated for purposes of paragraph (2) of this subsection as the governmental unit on behalf of which such bond was issued.

Amendments

• 1988, Technical and Miscellaneous Revenue Act of 1988 (P.L. 100-647)

P.L. 100-647, §1013(a)(12):

Amended Code Sec. 147(f) by adding at the end thereof new paragraph (4). **Effective** as if included in the provision of P.L. 99-514 to which it relates.

P.L. 100-647, §1013(a)(29):

Amended Code Sec. 147(f)(2)(D) by striking out "the maturity date" and all that follows and inserting in lieu thereof "the average maturity date of the issue of which the refunded bond is a part is later than the average maturity date of the bonds to be refunded by such issue. For purposes of the preceding sentence, average maturity shall be determined in accordance with subsection (b)(2)(A)". **Effective** as if included in the provision of P.L. 99-514 to which it relates. Prior to amendment, Code Sec. 147(f)(2)(D) read as follows:

(D) REFUNDING BONDS.—No approval under subparagraph (A) shall be necessary with respect to any bond which is issued to refund (other than to advance refund) a bond approved under subparagraph (A) (or treated as approved under subparagraph (C)) unless the maturity date of such bond is later than the maturity date of the bond to be refunded.

P.L. 100-647, §1013(a)(36):

Amended Code Sec. 147(f)(2)(E)(i) by adding at the end thereof a new sentence. **Effective** as if included in the provision of P.L. 99-514 to which it relates.

P.L. 100-647, §1013(b)(1), provides:

Sections 147(f) and 149(e) of the 1986 Code applies to bonds issued after December 31, 1986.

P.L. 100-647, §6180(b)(5)(A)-(B):

Amended Code Sec. 147(f)(3) by inserting "or high-speed intercity rail facilities" after "airport" each place it appears and by inserting "OR HIGH-SPEED INTERCITY RAIL FACILITIES" after "AIRPORTS" in the heading. **Effective** for bonds issued after the date of enactment of this Act.

[Sec. 147(g)]

(g) RESTRICTION ON ISSUANCE COSTS FINANCED BY ISSUE.—

(1) IN GENERAL.—A private activity bond shall not be a qualified bond if the issuance costs financed by the issue (of which such bond is a part) exceed 2 percent of the proceeds of the issue.

(2) SPECIAL RULE FOR SMALL MORTGAGE REVENUE BOND ISSUES.—In the case of an issue of qualified mortgage bonds or qualified veterans' mortgage bonds, paragraph (1) shall be applied by substituting "3.5 percent" for "2 percent" if the proceeds of the issue do not exceed $20,000,000.

Amendments

• 1988, Technical and Miscellaneous Revenue Act of 1988 (P.L. 100-647)

P.L. 100-647, §1013(a)(13)(A):

Amended Code Sec. 147(g)(1) by striking out "aggregate face amount of the issue" and inserting in lieu thereof "proceeds of the issue". **Effective** for bonds issued after 6-30-87.

P.L. 100-647, §1013(a)(13)(B):

Amended Code Sec. 147(g)(2) by striking out "aggregate authorized face amount of the issue does not" and inserting in lieu thereof "proceeds of the issue do not". **Effective** for bonds issued after 6-30-87.

[Sec. 147(h)]

(h) CERTAIN RULES NOT TO APPLY TO CERTAIN BONDS.—

(1) MORTGAGE REVENUE BONDS AND QUALIFIED STUDENT LOAN BONDS.—Subsections (a), (b), (c), and (d) shall not apply to any qualified mortgage bond, qualified veterans' mortgage bond, or qualified student loan bond.

(2) QUALIFIED 501(c)(3) BONDS.—Subsections (a), (c), and (d) shall not apply to any qualified 501(c)(3) bond and subsection (e) shall be applied as if it did not contain "health club facility" with respect to such a bond.

(3) EXEMPT FACILITY BONDS FOR QUALIFIED PUBLIC-PRIVATE SCHOOLS.—Subsection (c) shall not apply to any exempt facility bond issued as part of an issue described in section 142(a)(13) (relating to qualified public educational facilities).

Amendments

• 2013, American Taxpayer Relief Act of 2012 (P.L. 112-240)

P.L. 112-240, §101(a)(1) and (3), provides:

SEC. 101. PERMANENT EXTENSION AND MODIFICATION OF 2001 TAX RELIEF.

(a) PERMANENT EXTENSION.—

(1) IN GENERAL.—The Economic Growth and Tax Relief Reconciliation Act of 2001 is amended by striking title IX.

* * *

(3) EFFECTIVE DATE.—The amendments made by this subsection shall apply to taxable, plan, or limitation years beginning after December 31, 2012, and estates of decedents dying, gifts made, or generation skipping transfers after December 31, 2012.

• 2001, Economic Growth and Tax Relief Reconciliation Act of 2001 (P.L. 107-16)

P.L. 107-16, §422(d):

Amended Code Sec. 147(h) by adding at the end a new paragraph (3). **Effective** for bonds issued after 12-31-2001.

P.L. 107-16, §422(e):

Amended the heading for Code Sec. 147(h) by striking "MORTGAGE REVENUE BONDS, QUALIFIED STUDENT LOAN BONDS, AND QUALIFIED 501(c)(3) BONDS" and inserting "CERTAIN BONDS". E **ffective** for bonds issued after 12-31-2001.

P.L. 107-16, §901(a)-(b), as amended by P.L. 111-312, §101(a)(1), provides [but see P.L. 112-240, §101(a)(1) and (3), above]:

SEC. 901. SUNSET OF PROVISIONS OF ACT.

(a) IN GENERAL.—All provisions of, and amendments made by, this Act shall not apply—

(1) to taxable, plan, or limitation years beginning after December 31, 2012, or

(2) in the case of title V, to estates of decedents dying, gifts made, or generation skipping transfers, after December 31, 2012.

(b) APPLICATION OF CERTAIN LAWS.—The Internal Revenue Code of 1986 and the Employee Retirement Income Security Act of 1974 shall be applied and administered to years, estates, gifts, and transfers described in subsection (a) as if the provisions and amendments described in subsection (a) had never been enacted.

• 1986, Tax Reform Act of 1986 (P.L. 99-514)

P.L. 99-514, §1301(b):

Amended part IV of subchapter B of chapter 1 by adding Code Sec. 147. **Effective**, generally, for bonds issued after 8-15-86. However, for transitional rules, see Act Secs. 1312-1318 in the amendments for Code Sec. 103.

Subpart B—Requirements Applicable to All State and Local Bonds

[Sec. 148]

SEC. 148. ARBITRAGE.

[Sec. 148(a)]

(a) ARBITRAGE BOND DEFINED.—For purposes of section 103, the term "arbitrage bond" means any bond issued as part of an issue any portion of the proceeds of which are reasonably expected (at the time of issuance of the bond) to be used directly or indirectly—

(1) to acquire higher yielding investments, or

(2) to replace funds which were used directly or indirectly to acquire higher yielding investments.

For purposes of this subsection, a bond shall be treated as an arbitrage bond if the issuer intentionally uses any portion of the proceeds of the issue of which such bond is a part in a manner described in paragraph (1) or (2).

[Sec. 148(b)]

(b) HIGHER YIELDING INVESTMENTS.—For purposes of this section—

(1) IN GENERAL.—The term "higher yielding investments" means any investment property which produces a yield over the term of the issue which is materially higher than the yield on the issue.

(2) INVESTMENT PROPERTY.—The term "investment property" means—

(A) any security (within the meaning of section 165(g)(2)(A) or (B)),

(B) any obligation,

(C) any annuity contract,

(D) any investment-type property, or

(E) in the case of a bond other than a private activity bond, any residential rental property for family units which is not located within the jurisdiction of the issuer and which is not acquired to implement a court ordered or approved housing desegregation plan.

(3) ALTERNATIVE MINIMUM TAX BONDS TREATED AS INVESTMENT PROPERTY IN CERTAIN CASES.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term "investment property" does not include any tax-exempt bond.

(B) EXCEPTION.—With respect to an issue other than an issue a part of which is a specified private activity bond (as defined in section 57(a)(5)(C)), the term "investment property" includes a specified private activity bond (as so defined).

(4) SAFE HARBOR FOR PREPAID NATURAL GAS.—

(A) IN GENERAL.—The term "investment-type property" does not include a prepayment under a qualified natural gas supply contract.

(B) QUALIFIED NATURAL GAS SUPPLY CONTRACT.—For purposes of this paragraph, the term "qualified natural gas supply contract" means any contract to acquire natural gas for resale by a utility owned by a governmental unit if the amount of gas permitted to be acquired under the contract by the utility during any year does not exceed the sum of—

(i) the annual average amount during the testing period of natural gas purchased (other than for resale) by customers of such utility who are located within the service area of such utility, and

(ii) the amount of natural gas to be used to transport the prepaid natural gas to the utility during such year.

(C) NATURAL GAS USED TO GENERATE ELECTRICITY.—Natural gas used to generate electricity shall be taken into account in determining the average under subparagraph (B)(i)—

(i) only if the electricity is generated by a utility owned by a governmental unit, and

(ii) only to the extent that the electricity is sold (other than for resale) to customers of such utility who are located within the service area of such utility.

(D) ADJUSTMENTS FOR CHANGES IN CUSTOMER BASE.—

(i) NEW BUSINESS CUSTOMERS.—If—

(I) after the close of the testing period and before the date of issuance of the issue, the utility owned by a governmental unit enters into a contract to supply natural gas (other than for resale) for a business use at a property within the service area of such utility, and

(II) the utility did not supply natural gas to such property during the testing period or the ratable amount of natural gas to be supplied under the contract is significantly greater than the ratable amount of gas supplied to such property during the testing period,

then a contract shall not fail to be treated as a qualified natural gas supply contract by reason of supplying the additional natural gas under the contract referred to in subclause (I).

(ii) LOST CUSTOMERS.—The average under subparagraph (B)(i) shall not exceed the annual amount of natural gas reasonably expected to be purchased (other than for resale) by persons who are located within the service area of such utility and who, as of the date of issuance of the issue, are customers of such utility.

(E) RULING REQUESTS.—The Secretary may increase the average under subparagraph (B)(i) for any period if the utility owned by the governmental unit establishes to the satisfaction of the Secretary that, based on objective evidence of growth in natural gas consumption or population, such average would otherwise be insufficient for such period.

(F) ADJUSTMENT FOR NATURAL GAS OTHERWISE ON HAND.—

(i) IN GENERAL.—The amount otherwise permitted to be acquired under the contract for any period shall be reduced by—

(I) the applicable share of natural gas held by the utility on the date of issuance of the issue, and

(II) the natural gas (not taken into account under subclause (I)) which the utility has a right to acquire during such period (determined as of the date of issuance of the issue).

(ii) APPLICABLE SHARE.—For purposes of the clause (i), the term "applicable share" means, with respect to any period, the natural gas allocable to such period if the gas were allocated ratably over the period to which the prepayment relates.

(G) INTENTIONAL ACTS.—Subparagraph (A) shall cease to apply to any issue if the utility owned by the governmental unit engages in any intentional act to render the volume of natural gas acquired by such prepayment to be in excess of the sum of—

(i) the amount of natural gas needed (other than for resale) by customers of such utility who are located within the service area of such utility, and

(ii) the amount of natural gas used to transport such natural gas to the utility.

(H) TESTING PERIOD.—For purposes of this paragraph, the term "testing period" means, with respect to an issue, the most recent 5 calendar years ending before the date of issuance of the issue.

Amendments

• 1997, Taxpayer Relief Act of 1997 (P.L. 105-34)

P.L. 105-34, §1444(a):

Amended Code Sec. 148(c)(2) by striking subparagraph (B) and by redesignating subparagraphs (C), (D), and (E) as subparagraphs (B), (C), and (D), respectively. **Effective** for bonds issued after 8-5-97. Prior to being stricken, Code Sec. 148(c)(2)(B) read as follows:

(B) SPECIAL RULE FOR CERTAIN STUDENT LOAN POOLS.—In the case of the proceeds of an issue to be used to make or finance loans under a program described in section 144(b)(1)(A), subparagraph (A) shall be applied by substituting "18 months" for "6 months". The preceding sentence shall not apply to any bond issued after December 31, 1988.

• 1990, Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508)

P.L. 101-508, §11701(j)(5)(A)-(B):

Amended Code Sec. 148(c)(2)(D) by striking "subsection (f)(4)(B)(iv)(IV)" and inserting "subsection (f)(4)(C)(iv)", and by striking "subsection (f)(4)(B)(iv)(VIII)" and inserting "subsection (f)(4)(C)(v)". **Effective** as if included in the provision of P.L. 101-239 to which it relates.

• 1989, Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239)

P.L. 101-239, §7652(c):

Amended Code Sec. 148(c)(2) by redesignating subparagraph (D) as subparagraph (E) and by inserting after subparagraph (C) a new subparagraph (D). **Effective** for bonds issued after 12-19-89.

[Sec. 148(d)]

(d) SPECIAL RULES FOR REASONABLY REQUIRED RESERVE OR REPLACEMENT FUND.—

(1) IN GENERAL.—For purposes of subsection (a), a bond shall not be treated as an arbitrage bond solely by reason of the fact that an amount of the proceeds of the issue of which such bond is a part may be invested in higher yielding investments which are part of a reasonably required reserve or replacement fund. The amount referred to in the preceding sentence shall not exceed 10 percent of the proceeds of such issue unless the issuer establishes to the satisfaction of the Secretary that a higher amount is necessary.

(2) LIMITATION ON AMOUNT IN RESERVE OR REPLACEMENT FUND WHICH MAY BE FINANCED BY ISSUE.—A bond issued as part of an issue shall be treated as an arbitrage bond if the amount of the proceeds from the sale of such issue which is part of any reserve or replacement fund exceeds 10 percent of the proceeds of the issue (or such higher amount which the issuer establishes is necessary to the satisfaction of the Secretary).

Amendments

• 1997, Taxpayer Relief Act of 1997 (P.L. 105-34)

P.L. 105-34, §1443:

Amended Code Sec. 148(d) by striking paragraph (3). **Effective** for bonds issued after 8-5-97. Prior to being stricken, Code Sec. 148(d)(3) read as follows:

(3) LIMITATION ON INVESTMENT IN NONPURPOSE INVESTMENTS.—

(A) IN GENERAL.—A bond which is part of an issue which does not meet the requirements of subparagraph (B) shall be treated as an arbitrage bond.

(B) REQUIREMENTS.—An issue meets the requirements of this subparagraph only if—

(i) at no time during any bond year may the amount invested in nonpurpose investments with a yield materially higher than the yield on the issue exceed 150 percent of the debt service on the issue for the bond year, and

(ii) the aggregate amount invested as provided in clause (i) is promptly and appropriately reduced as the amount of outstanding bonds of the issue is reduced (or, in the case of a qualified mortgage bond or a qualified veterans' mortgage bond, as the mortgages are repaid).

(C) EXCEPTIONS FOR TEMPORARY PERIOD.—Subparagraph (B) shall not apply to—

(i) proceeds of the issue invested for an initial temporary period until such proceeds are needed for the governmental purpose of the issue, and

(ii) temporary investment periods related to debt service.

(D) DEBT SERVICE DEFINED.—For purposes of this paragraph, the debt service on the issue for any bond year is the scheduled amount of interest and amortization of principal payable for such year with respect to such issue. For purposes of the preceding sentence, there shall not be taken into account amounts scheduled with respect to any bond which has been redeemed before the beginning of the bond year.

(E) NO DISPOSITION IN CASE OF LOSS.—This paragraph shall not require the sale or disposition of any investment if such sale or disposition would result in a loss which exceeds the amount which, but for such sale or disposition, would at the time of such sale or disposition—

(i) be paid to the United States, or,

(ii) in the case of a qualified veterans' mortgage bond, be paid or credited mortgagors under section 143(g)(3)(A).

(F) EXCEPTION FOR GOVERNMENTAL USE BONDS AND QUALIFIED 501(c)(3) BONDS.—This paragraph shall not apply to any bond which is not a private activity bond or which is a qualified 501(c)(3) bond.

P.L. 105-34, §967, provides:

ACT SEC. 967. ADDITIONAL ADVANCE REFUNDING OF CERTAIN VIRGIN ISLAND BONDS.

Subclause (I) of section 149(d)(3)(A)(i) of the Internal Revenue Code of 1986 shall not apply to the second advance refunding of any issue of the Virgin Islands which was first advance refunded before June 9, 1997, if the debt provisions of the refunding bonds are changed to repeal the priority first lien requirement of the refunded bonds.

• 1989, Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239)

P.L. 101-239, §7814(c)(2):

Amended Code Sec. 148(d)(3)(E)(ii) by striking "a qualified mortgage bond or" after "in the case of". **Effective** as if included in the provision of P.L. 100-647 to which it relates.

• 1988, Technical and Miscellaneous Revenue Act of 1988 (P.L. 100-647)

P.L. 100-647, §1013(a)(14):

Amended Code Sec. 148(d)(2) by striking out "any fund described in paragraph (1)" and inserting in lieu thereof "any reserve or replacement fund". **Effective** as if included in the provision of P.L. 99-514 to which it relates.

[Sec. 148(e)]

(e) MINOR PORTION MAY BE INVESTED IN HIGHER YIELDING INVESTMENTS.—Notwithstanding subsections (a), (c), and (d), a bond issued as part of an issue shall not be treated as an arbitrage bond solely by reason of the fact that an amount of the proceeds of such issue (in addition to the amounts under subsections (c) and (d)) is invested in higher yielding investments if such amount does not exceed the lesser of—

(1) 5 percent of the proceeds of the issue, or

(2) $100,000.

[Sec. 148(f)]

(f) REQUIRED REBATE TO THE UNITED STATES.—

(1) IN GENERAL.—A bond which is part of an issue shall be treated as an arbitrage bond if the requirements of paragraphs (2) and (3) are not met with respect to such issue. The preceding sentence shall not apply to any qualified veterans' mortgage bond.

(2) REBATE TO UNITED STATES.—An issue shall be treated as meeting the requirements of this paragraph only if an amount equal to the sum of—

(A) the excess of—

(i) the amount earned on all nonpurpose investments (other than investments attributable to an excess described in this subparagraph), over

(ii) the amount which would have been earned if such nonpurpose investments were invested at a rate equal to the yield on the issue, plus

(B) any income attributable to the excess described in subparagraph (A),

is paid to the United States by the issuer in accordance with the requirements of paragraph (3).

(3) DUE DATE OF PAYMENTS UNDER PARAGRAPH (2).—Except to the extent provided by the Secretary, the amount which is required to be paid to the United States by the issuer shall be paid in installments which are made at least once every 5 years. Each installment shall be in an amount which ensures that 90 percent of the amount described in paragraph (2) with respect to the issue at the time payment of such installment is required will have been paid to the United States. The last installment shall be made no later than 60 days after the day on which the last bond of the issue is redeemed and shall be in an amount sufficient to pay the remaining balance of the amount described in paragraph (2) with respect to such issue. A series of issues which are redeemed during a 6-month period (or such longer period as the Secretary may prescribe) shall be treated (at the election of the issuer) as 1 issue for purposes of the preceding sentence if no bond which is part of any issue in such series has a maturity of more than 270 days or is a private activity bond. In the case of a tax and revenue anticipation bond, the last installment shall not be required to be made before the date 8 months after the date of issuance of the issue of which the bond is a part.

(4) SPECIAL RULES FOR APPLYING PARAGRAPH (2).—

(A) IN GENERAL.—In determining the aggregate amount earned on nonpurpose investments for purposes of paragraph (2)—

(i) any gain or loss on the disposition of a nonpurpose investment shall be taken into account, and

(ii) any amount earned on a bona fide debt service fund shall not be taken into account if the gross earnings on such fund for the bond year is less than $100,000.

In the case of an issue no bond of which is a private activity bond, clause (ii) shall be applied without regard to the dollar limitation therein if the average maturity of the issue (determined in accordance with section 147(b)(2)(A)) is at least 5 years and the rates of interest on bonds which are part of the issue do not vary during the term of the issue.

(B) TEMPORARY INVESTMENTS.—Under regulations prescribed by the Secretary—

(i) IN GENERAL.—An issue shall, for purposes of this subsection, be treated as meeting the requirements of paragraph (2) if—

(I) the gross proceeds of such issue are expended for the governmental purposes for which the issue was issued no later than the day which is 6 months after the date of issuance of the issue, and

(II) the requirements of paragraph (2) are met with respect to amounts not required to be spent as provided in subclause (I) (other than earnings on amounts in any bona fide debt service fund).

Gross proceeds which are held in a bona fide debt service fund or a reasonably required reserve or replacement fund, and gross proceeds which arise after such 6 months and which are not reasonably anticipated as of the date of issuance, shall not be considered gross proceeds for purposes of subclause (I) only.

(ii) ADDITIONAL PERIOD FOR CERTAIN BONDS.—

(I) IN GENERAL.—In the case of an issue described in subclause (II), clause (i) shall be applied by substituting "1 year" for "6 months" each place it appears with respect to the portion of the proceeds of the issue which are not expended in accordance with clause (i) if such portion does not exceed 5 percent of the proceeds of the issue.

(II) ISSUES TO WHICH SUBCLAUSE (I) APPLIES.—An issue is described in this subclause if no bond which is part of such issue is a private activity bond (other than a qualified 501(c)(3) bond) or a tax or revenue anticipation bond.

(iii) SAFE HARBOR FOR DETERMINING WHEN PROCEEDS OF TAX AND REVENUE ANTICIPATION BONDS ARE EXPENDED.—

(I) IN GENERAL.—For purposes of clause (i), in the case of an issue of tax or revenue anticipation bonds, the net proceeds of such issue (including earnings thereon) shall be treated as expended for the governmental purpose of the issue on the 1st day after the date of issuance that the cumulative cash flow deficit to be financed by such issue exceeds 90 percent of the proceeds of such issue.

(II) CUMULATIVE CASH FLOW DEFICIT.—For purposes of subclause (I), the term "cumulative cash flow deficit" means, as of the date of computation, the excess of the expenses paid during the period described in subclause (III) which would ordinarily be paid out of or financed by anticipated tax or other revenues over the aggregate amount available (other than from the proceeds of the issue) during such period for the payment of such expenses.

(III) PERIOD INVOLVED.—For purposes of subclause (II), the period described in this subclause is the period beginning on the date of issuance of the issue and ending on the earlier of the date 6 months after such date of issuance or the date of the computation of cumulative cash flow deficit.

(iv) PAYMENTS OF PRINCIPAL NOT TO AFFECT REQUIREMENTS.—For purposes of this subparagraph, payments of principal on the bonds which are part of an issue shall not be treated as expended for the governmental purposes of the issue.

(C) EXCEPTION FROM REBATE FOR CERTAIN PROCEEDS TO BE USED TO FINANCE CONSTRUCTION EXPENDITURES.—

(i) IN GENERAL.—In the case of a construction issue, paragraph (2) shall not apply to the available construction proceeds of such issue if the spending requirements of clause (ii) are met.

(ii) SPENDING REQUIREMENTS.—The spending requirements of this clause are met if at least—

(I) 10 percent of the available construction proceeds of the construction issue are spent for the governmental purposes of the issue within the 6-month period beginning on the date of the bonds are issued,

(II) 45 percent of such proceeds are spent for such purposes within the 1-year period beginning on such date,

(III) 75 percent of such proceeds are spent for such purposes within the 18-month period beginning on such date, and

(IV) 100 percent of such proceeds are spent for such purposes within the 2-year period beginning on such date.

(iii) EXCEPTION FOR REASONABLE RETAINAGE.—The spending requirement of clause (ii)(IV) shall be treated as met if—

(I) such requirement would be met at the close of such 2-year period but for a reasonable retainage (not exceeding 5 percent of the available construction proceeds of the construction issue), and

(II) 100 percent of the available construction proceeds of the construction issue are spent for the governmental purposes of the issue within the 3-year period beginning on the date the bonds are issued.

(iv) CONSTRUCTION ISSUE.—For purposes of this subparagraph, the term "construction issue" means any issue if—

(I) at least 75 percent of the available construction proceeds of such issue are to be used for construction expenditures with respect to property which is to be owned by a governmental unit or a 501(c)(3) organization, and

(II) all of the bonds which are part of such issue are qualified 501(c)(3) bonds, bonds which are not private activity bonds, or private activity bonds issued to finance property to be owned by a governmental unit or a 501(c)(3) organization.

For purposes of this subparagraph, the term "construction" includes reconstruction and rehabilitation, and rules similar to the rules of section 142(b)(1)(B) shall apply.

(v) PORTIONS OF ISSUES USED FOR CONSTRUCTION.—If—

(I) all of the construction expenditures to be financed by an issue are to be financed from a portion thereof, and

(II) the issuer elects to treat such portion as a construction issue for purposes of this subparagraph,

then, for purposes of this subparagraph and subparagraph (B), such portion shall be treated as a separate issue.

(vi) AVAILABLE CONSTRUCTION PROCEEDS.—For purposes of this subparagraph—

(I) IN GENERAL.—The term "available construction proceeds" means the amount equal to the issue price (within the meaning of sections 1273 and 1274) of the construction issue, increased by earnings on the issue price, earnings on amounts in any reasonably required reserve or replacement fund not funded from the issue, and earnings on all of the foregoing earnings, and reduced by the amount

of the issue price in any reasonably required reserve or replacement fund and the issuance costs financed by the issue.

(II) EARNINGS ON RESERVE INCLUDED ONLY FOR CERTAIN PERIODS.—The term "available construction proceeds" shall not include amounts earned on any reasonably required reserve or replacement fund after the earlier of the close of the 2-year period described in clause (ii) or the date the construction is substantially completed.

(III) PAYMENTS ON ACQUIRED PURPOSE OBLIGATIONS EXCLUDED.—The term "available construction proceeds" shall not include payments on any obligation acquired to carry out the governmental purposes of the issue and shall not include earnings on such payments.

(IV) ELECTION TO REBATE ON EARNINGS ON RESERVE.—At the election of the issuer, the term "available construction proceeds" shall not include earnings on any reasonably required reserve or replacement fund.

(vii) ELECTION TO PAY PENALTY IN LIEU OF REBATE.—

(I) IN GENERAL.—At the election of the issuer, paragraph (2) shall not apply to available construction proceeds which do not meet the spending requirements of clause (ii) if the issuer pays a penalty, with respect to each 6-month period after the date the bonds were issued, equal to 1½ percent of the amount of the available construction proceeds of the issue which, as of the close of such 6-month period, is not spent as required by clause (ii).

(II) TERMINATION.—The penalty imposed by this clause shall cease to apply only as provided in clause (viii) or after the latest maturity date of any bond in the issue (including any refunding bond with respect thereto).

(viii) ELECTION TO TERMINATE 1 ½ PERCENT PENALTY.—At the election of the issuer (made not later than 90 days after the earlier of the end of the initial temporary period or the date the construction is substantially completed), the penalty under clause (vii) shall not apply to any 6-month period after the initial temporary period under subsection (c) if the requirements of subclauses (I), (II), and (III) are met.

(I) 3 PERCENT PENALTY.—The requirement of this subclause is met if the issuer pays a penalty equal to 3 percent of the amount of available construction proceeds of the issue which is not spent for the governmental purposes of the issue as of the close of such initial temporary period multiplied by the number of years (including fractions thereof) in the initial temporary period.

(II) YIELD RESTRICTION AT CLOSE OF TEMPORARY PERIOD.—The requirement of this subclause is met if the amount of the available construction proceeds of the issue which is not spent for the governmental purposes of the issue as of the close of such initial temporary period is invested at a yield not exceeding the yield on the issue or which is invested in any tax exempt bond which is not investment property.

(III) REDEMPTION OF BONDS AT EARLIEST CALL DATE.—The requirement of this subclause is met if the amount of the available construction proceeds of the issue which is not spent for the governmental purposes of the issue as of the earliest date on which bonds may be redeemed is used to redeem bonds on such date.

(ix) ELECTION TO TERMINATE 1 ½ PERCENT PENALTY BEFORE END OF TEMPORARY PERIOD.—If—

(I) the construction to be financed by a construction issue is substantially completed before the end of the initial temporary period,

(II) the issuer identifies an amount of available construction proceeds which will not be spent for the governmental purposes of the issue,

(III) the issuer has made the election under clause (viii), and

(IV) the issuer makes an election under this clause before the close of the initial temporary period and not later than 90 days after the date the construction is substantially completed,

then clauses (vii) and (viii) shall be applied to the available construction proceeds so identified as if the initial temporary period ended as of the date the election is made.

(x) FAILURE TO PAY PENALTIES.—In the case of a failure (which is not due to willful neglect) to pay any penalty required to be paid under clause (vii) or (viii) in the amount or at the time prescribed therefor, the Secretary may treat such failure as not occurring if, in addition to paying such penalty, the issuer pays a penalty equal to the sum of—

(I) 50 percent of the amount which was not paid in accordance with clauses (vii) and (viii), plus

(II) interest (at the underpayment rate established under section 6621) on the portion of the amount which was not paid on the date required for the period beginning on such date.

The Secretary may waive all or any portion of the penalty under this clause. Bonds which are part of an issue with respect to which there is a failure to pay the amount

required under this clause (and any refunding bond with respect thereto) shall be treated as not being, and as never having been, tax-exempt bonds.

(xi) ELECTION FOR POOLED FINANCING BONDS.—At the election of the issuer of an issue the proceeds of which are to be used to make or finance loans (other than nonpurpose investments) to 2 or more persons, the periods described in clauses (ii) and (iii) shall begin on—

(I) the date the loan is made, in the case of loans made within the 1-year period after the date the bonds are issued, and

(II) the date following such 1-year period, in the case of loans made after such 1-year period.

If such an election applies to an issue, the requirements of paragraph (2) shall apply to amounts earned before the beginning of the periods determined under the preceding sentence.

(xii) PAYMENTS OF PRINCIPAL NOT TO AFFECT REQUIREMENTS.—For purposes of this subparagraph, payments of principal on the bonds which are part of the construction issue shall not be treated as an expenditure of the available construction proceeds of the issue.

(xiii) REFUNDING BONDS.—

(I) IN GENERAL.—Except as provided in this clause, clause (vii)(II), and the last sentence of clause (x), this subparagraph shall not apply to any refunding bond and no proceeds of a refunded bond shall be treated for purposes of this subparagraph as proceeds of a refunding bond.

(II) DETERMINATION OF CONSTRUCTION PORTION OF ISSUE.—For purposes of clause (v), any portion of an issue which is used to refund any issue (or portion thereof) shall be treated as a separate issue.

(III) COORDINATION WITH REBATE REQUIREMENT ON REFUNDING BONDS.—The requirements of paragraph (2) shall be treated as met with respect to earnings for any period if a penalty is paid under clause (vii) or (viii) with respect to such earnings for such period.

(xiv) DETERMINATION OF INITIAL TEMPORARY PERIOD.—For purposes of this subparagraph, the end of the initial temporary period shall be determined without regard to section 149(d)(3)(A)(iv).

(xv) ELECTIONS.—Any election under this subparagraph (other than clauses (viii) and (ix)) shall be made on or before the date the bonds are issued; and, once made, shall be irrevocable.

(xvi) TIME FOR PAYMENT OF PENALTIES.—Any penalty under this subparagraph shall be paid to the United States not later than 90 days after the period to which the penalty relates.

(xvii) TREATMENT OF BONA FIDE DEBT SERVICE FUNDS.—If the spending requirements of clause (ii) are met with respect to the available construction proceeds of a construction issue, then paragraph (2) shall not apply to earnings on a bona fide debt service fund for such issue.

(D) EXCEPTION FOR GOVERNMENTAL UNITS ISSUING $5,000,000 OR LESS OF BONDS.—

(i) IN GENERAL.—An issue shall, for purposes of this subsection, be treated as meeting the requirements of paragraphs (2) and (3) if—

(I) the issue is issued by a governmental unit with general taxing powers,

(II) no bond which is part of such issue is a private activity bond,

(III) 95 percent or more of the net proceeds of such issue are to be used for local governmental activities of the issuer (or of a governmental unit the jurisdiction of which is entirely within the jurisdiction of the issuer), and

(IV) the aggregate face amount of all tax-exempt bonds (other than private activity bonds) issued by such unit during the calendar year in which such issue is issued is not reasonably expected to exceed $5,000,000.

(ii) AGGREGATION OF ISSUERS.—For purposes of subclause (IV) of clause (i)—

(I) an issuer and all entities which issue bonds on behalf of such issuer shall be treated as 1 issuer,

(II) all bonds issued by a subordinate entity shall, for purposes of applying such subclause to each other entity to which such entity is subordinate, be treated as issued by such other entity, and

(III) an entity formed (or, to the extent provided by the Secretary, availed of) to avoid the purposes of such subclause (IV) and all other entities benefiting thereby shall be treated as 1 issuer.

(iii) CERTAIN REFUNDING BONDS NOT TAKEN INTO ACCOUNT IN DETERMINING SMALL ISSUER STATUS.—There shall not be taken into account under subclause (IV) of clause (i) any bond issued to refund (other than to advance refund) any bond to the extent the amount of the refunding bond does not exceed the outstanding amount of the refunded bond.

"(D) the shareholder of record of any such stock described in subparagraph (C)(i) is the custodian or its nominee; and

"(E) the contracts described in subparagraph (C)(ii) are held by the custodian until distributed under the plan.

For purposes of this title, in the case of a custodial account treated as a qualified trust under this section by reason of the preceding sentence, the custodian of such account shall be treated as the trustee thereof.

"(2) Definition.—For purposes of paragraph (1), the term `regulated investment company' means a domestic corporation which—

"(A) is a regulated investment company within the meaning of section 851(a), and

"(B) issues only redeemable stock."

• 1962, Self-Employed Individuals Tax Retirement Act of 1962 (P.L. 87-792)

P.L. 87-792, §2:

Added Code Sec. 401(f). **Effective** for tax years beginning after 12-31-62.

[Sec. 401(g)]

(g) ANNUITY DEFINED.—For purposes of this section and sections 402, 403, and 404, the term "annuity" includes a face-amount certificate, as defined in section 2(a)(15) of the Investment Company Act of 1940 (15 U. S. C., sec. 80a-2); but does not include any contract or certificate issued after December 31, 1962, which is transferable, if any person other than the trustee of a trust described in section 401(a) which is exempt from tax under section 501(a) is the owner of such contract or certificate.

Amendments

• 1962, Self-Employed Individuals Tax Retirement Act of 1962 (P.L. 87-792)

P.L. 87-792, §2:

Added Code Sec. 401(g). **Effective** for tax years beginning after 12-31-62.

[Sec. 401(h)]

(h) MEDICAL, ETC., BENEFITS FOR RETIRED EMPLOYEES AND THEIR SPOUSES AND DEPENDENTS.—Under regulations prescribed by the Secretary, and subject to the provisions of section 420, a pension or annuity plan may provide for the payment of benefits for sickness, accident, hospitalization, and medical expenses of retired employees, their spouses and their dependents, but only if—

(1) such benefits are subordinate to the retirement benefits provided by the plan,

(2) a separate account is established and maintained for such benefits,

(3) the employer's contributions to such separate account are reasonable and ascertainable,

(4) it is impossible, at any time prior to the satisfaction of all liabilities under the plan to provide such benefits, for any part of the corpus or income of such separate account to be (within the taxable year or thereafter) used for, or diverted to, any purpose other than the providing of such benefits,

(5) notwithstanding the provisions of subsection (a)(2), upon the satisfaction of all liabilities under the plan to provide such benefits, any amount remaining in such separate account must, under the terms of the plan, be returned to the employer, and

(6) in the case of an employee who is a key employee, a separate account is established and maintained for such benefits payable to such employee (and his spouse and dependents) and such benefits (to the extent attributable to plan years beginning after March 31, 1984, for which the employee is a key employee) are only payable to such employee (and his spouse and dependents) from such separate account.

For purposes of paragraph (6), the term "key employee" means any employee, who at any time during the plan year or any preceding plan year during which contributions were made on behalf of such employee, is or was a key employee as defined in section 416(i). In no event shall the requirements of paragraph (1) be treated as met if the aggregate actual contributions for medical benefits, when added to actual contributions for life insurance protection under the plan, exceed 25 percent of the total actual contributions to the plan (other than contributions to fund past service credits) after the date on which the account is established. For purposes of this subsection, the term "dependent" shall include any individual who is a child (as defined in section 152(f)(1)) of a retired employee who as of the end of the calendar year has not attained age 27.

Amendments

• 2010, Health Care and Education Reconciliation Act of 2010 (P.L. 111-152)

P.L. 111-152, §1004(d)(5):

Amended Code Sec. 401(h) by adding at the end a new sentence. **Effective** 3-30-2010.

• 1990, Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508)

P.L. 101-508, §12011(b):

Amended Code Sec. 401(h) by inserting ", and subject to the provisions of section 420" after "Secretary". **Effective,**

generally, for transfers in tax years beginning after 12-31-90. For a special rule, see Act Sec. 12011(c)(2), below.

P.L. 101-508, §12011(c)(2), provides:

(2) WAIVER OF ESTIMATED TAX PENALTIES.—No addition to tax shall be made under section 6654 or section 6655 of the Internal Revenue Code of 1986 for the taxable year preceding the taxpayer's 1st taxable year beginning after December 31, 1990, with respect to any underpayment to the extent such underpayment was created or increased by reason of section 420(b)(4)(B) of such Code (as added by subsection (a)).

• 1989, Omnibus Budget Reconciliation Act of 1989 (P.L. 101-239)

P.L. 101-239, §7311(a):

Amended Code Sec. 401(h) by adding at the end thereof a new sentence. **Effective**, generally, for contributions after 10-3-89. However, for a transitional rule, see Act Sec. 7311(b)(2), below.

P.L. 101-239, §7311(b)(2), provides:

(2) TRANSITION.—The amendment made by this section shall not apply to contributions made before January 1, 1990, if—

(A) the employer requested before October 3, 1989, a private letter ruling or determination letter with respect to the qualification of the plan maintaining the account under section 401(h) of the Internal Revenue Code of 1986,

(B) the request sets forth a method under which the amount of contributions to the account are to be determined on the basis of cost,

(C) such method is permissible under section 401(h) of such Code under the provisions of General Counsel Memorandum 39785, and

(D) the Internal Revenue Service issued before October 4, 1989, a private letter ruling, determination letter, or other letter providing that the specific plan involved qualifies under section 401(a) of such Code when such method is used, that contributions to the account are deductible, or acknowledging that the account would not adversely affect the qualified status of the plan (contingent on all phases of the particular plan being approved).

• 1986, Tax Reform Act of 1986 (P.L. 99-514)

P.L. 99-514, §1852(h)(1)(A) and (B):

Amended Code Sec. 401(h) by striking out "5-percent owner" each place it appears in paragraph (6) and inserting in lieu thereof "key employee", and by striking out the last sentence and inserting in lieu thereof "For purposes of paragraph (6), the term 'key employee' means any employee, who at any time during the plan year or any preceding plan year during which contributions were made on behalf of such employee, is or was a key employee as defined in section 416(i)." **Effective** for years beginning after 12-31-85. Prior to amendment, the last sentence read as follows:

For purposes of paragraph (6), the term "5-percent owner" means any employee who, at any time during the plan year or any preceding plan year during which contributions were made on behalf of such employee, is or was a 5-percent owner (as defined in section 416(i)(1)(B)).

• 1984, Deficit Reduction Act of 1984 (P.L. 98-369)

P.L. 98-369, §528(b):

Amended Code Sec. 401(h) by striking out "and" at the end of paragraph (4), by striking out the period at the end of paragraph (5) and inserting in lieu thereof ", and", and by adding at the end thereof new paragraph (6). **Effective** for years beginning after 3-31-84.

• 1976, Tax Reform Act of 1976 (P.L. 94-455)

P.L. 94-455, §1906(b)(13)(A):

Amended 1954 Code by substituting "Secretary" for "Secretary or his delegate" each place it appeared. **Effective** 2-1-77.

• 1962 (P.L. 87-863)

P.L. 87-863, §2(a):

Added Code Sec. 401(h) and redesignated former Code Sec. 401(h) as Code Sec. 401(i). **Effective** for tax years beginning after 10-23-62.

[Sec. 401(i)]

(i) CERTAIN UNION-NEGOTIATED PENSION PLANS.—In the case of a trust forming part of a pension plan which has been determined by the Secretary to constitute a qualified trust under subsection (a) and to be exempt from taxation under section 501(a) for a period beginning after contributions were first made to or for such trust, if it is shown to the satisfaction of the Secretary that—

(1) such trust was created pursuant to a collective bargaining agreement between employee representatives and one or more employers,

(2) any disbursements of contributions, made to or for such trust before the time as of which the Secretary determined that the trust constituted a qualified trust, substantially complied with the terms of the trust, and the plan of which the trust is a part, as subsequently qualified, and

(3) before the time as of which the Secretary determined that the trust constitutes a qualified trust, the contributions to or for such trust were not used in a manner which would jeopardize the interests of its beneficiaries,

then such trust shall be considered as having constituted a qualified trust under subsection (a) and as having been exempt from taxation under section 501(a) for the period beginning on the date on which contributions were first made to or for such trust and ending on the date such trust first constituted (without regard to this subsection) a qualified trust under subsection (a).

Amendments

• 1976, Tax Reform Act of 1976 (P.L. 94-455)

P.L. 94-455, §1906(b)(13)(A):

Amended 1954 Code by substituting "Secretary" for "Secretary or his delegate" each place it appeared. **Effective** 2-1-77.

• 1971 (P.L. 91-691)

P.L. 91-691, §1(a):

Amended the heading of Code Sec. 401(i) by deleting "Multiemployer" which formerly appeared after "Union-Negotiated", and amended paragraph (1). **Effective** for tax years beginning after 12-31-53, and ending after 8-16-54, but only with respect to contributions made after 12-31-54. Prior to amendment, the paragraph read as follows:

(1) such trust was created pursuant to a collective bargaining agreement between employee representatives and two or more employers who are not related (determined under regulations prescribed by the Secretary or his delegate).

• 1964, Revenue Act of 1964 (P.L. 88-272)

P.L. 88-272, §219(a):

Added Code Sec. 401(i) and redesignated former Code Sec. 401(i) as Code Sec. 401(j). **Effective** with respect to tax years beginning after 12-31-53, and ending after 8-16-54, but only with respect to contributions made after 12-31-54.

[Sec. 401(j)—Repealed]

Amendments

• 1983, Technical Corrections Act of 1982 (P.L. 97-448)

P.L. 97-448, §103(d)(2):

Amended the last sentence of Code Sec. 401(j)(3) by striking out "subsection (j)(2)" and inserting in lieu thereof "paragraph (2)", and by inserting "with respect only to such change" after "participation". **Effective** as if included in the provision of P.L. 97-34 to which it relates.

• 1982, Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248)

P.L. 97-248, §238(b):

Repealed Code Sec. 401(j). **Effective** for years beginning after 12-31-83. Prior to repeal, Code Sec. 401(j) read as follows:

(j) DEFINED BENEFIT PLANS PROVIDING BENEFITS FOR SELF-EMPLOYED INDIVIDUALS AND SHAREHOLDER-EMPLOYEES.—

(1) IN GENERAL.—A defined benefit plan satisfies the requirements of this subsection only if the basic benefit accruing under the plan for each plan year of participation by an employee within the meaning of subsection (c)(1) (or a shareholder-employee) is permissible under regulations prescribed by the Secretary under this subsection to insure that there will be reasonable comparability (assuming level funding) between the maximum retirement benefits which may be provided with favorable tax treatment under this title for such employees under—

(A) defined contribution plans,

(B) defined benefit plans, and

(C) a combination of defined contribution plans and defined benefit plans.

(2) GUIDELINES FOR REGULATIONS.—The regulations prescribed under this subsection shall provide that a plan does not satisfy the requirements of this subsection if, under the plan, the basic benefit of any employee within the meaning of subsection (c)(1) (or a shareholder-employee) may exceed the sum of the products for each plan year of participation of—

(A) his annual compensation (not in excess of $100,000) for such year, and

(B) the applicable percentage determined under paragraph (3).

(3) APPLICABLE PERCENTAGE.—

(A) TABLE.—For purposes of paragraph (2), the applicable percentage for any individual for any plan year shall be based on the percentage shown in the following table opposite his age when his current period of participation in the plan began.

Age when participation began:	*Applicable percentage*
30 or less	6.5
35	5.4
40	4.4
45	3.6
50	3.0
55	2.5
60 or over	2.0

(B) ADDITIONAL REQUIREMENTS.—The regulations prescribed under this subsection shall include provisions—

(i) for applicable percentages for ages between any two ages shown on the table,

(ii) for adjusting the applicable percentages in the case of plans providing benefits other than a basic benefit,

(iii) that any increase in the rate of accrual, and any increase in the compensation base which may be taken into account, shall, with respect only to such increase, begin a new period of participation in the plan, and

(iv) when appropriate, in the case of periods beginning after December 31, 1977, for adjustments in the applicable percentages based on changes in prevailing interest and mortality rates occurring after 1973.

For purposes of this paragraph, a change in the annual compensation taken into account under subparagraph (A) of paragraph (2) shall be treated as beginning a new period of plan participation with respect only to such change.

(4) CERTAIN CONTRIBUTIONS AND BENEFITS MAY NOT BE TAKEN INTO ACCOUNT.—A defined benefit plan which provides contributions or benefits for owner-employees does not satisfy the requirements of this subsection unless such plan meets the requirements of subsection (a)(4) without taking into account contributions or benefits under chapter 2 (relating to tax on self-employment income), chapter 21 (relating to Federal Insurance Contributions Act), title II of the Social Security Act, or any other Federal or State law.

(5) DEFINITIONS.—For purposes of this subsection—

(A) BASIC BENEFIT.—The term "basic benefit" means a benefit in the form of a straight life annuity commencing at the later of—

(i) age 65, or

(ii) the day 5 years after the day the participant's current period of participation began

under a plan which provides no ancillary benefits and to which employees do not contribute.

(B) SHAREHOLDER-EMPLOYEE.—The term "shareholder-employee" has the same meaning as when used in section 1379(d).

(C) COMPENSATION.—The term "compensation" means—

(i) in the case of an employee within the meaning of subsection (c)(1), the earned income of such individual, or

(ii) in the case of a shareholder-employee, the compensation received or accrued by the individual from the electing small business corporation.

(6) SPECIAL RULES.—Section 404(e) (relating to special limitations for self-employed individuals) and section 1379(b) (relating to taxability of shareholder-employee beneficiaries) do not apply to a trust to which this subsection applies.

• 1981, Economic Recovery Tax Act of 1981 (P.L. 97-34)

P.L. 97-34, §312(c)(3):

Amended Code Sec. 401(j)(2)(A) by striking out "$50,000" and inserting "$100,000". **Effective** with respect to plans which include employees within the meaning of Code Sec. 401(c)(1) for tax years beginning after 12-31-81.

P.L. 97-34, §312(c)(4):

Amended Code Sec. 401(j)(3) by adding the last sentence. **Effective** for plans which include employees within the meaning of Code Sec. 401(c)(1) with respect to tax years beginning after 12-31-81.

• 1976, Tax Reform Act of 1976 (P.L. 94-455)

P.L. 94-455, §1906(b)(13)(A):

Amended 1954 Code by substituting "Secretary" for "Secretary or his delegate" each place it appeared. **Effective** 2-1-77.

• 1974, Employee Retirement Income Security Act of 1974 (P.L. 93-406)

P.L. 93-406, §2001(d)(2):

Added Code Sec. 401(j) and redesignated former Code Sec. 401(j) as Code Sec. 401(k). **Effective** for tax years beginning after 12-31-75.

[Sec. 401(k)]

(k) CASH OR DEFERRED ARRANGEMENTS.—

(1) GENERAL RULE.—A profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan shall not be considered as not satisfying the requirements of subsection (a) merely because the plan includes a qualified cash or deferred arrangement.

(2) QUALIFIED CASH OR DEFERRED ARRANGEMENT.—A qualified cash or deferred arrangement is any arrangement which is part of a profit-sharing or stock bonus plan, a pre-ERISA money purchase plan, or a rural cooperative plan which meets the requirements of subsection (a)—

(A) under which a covered employee may elect to have the employer make payments as contributions to a trust under the plan on behalf of the employee, or to the employee directly in cash;

(B) under which amounts held by the trust which are attributable to employer contributions made pursuant to the employee's election—

(i) may not be distributable to participants or other beneficiaries earlier than—

(I) severance from employment, death, or disability,

(II) an event described in paragraph (10),

(III) in the case of a profit-sharing or stock bonus plan, the attainment of age 59½,

(IV) in the case of contributions to a profit-sharing or stock bonus plan to which section 402(e)(3) applies, upon hardship of the employee, or

(V) in the case of a qualified reservist distribution (as defined in section 72(t)(2)(G)(iii)), the date on which a period referred to in subclause (III) of such section begins, and

(ii) will not be distributable merely by reason of the completion of a stated period of participation or the lapse of a fixed number of years;

(C) which provides that an employee's right to his accrued benefit derived from employer contributions made to the trust pursuant to his election is nonforfeitable, and

(D) which does not require, as a condition of participation in the arrangement, that an employee complete a period of service with the employer (or employers) maintaining the plan extending beyond the period permitted under section 410(a)(1) (determined without regard to subparagraph (B)(i) thereof).

(3) APPLICATION OF PARTICIPATION AND DISCRIMINATION STANDARDS.—

(A) A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement unless—

(i) those employees eligible to benefit under the arrangement satisfy the provisions of section 410(b)(1), and

(ii) the actual deferral percentage for eligible highly compensated employees (as defined in paragraph (5)) for the plan year bears a relationship to the actual deferral percentage for all other eligible employees for the preceding plan year which meets either of the following tests:

(I) The actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 1.25.

(II) The excess of the actual deferral percentage for the group of eligible highly compensated employees over that of all other eligible employees is not more than 2 percentage points, and the actual deferral percentage for the group of eligible highly compensated employees is not more than the actual deferral percentage of all other eligible employees multiplied by 2.

If 2 or more plans which include cash or deferred arrangements are considered as 1 plan for purposes of section 401(a)(4) or 410(b), the cash or deferred arrangements included in such plans shall be treated as 1 arrangement for purposes of this subparagraph.

If any highly compensated employee is a participant under 2 or more cash or deferred arrangements of the employer, for purposes of determining the deferral percentage with respect to such employee, all such cash or deferred arrangements shall be treated as 1 cash or deferred arrangement. An arrangement may apply clause (ii) by using the plan year rather than the preceding plan year if the employer so elects, except that if such an election is made, it may not be changed except as provided by the Secretary.

(B) For purposes of subparagraph (A), the actual deferral percentage for a specified group of employees for a plan year shall be the average of the ratios (calculated separately for each employee in such group) of—

(i) the amount of employer contributions actually paid over to the trust on behalf of each such employee for such plan year, to

(ii) the employee's compensation for such plan year.

(C) A cash or deferred arrangement shall be treated as meeting the requirements of subsection (a)(4) with respect to contributions if the requirements of subparagraph (A)(ii) are met.

(D) For purposes of subparagraph (B), the employer contributions on behalf of any employee—

(i) shall include any employer contributions made pursuant to the employee's election under paragraph (2), and

(ii) under such rules as the Secretary may prescribe, may, at the election of employer, include—

(I) matching contributions (as defined in section 401(m)(4)(A)) which meet the requirements of paragraph (2)(B) and (C), and

(II) qualified nonelective contributions (within the meaning of section 401(m)(4)(C)).

(E) For purposes of this paragraph, in the case of the first plan year of any plan (other than a successor plan), the amount taken into account as the actual deferral percentage of nonhighly compensated employees for the preceding plan year shall be—

(i) 3 percent, or

(ii) if the employer makes an election under this subclause, the actual deferral percentage of nonhighly compensated employees determined for such first plan year.

(F) SPECIAL RULE FOR EARLY PARTICIPATION.—If an employer elects to apply section 410(b)(4)(B) in determining whether a cash or deferred arrangement meets the requirements of subparagraph (A)(i), the employer may, in determining whether the arrangement meets the requirements of subparagraph (A)(ii), exclude from consideration all eligible employees (other than highly compensated employees) who have not met the minimum age and service requirements of section 410(a)(1)(A).

(G) GOVERNMENTAL PLAN.—A governmental plan (within the meaning of section 414(d)) shall be treated as meeting the requirements of this paragraph.

(4) OTHER REQUIREMENTS.—

(A) BENEFITS (OTHER THAN MATCHING CONTRIBUTIONS) MUST NOT BE CONTINGENT ON ELECTION TO DEFER.—A cash or deferred arrangement of any employer shall not be treated as a qualified cash or deferred arrangement if any other benefit is conditioned (directly or indirectly) on the employee electing to have the employer make or not make contributions under the arrangement in lieu of receiving cash. The preceding sentence shall not apply to any matching contribution (as defined in section 401(m)) made by reason of such an election.

(B) ELIGIBILITY OF STATE AND LOCAL GOVERNMENTS AND TAX-EXEMPT ORGANIZATIONS.—

(i) TAX-EXEMPTS ELIGIBLE.—Except as provided in clause (ii), any organization exempt from tax under this subtitle may include a qualified cash or deferred arrangement as part of a plan maintained by it.

(ii) GOVERNMENTS INELIGIBLE.—A cash or deferred arrangement shall not be treated as a qualified cash or deferred arrangement if it is part of a plan maintained by a State or local government or political subdivision thereof, or any agency or instrumentality thereof. This clause shall not apply to a rural cooperative plan or to a plan of an employer described in clause (iii).

(iii) TREATMENT OF INDIAN TRIBAL GOVERNMENTS.—An employer which is an Indian tribal government (as defined in section 7701(a)(40)), a subdivision of an Indian tribal government (determined in accordance with section 7871(d)), an agency or instrumentality of an Indian tribal government or subdivision thereof, or a corporation chartered under Federal, State, or tribal law which is owned in whole or in part by any of the foregoing may include a qualified cash or deferred arrangement as part of a plan maintained by the employer.

(C) COORDINATION WITH OTHER PLANS.—Except as provided in section 401(m), any employer contribution made pursuant to an employee's election under a qualified cash or deferred arrangement shall not be taken into account for purposes of determining whether any other plan meets the requirements of section 401(a) or 410(b). This subparagraph shall not apply for purposes of determining whether a plan meets the average benefit requirement of section 410(b)(2)(A)(ii).

(5) HIGHLY COMPENSATED EMPLOYEE.—For purposes of this subsection, the term "highly compensated employee" has the meaning given such term by section 414(q).

(6) PRE-ERISA MONEY PURCHASE PLAN.—For purposes of this subsection, the term "pre-ERISA money purchase plan" means a pension plan—

(A) which is a defined contribution plan (as defined in section 414(i)),

(B) which was in existence on June 27, 1974, and which, on such date, included a salary reduction arrangement, and

(C) under which neither the employee contributions nor the employer contributions may exceed the levels provided for by the contribution formula in effect under the plan on such date.

(7) RURAL COOPERATIVE PLAN.—For purposes of this subsection—

(A) IN GENERAL.—The term "rural cooperative plan" means any pension plan—

(i) which is a defined contribution plan (as defined in section 414(i)), and

(ii) which is established and maintained by a rural cooperative.

(B) RURAL COOPERATIVE DEFINED.—For purposes of subparagraph (A), the term "rural cooperative" means—

(i) any organization which—

(I) is engaged primarily in providing electric service on a mutual or cooperative basis, or

(II) is engaged primarily in providing electric service to the public in its area of service and which is exempt from tax under this subtitle or which is a State or local

government (or an agency or instrumentality thereof), other than a municipality (or an agency or instrumentality thereof),

(ii) any organization described in paragraph (4) or (6) of section 501(c) and at least 80 percent of the members of which are organizations described in clause (i),

(iii) a cooperative telephone company described in section 501(c)(12),

(iv) any organization which—

(I) is a mutual irrigation or ditch company described in section 501(c)(12) (without regard to the 85 percent requirement thereof), or

(II) is a district organized under the laws of a State as a municipal corporation for the purpose of irrigation, water conservation, or drainage, and

(v) an organization which is a national association of organizations described in clause (i), (ii), [sic] (iii), or (iv).

(C) SPECIAL RULE FOR CERTAIN DISTRIBUTIONS.—A rural cooperative plan which includes a qualified cash or deferred arrangement shall not be treated as violating the requirements of section 401(a) or of paragraph (2) merely by reason of a hardship distribution or a distribution to a participant after attainment of age 59½. For purposes of this section, the term "hardship distribution" means a distribution described in paragraph (2)(B)(i)(IV) (without regard to the limitation of its application to profit-sharing or stock bonus plans).

(8) ARRANGEMENT NOT DISQUALIFIED IF EXCESS CONTRIBUTIONS DISTRIBUTED.—

(A) IN GENERAL.—A cash or deferred arrangement shall not be treated as failing to meet the requirements of clause (ii) of paragraph (3)(A) for any plan year if, before the close of the following plan year—

(i) the amount of excess contributions for such plan year (and any income allocable to such contributions through the end of such year) is distributed, or

(ii) to the extent provided in regulations, the employee elects to treat the amount of the excess contributions as an amount distributed to the employee and then contributed by the employee to the plan.

Any distribution of excess contributions (and income) may be made without regard to any other provision of law.

(B) EXCESS CONTRIBUTIONS.—For purposes of subparagraph (A), the term "excess contributions" means, with respect to any plan year, the excess of—

(i) the aggregate amount of employer contributions actually paid over to the trust on behalf of highly compensated employees for such plan year, over

(ii) the maximum amount of such contributions permitted under the limitations of clause (ii) of paragraph (3)(A) (determined by reducing contributions made on behalf of highly compensated employees in order of the actual deferral percentages beginning with the highest of such percentages).

(C) METHOD OF DISTRIBUTING EXCESS CONTRIBUTIONS.—Any distribution of the excess contributions for any plan year shall be made to highly compensated employees on the basis of the amount of contributions by, or on behalf of, each of such employees.

(D) ADDITIONAL TAX UNDER SECTION 72(t) NOT TO APPLY.—No tax shall be imposed under section 72(t) on any amount required to be distributed under this paragraph.

(E) TREATMENT OF MATCHING CONTRIBUTIONS FORFEITED BY REASON OF EXCESS DEFERRAL OR CONTRIBUTION OR PERMISSIBLE WITHDRAWAL.—For purposes of paragraph (2)(C), a matching contribution (within the meaning of subsection (m)) shall not be treated as forfeitable merely because such contribution is forfeitable if the contribution to which the matching contribution relates is treated as an excess contribution under subparagraph (B), an excess deferral under section 402(g)(2)(A), a permissible withdrawal under section 414(w), or an excess aggregate contribution under section 401(m)(6)(B).

(F) CROSS REFERENCE.—

For excise tax on certain excess contributions, see section 4979.

(9) COMPENSATION.—For purposes of this subsection, the term "compensation" has the meaning given such term by section 414(s).

(10) DISTRIBUTIONS UPON TERMINATION OF PLAN.—

(A) IN GENERAL.—An event described in this subparagraph is the termination of the plan without establishment or maintenance of another defined contribution plan (other than an employee stock ownership plan as defined in section 4975(e)(7)).

(B) DISTRIBUTIONS MUST BE LUMP SUM DISTRIBUTIONS.—

(i) IN GENERAL.—A termination shall not be treated as described in subparagraph (A) with respect to any employee unless the employee receives a lump sum distribution by reason of the termination.

(ii) LUMP-SUM DISTRIBUTION.—For purposes of this subparagraph, the term "lump-sum distribution" has the meaning given such term by section 402(e)(4)(D) (without regard to subclauses (I), (II), (III), and (IV) of clause (i) thereof). Such term includes a distribution of an annuity contract from—

(I) a trust which forms a part of a plan described in section 401(a) and which is exempt from tax under section 501(a), or

(II) an annuity plan described in section 403(a).

(11) ADOPTION OF SIMPLE PLAN TO MEET NONDISCRIMINATION TESTS.—

(A) IN GENERAL.—A cash or deferred arrangement maintained by an eligible employer shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement meets—

(i) the contribution requirements of subparagraph (B),

(ii) the exclusive plan requirements of subparagraph (C), and

(iii) the vesting requirements of section 408(p)(3).

(B) CONTRIBUTION REQUIREMENTS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if, under the arrangement—

(I) an employee may elect to have the employer make elective contributions for the year on behalf of the employee to a trust under the plan in an amount which is expressed as a percentage of compensation of the employee but which in no event exceeds the amount in effect under section 408(p)(2)(A)(ii),

(II) the employer is required to make a matching contribution to the trust for the year in an amount equal to so much of the amount the employee elects under subclause (I) as does not exceed 3 percent of compensation for the year, and

(III) no other contributions may be made other than contributions described in subclause (I) or (II).

(ii) EMPLOYER MAY ELECT 2-PERCENT NONELECTIVE CONTRIBUTION.—An employer shall be treated as meeting the requirements of clause (i)(II) for any year if, in lieu of the contributions described in such clause, the employer elects (pursuant to the terms of the arrangement) to make nonelective contributions of 2 percent of compensation for each employee who is eligible to participate in the arrangement and who has at least $5,000 of compensation from the employer for the year. If an employer makes an election under this subparagraph for any year, the employer shall notify employees of such election within a reasonable period of time before the 60th day before the beginning of such year.

(iii) ADMINISTRATIVE REQUIREMENTS.—

(I) IN GENERAL.—Rules similar to the rules of subparagraphs (B) and (C) of section 408(p)(5) shall apply for purposes of this subparagraph.

(II) NOTICE OF ELECTION PERIOD.—The requirements of this subparagraph shall not be treated as met with respect to any year unless the employer notifies each employee eligible to participate, within a reasonable period of time before the 60th day before the beginning of such year (and, for the first year the employee is so eligible, the 60th day before the first day such employee is so eligible), of the rules similar to the rules of section 408(p)(5)(C) which apply by reason of subclause (I).

(C) EXCLUSIVE PLAN REQUIREMENT.—The requirements of this subparagraph are met for any year to which this paragraph applies if no contributions were made, or benefits were accrued, for services during such year under any qualified plan of the employer on behalf of any employee eligible to participate in the cash or deferred arrangement, other than contributions described in subparagraph (B).

(D) DEFINITIONS AND SPECIAL RULE.—

(i) DEFINITIONS.—For purposes of this paragraph, any term used in this paragraph which is also used in section 408(p) shall have the meaning given such term by such section.

(ii) COORDINATION WITH TOP-HEAVY RULES.—A plan meeting the requirements of this paragraph for any year shall not be treated as a top-heavy plan under section 416 for such year if such plan allows only contributions required under this paragraph.

(12) ALTERNATIVE METHODS OF MEETING NONDISCRIMINATION REQUIREMENTS.—

(A) IN GENERAL.—A cash or deferred arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii) if such arrangement—

(i) meets the contribution requirements of subparagraph (B) or (C), and

(ii) meets the notice requirements of subparagraph (D).

(B) MATCHING CONTRIBUTIONS.—

(i) IN GENERAL.—The requirements of this subparagraph are met if, under the arrangement, the employer makes matching contributions on behalf of each employee who is not a highly compensated employee in an amount equal to—

(I) 100 percent of the elective contributions of the employee to the extent such elective contributions do not exceed 3 percent of the employee's compensation, and

(II) 50 percent of the elective contributions of the employee to the extent that such elective contributions exceed 3 percent but do not exceed 5 percent of the employee's compensation.

(ii) RATE FOR HIGHLY COMPENSATED EMPLOYEES.—The requirements of this subparagraph are not met if, under the arrangement, the rate of matching contribution with respect to any elective contribution of a highly compensated employee at any rate of elective contribution is greater than that with respect to an employee who is not a highly compensated employee.

(iii) ALTERNATIVE PLAN DESIGNS.—If the rate of any matching contribution with respect to any rate of elective contribution is not equal to the percentage required under clause (i), an arrangement shall not be treated as failing to meet the requirements of clause (i) if—

(I) the rate of an employer's matching contribution does not increase as an employee's rate of elective contributions increase, and

(II) the aggregate amount of matching contributions at such rate of elective contribution is at least equal to the aggregate amount of matching contributions which would be made if matching contributions were made on the basis of the percentages described in clause (i).

(C) NONELECTIVE CONTRIBUTIONS.—The requirements of this subparagraph are met if, under the arrangement, the employer is required, without regard to whether the employee makes an elective contribution or employee contribution, to make a contribution to a defined contribution plan on behalf of each employee who is not a highly compensated employee and who is eligible to participate in the arrangement in an amount equal to at least 3 percent of the employee's compensation.

(D) NOTICE REQUIREMENT.—An arrangement meets the requirements of this paragraph if, under the arrangement, each employee eligible to participate is, within a reasonable period before any year, given written notice of the employee's rights and obligations under the arrangement which—

(i) is sufficiently accurate and comprehensive to appraise the employee of such rights and obligations, and

(ii) is written in a manner calculated to be understood by the average employee eligible to participate.

(E) OTHER REQUIREMENTS.—

(i) WITHDRAWAL AND VESTING RESTRICTIONS.—An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) of this paragraph unless the requirements of subparagraphs (B) and (C) of paragraph (2) are met with respect to all employer contributions (including matching contributions) taken into account in determining whether the requirements of subparagraphs (B) and (C) of this paragraph are met.

(ii) SOCIAL SECURITY AND SIMILAR CONTRIBUTIONS NOT TAKEN INTO ACCOUNT.—An arrangement shall not be treated as meeting the requirements of subparagraph (B) or (C) unless such requirements are met without regard to subsection (l), and, for purposes of subsection (l), employer contributions under subparagraph (B) or (C) shall not be taken into account.

(F) OTHER PLANS.—An arrangement shall be treated as meeting the requirements under subparagraph (A)(i) if any other plan maintained by the employer meets such requirements with respect to employees eligible under the arrangement.

(13) ALTERNATIVE METHOD FOR AUTOMATIC CONTRIBUTION ARRANGEMENTS TO MEET NONDISCRIMINATION REQUIREMENTS.—

(A) IN GENERAL.—A qualified automatic contribution arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii).

(B) QUALIFIED AUTOMATIC CONTRIBUTION ARRANGEMENT.—For purposes of this paragraph, the term "qualified automatic contribution arrangement" means any cash or deferred arrangement which meets the requirements of subparagraphs (C) through (E).

(C) AUTOMATIC DEFERRAL.—

(i) IN GENERAL.—The requirements of this subparagraph are met if, under the arrangement, each employee eligible to participate in the arrangement is treated as having elected to have the employer make elective contributions in an amount equal to a qualified percentage of compensation.

(ii) ELECTION OUT.—The election treated as having been made under clause (i) shall cease to apply with respect to any employee if such employee makes an affirmative election—

(I) to not have such contributions made, or

(II) to make elective contributions at a level specified in such affirmative election.

(iii) QUALIFIED PERCENTAGE.—For purposes of this subparagraph, the term "qualified percentage" means, with respect to any employee, any percentage determined under the arrangement if such percentage is applied uniformly, does not exceed 10 percent, and is at least—