Joint Explanatory Statement of the Committee of the Conference

The managers on the part of the Senate and the House at the conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 4348), to provide an extension of Federal-aid highway, highway safety, motor carrier safety, transit, and other programs funded out of the Highway Trust Fund pending enactment of a multiyear law reauthorizing such programs, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House recedes from its disagreement to the amendment of the Senate to the text of the bill and agrees to the same with an amendment.

A summary of the bill agreed to in conference is set forth below:

Moving Ahead for Progress in the 21st Century (MAP-21) replaces the previous authorization, the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), that expired on September 30, 2009 and which has been continued with a series of short-term extensions. MAP-21 will modernize and reform our current transportation system to help create jobs, accelerate economic recovery, and build the foundation for long-term prosperity. This conference report makes a number of necessary changes in the Federal-aid highway program structure to increase State flexibility and better serve the American people.

DIVISION A—FEDERAL-AID HIGHWAYS AND HIGHWAY SAFETY CONSTRUCTION PROGRAMS

Highway Funding Levels

The conference report provides funding for the federal-aid highway program through fiscal 2014 at current funding levels with a small inflationary adjustment.

Program Consolidation

The Senate and the House both sought to consolidate the number of programs in the federal-aid highway program to focus priorities and resources on key national goals. The conference report consolidates the number of highway programs by two-thirds. The elimination of dozens of programs makes more resources available to States and metropolitan areas to invest in their most critical needs to improve the condition and performance of their transportation system.

Project Delivery

The conference report combined provisions from the House and Senate bills focusing on the shared priority of accelerating project delivery. It maintains the vast majority of project acceleration provisions from S. 1813 and provisions from the House bill in addition to new provisions that will maintain substantive environment and public health protections while streamlining the creation and use of documents and environmental reviews, enhancing efficiency and accountability in the project delivery process.

The conference report adopts and modifies provisions from the House bill directing the Secretary to designate, through rulemaking, certain activities as categorical exclusions under the National Environmental Policy Act. The Secretary is directed to designate the repair or reconstruction of a road, highway, or bridge damaged by a declared emergency or disaster as a categorical exclusion, if the repair or reconstruction project is in the same location and with the same specifications as the original project and is commenced within two years of the declaration of emergency or disaster. The Secretary is also directed to designate any project within the existing operational right-of-way as a categorical exclusion and defines the term "operational right-of-way". Additionally, the Secretary is directed to designate projects receiving limited Federal assistance as a categorical exclusion. The categorical exclusion applies to any project that receives less than $5,000,000 in Federal funds and any project with a total estimated cost of not more than $30,000,000 receiving Federal funds comprising less than 15 percent of the total estimated project costs

Performance measures

The nation's surface transportation programs have not provided sufficient accountability for how tax dollars are being spent on transportation projects and would benefit from a greater focus on key national priorities. The conference report focuses the highway program on key outcomes, such as reducing fatalities, improving road and bridge conditions, reducing congestion, increasing system reliability, and improving freight movement and economic vitality.

Focus on the National Highway System

The conference report combines the old interstate maintenance program into a new program called the National Highway Performance Program to address both the interstate system as well as an extended National Highway System. It is these roads that are most critical to our economic vitality, and the conference report ensures the roads and bridges that make up this system will be better maintained.

Freight Policy

A top priority of the nation's transportation system should be the safe and efficient movement of goods. The nation's economic health is reliant upon a transportation system that provides for reliable and timely goods movement.

This conference report establishes policies to improve freight movement. It calls for the development of a National Freight Strategic Plan, encourages state freight plans and advisory committees, and provides incentives for states that fund projects to improve freight movement.

America Fast Forward

Given our massive investment needs and the limited funding available, we need to find ways to better leverage Federal dollars by encouraging additional non-Federal investment and helping to accelerate the benefits of State and locally funded transportation projects.

This conference report builds upon the success of the TIFIA program to help communities leverage their transportation resources and stretch Federal dollars further than they have been stretched before. The conference report modifies the TIFIA program by increasing funding for the program to $1 billion per year, by increasing the maximum share of project costs from 33 percent to 49 percent, by allowing TIFIA to be used to support a related set of projects, and by setting aside funding for projects in rural areas at more favorable terms.

Gulf Coast Restoration

The conference report modifies a Senate provision related to Gulf Coast restoration known as the Resources and Ecosystems Sustainability, Tourism Opportunities and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act). The provision establishes the Gulf Coast Restoration Trust Fund and places in the Trust Fund 80% of all civil penalties paid by responsible parties in connection with the Deepwater Horizon oil spill. Funding may be used to invest in projects and activities to restore the long-term health of the coastal ecosystem and local economies in the Gulf Coast Region, which includes the states of Mississippi, Louisiana, Alabama, Florida, and Texas. A portion of the funds will be allocated directly and equally to the five Gulf Coast states for ecological and economic recovery along the coast. A portion will be provided to the Gulf Coast Ecosystem Restoration Council established by the bill to develop and fund a comprehensive plan for the restoration of Gulf Coast ecosystems. A portion will be allocated among the states using an impact-based formula to implement state plans that have been approved by the Council. Finally, a portion of the fines will be allocated to a Gulf Coast ecosystem restoration, science, observation, monitoring and technology program and for grants to nongovernmental entities for the establishment of Gulf Coast centers of excellence.

Harbor Maintenance

The Conference report modifies a Senate provision highlighting the significance of the nation's ports for efficient movement of goods and products and the need for increased investment in the maintenance of these ports to promote the economic competiveness of the United States. The provision states the Sense of Congress that the Administration should request and the Congress should fully expend each year all of the revenues collected in the Harbor Maintenance Trust Fund (HMTF) for the operation and maintenance of the nation's federally maintained ports. The provision also expresses the importance of protecting other critical Army Corps programs, including inland navigation, flood and coastal storm protection, and ecosystem restoration, from funding reductions.

Finally, the provision directs the Administration to provide an annual estimate of national harbor maintenance needs, including an estimate of the percentage of waterways that will be available for use based on the annual budget request as well as how much funding would be needed to achieve 95 percent availability of the nation's ports and waterways within 3 year

Division B—Federal Public Transportation Act of 2012

The Federal Public Transportation Act of 2012 contains historic improvements in safety oversight, streamlined review of new capital projects, program consolidation, and a shift from earmarks and discretionary programs to robust formula programs that public transportation systems can rely on to upgrade and improve aging infrastructure and vehicles. The Act provides increased funding levels for fiscal years 2013 and 2014 based on expected inflation, giving public transportation providers the stable funding needed to make essential investments.

Secs. 20005 and 20006, 49 U.S.C. 5303/5304, Metropolitan and Statewide Transportation Planning

The Conference report improves metropolitan and statewide planning processes to incorporate a more comprehensive performance-based approach. The conference committee requires the structure of all Metropolitan Planning Organizations include officials of public agencies that administer or operate public transportation systems within two years of enactment.

The conference report creates a pilot program for transit-oriented development planning to advance planning efforts that support transit-oriented development around fixed guideway capital investment projects. Grants for planning will help communities develop strategies to facilitate transit-oriented development.

Secs. 20007 and 20026, 49 U.S.C. 5307 and 5336, Urbanized Area Formula Grants

Maintains the basic structure for urbanized area grants under Section 5307. The program continues to be the largest program for federal investment in public transportation. The "Job Access and Reverse Commute" program (JARC) has been moved to Section 5307 and the conferees have removed the Senate bill set-aside for JARC activities.

Maintains the existing criteria for use of 5307 funds for capital projects (operating expenses continue to be ineligible) in urban areas with a population greater than 200,000. In addition, the bill maintains language allowing small urbanized areas with populations under 200,000 to use up to 100 percent of their 5307 funding for operating expenses. A modified "100 bus rule" has been included, allowing systems with 76-100 buses operating in peak service to use up to 50% of their 5307 funding for operating expenses and those operating 75 or fewer buses to use up to 75% for operating expenses.

The Senate receded to the House request to remove a provision in the Senate bill establishing a program to allow public transportation providers temporary flexibility during periods of high unemployment to use a limited portion of their 5307 funds for up to two years for operating expenses.

Sec. 20008, 49 U.S.C. 5309, Fixed Guideway Capital Investment Grants (New Starts)
Reforms and streamlines the "Fixed Guideway Capital Investment Grant" program (previously the "Major Capital Investment Grant" or "New Starts" program). Based on extensive feedback from project sponsors and other stakeholders, the bill streamlines the New Starts process to accelerate project delivery by eliminating duplicative steps in project development and instituting a modified program structure that will allow the Federal Transit Administration to review proposals quickly, without sacrificing effective project oversight.

Projects under $100 million can utilize an expedited review process if they meet standards of similar highly qualified projects. The bill also creates a category of demonstration projects for sponsors that propose a significant amount of local and/or private funding and reduce the federal commitment required for the projects.

Establishes a new category for capital investment projects by authorizing core capacity projects, which will undergo the same process as other "new starts" projects but provide an opportunity for existing systems to make necessary but significant investments that were not previously eligible for funding. The conference report requires that eligible activities under a core capacity project achieve at least a 10% increase in capacity along a corridor.

The Senate agreed to a House request to modify the definition of Bus Rapid Transit projects in the Senate bill to allow broader use of the program. The conference report also includes incentives for the development of bus rapid transit projects that incorporate elements of fixed-guideway transit like light rail.

Sec. 20009, 49 U.S.C. 5310, Formula Grants for the Enhanced Mobility of Seniors and Individuals with Disabilities
Consolidates the existing "Elderly and Disabled" (Sec. 5310) and "New Freedom" (Sec. 5317) programs into a single program that increases the level of resources available beyond the level of funding available under existing programs. The consolidated program will continue to ensure support for non-profit providers of transportation, and it will continue to make available funds for public transportation services that exceed the requirements of the Americans with Disabilities Act, as previously provided under the "New Freedom" program.

Sec. 20010, 49 U.S.C. 5311, Formula Grants for Rural Areas
Maintains the existing structure providing funding to states for public transportation in rural areas. The 5311 formula is expanded to include the rural component of the "Job Access and Reverse Commute" program, and the level of public transportation service that is provided within a state's rural areas is considered in the distribution of new funds.

Funding for the "Public Transportation on Indian Reservations" program is increased to $30 million. The Secretary will distribute $5 million competitively each fiscal year, and $25 million will be available to Indian Tribes as formula grants to continue and expand public transportation services.

The conference report also establishes a new "Appalachian Development Public Transportation Program" to distribute $20 million to states within the Appalachian region with a goal of providing greater public transportation opportunities to residents in these challenged areas.

Sec. 20011, 49 U.S.C. 5312, Research, Development, Demonstration, and Deployment Projects
Modifies the existing research program by eliminating earmarks and reforming the program to provide research focused on public transportation with a goal of providing meaningful results.

Creates a clearly delineated pipeline with criteria for continued progress with a goal of taking an idea from the research phase through to demonstration and deployment in the field. For the first time, the program specifically provides funding for demonstration and deployment of products and services that may benefit public transportation; a major impediment to putting new technology to use in the field often cited by public transportation providers.

Creates a section of the deployment program dedicated to low or no emission public transportation vehicles. Grants will be available for the acquisition of low or no emission vehicles and related equipment, the construction of facilities for low or no emission vehicles, and the rehabilitation of existing facilities to accommodate the use of low or no emission vehicles.

Sec. 20012, 49 U.S.C. 5314, Technical Assistance and Standards Development
Provides grants for activities that help public transportation systems more effectively and efficiently provide public transportation service and helps grant recipients administer funds received under this chapter. Authorizes the Federal Transit Administration to continue making grants for the development of voluntary standards by the public transportation industry related to procurement, safety and other subjects and authorizes the Secretary to fund technical assistance centers to assist grant recipients following a competitive process.

Sec. 20014, 49 U.S.C. 5318, Bus Testing Facilities
Instructs the Secretary to certify one facility for testing new bus models. Requires the Secretary to work with the bus industry to develop a mutually agreed upon pass/fail test for vehicles to ensure the safety and reliability of buses purchased with federal funds.

Sec. 20015, 49 U.S.C. 5322, Public Transportation Workforce Development and Human Resource Programs
Authorizes the Secretary to make grants, or enter into contracts for, activities that address human resource and workforce needs as they apply to public transportation activities. Creates the Innovative Public Transportation Workforce Development Program, a competitive grant program to promote and assist the development of innovative workforce development and human resource activities within the public transportation industry.

Sec. 20017, 49 U.S.C. 5324, Public Transportation Emergency Relief Program
Establishes a program to assist States and public transportation systems pay for protecting, repairing, or replacing equipment and facilities that are in danger of suffering serious damage or have suffered serious damage as a result of an emergency.

Sec. 20019, 49 U.S.C. 5326, Transit Asset Management
Establishes a system to monitor and manage public transportation assets to improve safety and increase reliability and performance. Recipients are required to establish and use an asset management system to develop capital asset inventories and condition assessments, and report on the condition of their system as a whole, including a description of the change in overall condition since the last report. The Secretary of Transportation is also required to define the term 'state of good repair,' including objective standards for measuring the condition of capital assets.

Sec. 20021, 49 U.S.C. 5329, Public Transportation Safety Program
Establishes a National Public Transportation Safety Plan to improve the safety of all public transportation systems that receive Federal funding. The Secretary will develop minimum performance standards for vehicles used in public transportation and establish a training program for Federal and State employees who conduct safety audits and examinations of public transportation systems.

Requires public transportation agencies to establish comprehensive safety plans, thus encouraging a "culture of safety" in which each employee completes a safety training program that includes continuing safety education and training. The Senate receded to a House request to give smaller systems the option to rely on states to prepare these plans.

Improves the effectiveness of State Safety Oversight Agencies and increases federal funding for safety. States will submit proposals for state safety oversight programs for rail fixed guideway public transportation systems to the Secretary, and upon approval, receive funding at an 80 percent Federal share. The Act builds on the existence of State safety oversight agencies and requires them to be legally and financially independent from the rail fixed guideway systems they oversee, and have the authority, staff training and expertise to enforce Federal and state safety laws.

At the request of the House the conference changes the nature of the enforcement powers contained in the Senate bill. Instead of direct oversight of public transportation agencies, the program relies on State Safety Oversight Agencies to provide direct oversight of rail fixed guideway public transportation providers.

Sec 20027, 49 U.S.C. 5337, State of Good Repair Grant Program
Modernizes, renames, and provides historic levels of funding for the old "Rail Modernization" program by establishing a program structure and defining eligible expenses under the program with a goal of moving all systems towards a state of good repair and enabling systems to maintain a state of good repair.

The program has two major components: a rail fixed guideway state of good repair formula program and a high intensity bus state of good repair formula program. Funding tiers and earmarks in the old rail modernization program have been eliminated and replaced with a new structure that focuses on the age of the system, revenue vehicle miles and directional route miles.

Division C—Transportation Safety and Surface Transportation Policy

Title I – Motor Vehicle and Highway Safety Improvement Act

Highway Safety Grant Programs. The conference report includes provisions that restructure the existing highway safety grant programs administered by the National Highway Traffic Safety Administration (NHTSA). The conference report largely reflects the Senate approach on modifications to the existing formula grant programs, including the establishment of a single grant application and reporting process for all grants received under this title, the adoption of performance measures, and the establishment of planning and reporting requirements for the states. In addition, the conference report inserts a prohibition on state use of these formula grant funds to pay for red light or speed cameras. The report moves a provision establishing a cooperative research and evaluation program into a different section, but continues to fund it from the funds provided for the formula grant program.

The conference report accepts the Senate approach on incentive grants, but consolidates all of those grants into a single section in Code. The new Section 405 of Title 23, "National Priority Safety Programs," allocates funds across six incentive grant programs and allows such funds to be used for a research program on technology to prevent impaired driving. The conference report retains the Senate language with respect to state traffic safety information system improvement grants, the motorcycle safety grant program, and the high visibility enforcement program.

The conference report retains the Senate language with respect to an occupant protection incentive grant with two modifications. First, the report provides the highest performing states with additional flexibility in spending grant funds. Second, the report does not specifically state that education to the public concerning the dangers of children left unattended in vehicles is an allowable use of these funds, however the conferees agree that such education efforts could be carried out under other allowable uses, including education to the public concerning the proper use of child restraints.

The conference report reflects the Senate approach with regard to the impaired driving countermeasures and teen driver safety grants with one modification made to each that allows states additional flexibility in spending a percentage of funds received through these programs. The report also accepts the Senate approach on distracted driving incentive grants, with one change to the eligibility requirements for the grants.

Highway Safety Research. The conference report accepts the Senate approach to modifying the highway safety research authorities provided to NHTSA. The report strikes provisions in the Senate bill that authorized additional collaborative research and development with non-federal entities, allowed the Secretary to establish an international highway safety information and cooperation program, funded training for highway safety personnel, and created a clearinghouse for information about best practices for driver's licensing concerning drivers with medical issues. The report removes language in the Senate bill that allowed NHTSA to develop model specifications for devices. The conferees understand the removal of this language does not alter the current authority of NHTSA in this area.

The conference report modifies Senate language providing NHTSA with the authority to conduct research into advanced technology to prevent impaired driving, and allows the Secretary to use funds from the National Priority Safety Programs to fund this research.

Enhanced Safety Authorities. The conference report includes several provisions intended to enhance NHTSA's safety authorities. The conference report revises the Senate language on civil penalties and sets the maximum penalty at $35 million for a related series of violations. The increase will take effect one year after enactment or when NHTSA issues a rule interpreting the new civil penalty factors, whichever is earlier, and the conferees agree that the new penalty amount will only be subject to adjustment for inflation occurring thereafter. The conference report maintains the Senate approach on motor vehicle safety research and development with modification, including to NHTSA's authority to plan, design, or build facilities. The conference report largely maintains the Senate approach providing NHTSA additional authority over imported motor vehicles and motor vehicle equipment, though it strikes a provision related to financial responsibility requirements for importers and modifies a provision relating to conditions of importation.

Transparency and Accountability. The conference report contains several provisions designed to increase transparency and accountability at NHTSA and in the auto industry. The conference report adopts a modified Senate approach on establishing public accessibility to vehicle recall information and further modifies Senate provisions addressing the set of communications with dealers that must be made available to the public. The report strikes the provision regarding public availability of early warning reporting data. The report strikes a provision imposing new post-employment restrictions for vehicle safety officials at NHTSA, but retains language calling on the inspector general to report on the issue. The report slightly modifies the whistleblower protection provision and calls on the Government Accountability Office to examine this and other such provisions. The report slightly modifies the provision directing NHTSA to study crash data collection. And the report makes slight modifications to NHTSA's authority to require additional recall notifications.

Vehicle Electronics and Safety Standards. The conference report maintains a Senate provision that establishes a Council for Vehicle Electronics, Vehicle Software, and Emerging Technologies to build, implement, and aggregate NHTSA's expertise in passenger motor vehicle electronics and other new and emerging technologies. The conference report includes a provision calling on NHTSA to evaluate vehicle electronic systems and report to Congress on highest priority areas for safety. The conference report strikes all other safety mandates contained in Subtitle D of the Senate bill.

Child Safety Standards. The conference report maintains the Senate approach with regard to child safety. The report strikes mandates for new safety standards for booster seats and child restraint anchorage systems because conferees understand that NHTSA has completed a rulemaking that achieves these goals. The report modifies the mandate that NHTSA update its frontal impact test parameters for child safety seats to clarify that the mandate only applies to the seat assembly specifications. The report revises the provision relating to unattended passengers to a discretionary research effort without any mandate for NHTSA to begin a rulemaking process.

Improved Daytime and Nighttime Visibility of Agricultural Equipment. The Conference report accepts the Senate language.

<u>Title II – Commercial Motor Vehicle Safety Enhancement Act of 2012</u>

Commercial Motor Vehicle Registration requirements. The conference report includes several provisions amending registration requirements under federal law for commercial motor vehicles (CMV), freight forwarders, and brokers. The conference report largely adopts the Senate registration provisions. The provisions include new requirements, such as completing a written examination and applying for a US DOT number, as a precondition for being registered. The included provisions amend safety fitness requirements and require license holders to provide registration updates. The conference report also includes Senate provisions for registering household goods motor carriers, but removes provisions directing the Secretary to establish education and assistance programs to address the problems of household property being held hostage.

The conference report makes changes to some Senate registration provisions. It retains the current presumption in favor of registration, removes a management plan requirement, and changes written examination provisions. For providers of motorcoach services, the conference report also replaces a pre-authorization audit requirement with a requirement that new operators undergo a safety review within 120 days of beginning operations. The conference report also removes requirements to periodically update registration information when no changes have been made.

The conference report includes a number of Senate provisions to address motor carrier companies that mask prior noncompliance and adverse safety history. The provisions authorize the Secretary to withhold, suspend, amend, or revoke a motor carrier's registration if the carrier failed to disclose an adverse safety history or other facts relevant to its past regulatory compliance. The provisions authorize similar action where the Secretary finds that within the previous 3 years the carrier: (1) was closely related to another motor carrier with a poor compliance history; and (2) did not disclose this relationship in its application. The Secretary is granted authority to refuse or revoke a USDOT number to an applicant that is unfit, unwilling or unable to comply with the safety regulations. The conference report amends some of the Senate provisions to limit the unintended results of punishing individuals who were not guilty parties in previous companies.

The conference report adopts several Senate penalty provisions for operations in violation of registration requirements. The conference report includes civil penalties and revocation authority for operating without registration, operating as imminent hazard, and transporting hazardous wastes without necessary registration. Provisions increase the civil penalties for motor carriers, motor carriers of migrant workers and private motor carriers that disobey a subpoena or a requirement of the Secretary to produce witnesses or records. Other provisions included authorize the Secretary to suspend, amend or revoke the registration of a motor carrier, broker or freight forwarder for failing to obey an administrative subpoena. Another provision authorizes the Secretary to place out of service the operations of a motor carrier discovered to be operating vehicles without the required registration, or operating beyond the scope of the registration granted. The conference report amends the Senate provision for hazardous waste transportation penalties and sets the penalty range at not less than $20,000 but not to exceed $40,000.

Electronic logging devices. The conference report includes provisions directing the Secretary to issue regulations requiring electronic logging devices for recording hours of service in commercial motor vehicles and sets basic performance standards for the device. The conference report adopted the Senate approach with some amendments. The conference report adds an hours of service field study to expand on a previous Federal Motor Carrier Safety Administration (FMCSA) report on driver fatigue and maximum driving time requirements focusing on the 34-hour restart rule. The conference report directs the Secretary, in prescribing regulations, to consider how the rule may reduce or eliminate requirements for drivers and motor carriers to retain supporting documentation associated with paper-based records. The conference report changes the name of the device and adds other language to make clear that the devices are to be used only to enforce federal regulations. The report also includes a definition of “tamper resistant” and provisions to ensure that appropriate measures are taken to protect the privacy of individuals and the confidentiality of the data.

Commercial motor vehicle driver safety. The conference report includes several Senate provisions to address commercial driver safety: driver medical qualifications, operator training, driver’s license program, driver’s requirements and driver information systems. The conference report removes a Senate provision that would have directed the development of driver safety fitness ratings. The report also removes a study and report to Congress examining the extent to which detention time contributes to drivers violating hours of service requirements and driver fatigue. The conference report removes a Senate provision that would have amended the membership of the Motor Carrier Safety Advisory Committee to specifically include non-profit employee organization representation.

The provisions included direct the Secretary to establish a national registry of medical examiners, issue regulations to establish minimum entry-level training requirements for all CMV operators, require States to modernize commercial driver’s license (CDL) information systems, and add disqualification standards for drivers. The conference reports includes Senate provisions for the commercial driver's license program, but removes language for federal guidance on critical requirements for effective State CDL programs. The conference report includes alternate language directing states to prioritize areas that the Secretary has identified as critical in the most recent audit of their programs.

The conference report also includes language for streamlining the process by which military members and veterans who operate heavy trucks during duty are able to obtain commercial driver's licenses. The conference provision includes Senate language directing the Secretary to complete a study and report to Congress on what can be done to streamline the process. The report adds new language requiring the Secretary, based on recommendations of the report, to establish accelerated licensing procedures within 1 year of enactment.

Drug and Alcohol Clearinghouse . The conference report includes Senate provisions directing the Secretary to establish a national repository for records relating to alcohol and controlled substances testing of CMV drivers. The records will be used to determine the qualifications for operating a CMV. The clearinghouse will include safeguards to protect the privacy of individuals to whom the information pertains and ensure that the information is not divulged to anyone not directly involved in evaluating the individual's qualifications to drive a CMV. The conference report also includes Senate provisions for prohibiting an employer from hiring a driver unless he or she has determined that during the preceding three years that such driver: did not test positive in violation of the regulations at title 49, Code of Federal Regulations; and did not refuse a test under these regulations. Other included provisions grant preemption authority to the Secretary in regard to the reporting of valid positive results or refusals to take alcohol screening and drug tests, and apply civil penalties to any violators of privacy and reporting requirements.

The conference report amends Senate provisions for archiving personal records to ensure further individual privacy protections. The conference report also includes amendments to the National Transportation Safety Board's access to clearinghouse records. The conference report makes amendments to clarify that the clearinghouse will be used to determine whether individuals have existing employment prohibitions at the time of making hiring decisions.

Motor Carrier Grant programs. The conference report does not include Senate provisions updating and consolidating grant programs and processes. While the conference believes that reducing administrative burdens on the states and local governments by streamlining grants processes is beneficial, the short time frame of the legislation does not allow for these changes. In that regard, the conference agrees to retain existing grant programs and authorizes them for FY 2013 and FY 2014 at current funding levels. The conference report adds language allowing the Secretary to examine methods and approaches for streamlining grants administration and processes to reduce burdens for the states and local governments. The conference report makes some administrative amendments to the existing commercial driver license program improvement grant that was included in the Senate bill. The conference also retains the Senate provision requiring a report to Congress on resuming the commercial vehicle information systems and networks program.

Motorcoach Safety. The conference report includes provisions addressing the safety of motorcoach operations. The conference adopts the Senate approach, but modifies some rulemaking and research requirements and removes registration provisions. The conference report consolidates several research and rulemakings related to fire prevention and mitigation. The report amends language on assessing the feasibility of retrofitting existing motorcoaches with safety requirements. The report makes conforming definition changes regarding the registration of motorcoaches. The registration provisions were not included in the conference report because they are largely redundant to the provisions in the report updating registration requirements for all motor carriers.

The conference report also includes a Senate provision for oversight of motorcoaches. The provision directs the Secretary to establish a safety fitness system to rate motor coaches, determine and assign a fitness rating for each motor coach, periodically review the safety ratings and make public the fitness ratings of each motorcoach.

The conference report includes a new provision that directs the Secretary, to the extent feasible, to ensure that motorcoach research programs and rulemaking are carried out concurrently. The report also includes a provision requiring the Secretary to review and report to Congress on the current knowledge and skill testing requirements for a commercial driver's license passenger endorsement. The conference agreement removes a Senate rulemaking requirement on distracted driving because FMCSA has already addressed this issue.

Truck, Size and Weight. The conference report includes provisions directing the Secretary to study the effects of truck, size and weight on highway safety and infrastructure and compile a list of existing state truck size and weight laws. The conference report amends the Senate study provisions. The conference report includes language directing the Secretary to consider the effects of trucks operating in excess of federal law and regulations in comparison to those trucks that do not operate in excess of federal law and regulations, when assessing accident frequency and impacts to highway and bridge infrastructure. The conference report adopts the Senate requirement that the report must be submitted to Congress not later than 2 years after enactment.

Financial responsibility requirements. The conference report includes provisions addressing the financial responsibility of freight-forwarders and brokers. These provisions direct rulemakings to establish minimum financial solvency and bonding requirements for these entities. The conference agreement includes exemptions for air carrier and customs brokers who are already subject to financial responsibility requirements under federal law.

Enforcement. The Senate bill included several provisions amending and updating FMCSA's enforcement authorities. The conference report includes nine of the Senate provisions. Five of the Senate enforcement provisions were not included in the conference report: minimum prohibition on operation of unfit carriers, minimum out of service penalties, failure to pay civil penalty as a disqualifying offense, intrastate operations of interstate motor carriers and enforcement of safety laws and regulations.

Exemptions. The conference report amends an exemption for the transportation of agricultural commodities by increasing the permitted travel radius from 100 air-miles to 150 air-miles. The conference report includes Senate language for a narrow exemption from federal requirements for covered farm vehicles. This conference report adopts the Senate language directing the Secretary to study and report to Congress on the safety impacts of the covered farm vehicle exemption.

Title III- Surface Transportation and Freight Policy Act of 2012

The Senate legislation included provisions establishing a comprehensive national surface transportation system and freight transportation policy. The policy would have provided certainty to states and localities by requiring the development of long term, strategic plans and directing transportation investment data collection and evaluation efforts. This Senate title had included provisions for safety standards to ensure that the design of federal transportation projects provides for adequate consideration of non-motorized users. The conference report does not include this title.

Title IV – Hazardous Materials Transportation Safety Improvement Act of 2012

Training Programs. There is currently no uniform training standard for hazardous materials ("hazmat") inspectors and investigators. The conference bill requires the Secretary to establish standards for training these inspectors and investigators. The conference report modifies the Senate bill to require that the standards be developed not later than 18 months after enactment, and to clarify that the standards are established as guidelines.

The conference report includes Senate provisions that amend training requirements for emergency responders of hazardous materials. These provisions direct that organizations receiving grant funding to train emergency responders have the ability to protect against accidents or incidents involving the transportation of hazardous material in accordance with existing regulations and standards.

The conference report adds language to permit "portable training" which can be offered in any suitable setting rather than specific, designated facilities. This provision is includes to allow training at locations and times convenient to students and instructors. The conference report also adds requirements to ensure that the emergency responder and hazmat employee training grants be awarded through a competitive process.

Data Collection and Research. The Senate bill recognized the need for increased research and data collection on hazardous materials programs and included a new pilot program for paperless hazard communications. The program would permit the Secretary to conduct pilot projects to evaluate the feasibility and effectiveness of using paperless hazard communications systems. The conference report includes these provisions and adds a requirement to conduct a cost-benefit analysis of the pilot projects and submit recommendations on the analysis and other findings in the report to Congress.

The conference report includes Senate provisions requiring an assessment of the Pipeline and Hazardous Materials Safety Administration's (PHMSA) hazmat data collection, analysis and reporting. These provisions require PHMSA to develop an action plan and timeline to make improvements to its systems. The conference report directs PHMSA to conduct the assessment in consultation with Commandant of the Coast Guard, in lieu of in coordination with the Secretary of Homeland Security. This amendment was included because the Coast Guard is more specifically involved in handling accidents and investigations in the transportation of hazardous materials.

Hazmat Transportation. The conference report includes a new requirement for the Secretary to study the safety of transporting flammable liquids in the external pipes of cargo tanks, "wetlines." The report specifies that the Secretary may not issue a rulemaking on "wetlines" until the study is complete, but no later than two years after the date of enactment. The conference report also modifies Senate provisions that direct the Secretary to address transportation of perishable material after inspection, training for inspectors and the proper closing of packaging after inspections, by requiring that these regulations be issued within a year after enactment.

The Senate bill included a provision that requires uniform regulations for the safe loading and unloading of hazardous materials on and off tank cars and cargo tank trucks. The provision was not included in the conference report due to an ongoing rulemaking addressing the matter.

The conference report includes a Senate provision that ensures States update the hazardous materials route registry kept by the Department of Transportation.

Special permitting. The conference report amends provisions included in the Senate bill on special permits. The conference report removes some language regarding criteria for special permits but includes the rulemaking provision for special permit and approvals procedures. It directs a review and analysis of special permits that have been in continuous effect for a 10-year period to determine which permits can be converted into the hazardous materials regulations (HMR). It includes factors that the Secretary may consider in reviewing special permits. After the analysis is complete, but no later than 3 years after enactment, the report authorizes the Secretary to issue regulations for incorporating special permits into the HMR. The amended language also directs the Secretary to publish in the Federal Register justification in the case of special permits that are not appropriate for incorporation into the HMR. Similarly, the amended language includes a process to review a special permit for incorporation into the regulations once that permit has been in effect for 10 years.

Motor carrier safety permits. The conference report includes a provision directing the Secretary to conduct a review of the implementation of the hazardous material safety permit program. The conference report directs the Secretary to consider factors, including the list of hazardous materials requiring a safety permit, the criteria used by PHMSA to determine whether a hazardous material safety permit issued by a State is equivalent to the Federal permit, and actions to improve the program including an additional level of fitness review. Based on the findings of the review, the Secretary may either issue a rulemaking to make any necessary improvements to the program, or publish in the Federal Register justification for why a rulemaking is not necessary.

Civil penalties. The conference report adds new language amending civil penalties by removing the minimum penalty amount for violations of hazardous materials laws and regulations. The conference report also adds language amending penalties for training violations. It includes a definition of "obstruct" regarding penalties for obstruction of inspections and investigations.

Title V – National Rail System Preservation, Expansion and Development Act of 2012

The Senate legislation included provisions that would direct the Secretary, in collaboration with stakeholders, to develop a long-range, national rail plan. Other provisions in this title would amend statutory requirements for implementation of positive train control, refine Surface Transportation Board authorities and amend and update Amtrak's environmental review, capital planning and financing, and inspector general authorities. The conference report does not include any of the provisions in this title.

Title VI – Sport Fish Restoration and Recreational Boating Safety Act of 2012

Sport Fish Restoration and Boating Trust Fund. The conference report adopts Senate provisions to authorize appropriations and amounts for administrative costs through FY 2013 for the Sport Fish Restoration and Boating Trust Fund. The Trust Fund, often referred to as Wallop-Breaux, is the mainstay of funding for State and Federal sport fish conservation and recreational boating safety programs. Funds go to projects that support sport fish conservation and habitat conservation in the States, and to assist States in establishing and maintaining recreational boating safety and boater education programs. The Trust Fund receives income from the following five sources: (1) motorboat fuel taxes; (2) annual tax receipts from small engine fuel used for outdoor power equipment; (3) a manufacturers' excise tax on sport fishing equipment; (4) import duties on fishing tackle and on yachts and pleasure craft; and (5) interest on funds invested prior to disbursal. All moneys received in a given fiscal year are apportioned to the States in the following fiscal year.

Title VII – Miscellaneous

Overflights in Grand Canyon National Park. The conference report makes amendments to a Senate provision on aircraft noise abatement at Grand Canyon National Park (GCNP). The provision establishes standards to be used by the National Park Service (NPS) in restoring natural quiet at GCNP, defines the term "substantial restoration of natural quiet" for the park, and directs the NPS to take measures that promote adoption of quiet technology aircraft at GCNP.

Commercial air tour operations. The conference report amends a Senate provision for commercial air tour operations at national parks. The report modifies existing statutory authority to clarify the conditions under which the Director of the NPS may deny an application to begin or expand commercial air tour operations without developing an air tour management plan at Crater Lake National Park and Great Smoky Mountains National Park only.

CONTENTS

Page

PART I − EXTENSION OF HIGHWAY TRUST FUND EXPENDITURE AUTHORITY AND RELATED TAXES

A. Extension of Highway Trust Fund Expenditure Authority and Extension of Highway-Related Taxes (secs. 141 and 142 of the House bill, secs. 40101 and 40102 of the Senate amendment, secs. 40101 and 40102 of the conference agreement, and secs. 4041, 4051, 4071, 4081, 4221, 4481 4483, 6412, 9503, 9504, and 9508 of the Code)[1]

Present Law Highway Trust Fund Excise Taxes

In general

Six separate excise taxes are imposed to finance the Federal Highway Trust Fund program. Three of these taxes are imposed on highway motor fuels. The remaining three are a retail sales tax on heavy highway vehicles, a manufacturers' excise tax on heavy vehicle tires, and an annual use tax on heavy vehicles. A substantial majority of the revenues produced by the Highway Trust Fund excise taxes are derived from the taxes on motor fuels. The annual use tax on heavy vehicles expires October 1, 2013. Except for 4.3 cents per gallon of the Highway Trust Fund fuels tax rates, the remaining taxes are scheduled to expire after June 30, 2012. The 4.3-cents-per-gallon portion of the fuels tax rates is permanent.[2] The six taxes are summarized below.

Highway motor fuels taxes

The Highway Trust Fund motor fuels tax rates are as follows: [3]

Gasoline	18.3 cents per gallon
Diesel fuel and kerosene	24.3 cents per gallon
Alternative fuels	18.3 or 24.3 cents per gallon generally[4]

[1] Except where otherwise stated, all section references are to the Internal Revenue Code of 1986, as amended (the "Code").

[2] This portion of the tax rates was enacted as a deficit reduction measure in 1993. Receipts from it were retained in the General Fund until 1997 legislation provided for their transfer to the Highway Trust Fund.

[3] Secs. 4081(a)(2)(A)(i), 4081(a)(2)(A)(iii), 4041(a)(2), 4041(a)(3), and 4041(m). Some of these fuels also are subject to an additional 0.1-cent-per-gallon excise tax to fund the Leaking Underground Storage Tank Trust Fund (secs. 4041(d) and 4081(a)(2)(B)).

[4] See secs. 4041(a)(2), 4041(a)(3), and 4041(m).

Non-fuel Highway Trust Fund excise taxes

In addition to the highway motor fuels excise tax revenues, the Highway Trust Fund receives revenues produced by three excise taxes imposed exclusively on heavy highway vehicles or tires. These taxes are:

1. A 12-percent excise tax imposed on the first retail sale of heavy highway vehicles, tractors, and trailers (generally, trucks having a gross vehicle weight in excess of 33,000 pounds and trailers having such a weight in excess of 26,000 pounds);[5]

2. An excise tax imposed on highway tires with a rated load capacity exceeding 3,500 pounds, generally at a rate of 0.945 cents per 10 pounds of excess;[6] and

3. An annual use tax imposed on highway vehicles having a taxable gross weight of 55,000 pounds or more.[7] (The maximum rate for this tax is $550 per year, imposed on vehicles having a taxable gross weight over 75,000 pounds.)

The taxable year for the annual use tax is from July 1st through June 30th of the following year. For the period July 1, 2013, through September 30, 2013, the amount of the annual use tax is reduced by 75 percent.[8]

Present Law Highway Trust Fund Expenditure Provisions

In general

Under present law, revenues from the highway excise taxes, as imposed through June 30, 2012, generally are dedicated to the Highway Trust Fund. Dedication of excise tax revenues to the Highway Trust Fund and expenditures from the Highway Trust Fund are governed by the Code.[9] The Code authorizes expenditures (subject to appropriations) from the Highway Trust Fund through June 30, 2012, for the purposes provided in authorizing legislation, as such legislation was in effect on the date of enactment of the Surface Transportation Extension Act of 2012.

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[5] Sec. 4051.

[6] Sec. 4071.

[7] Sec. 4481.

[8] Sec. 4482(c)(4) and (d).

[9] Sec. 9503. The Highway Trust Fund statutory provisions were placed in the Internal Revenue Code in 1982.

Highway Trust Fund expenditure purposes

The Highway Trust Fund has a separate account for mass transit, the Mass Transit Account.[10] The Highway Trust Fund and the Mass Transit Account are funding sources for specific programs.

Highway Trust Fund expenditure purposes have been revised with each authorization Act enacted since establishment of the Highway Trust Fund in 1956. In general, expenditures authorized under those Acts (as the Acts were in effect on the date of enactment of the most recent such authorizing Act) are specified by the Code as Highway Trust Fund expenditure purposes.[11] The Code provides that the authority to make expenditures from the Highway Trust Fund expires after June 30, 2012. Thus, no Highway Trust Fund expenditures may occur after June 30, 2012, without an amendment to the Code.

As noted above, section 9503 appropriates to the Highway Trust Fund amounts equivalent to the taxes received from the following: the taxes on diesel, gasoline, kerosene and special motor fuel, the tax on tires, the annual heavy vehicle use tax, and the tax on the retail sale of heavy trucks and trailers.[12] Section 9601 provides that amounts appropriated to a trust fund pursuant to sections 9501 through 9511, are to be transferred at least monthly from the General Fund of the Treasury to such trust fund on the basis of estimates made by the Secretary of the Treasury of the amounts referred to in the Code section appropriating the amounts to such trust fund. The Code requires that proper adjustments be made in amounts subsequently transferred to the extent prior estimates were in excess of, or less than, the amounts required to be transferred.

House Bill

Present-law expenditure authority and taxes are extended for an additional three months, through September 30, 2012.

Effective date.−The provision is effective July 1, 2012.

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[10] Sec. 9503(e)(1).

[11] The authorizing Acts that currently are referenced in the Highway Trust Fund provisions of the Code are: the Highway Revenue Act of 1956; Titles I and II of the Surface Transportation Assistance Act of 1982; the Surface Transportation and Uniform Relocation Act of 1987; the Intermodal Surface Transportation Efficiency Act of 1991; the Transportation Equity Act for the 21st Century, the Surface Transportation Extension Act of 2003, the Surface Transportation Extension Act of 2004; the Surface Transportation Extension Act of 2004, Part II; the Surface Transportation Extension Act of 2004, Part III; the Surface Transportation Extension Act of 2004, Part IV; the Surface Transportation Extension Act of 2004, Part V; the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users; the SAFETEA-LU Technical Corrections Act of 2008; the Surface Transportation Extension Act of 2010; the Surface Transportation Extension Act of 2010, Part II; the Surface Transportation Extension Act of 2011; the Surface Transportation Extension Act of 2011, Part II, and the Surface Transportation Extension Act of 2012.

[12] Sec. 9503(b)(1).

Senate Amendment

The expenditure authority for the Highway Trust Fund is extended through September 30, 2013. The Code provisions governing the purposes for which monies in the Highway Trust Fund may be spent are updated to include the reauthorization bill, Moving Ahead for Progress for the 21st Century (MAP-21).[13]

The provision extends the motor fuel taxes, and all three non-fuel excise taxes at their current rates through September 30, 2015.[14] The provision resolves the projected deficit in the Highway Trust Fund, assures a cushion of $2.8 billion in each account of the Highway Trust Fund, and creates a solvency account available for use by either highways or mass transit. Specifically, the Secretary of the Treasury is to transfer the excess of (1) any amount appropriated to the Highway Trust Fund before October 1, 2013, by reason of the provisions of this bill, over (2) the amount necessary to meet the required expenditures from the Highway Trust Fund as authorized in section 9503(c) of the Code (which provides expenditure authority from the Highway Trust Fund) for the period ending before October 1, 2013. Amounts in the solvency account are available for transfers to the Highway Account and the Mass Transit Account in such amounts as determined necessary by the Secretary to ensure that each account has a surplus balance of $2.8 billion on September 30, 2013. The solvency account terminates on September 30, 2013 and any remainder in the solvency account remains in the Highway Trust Fund. The Committee expects that the Secretary of the Treasury will consult with the Secretary of Transportation in making determinations concerning amounts necessary to meet required expenditures and amounts necessary to ensure the cushion of $2.8 billion.

Effective date.−The provision is effective on April 1, 2012.

Conference Agreement

The conference agreement provides for expenditure authority through September 30, 2014. The Code provisions governing the purposes for which monies in the Highway Trust Fund may be spent are updated to include the conference agreement bill, MAP-21. Cross-references to the reauthorization bill in the Code provisions governing the Sport Fish Restoration and Boating Trust Fund are also updated to include the conference agreement bill. In general, the provision extends the taxes dedicated to the Highway Trust Fund at their present law rates through September 30, 2016, and for the heavy vehicle use tax, through September 30, 2017.[15]

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[13] The provision also replaces cross-references to the Surface Transportation Extension Act of 2011, Part II, with MAP-21, and replaces April 1, 2012 references with October 1, 2013 in the Code provisions governing the Leaking Underground Storage Tank Trust Fund, and the Sport Fish Restoration and Boating Trust Fund.

[14] The Leaking Underground Storage Tank Trust Fund financing rate of 0.1 cent per gallon also is extended through September 30, 2015.

[15] The Leaking Underground Storage Tank Trust Fund financing rate also is extended through September 30, 2016. The provision also corrects a potential drafting ambiguity regarding the taxable period as reflected in prior legislation. The provision is effective as if included in section 142 of the Surface Transportation Extension Act of 2011, Part II.

Effective date.−The provision is effective July 1, 2012.

PART II − REVENUE PROVISIONS

A. Leaking Underground Storage Tank Trust Fund (secs. 40301 and 40302 of the Senate amendment, sec. 40201 of the conference agreement and secs. 9503 and 9508 of the Code)

Present Law

Leaking Underground Storage Tank Trust Fund financing rate

Fuels of a type subject to other trust fund excise taxes generally are subject to an add-on excise tax of 0.1-cent-per-gallon to fund the Leaking Underground Storage Tank ("LUST") Trust Fund.[16] For example, the LUST excise tax applies to gasoline, diesel fuel, kerosene, and most alternative fuels subject to highway and aviation fuels excise taxes, and to fuels subject to the inland waterways fuel excise tax. This excise tax is imposed on both uses and parties subject to the other taxes, and to situations (other than export) in which the fuel otherwise is tax-exempt. For example, off-highway business use of gasoline and off-highway use of diesel fuel and kerosene generally are exempt from highway motor fuels excise tax. Similarly, States and local governments and certain other parties are exempt from such tax. Nonetheless, all such uses and parties are subject to the 0.1-cent-per-gallon LUST excise tax.

Liquefied natural gas, compressed natural gas, and liquefied petroleum gas are exempt from the LUST tax. Additionally, methanol and ethanol fuels produced from coal (including peat) are taxed at a reduced rate of 0.05 cents per gallon.

The LUST tax is scheduled to expire after June 30, 2012.[17]

Overview of Leaking Underground Storage Tank Trust Fund expenditure provisions

Amounts in the LUST Trust Fund are available, as provided in appropriations Acts, for purposes of making expenditures to carry out sections 9003(h)-(j), 9004(f), 9005(c), and 9010-9013 of the Solid Waste Disposal Act as in effect on the date of enactment of Public Law 109-168. Any claim filed against the LUST Trust Fund may be paid only out of such fund, and the liability of the United States for claims is limited to the amount in the fund.

The monies in the LUST Trust Fund are used to pay expenses incurred by the Environmental Protection Agency (the "EPA") and the States for preventing, detecting, and cleaning up leaks from petroleum underground storage tanks, as well as programs to evaluate the compatibility of fuel storage tanks with alternative fuels, MTBE additives, and ethanol and biodiesel blends.

The EPA makes grants to States to implement the program, and States use cleanup funds primarily to oversee and enforce corrective actions by responsible parties. States and EPA also

[16] Secs. 4041, 4042, and 4081.

[17] For Federal budget scorekeeping purposes, the LUST Trust Fund tax, like other excise taxes dedicated to trust funds, is assumed to be permanent.

use cleanup funds to conduct corrective actions where no responsible party has been identified, where a responsible party fails to comply with a cleanup order, in the event of an emergency, and to take cost recovery actions against parties. In 2005, Congress authorized the EPA and States to use trust fund monies for non-cleanup purposes as well, specifically for administration and enforcement of the leak prevention requirements of the UST program.[18]

House Bill

No provision.

Senate Amendment

The provision transfers $3 billion from the LUST Trust Fund to the Highway Trust Fund. The provision also provides that 0.033 cent of the 0.1 cent LUST Trust Fund financing rate is dedicated to the Highway Trust Fund.[19]

Effective date.−The provision is effective on the date of enactment.

Conference Agreement

The conference agreement transfers $2.4 billion from the LUST Trust Fund to the Highway Account of the Highway Trust Fund.

The conference agreement does not include the Senate amendment provision to transfer 0.033 cent of the 0.1 cent LUST Trust Fund financing rate to the Highway Trust Fund.

Effective date.−The provision is effective on the date of enactment.

[18] Pub. L. No. 109-58.

[19] As noted above, the Leaking Underground Storage Tank Trust Fund financing rate of 0.1 cent per gallon is also extended through September 30, 2015.

B. Pension Funding Stabilization
(sec. 40312 of the Senate amendment, sec. 40211 of the conference agreement, Code sec. 430, and ERISA secs. 101(f) and 303)

Present Law

Minimum funding rules

Defined benefit plans generally are subject to minimum funding rules that require the sponsoring employer generally to make a contribution for each plan year to fund plan benefits.[20] Parallel rules apply under the Employee Retirement Income Security Act of 1974 ("ERISA"), which is generally in the jurisdiction of the Department of Labor.[21] The minimum funding rules for single-employer defined benefit plans were substantially revised by the Pension Protection Act of 2006 ("PPA").[22]

Minimum required contributions

In general

The minimum required contribution for a plan year for a single-employer defined benefit plan generally depends on a comparison of the value of the plan's assets, reduced by any prefunding balance or funding standard carryover balance ("net value of plan assets"),[23] with the plan's funding target and target normal cost. The plan's funding target for a plan year is the present value of all benefits accrued or earned as of the beginning of the plan year. A plan's target normal cost for a plan year is generally the present value of benefits expected to accrue or to be earned during the plan year.

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[20] Sec. 412. A number of exceptions to the minimum funding rules apply. For example, governmental plans (within the meaning of section 414(d) and church plans (within the meaning of section 414(e)) are generally not subject to the minimum funding rules. Under section 4971, an excise tax applies to an employer maintaining a single-employer plan if the minimum funding requirements are not satisfied.

[21] Sec. 302 of ERISA.

[22] Pub. L. No. 109-280. The PPA minimum funding rules for single-employer plans are generally effective for plan years beginning after December 31, 2007. Delayed effective dates apply to single-employer plans sponsored by certain large defense contractors, multiple-employer plans of some rural cooperatives, eligible charity plans, and single-employer plans affected by settlement agreements with the Pension Benefit Guaranty Corporation. Subsequent changes to the single-employer plan and multiemployer plan funding rules (including temporary funding relief) were made by the Worker, Retiree, and Employer Recovery Act of 2008 ("WRERA"), Pub. L. No. 110-458, and the Preservation of Access to Care for Medicare Beneficiaries and Pension Relief Act of 2010 ("PRA 2010"), Public Law 111-192.

[23] The value of plan assets is generally reduced by any prefunding balance or funding standard carryover balance in determining minimum required contributions, including for this purpose. A prefunding balance results from contributions to a plan that exceed the minimum required contributions. A funding standard carryover balance results from a positive balance in the funding standard account that applied under the funding requirements in effect before PPA. Subject to certain conditions, a prefunding balance or funding standard carryover balance may be credited against the minimum required contribution for a year, reducing the amount that must be contributed.

If the net value of plan assets is less than the plan's funding target, so that the plan has a funding shortfall (discussed further below), the minimum required contribution is the sum of the plan's target normal cost and the shortfall amortization charge for the plan year (determined as described below).[24] If the net value of plan assets is equal to or exceeds the plan's funding target, the minimum required contribution is the plan's target normal cost, reduced by the amount, if any, by which the net value of plan assets exceeds the plan's funding target.

Shortfall amortization charge

The shortfall amortization charge for a plan year is the sum of the annual shortfall amortization installments attributable to the shortfall bases for that plan year and the six previous plan years. Generally, if a plan has a funding shortfall for the plan year, a shortfall amortization base must be established for the plan year.[25] A plan's funding shortfall is the amount by which the plan's funding target exceeds the net value of plan assets. The shortfall amortization base for a plan year is: (1) the plan's funding shortfall, minus (2) the present value, determined using the segment interest rates (discussed below), of the aggregate total of the shortfall amortization installments that have been determined for the plan year and any succeeding plan year with respect to any shortfall amortization bases for the six previous plan years. The shortfall amortization base is amortized in level annual installments ("shortfall amortization installments") over a seven-year period beginning with the current plan year and using the segment interest rates (discussed below).[26]

The shortfall amortization base for a plan year may be positive or negative, depending on whether the present value of remaining installments with respect to amortization bases for previous years is more or less than the plan's funding shortfall. If the shortfall amortization base is positive (that is, the funding shortfall exceeds the present value of the remaining installments), the related shortfall amortization installments are positive. If the shortfall amortization base is negative, the related shortfall amortization installments are negative. The positive and negative shortfall amortization installments for a particular plan year are netted when adding them up in determining the shortfall amortization charge for the plan year, but the resulting shortfall amortization charge cannot be less than zero (i.e., negative amortization installments may not offset normal cost).

[24] If the plan has obtained a waiver of the minimum required contribution (a funding waiver) within the past five years, the minimum required contribution also includes the related waiver amortization charge, that is, the annual installment needed to amortize the waived amount in level installments over the five years following the year of the waiver.

[25] If the value of plan assets, reduced only by any prefunding balance if the employer elects to apply the prefunding balance against the required contribution for the plan year, is at least equal to the plan's funding target, no shortfall amortization base is established for the year.

[26] Under PRA 2010, employers were permitted to elect to use one of two alternative extended amortization schedules for up to two "eligible" plan years during the period 2008-2011. The use of an extended amortization schedule has the effect of reducing the amount of the shortfall amortization installments attributable to the shortfall amortization base for the eligible plan year. However, the shortfall amortization installments attributable to an eligible plan year may be increased by an additional amount, an "installment acceleration amount," in the case of employee compensation exceeding $1 million, extraordinary dividends, or stock redemptions within a certain period of the eligible plan year.

If the net value of plan assets for a plan year is at least equal to the plan's funding target for the year, so the plan has no funding shortfall, any shortfall amortization bases and related shortfall amortization installments are eliminated.[27] As indicated above, if the net value of plan assets exceeds the plan's funding target, the excess is applied against target normal cost in determining the minimum required contribution.

Interest rate used to determine target normal cost and funding target

The minimum funding rules for single-employer plans specify the interest rates and other actuarial assumptions that must be used in determining the present value of benefits for purposes of a plan's target normal cost and funding target.

Present value is determined using three interest rates ("segment" rates), each of which applies to benefit payments expected to be made from the plan during a certain period. The first segment rate applies to benefits reasonably determined to be payable during the five-year period beginning on the first day of the plan year; the second segment rate applies to benefits reasonably determined to be payable during the 15-year period following the initial five-year period; and the third segment rate applies to benefits reasonably determined to be payable at the end of the 15-year period. Each segment rate is a single interest rate determined monthly by the Secretary of the Treasury ("Secretary") on the basis of a corporate bond yield curve, taking into account only the portion of the yield curve based on corporate bonds maturing during the particular segment rate period. The corporate bond yield curve used for this purpose reflects the average, for the 24-month period ending with the preceding month, of yields on investment grade corporate bonds with varying maturities and that are in the top three quality levels available. The Internal Revenue Service (IRS) publishes the segment rates each month.

The present value of liabilities under a plan is determined using the segment rates for the "applicable month" for the plan year. The applicable month is the month that includes the plan's valuation date for the plan year, or, at the election of the employer, any of the four months preceding the month that includes the valuation date.

Solely for purposes of determining minimum required contributions, in lieu of the segment rates described above, an employer may elect to use interest rates on a yield curve based on the yields on investment grade corporate bonds for the month preceding the month in which the plan year begins (i.e., without regard to the 24-month averaging described above) ("monthly yield curve"). If an election to use a monthly yield curve is made, it cannot be revoked without IRS approval.

Use of segment rates for other purposes

In general

In addition to being used to determine a plan's funding target and target normal cost, the segment rates are used also for other purposes, either directly because the segment rates themselves are specifically cross-referenced or indirectly because funding target, target normal

[27] Any amortization base relating to a funding waiver for a previous year is also eliminated.

cost, or some other concept, such as funding target attainment percentage (discussed below) in which funding target or target normal cost is an element, is cross-referenced elsewhere.

Funding target attainment percentage

A plan's funding target attainment percentage for a plan year is the ratio, expressed as a percentage, that the net value of plan assets bears to the plan's funding target for the year. Special rules may apply to a plan if its funding target attainment percentage is below a certain level. For example, funding target attainment percentage is used to determine whether a plan is in "at-risk" status, so that special actuarial assumptions ("at-risk assumptions") must be used in determining the plan's funding target and target normal cost.[28] A plan is in at risk status for a plan year if, for the preceding year: (1) the plan's funding target attainment percentage, determined without regard to the at-risk assumptions, was less than 80 percent, and (2) the plan's funding target attainment percentage, determined using the at-risk assumptions (without regard to whether the plan was in at-risk status for the preceding year), was less than 70 percent.[29] In addition, special reporting to the Pension Benefit Guaranty Corporation ("PBGC") may be required if a plan's funding target attainment percentage is less than 80 percent.[30]

Restrictions on benefit increases, certain types of benefits and benefit accruals (collectively referred to as "benefit restrictions") may apply to a plan if the plan's adjusted funding target attainment percentage is below a certain level.[31] Adjusted funding target attainment percentage is determined in the same way as funding target attainment percentage, except that the net value of plan assets and the plan's funding target are both increased by the aggregate amount of purchases of annuities for employees, other than highly compensated employees, made by the plan during the two preceding plan years. Although anti-cutback rules generally prohibit reductions in benefits that have already been earned under a plan,[32] reductions required to comply with the benefit restrictions are permitted.

Minimum and maximum lump sums, limits on deductible contributions, retiree health

Defined benefit plans commonly allow a participant to choose among various forms of benefit offered under the plan, such as a lump-sum distribution. These optional forms of benefit generally must be actuarially equivalent to the life annuity benefit payable to the participant at normal retirement age. For certain forms of benefit, such as lump sums, the benefit amount cannot be less than the amount determined using the segment rates and a specified mortality

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[28] If a plan is in at-risk status, under section 409A(b)(3), limitations apply on the employer's ability to set aside assets to provide benefits under a nonqualified deferred compensation plan.

[29] A similar test applies in order for an employer to be permitted to apply a prefunding balance against its required contribution, that is, for the preceding year, the ratio of the value of plan assets (reduced by any prefunding balance) must be at least 80 percent of the plan's funding target (determined without regard to the at-risk rules).

[30] ERISA sec. 4010.

[31] Code sec. 436 and ERISA sec. 206(g).

[32] Code sec. 411(d)(6) and ERISA sec. 204(g).

table.[33] For this purpose, however, the segment rates are determined on a monthly basis, rather than using a 24-month average of corporate bond rates.

The amount of benefits under a defined benefit plan are subject to certain limits.[34] The segment rates used in determining minimum lump sums (and certain other forms of benefit) are also used in applying the benefit limits to lump sums (and the certain other forms of benefit).

Limits apply to the amount of plan contributions that may be deducted by an employer.[35] In the case of a single-employer defined benefit plan, the plan's funding target and target normal cost, determined using the segment rates that apply for funding purposes, are taken into account in calculating the limit on deductible contributions.

Subject to various conditions, a qualified transfer of excess assets of a single-employer defined benefit plan to a retiree medical account within the plan may be made in order to fund retiree health benefits.[36] For this purpose, excess assets generally means the excess, if any, of the value of the plan's assets over 125 percent of the sum of the plan's funding target and target normal cost for the plan year.

PBGC premiums and 4010 reporting

PBGC premiums apply with respect to defined benefit plans covered by ERISA.[37] In the case of a single-employer defined benefit plan, flat-rate premiums apply at a rate of $35.00 per participant for 2012.[38] If a single-employer defined benefit plan has unfunded vested benefits, variable-rate premiums also apply at a rate of $9 per $1,000 of unfunded vested benefits divided by the number of participants. For purposes of determining variable-rate premiums, unfunded vested benefits are equal to the excess (if any) of (1) the plan's funding target for the year determined as under the minimum funding rules, but taking into account only vested benefits, over (2) the fair market value of plan assets. In determining the plan's funding target for this purpose, the interest rates used are segment rates determined as under the minimum funding rules, but determined on a monthly basis, rather than using a 24-month average of corporate bond rates.

In certain circumstances, the contributing sponsor of a single-employer plan defined benefit pension plan covered by the PBGC (and members of the contributing sponsor's controlled group) must provide certain information to the PBGC (referred to as "section 4010

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[33] Code sec. 417(e) and ERISA sec. 205(g).

[34] Sec. 415(b).

[35] Sec. 404.

[36] Sec. 420. Under present law, a qualified transfer is not permitted after December 31, 2013.

[37] ERISA sec. 4006.

[38] Flat-rate premiums apply also to multiemployer defined benefit plans at a rate of $9.00 per participant. Single-employer and multiemployer flat-rate premium rates are indexed for inflation. The rate of variable-rate premiums is not indexed.

reporting").[39] This information includes actuarial information with respect to single-employer plans maintained by the contributing sponsor (and controlled group members). Section 4010 reporting is required if: (1) the funding target attainment percentage at the end of the preceding plan year of a plan maintained by the contributing sponsor or any member of its controlled group is less than 80 percent; (2) the conditions for imposition of a lien (i.e., required contributions totaling more than $1 million have not been made) have occurred with respect to a plan maintained by the contributing sponsor or any member of its controlled group; or (3) minimum funding waivers in excess of $1 million have been granted with respect to a plan maintained by the contributing sponsor or any member of its controlled group and any portion of the waived amount is still outstanding.

Annual funding notice

The plan administrator of a defined benefit plan must provide an annual funding notice to: (1) each participant and beneficiary; (2) each labor organization representing such participants or beneficiaries; and (4) the PBGC.[40]

In addition to the information required to be provided in all funding notices, certain information must be provided in the case of a single-employer defined benefit plan, including:

- a statement as to whether the plan's funding target attainment percentage (as defined under the minimum funding rules) for the plan year to which the notice relates and the two preceding plan years, is at least 100 percent (and, if not, the actual percentages); and
- a statement of (a) the total assets (separately stating any funding standard carryover or prefunding balance) and the plan's liabilities for the plan year and the two preceding years, determined in the same manner as under the funding rules, and (b) the value of the plan's assets and liabilities as of the last day of the plan year to which the notice relates, determined using fair market value and the interest rate used in determining variable rate premiums.

A funding notice may also include any additional information that the plan administrator elects to include to the extent not inconsistent with regulations. The notice must be written so as to be understood by the average plan participant. As required under PPA, the Secretary of Labor has issued a model funding notice that can be used to satisfy the notice requirement.

House Bill

No provision.

Senate Amendment

[39] ERISA sec. 4010.

[40] ERISA sec. 101(f). In the case of a multiemployer plan, the notice must also be sent to each employer that has an obligation to contribute under the plan;

The Senate amendment revises the rules for determining the segment rates under the single-employer plan funding rules by adjusting a segment rate if the rate determined under the regular rules is outside a specified range of the average of the segment rates for the preceding 25-year period ("average" segment rates). In particular, if a segment rate determined for an applicable month under the regular rules is less than the applicable minimum percentage, the segment rate is adjusted upward to match that percentage. If a segment rate determined for an applicable month under the regular rules is more than the applicable maximum percentage, the segment rate is adjusted downward to match that percentage. For this purpose, the average segment rate is the average of the segment rates determined under the regular rules for the 25-year period ending September 30 of the calendar year preceding the calendar year in which the plan year begins. The Secretary is to determine average segment rates on an annual basis and may prescribe equivalent rates for any years in the 25-year period for which segment rates determined under the regular rules are not available. The Secretary is directed to publish the average segment rates each month.

The applicable minimum percentage and the applicable maximum percentage depend on the calendar year in which the plan year begins as shown by the following table:

If the calendar year is:	**The applicable minimum percentage is:**	**The applicable maximum percentage is:**
2012	90 percent	110 percent
2013	85 percent	115 percent
2014	80 percent	120 percent
2015	75 percent	125 percent
2016 or later	70 percent	130 percent

Thus, for example, if the first segment rate determined for an applicable month under the regular rules for a plan year beginning in 2012 is less than 90 percent of the average of the first segment rates determined under the regular rules for the 25-year period ending September 30, 2011, the segment rate is adjusted to 90 percent of the 25-year average.

The change in the method of determining segment rates generally applies for the purposes for which segment rates are used under present law, except for purposes of determining minimum and maximum lump-sum benefits,[41] limits on deductible contributions to single-employer defined benefit plans, and PBGC variable-rate premiums.

Effective date.−The provision in the Senate Amendment is generally effective for plan years beginning after December 31, 2011. Under a special rule, an employer may elect, for any plan year beginning on or before the date of enactment and solely for purposes of determining the plan's adjusted funding target attainment percentage (used in applying the benefit restrictions) for that year, not to have the provision apply. A plan is not treated as failing to meet the requirements of the anti-cutback rules solely by reason of an election under the special rule.

Conference Agreement

The conference agreement follows the Senate amendment with several modifications.

Average segment rates

The change in the method of determining segment rates generally applies for the purposes for which segment rates are used under present law, except for purposes of minimum and maximum lump-sum benefits,[42] limits on deductible contributions to single-employer defined benefit plans, qualified transfers of excess pension assets to retiree medical accounts,[43] PBGC variable-rate premiums,[44] and 4010 reporting to the PBGC.

The special effective date rule is modified under the conference agreement so that an employer may elect, for any plan year beginning before January 1, 2013, not to have the provision apply either (1) for all purposes for which the provision would otherwise apply, or (2) solely for purposes of determining the plan's adjusted funding target attainment percentage (used in applying the benefit restrictions) for that year. A plan is not treated as failing to meet the requirements of the anti-cutback rules solely by reason of an election under the special rule.

Under the conference agreement, if, as of the date of enactment, an employer election is in effect to use a monthly yield curve in determining minimum required contributions, rather than segment rates, the employer may revoke the election (and use segment rates, as modified by the conference agreement provision) without obtaining IRS approval. The revocation must be made at any time before the date that is one year after the date of enactment, and the revocation will be effective for the first plan year to which the amendments made by the provision apply and all subsequent plan years. The employer is not precluded from making a subsequent election

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[41] The provision does not provide a specific exception for determining maximum lump sum benefits. However, the exception for minimum lump sum benefits applies by cross-reference.

[42] The provision does not provide a specific exception for determining maximum lump sum benefits. However, the exception for minimum lump sum benefits applies by cross-reference.

[43] Another provision of the conference agreement extends to December 31, 2021, the ability to make a qualified transfer. In addition, another provision of the conference agreement allows qualified transfers to be made to provide group-term life insurance benefits.

[44] Another provision of the conference agreement increases PBGC flat-rate and variable-rate premiums.

to use a monthly yield curve in determining minimum required contributions in accordance with present law.

Annual funding notice

The conference agreement requires additional information to be included in the annual funding notice in the case of an applicable plan year. For this purpose, an applicable plan year is any plan year beginning after December 31, 2011, and before January 1, 2015, for which (1) the plan's funding target, determined using segment rates as adjusted to reflect average segment rates ("adjusted" segment rates), is less than 95 percent of the funding target determined without regard to adjusted segment rates (that is, determined as under present law), (2) the plan has a funding shortfall, determined without regard to adjusted segment rates, greater than $500,000 and (3) the plan had 50 or more participants on any day during the preceding plan year.

The additional information that must be provided is:

- a statement that MAP-21 modified the method for determining the interest rates used to determine the actuarial value of benefits earned under the plan, providing for a 25-year average of interest rates to be taken into account in addition to a 2-year average;
- a statement that, as a result of MAP-21, the plan sponsor may contribute less money to the plan when interest rates are at historical lows, and
- a table showing, for the applicable plan year and each of the two preceding plan years, the plan's funding target attainment percentage, funding shortfall, and the employer's minimum required contribution, each determined both using adjusted segment rates and without regard to adjusted segment rates (that is, as under present law). In the case of a preceding plan year beginning before January 1, 2012, the plan's funding target attainment percentage, funding shortfall, and the employer's minimum required contribution provided are determined only without regard to adjusted segment rates (that is, as under present law).

As under present law, a funding notice may also include any additional information that the plan administrator elects to include to the extent not inconsistent with regulations. For example, a funding notice may include a statement of the amount of the employer's actual or planned contributions to the plan.

The Secretary of Labor is directed to modify the model funding notice required so that the model includes the additional information in a prominent manner, for example, on a separate first page before the remainder of the notice.

C. Transfer of Excess Pension Assets (secs. 40310 and 40311 of the Senate amendment, secs. 40241 and 40242 of the conference agreement, and sec. 420 of the Code)

Present Law

Defined benefit pension plan reversions

Defined benefit plan assets generally may not revert to an employer prior to termination of the plan and satisfaction of all plan liabilities.[45] Upon plan termination, the accrued benefits of all plan participants are required to be 100-percent vested. A reversion prior to plan termination may constitute a prohibited transaction and may result in plan disqualification. Any assets that revert to the employer upon plan termination are includible in the gross income of the employer and subject to an excise tax. The excise tax rate is 20 percent if the employer maintains a replacement plan or makes certain benefit increases in connection with the termination; if not, the excise tax rate is 50 percent. Medical benefits and life insurance benefits provided under a pension plan

Retiree medical accounts

A pension plan may provide medical benefits to retired employees through a separate account that is part of a defined benefit plan ("retiree medical accounts").[46] Medical benefits provided through a retiree medical account are generally not includible in the retired employee's gross income.[47]

Transfers of excess pension assets

In general

A qualified transfer of excess assets of a defined benefit plan, including a multiemployer plan,[48] to a retiree medical account within the plan may be made in order to fund retiree health benefits.[49] A qualified transfer does not result in plan disqualification, is not a prohibited transaction, and is not treated as a reversion. Thus, transferred assets are not includible in the gross income of the employer and are not subject to the excise tax on reversions. No more than one qualified transfer may be made in any taxable year. No qualified transfer may be made after December 31, 2013.

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[45] In addition, a reversion may occur only if the terms of the plan so provide.

[46] Sec. 401(h) and Treas. Reg. sec. 1.401-1(b).

[47] Treas. Reg. sec. 1.72-15(h).

[48] The Pension Protection Act of 2006 ("PPA"), Pub. L. No. 109-280, extended the application of the rules for qualified transfers to multiemployer plans with respect to transfers made in taxable years beginning after December 31, 2006. However, the rules for qualified future transfers and collectively bargained transfers do not apply to multiemployer plans.

[49] Sec. 420.

Excess assets generally means the excess, if any, of the value of the plan's assets[50] over 125 percent of the sum of the plan's funding target and target normal cost for the plan year. In addition, excess assets transferred in a qualified transfer may not exceed the amount reasonably estimated to be the amount that the employer will pay out of such account during the taxable year of the transfer for qualified current retiree health liabilities. No deduction is allowed to the employer for (1) a qualified transfer, or (2) the payment of qualified current retiree health liabilities out of transferred funds (and any income thereon). In addition, no deduction is allowed for amounts paid other than from transferred funds for qualified current retiree health liabilities to the extent such amounts are not greater than the excess of (1) the amount transferred (and any income thereon), over (2) qualified current retiree health liabilities paid out of transferred assets (and any income thereon). An employer may not contribute any amount to a health benefits account or welfare benefit fund with respect to qualified current retiree health liabilities for which transferred assets are required to be used.

Transferred assets (and any income thereon) must be used to pay qualified current retiree health liabilities for the taxable year of the transfer. Transferred amounts generally must benefit pension plan participants, other than key employees, who are entitled upon retirement to receive retiree medical benefits through the separate account. Retiree health benefits of key employees may not be paid out of transferred assets.

Amounts not used to pay qualified current retiree health liabilities for the taxable year of the transfer are to be returned to the general assets of the plan. These amounts are not includible in the gross income of the employer, but are treated as an employer reversion and are subject to a 20-percent excise tax.

In order for the transfer to be qualified, accrued retirement benefits under the pension plan generally must be 100-percent vested as if the plan terminated immediately before the transfer (or in the case of a participant who separated in the one-year period ending on the date of the transfer, immediately before the separation).

In order for a transfer to be qualified, there is maintenance of effort requirement under which, the employer generally must maintain retiree health benefits at the same level for the taxable year of the transfer and the following four years.

In addition, the Employee Retirement Income Security Act of 1974 ("ERISA")[51] provides that, at least 60 days before the date of a qualified transfer, the employer must notify the Secretary of Labor, the Secretary of the Treasury, employee representatives, and the plan administrator of the transfer, and the plan administrator must notify each plan participant and beneficiary of the transfer.[52]

<u>Qualified future transfers and collectively bargained transfers</u>

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[50] The value of plan assets for this purpose is the lesser of fair market value or actuarial value.

[51] Pub. L. No. 93-406.

[52] ERISA sec. 101(e). ERISA also provides that a qualified transfer is not a prohibited transaction under ERISA or a prohibited reversion.

If certain requirements are satisfied, transfers of excess pension assets under a single-employer plan to retiree medical accounts to fund the expected cost of retiree medical benefits are permitted for the current and future years (a "qualified future transfer") and such transfers are also allowed in the case of benefits provided under a collective bargaining agreement (a "collectively bargained transfer").[53] Transfers must be made for at least a two-year period. An employer can elect to make a qualified future transfer or a collectively bargained transfer rather than a qualified transfer. A qualified future transfer or collectively bargained transfer must meet the requirements applicable to qualified transfers, except that the provision modifies the rules relating to: (1) the determination of excess pension assets; (2) the limitation on the amount transferred; and (3) the maintenance of effort requirement. The general sunset applicable to qualified transfer applies (i.e., no transfers can be made after December 31, 2013).

Qualified future transfers and collectively bargained transfers can be made to the extent that plan assets exceed 120 percent of the sum of the plan's funding target and the normal cost for the plan year. During the transfer period, the plan's funded status must be maintained at the minimum level required to make transfers. If the minimum level is not maintained, the employer must make contributions to the plan to meet the minimum level or an amount required to meet the minimum level must be transferred from the health benefits account. The transfer period is the period not to exceed a total of ten consecutive taxable years beginning with the taxable year of the transfer. As previously discussed, the period must be not less than two consecutive years.

Employer provided group-term life insurance

Group-term life insurance coverage provided under a policy carried by an employer is includible in the gross income of an employee (including a former employee) but only to the extent that the cost exceeds the sum of the cost of $50,000 of such insurance plus the amount, if any, paid by the employee toward the purchase of such insurance.[54] Special rules apply for determining the cost of group-term life insurance that is includible in gross income under a discriminatory group-term life insurance plan.

A pension plan may provide life insurance benefits for employees (including retirees) but only to the extent that the benefits are incidental to the retirement benefits provided under the plan.[55] The cost of term life insurance provided through a pension plan is includible in the employee's gross income.[56]

House Bill

No provision.

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[53] The rules for qualified future transfers and collectively bargained transfers were added by the PPA and apply to transfers after the date of enactment (August 17, 2006).

[54] Sec. 79.

[55] Treas. Reg. sec. 1.401-1(b).

[56] Secs. 72(m)(3) and 79(b)(3).

Senate Amendment

Extension of existing provisions

The provision allows qualified transfers, qualified future transfers, and collectively bargained transfers to retiree medical accounts to be made through December 31, 2021. No transfers are permitted after that date.

Transfers to fund retiree group-term life insurance permitted

The provision allows qualified transfers, qualified future transfers, and collectively bargained transfers to be made to fund the purchase of retiree group-term life insurance. The assets transferred for the purchase of group-term life insurance must be maintained in a separate account within the plan ("retiree life insurance account"), which must be separate both from the assets in the retiree medical account and from the other assets in the defined benefit plan.

Under the provision, the general rule that the cost of group-term life insurance coverage provided under a defined benefit plan is includable in gross income of the participant does not apply to group-term life insurance provided through a retiree life insurance account. Instead, the general rule for determining the amount of employer-provided group-term life insurance that is includible in gross income applies. However, group-term life insurance coverage is permitted to be provided through a retiree life insurance account only to the extent that it is not includible in gross income. Thus, generally, only group-term life insurance not in excess of $50,000 may be purchased with such transferred assets.

Generally, the present law rules for transfers of excess pension assets to retiree medical accounts to fund retiree health benefits also apply to transfers to retiree life insurance accounts to fund retiree group-term life. However, generally, the rules are applied separately. Thus, for example, the one-transfer-a-year rule generally applies separately to transfers to retiree life insurance accounts and transfers to retiree medical accounts. Further, the maintenance of effort requirement for qualified transfers applies separately to life insurance benefits and health benefits. Similarly, for qualified future transfers and collectively bargained transfers for retiree group-term life insurance, the maintenance of effort and other special rules are applied separately to transfers to retiree life insurance accounts and retiree medical accounts.

Reflecting the inherent differences between life insurance coverage and health coverage, certain rules are not applied to transfers to retiree life insurance accounts, such as the special rules allowing the employer to elect to the determine the applicable employer cost for health coverage during the cost maintenance period separately for retirees eligible for Medicare and retirees not eligible for Medicare. However, a separate test is allowed for the cost of retiree group-term life insurance for retirees under age 65 and those retirees who have reached age 65.

The provision makes other technical and conforming changes to the rules for transfers to fund retiree health benefits and removes certain obsolete ("deadwood") rules.

The same sunset applicable to qualified transfers, qualified future transfers, and collectively bargained transfers to retiree medical accounts applies to transfers to retiree life insurance accounts (i.e., no transfers can be made after December 31, 2021).

Effective date.−The provision applies to transfers made after the date of enactment.

Conference Agreement

The conference agreement includes the Senate amendment provision.

D. Exception from Early Distribution Tax for Annuities Under Phased Retirement Program (sec. 100111 of conference agreement and sec. 72(t) of the Code)

Present Law

The Code imposes an early distribution tax on distributions made from qualified retirement plans before an employee attains age 59½.[57] The tax is equal to 10 percent of the amount of the distribution that is includible in gross income. The 10-percent tax is in addition to the taxes that would otherwise be due on distribution. Certain exceptions to the early distribution tax apply including an exception for distributions after separation from service with the employer after attaining age 55, or in the form of substantially equal periodic payments from the qualified retirement plan commencing after separation from service at any age. However, there is no exception for annuity payments that commence before separating from service with the employer.

House bill

No provision

Senate Amendment

No provision

Conference Agreement

The Senate amendment and the Conference agreement include a new Federal Phased Retirement Program under which a Federal agency may allow a full-time retirement eligible employee to elect to enter phased retirement status in accordance with regulations issued by the Office of Personnel Management (OPM).[58] During that status, generally, the employee's work schedule is a percentage of a full time work schedule, and the employee receives a phased retirement annuity. At full-time retirement, the phased retiree is entitled to a composite retirement annuity that also includes the portion of the employee's retirement annuity attributable to the reduced work schedule. The Conference agreement includes an exception to the early distribution tax for payments under a phased retirement annuity and a composite retirement annuity received by an employee participating in this new Federal Phased Retirement Program.

Effective date.−The provision is effective on the effective date of implementing regulations issued by OPM implementing the Federal Phased Retirement Program.

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[57] Sec. 72(t). The early distribution tax also applies to distributions from section 403(b) plans and IRAs but does not apply to distributions from governmental section 457(b) plans.

[58] See the explanation for section 100111 of the Conference agreement for a description of the new Federal Phased Retirement Program.

E. Additional Transfers to the Highway Trust Fund (sec. 40313 of the Senate amendment, sec. 40251 of the conference agreement, and sec. 9503 of the Code)

Present Law

Public Law No. 111-46, an Act to restore funds to the Highway Trust Fund, provided that out of money in the Treasury not otherwise appropriated, $7 billion was appropriated to the Highway Trust Fund effective August 7, 2009. The Hiring Incentives to Restore Employment Act (the "HIRE Act") provided that out of money in the Treasury not otherwise appropriated, $14,700,000,000 is appropriated to the Highway Trust Fund and $4,800,000,000 is appropriated to the Mass Transit Account in the Highway Trust Fund.

House Bill

No provision.

Senate Amendment

The provision provides that out of money in the Treasury not otherwise appropriated, the following transfers are to be made from the General Fund to the Highway Trust Fund: $2,183 million in FY 2012, $2,277 million in FY 2013, and $510 million in FY 2014.

Effective date.−The provision is effective on the date of enactment.

Conference Agreement

The conference agreement provides that out of money in the Treasury not otherwise appropriated, the following transfers are to be made from the General Fund to the Highway Trust Fund:

	FY 2013	FY 2014
Highway Account	$6.2 billion	$10.4 billion
Mass Transit Account	_____	$2.2 billion

Effective date.−The provision is effective on the date of enactment.

F. Expand the Definition of a Tobacco Manufacturer to Include Businesses Making Available Roll-Your-Own Cigarette Machines for Consumer Use (sec. 100116 of the Senate amendment, section 100112 of the conference agreement and sec. 5702(d) of the Code)

Present Law

Tobacco products and cigarette papers and tubes manufactured in the United States or imported into the United States are subject to Federal excise tax at the following rates:[59]

- Cigars weighing not more than three pounds per thousand ("small cigars") are taxed at the rate of $50.33 per thousand;
- Cigars weighing more than three pounds per thousand ("large cigars") are taxed at the rate equal to 52.75 percent of the manufacturer's or importer's sales price but not more than 40.26 cents per cigar;
- Cigarettes weighing not more than three pounds per thousand ("small cigarettes") are taxed at the rate of $50.33 per thousand ($1.0066 per pack);
- Cigarettes weighing more than three pounds per thousand ("large cigarettes") are taxed at the rate of $105.69 per thousand, except that, if they measure more than six and one-half inches in length, they are taxed at the rate applicable to small cigarettes, counting each two and three-quarter inches (or fraction thereof) of the length of each as one cigarette;
- Cigarette papers are taxed at the rate of 3.15 cents for each 50 papers or fractional part thereof, except that, if they measure more than six and one-half inches in length, they are taxable by counting each two and three-quarter inches (or fraction thereof) of the length of each as one cigarette paper;
- Cigarette tubes are taxed at the rate of 6.30 cents for each 50 tubes or fractional part thereof, except that, if they measure more than six and one-half inches in length, they are taxable by counting each two and three-quarter inches (or fraction thereof) of the length of each as one cigarette tube;
- Snuff is taxed at the rate of $1.51 per pound, and proportionately at that rate on all fractional parts of a pound;
- Chewing tobacco is taxed at the rate of 50.33 cents per pound, and proportionately at that rate on all fractional parts of a pound;
- Pipe tobacco is taxed at the rate of $2.8311 per pound, and proportionately at that rate on all fractional parts of a pound; and
- Roll-your-own tobacco is taxed at the rate of $24.78 per pound, and proportionately at that rate on all fractional parts of a pound.

[59] Sec. 5701.

In general, the excise tax on tobacco products and cigarette papers and tubes manufactured in the United States comes into existence when the products are manufactured and is determined and payable when the tobacco products or cigarette papers and tubes are removed from the bonded premises of the manufacturer. "Tobacco products" means cigars, cigarettes, smokeless tobacco (snuff and chewing tobacco), pipe tobacco, and roll your own tobacco. Processed tobacco is regulated under the internal revenue laws but no excise tax is imposed. Tobacco products and cigarette papers and tubes may be exported from the United States without payment of tax.

Manufacturers and importers of tobacco products or processed tobacco are subject to certain permitting, bonding, reporting, and record keeping requirements. "Manufacturer of tobacco products" means any person who manufactures cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco. There is an exception for a person who produces these products for their own personal consumption or use.

House Bill

No provision.

Senate Amendment

The provision amends the definition of manufacturer of tobacco products to include any person who for commercial purposes makes available machines capable of making tobacco products for consumer use. This includes making a machine available for consumers to produce tobacco products for personal consumption or use. The addition of this provision is not intended to change the treatment of such machines under present law, or to make taxable the sale, at retail, for a consumer's personal home use, a machine designed to produce tobacco only in personal use quantities, where the machine is not used on the retail premises.

For purposes of imposing the tax liability, the person making the machine available for consumer use is deemed to be the person making the removal with respect to any tobacco products manufactured by the machine.

Effective date.−The provision is effective for articles removed after the date of enactment.

Conference Agreement

The conference agreement includes the Senate amendment with the following modification. The provision is modified to clarify that a person who sells a machine directly to a consumer at retail for the consumer's personal home use is not a manufacturer of tobacco products under the provision if the machine is not used at a retail establishment and is designed to produce only personal use quantities.

PART III − OTHER ITEMS

A. Small Issuer Exception to Tax-Exempt Interest Expense Allocation Rules for Financial Institutions (sec. 40201 of the Senate amendment and sec. 265 of the Code)

Present Law

Present law disallows a deduction for interest on indebtedness incurred or continued to purchase or carry obligations the interest on which is exempt from tax.[60] In general, an interest deduction is disallowed only if the taxpayer has a purpose of using borrowed funds to purchase or carry tax-exempt obligations; a determination of the taxpayer's purpose in borrowing funds is made based on all of the facts and circumstances.[61]

Financial institutions

In the case of a financial institution, the Code generally disallows that portion of the taxpayer's interest expense that is allocable to tax-exempt interest.[62] The amount of interest that is disallowed is an amount which bears the same ratio to such interest expense as the taxpayer's average adjusted bases of tax-exempt obligations acquired after August 7, 1986, bears to the average adjusted bases for all assets of the taxpayer.

Exception for certain obligations of qualified small issuers

The general rule in section 265(b), denying financial institutions' interest expense deductions allocable to tax-exempt obligations, does not apply to "qualified tax-exempt obligations."[63] Instead, as discussed in the next section, only 20 percent of the interest expense allocable to "qualified tax-exempt obligations" is disallowed.[64] A "qualified tax-exempt obligation" is a tax-exempt obligation that is (1) issued after August 7, 1986, by a qualified small issuer, (2) not a private activity bond, and (3) designated by the issuer as qualifying for the exception from the general rule of section 265(b).

A "qualified small issuer" is an issuer that reasonably anticipates that the amount of tax-exempt obligations that it will issue during the calendar year will be $10 million or less.[65] The Code specifies the circumstances under which an issuer and all subordinate entities are

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[60] Sec. 265(a).

[61] *See* Rev. Proc. 72-18, 1972-1 C.B. 740.

[62] Sec. 265(b)(1). A "financial institution" is any person that (1) accepts deposits from the public in the ordinary course of such person's trade or business and is subject to Federal or State supervision as a financial institution or (2) is a corporation described by section 585(a)(2). Sec. 265(b)(5).

[63] Sec. 265(b)(3).

[64] Secs. 265(b)(3)(A), 291(a)(3) and 291(e)(1).

[65] Sec. 265(b)(3)(C).

aggregated.[66] For purposes of the $10 million limitation, an issuer and all entities that issue obligations on behalf of such issuer are treated as one issuer. All obligations issued by a subordinate entity are treated as being issued by the entity to which it is subordinate. An entity formed (or availed of) to avoid the $10 million limitation and all entities benefiting from the device are treated as one issuer.

Composite issues (i.e., combined issues of bonds for different entities) qualify for the "qualified tax-exempt obligation" exception only if the requirements of the exception are met with respect to (1) the composite issue as a whole (determined by treating the composite issue as a single issue) and (2) each separate lot of obligations that is part of the issue (determined by treating each separate lot of obligations as a separate issue).[67] Thus a composite issue may qualify for the exception only if the composite issue itself does not exceed $10 million, and if each issuer benefitting from the composite issue reasonably anticipates that it will not issue more than $10 million of tax-exempt obligations during the calendar year, including through the composite arrangement.

<u>Special rules providing modifications to qualified small issuer exception for certain issues in 2009 and 2010</u>

With respect to tax-exempt obligations issued during 2009 and 2010, the special rules increased from $10 million to $30 million the annual limit for qualified small issuers.

In addition, in the case of a "qualified financing issue" issued in 2009 or 2010, the special rules applied the $30 million annual volume limitation at the borrower level (rather than at the level of the pooled financing issuer). Thus, for the purpose of applying the requirements of the section 265(b)(3) qualified small issuer exception, the portion of the proceeds of a qualified financing issue that are loaned to a "qualified borrower" that participates in the issue were treated as a separate issue with respect to which the qualified borrower is deemed to be the issuer.

A "qualified financing issue" was any composite, pooled, or other conduit financing issue the proceeds of which were used directly or indirectly to make or finance loans to one or more ultimate borrowers all of whom are qualified borrowers. A "qualified borrower" meant (1) a State or political subdivision of a State or (2) an organization described in section 501(c)(3) and exempt from tax under section 501(a). Thus, for example, a $100 million pooled financing issue that was issued in 2009 would qualify for the section 265(b)(3) exception if the proceeds of such issue were used to make four equal loans of $25 million to four qualified borrowers. However, if (1) more than $30 million were loaned to any qualified borrower, (2) any borrower were not a qualified borrower, or (3) any borrower would, if it were the issuer of a separate issue in an amount equal to the amount loaned to such borrower, fail to meet any of the other requirements of section 265(b)(3), the entire $100 million pooled financing issue failed to qualify for the exception.

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[66] Sec. 265(b)(3)(E).

[67] Sec. 265(b)(3)(F).

For purposes of determining whether an issuer meets the requirements of the small issuer exception, under the special rules, qualified 501(c)(3) bonds issued in 2009 or 2010 were treated as if they were issued by the 501(c)(3) organization for whose benefit they were issued (and not by the actual issuer of such bonds). In addition, in the case of an organization described in section 501(c)(3) and exempt from taxation under section 501(a), requirements for "qualified financing issues" were applied as if the section 501(c)(3) organization were the issuer. Thus, in any event, an organization described in section 501(c)(3) and exempt from taxation under section 501(a) was limited to the $30 million per issuer cap for qualified tax exempt obligations described in section 265(b)(3).

House Bill

No provision.

Senate Amendment

The provision extends the special rules providing modifications to the qualified small issuer exception to bonds issued after June 30, 2012 and before July 1, 2013.

Effective date.−The provision is effective for obligations issued after June 30, 2012.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

B. Temporary Modification of Alternative Minimum Tax Limitations on Tax-Exempt Bonds (sec. 40202 of the Senate amendment and secs. 56 and 57 of the Code)

Present Law

Present law imposes an alternative minimum tax ("AMT") on individuals and corporations. AMT is the amount by which the tentative minimum tax exceeds the regular income tax. The tentative minimum tax is computed based upon a taxpayer's alternative minimum taxable income ("AMTI"). AMTI is the taxpayer's taxable income modified to take into account certain preferences and adjustments. One of the preference items is tax-exempt interest on certain tax-exempt bonds issued for private activities.[68] Also, in the case of a corporation, an adjustment based on current earnings is determined, in part, by taking into account 75 percent of certain items, including tax-exempt interest, excluded from taxable income but included in the corporation's earnings and profits.[69]

The American Recovery and Reinvestment Act of 2009 ("2009 Act") provided that tax-exempt interest on private activity bonds issued in 2009 and 2010 is not an item of tax preference for purposes of the AMTI and interest on tax exempt bonds issued in 2009 and 2010 is not included in the corporate adjustment based on current earnings.

For these purposes, a refunding bond generally is treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond). However, the 2009 Act provided that tax-exempt interest on bonds issued in 2009 and 2010 to currently refund a bond issued after December 31, 2003, and before January 1, 2009, is not an item of tax preference for purposes of the AMT and is not included in the corporate adjustment based on current earnings.

House Bill

No provision.

Senate Amendment

The provision provides that tax-exempt interest on private activity bonds issued after the date of enactment and before January 1, 2013, is not an item of tax preference for purposes of the AMT and interest on tax exempt bonds issued during this period is not included in the corporate adjustment based on current earnings. For these purposes, a refunding bond is treated as issued on the date of the issuance of the refunded bond (or in the case of a series of refundings, the original bond).

Effective date.−The provision applies to interest on bonds issued after the date of enactment.

[68] Sec. 57(a)(5).

[69] Sec. 56(g)(4)(B).

Conference Agreement

The conference agreement does not include the Senate amendment provision.

C. Issuance of TRIP Bonds by State Infrastructure Banks (sec. 40203 of the Senate amendment)

Present Law

There are no Code provisions for the issuance of transportation and regional infrastructure project ("TRIP") bonds.

House Bill

No provision.

Senate Amendment

The provision amends Title 23 to provide that a State, through a State infrastructure bank, may issue TRIP bonds and deposit the proceeds from such bonds into a TRIP bond account of the bank. A "TRIP bond" means any bond issued as part of an issue if (1) 100 percent of the available project proceeds of such issue are to be used for expenditures incurred after the date of enactment for one or more qualified projects pursuant to an allocation of such proceeds to such project or projects by a State infrastructure bank, (2) the bond is issued by a State infrastructure bank and is in registered form (within the meaning of section 149 of the Internal Revenue Code), (3) the State infrastructure bank designates such bond for purposes of the provision and (4) the term of each bond that is part of such issue does not exceed 30 years. A "qualified project" means the capital improvements to any transportation infrastructure project of any governmental unit or other person, including roads, bridges, rail and transit systems, ports and, inland waterways proposed and approved by a State infrastructure bank, but does not include costs of operations or maintenance with respect to such project.

The provision requires a State to develop a transparent and competitive process for the award of funds deposited into the TRIP bond account that considers the impact of qualified projects on the economy, the environment, state of good repair, and equity. The requirements of any Federal law, including Title 23 and Titles 40 and 49, which would otherwise apply to projects to which the United States is a party or to funds made available under such law and projects assisted with those funds shall apply to (1) funds made available under the TRIP bond account for similar qualified projects and (2) similar qualified projects assisted through the use of such funds.

<u>Effective date</u>.−The provision is effective on the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

D. Mass Transit and Parking Benefits (sec. 40204 of the Senate amendment, and sec. 132(f) of the Code)

Present Law

Qualified transportation fringe benefits provided by an employer are excluded from an employee's gross income for income tax purposes and from an employee's wages for payroll tax purposes.[70] Qualified transportation fringe benefits include parking, transit passes, vanpool benefits, and qualified bicycle commuting reimbursements. No amount is includible in the income of an employee merely because the employer offers the employee a choice between cash and qualified transportation fringe benefits (other than a qualified bicycle commuting reimbursement). Qualified transportation fringe benefits also include a cash reimbursement by an employer to an employee. In the case of transit passes, however, a cash reimbursement is considered a qualified transportation fringe benefit only if a voucher or similar item which may be exchanged only for a transit pass is not readily available for direct distribution by the employer to the employee.

Prior to February 17, 2009, the amount that could be excluded as qualified transportation fringe benefits was limited to $100 per month in combined vanpooling and transit pass benefits and $175 per month in qualified parking benefits. All limits are adjusted annually for inflation, using 1998 as the base year (for 2012 the limits are $125 and $240, respectively). The American Recovery and Reinvestment Act of 2009[71] provided parity in qualified transportation fringe benefits by temporarily increasing the monthly exclusion for employer-provided vanpool and transit pass benefits to the same level as the exclusion for employer-provided parking, effective for months beginning on or after the date of enactment (February 17, 2009) and before January 1, 2011. The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010[72] extended the parity in qualified transportation fringe benefits through December 31, 2011.

Effective January 1, 2012, the amount that could be excluded as qualified transportation fringe benefits is limited to $125 per month in combined vanpooling and transit pass benefits and $240 per month in qualified parking benefits.

House Bill

No provision.

Senate Amendment

The Senate amendment extends the parity in qualified transportation fringe benefits for the entirety of 2012. In order for the extension to be effective retroactive to January 1, 2012, it is intended that expenses incurred prior to enactment by an employee for employer-provided

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[70] Secs. 132(f), 3121(b)(2), and 3306(b)(16) and 3401(a)(19).

[71] Pub. L. No. 111-5.

[72] Pub. L. No. 111-312.

vanpool and transit benefits may be reimbursed by employers on a tax free basis to the extent they exceed $125 per month and are less than $240 per month, but only to the extent that such amount has not already been excluded from such employee's taxable compensation.

Effective date.−The provision in the Senate amendment is effective for months after December 31, 2011.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

E. Private Activity Volume Cap Exemption for Sewage and Water Facility Bonds (sec. 40205 of the Senate amendment and sec. 146(g) of the Code)

In general

Subject to certain Code restrictions, interest on bonds issued by State and local government generally is excluded from gross income for Federal income tax purposes. Bonds issued by State and local governments may be classified as either governmental bonds or private activity bonds. Governmental bonds are bonds the proceeds of which are primarily used to finance governmental functions or which are repaid with governmental funds. Private activity bonds are bonds in which the State or local government serves as a conduit providing financing to nongovernmental persons. For this purpose, the term "nongovernmental person" generally includes the Federal Government and all other individuals and entities other than State or local governments. The exclusion from income for interest on State and local bonds does not apply to private activity bonds, unless the bonds are issued for certain permitted purposes ("qualified private activity bonds") and other Code requirements are met.

Qualified private activity bonds

Interest on private activity bonds is taxable unless the bonds meet the requirements for qualified private activity bonds. Qualified private activity bonds permit States or local governments to act as conduits providing tax-exempt financing for certain private activities. The definition of qualified private activity bonds includes an exempt facility bond, or qualified mortgage, veterans' mortgage, small issue, redevelopment, qualified 501(c)(3), or student loan bond.[73] The definition of exempt facility bond includes bonds issued to finance certain transportation facilities (airports, ports, mass commuting, and high-speed intercity rail facilities); qualified residential rental projects; privately owned and/or operated utility facilities (sewage, water, solid waste disposal, and local district heating and cooling facilities, certain private electric and gas facilities, and hydroelectric dam enhancements); public/private educational facilities; qualified green building and sustainable design projects; and qualified highway or surface freight transfer facilities.[74]

In most cases, the aggregate volume of these tax-exempt private activity bonds is restricted by annual aggregate volume limits imposed on bonds issued by issuers within each State. Certain types of private activity bonds are exempted from the annual volume limits

For calendar year 2012, the State volume cap, which is indexed for inflation, equals $95 per resident of the State, or $284,560,000, whichever is greater.

House Bill

No provision.

Senate Amendment

[73] Sec. 141(e).

[74] Sec. 142(a).

The provision exempts two types of exempt facility bonds from the annual private activity volume limits. The newly-exempted bonds are exempt facility bonds for sewage and water facilities.

The provision only applies to bonds issued before January 1, 2018.

Effective date.−The provision is effective for bonds issued after the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

F. Dedication of Gas Guzzler Tax to the Highway Trust Fund (sec. 40303 of the Senate amendment and sec. 9503 of the Code)

Present Law

Under present law, the Code imposes a tax ("the gas guzzler tax") on automobiles that are manufactured primarily for use on public streets, roads, and highways and that are rated at 6,000 pounds unloaded gross vehicle weight or less.[75] The tax is imposed on the sale by the manufacturer of each automobile of a model type with a fuel economy of 22.5 miles per gallon or less. The tax range begins at $1,000 and increases to $7,700 for models with a fuel economy less than 12.5 miles per gallon.

Emergency vehicles and non-passenger automobiles are exempt from the tax. The tax also does not apply to non-passenger automobiles. The Secretary of Transportation determines which vehicles are "non-passenger" automobiles, thereby exempting these vehicles from the gas guzzler tax based on regulations in effect on the date of enactment of the gas guzzler tax.[76] Hence, vehicles defined in Title 49 C.F.R. sec. 523.5 (relating to light trucks) are exempt. These vehicles include those designed to transport property on an open bed (e.g., pick-up trucks) or provide greater cargo-carrying than passenger carrying volume including the expanded cargo-carrying space created through the removal of readily detachable seats (e.g., pick-up trucks, vans, and most minivans, sports utility vehicles, and station wagons). Additional vehicles that meet the "non-passenger" requirements are those with at least four of the following characteristics: (1) an angle of approach of not less than 28 degrees; (2) a breakover angle of not less than 14 degrees; (3) a departure angle of not less than 20 degrees; (4) a running clearance of not less than 20 centimeters; and (5) front and rear axle clearances of not less than 18 centimeters each. These vehicles would include many sports utility vehicles.

House Bill

No provision.

Senate Amendment

The provision requires that amounts equivalent to the gas guzzler taxes received in the Treasury be transferred to the Highway Trust Fund.

Effective date.−The provision is effective on the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

G. Revocation or Denial of Passport in Case of Certain Unpaid Taxes (sec. 40304 of the Senate amendment and new secs. 7345 and 6103(l)(23) of the Code)

[75] Sec. 4064.

[76] Sec. 4064(b)(1)(A).

Present Law

The administration of passports is the responsibility of the Department of State.[77] State may refuse to issue or renew a passport if the applicant owes child support in excess of $2,500 or owes certain types of Federal debts, such as expenses incurred in providing assistance to an applicant to return to the United States. The scope of this authority does not extend to rejection or revocation of a passport on the basis of delinquent Federal taxes. Issuance of a passport does not require the applicant to provide a social security number or taxpayer identification number.

Returns and return information are confidential and may not be disclosed by the IRS, other Federal employees, State employees, and certain others having access to such information except as provided in the Internal Revenue Code.[78] There are a number of exceptions to the general rule of nondisclosure that authorize disclosure in specifically identified circumstances, including disclosure of information about federal tax debts for purposes of reviewing an application for a Federal loan[79] and for purposes of enhancing the integrity of the Medicare program.[80]

House Provision

No provision.

Senate Amendment

If the Commissioner of Internal Revenue certifies to the Secretary of the Treasury the identity of persons who have seriously delinquent Federal taxes, the Secretary of Treasury or his delegate is authorized to transmit such certification to the Secretary of State for use in determining whether to issue, renew, or revoke a passport. Applicants whose names are included on the certifications provided to the Secretary of State are ineligible for a passport. The provision bars the Secretary of State from issuing a passport to any individual who has a seriously delinquent tax debt. It also requires revocation of a passport previously issued to any such individual. Exceptions are permitted for emergency or humanitarian circumstances, as well as short term use of a passport for return travel to the United States by the delinquent taxpayer.

A seriously delinquent tax debt generally includes any outstanding debt for Federal tax in excess of $50,000, including interest and any penalties, for which a notice of lien or a notice of levy has been filed. This amount is to be adjusted for inflation annually, using calendar year 2011, and a cost-of-living adjustment. Even if a tax debt otherwise meets the statutory threshold, it may not be considered seriously delinquent if (1) the debt is being paid in a timely manner pursuant to an installment agreement or offer-in-compromise, or (2) collection action with

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[77] "Passport Act of 1926," 22 U.S.C. sec. 211a, *et seq*.

[78] Sec. 6103.

[79] Sec. 6103(l)(3).

[80] Sec. 6103(l)(22).

respect to the debt is suspended because a collection due process hearing or innocent spouse relief has been requested or is pending.

Effective date.−The provision is effective on January 1, 2013.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

H. 100 Percent Continuous Levy on Payments to Medicare Providers and Suppliers (sec. 40305 of the Senate amendment and sec. 6331(h) of the Code)

Present Law

In general

Levy is the administrative authority of the IRS to seize a taxpayer's property, or rights to property, to pay the taxpayer's tax liability.[81] Generally, the IRS is entitled to seize a taxpayer's property by levy if a Federal tax lien has attached to such property,[82] the property is not exempt from levy,[83] and the IRS has provided both notice of intention to levy[84] and notice of the right to an administrative hearing (the notice is referred to as a "collections due process notice" or "CDP notice" and the hearing is referred to as the "CDP hearing")[85] at least 30 days before the levy is made. A levy on salary or wages generally is continuously in effect until released.[86] A Federal tax lien arises automatically when: (1) a tax assessment has been made; (2) the taxpayer has been given notice of the assessment stating the amount and demanding payment; and (3) the taxpayer has failed to pay the amount assessed within 10 days after the notice and demand.[87]

The notice of intent to levy is not required if the Secretary finds that collection would be jeopardized by delay. The standard for determining whether jeopardy exists is similar to the standard applicable when determining whether assessment of tax without following the normal deficiency procedures is permitted.[88]

The CDP notice (and pre-levy CDP hearing) is not required if: (1) the Secretary finds that collection would be jeopardized by delay; (2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund; (3) the taxpayer subject to the levy requested a CDP hearing with respect to unpaid employment taxes arising in the two-year period before the beginning of the taxable period with respect to which the employment tax levy is served; or (4) the Secretary has served a Federal contractor levy. In each of these four cases, however, the taxpayer is provided an opportunity for a hearing within a reasonable period of time after the levy.[89]

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[81] Sec. 6331(a). Levy specifically refers to the legal process by which the IRS orders a third party to turn over property in its possession that belongs to the delinquent taxpayer named in a notice of levy.

[82] *Ibid*.

[83] Sec. 6334.

[84] Sec. 6331(d).

[85] Sec. 6330. The notice and the hearing are referred to collectively as the CDP requirements.

[86] Secs. 6331(e) and 6343.

[87] Sec. 6321.

[88] Secs. 6331(d)(3), 6861.

[89] Sec. 6330(f).

Federal payment levy program

To help the IRS collect taxes more effectively, the Taxpayer Relief Act of 1997[90] authorized the establishment of the Federal Payment Levy Program ("FPLP"), which allows the IRS to continuously levy up to 15 percent of certain "specified payments" by the Federal government if the payees are delinquent on their tax obligations. With respect to payments to vendors of goods, services, or property sold or leased to the Federal government, the continuous levy may be up to 100 percent of each payment.[91] The levy (either up to 15 percent or up to 100 percent) generally continues in effect until the liability is paid or the IRS releases the levy.

Under FPLP, the IRS matches its accounts receivable records with Federal payment records maintained by the Department of the Treasury's Financial Management Service ("FMS"), such as certain Social Security benefit and Federal wage records. When these records match, the delinquent taxpayer is provided both the notice of intention to levy and the CDP notice. If the taxpayer does not respond after 30 days, the IRS can instruct FMS to levy the taxpayer's Federal payments. Subsequent payments are continuously levied until such time that the tax debt is paid or the IRS releases the levy.

Payments to Medicare Providers

In 2008, the Government Accountability Office ("GAO") found that over 27,000 Medicare providers (i.e., about six percent of all such providers) owed more than $2 billion of tax debt, consisting largely of individual income and payroll taxes.[92] In one case, a home health company received over $15 million in Medicare payments but did not pay $7 million in federal taxes.[93] As of 2008, the Centers for Medicare & Medicaid Services ("CMS") had not incorporated most of its Medicare payments into the continuous levy program, despite the IRS authority to continuously levy up to 15 percent of these payments. Thus, for calendar year 2006, the government lost the chance to possibly collect over $140 million in unpaid Federal taxes.[94] The GAO noted that CMS officials promised to incorporate about 60 percent of all Medicare fee-for-service payments into the levy program by October 2008 and the remaining 40 percent in the next several years.

Following the GAO study, Congress directed CMS to participate in the FPLP and ensure that all Medicare provider and supplier payments are processed through it, in specified graduated percentages, by the end of fiscal year 2011.[95]

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[90] Pub. L. No. 105-34.

[91] Sec. 6331(h)(3). The word "property" was added to "goods or services" in section 301 of the "3% Withholding Repeal and Job Creation Act," Pub. L. No. 112-56.

[92] Government Accountability Office, *Medicare: Thousands of Medicare Providers Abuse the Federal Tax System* (GAO-08-618), June 13, 2008.

[93] *Ibid*., p. 4.

[94] *Ibid*.

[95] Medicare Improvement for Patients and Providers Act of 2008, Pub. L. No. 110-275, sec. 189.

House Provision

No provision.

Senate Amendment

The provision allows Treasury to levy up to 100 percent of a payment to a Medicare provider to collect unpaid taxes.

Effective date.−The provision is effective for payments made after the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

I. Appropriation to the Highway Trust Fund of Amounts Attributable to Certain Duties on Imported Vehicles (sec. 40306 of the Senate amendment)

Present Law

Customs duties are deposited into the general fund of the Treasury of the United States. This includes customs duties collected on imported vehicles classified under Chapter 87 of the Harmonized Tariff Schedule of the United States.

House Bill

No provision.

Senate Amendment

The provision would appropriate from the General Fund and deposit into the Highway Trust Fund amounts equivalent to amounts received in the General Fund, for FY 2012 through FY 2016, on articles classified under subheadings 8703.22.00 and 8703.24.00 of Chapter 87.

Effective date.−The provision is effective on the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

J. Treatment of Securities of a Controlled Corporation Exchanged for Assets in Certain Reorganizations (sec. 40307 of the Senate amendment and sec. 361 of the Code)

Present Law

The transfer of assets by a transferor corporation to another corporation, controlled (immediately after the transfer) by the transferor or one or more of its shareholders, qualifies as a tax-free reorganization if the transfer is made by one corporation ("distributing") to a controlled subsidiary corporation ("controlled"), followed by the distribution of the stock and securities of the controlled subsidiary in a divisive spin-off, split-off, or split-up which meets the requirements of section 355, including an active business requirement and a requirement that the transaction is not used principally as a device for the distribution of earnings and profits ("divisive D reorganization").[96]

No gain or loss is recognized to a corporation if the corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation that is a party to the reorganization.[97] If property other than stock or securities is received ("other property"), the transferor corporation recognizes gain (if any) to the extent the other property is not distributed.[98]

In addition, in a divisive D reorganization, if there is a transfer to the transferor corporation's creditors of money or other property received from the controlled corporation in the exchange in connection with the reorganization, the transferor distributing corporation recognizes gain to the extent the sum of the money and the fair market value of the other property exceeds the adjusted bases of the assets transferred (reduced by the amount of liabilities assumed by the transferee under section 357(c)).[99] Thus, such a transfer to creditors is aggregated with other assumptions of the transferor corporation's liabilities by the transferee, and the transferor corporation recognizes gain to the extent this aggregate amount exceeds the adjusted basis of assets transferred.[100]

[96] Secs. 355 and 368(a)(1)(D). Section 355 imposes requirements for a qualified spin-off, split-off, or split-up. Among other requirements, in order for a transaction to qualify under section 355, the distributing corporation must either (i) distribute all of the stock and securities of the controlled corporation that it holds, or (ii) distribute at least an amount of stock constituting control under section 368(c) and establish to the satisfaction of the Secretary of the Treasury that the retention of stock (or stock and securities) was not in pursuance of a plan having as one of its principal purposes the avoidance of Federal income tax. Sec. 355(a)(1)(D). Section 355 imposes other requirements to avoid gain recognition at the corporate level with respect to the spin-off, split-up, or split-off, *e.g.*, secs. 355(d) and (e).

[97] Sec. 361(a).

[98] Sec. 361(b).

[99] The last sentence of sec. 361(b)(3).

[100] Sec. 357(c) and the last sentence of sec. 361(b)(3).

For example, if in a divisive D reorganization the controlled corporation either (1) directly assumes the debt of the distributing corporation, or (2) borrows and distributes cash to the distributing corporation to pay the distributing corporation's creditors, such debt assumption or cash distribution is treated as money received by the distributing corporation, and the aggregate amount of such debt assumptions and distributions is taxable to the extent it exceeds the distributing corporation's basis in the assets transferred to the controlled corporation. However, if the controlled corporation issues its own debt securities and such securities are distributed to the creditors of the distributing corporation, the controlled corporation's debt securities are not treated as money or other property received by the distributing corporation. Thus, the distributing corporation could use the controlled corporation's securities to retire the distributing corporation's own debt, recognize no gain, and be in the same economic position as if its debt had been directly assumed by the controlled corporation or as if it had retired its debt with cash received from the controlled corporation. In addition, to the extent that such debt securities of the controlled corporation are permitted to be retained by the distributing corporation, such securities are not treated as taxable property.

House Bill

No provision.

Senate Amendment

Under the Senate amendment, in the case of a divisive D reorganization, no gain or loss is recognized to a corporation if the corporation is a party to a reorganization and exchanges property, in pursuance of the plan of reorganization, solely for stock other than nonqualified preferred stock (as defined in section 351(g)(2)).[101] Thus, under the provision, securities and nonqualified preferred stock are treated as "other property."

The transferor corporation's gain on the exchange is recognized to the extent of the sum of money and the value of other property, including securities and nonqualified preferred stock, not distributed in pursuance of the plan of reorganization. A distribution to creditors of the transferor corporation is not treated as a distribution for this purpose.

[101] Section 351(g)(2) defines nonqualified preferred stock as preferred stock if (i) the holder has a right to require the issuer or a related person to redeem or purchase the stock, which right may be exercised within the 20 year period beginning on the issue date and is not subject to a contingency which, as of the issue date, makes remote the likelihood of redemption or purchase; (ii) the issuer or a related person is required to redeem or purchase the stock (within such 20 year period and not subject to such a contingency); (iii) the issuer or a related person has the right to redeem or purchase the stock (which right is exercisable within such 20 year period and not subject to such a contingency) and as of the issue date, it is more likely than not that such right will be exercised, or (iv) the dividend on such stock varies in whole or in part (directly or indirectly) with reference to interest rates, commodity prices, or other similar indices. There are exceptions for certain rights that are exercisable only on the death, disability or mental incompetency of the holder, or only upon the separation from service of a service provider who received the right as reasonable compensation for services, and for certain situations involving publicly traded stock. Nonqualified preferred stock is treated in the same manner as securities under section 351 and thus is not qualified consideration that may be received tax free by a contributing shareholder. Sections 354(a)(2)(C) and 356(e) treat nonqualified preferred stock as taxable consideration if received in exchange for stock by shareholders of a corporation that itself is a party to a reorganization (except to the extent received in exchange for other nonqualified preferred stock); and section 355 contains a similar rule (sec. 355(a)(3)(D)).

The value of controlled corporation securities or nonqualified preferred stock transferred to creditors of the distributing corporation is treated in the same manner as a direct assumption of distributing corporation's debt by the controlled corporation, or as a distribution of cash (or other nonqualified property) from the controlled corporation that is paid to the distributing corporation's creditors, so that the distributing corporation recognizes gain on the exchange to the extent that the sum of such amounts exceeds the adjusted bases of the assets transferred

Effective date.−The provision generally applies to exchanges occurring after the date of enactment.

However, the provision does not apply to any exchange in connection with a transaction which is (1) made pursuant to a written agreement which was binding on February 6, 2012 and at all times thereafter, (2) described in a ruling request submitted to the IRS on or before such date, or (3) described on or before such date in a public announcement or in a filing with the Securities and Exchange Commission.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

K. Internal Revenue Service Levies and Thrift Savings Plan Accounts (sec. 40308 of the Senate amendment)

Present Law

In general

Levy is the IRS's administrative authority to seize a taxpayer's property, or rights to property, to pay the taxpayer's tax liability.[102] Generally, the IRS is entitled to seize a taxpayer's property by levy if a Federal tax lien has attached to such property,[103] the property is not exempt from levy,[104] and the IRS has provided both notice of intention to levy[105] and notice of the right to an administrative hearing (the notice is referred to as a "collections due process notice" or "CDP notice" and the hearing is referred to as the "CDP hearing")[106] at least 30 days before the levy is made. A levy on salary or wages is generally continuously in effect until released.[107] A Federal tax lien arises automatically when: (1) a tax assessment has been made; (2) the taxpayer has been given notice of the assessment stating the amount and demanding payment; and (3) the taxpayer has failed to pay the amount assessed within 10 days after the notice and demand.[108]

The notice of intent to levy is not required if the Secretary finds that collection would be jeopardized by delay. The standard for determining whether jeopardy exists is similar to the standard applicable when determining whether assessment of tax without following the normal deficiency procedures is permitted.[109]

The CDP notice (and pre-levy CDP hearing) is not required if: (1) the Secretary finds that collection would be jeopardized by delay; (2) the Secretary has served a levy on a State to collect a Federal tax liability from a State tax refund; (3) the taxpayer subject to the levy requested a CDP hearing with respect to unpaid employment taxes arising in the two-year period before the beginning of the taxable period with respect to which the employment tax levy is served; or (4) the Secretary has served a Federal contractor levy. In each of these four cases, however, the taxpayer is provided an opportunity for a hearing within a reasonable period of time after the levy.[110]

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[102] Sec. 6331(a). Levy specifically refers to the legal process by which the IRS orders a third party to turn over property in its possession that belongs to the delinquent taxpayer named in a notice of levy.

[103] *Ibid*.

[104] Sec. 6334.

[105] Sec. 6331(d).

[106] Sec. 6330. The notice and the hearing are referred to collectively as the CDP requirements.

[107] Secs. 6331(e) and 6343.

[108] Sec. 6321.

[109] Secs. 6331(d)(3) and 6861.

[110] Sec. 6330(f).

Thrift Savings Plan

Present law includes an anti-alienation rule that provides that the balance of an employee's Thrift Savings Plan ("TSP") Account is subject to taking only for the enforcement of one's obligations to provide for child support or alimony payments, restitution orders, certain forfeitures, or certain obligations of the Executive Director.[111] The authority for the IRS to levy an employee's TSP Account to satisfy tax liabilities is not mentioned in the anti-alienation rule; TSP Accounts are not specifically enumerated in the Code provisions identifying property that is exempt from levy.

House Provision

No provision.

Senate Amendment

The provision amends the statutory provisions governing the TSP to clarify that the anti-alienation provisions therein do not bar the IRS from issuing a notice of levy on a TSP Account.

Effective date.–The provision is effective upon date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

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[111] 5 U.S.C. sec. 8437(e)(3).

L. Depreciation and Amortization Rules for Highway and Related Property Subject to Long-Term Leases (sec. 40309 of the Senate amendment and secs. 168, 197, and 147 of the Code)

Present Law

Depreciation and amortization for highways and related property

A taxpayer generally must capitalize the cost of property used in a trade or business and recover such cost over time through annual deductions for depreciation or amortization. Tangible property generally is depreciated under the modified accelerated cost recovery system ("MACRS"), which determines depreciation by applying specific recovery periods, placed-in-service conventions, and depreciation methods to the cost of various types of depreciable property.[112] The alternative depreciation system ("ADS") applies with respect to tangible property used predominantly outside the United States during the taxable year, tax-exempt use property, tax-exempt bond financed property, and certain other property. ADS generally requires the use of the straight-line method without regard to salvage value, and requires longer recovery periods than MACRS.

Under MACRS, the cost of land improvements (such as roads and fences) is recovered over 15 years.[113] Land improvements subject to ADS are recovered over 20 years using the straight-line method.[114]

Amortization of intangible property

The cost recovery of many intangible assets is governed by the rules of section 197. In particular, section 197 provides that any amortizable section 197 intangible, including rights granted by a governmental unit and franchise rights, is amortized over a 15-year period.[115]

Private activity bond financing for highways

In general, interest on a private activity bond that is a qualified bond is excludable from taxable income.[116] Under present law, a private activity bond is not a qualified bond, interest on which is tax-exempt, if any portion of the proceeds of the issue of which the bond is a part is used to provide any airplane, skybox, or other private luxury box, health club facility, facility

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[112] Sec. 168.

[113] Rev. Proc. 87-56, 1987-42 I.R.B. 4.

[114] *Ibid.* The longest MACRS recovery period is 50 years and applies to railroad gradings and tunnel bores. Sec. 168(c).

[115] Secs. 197(d)(1)(D) and (F). The 15-year amortization provision does not apply to various types of rights, including any interest in land. Sec. 197(e)(2).

[116] Sec. 141.

primarily used for gambling, or store the principal business of which is the sale of alcoholic beverages for consumption off premises.[117]

House Bill

No provision.

Senate Amendment

Under this provision, the depreciation for applicable leased highway property is determined under ADS with a statutory 45-year recovery period and requirement to use the straight-line method. Further, this provision requires that any amortizable section 197 intangible acquired in connection with an applicable lease must be recovered over a period not less than the term of the applicable lease.

Under this provision, private activity bonds are not qualified bonds, interest on which is tax-exempt, if the bonds are part of an issue, any portion of the proceeds of which is used to finance any applicable leased highway property.

For purposes of this provision, applicable leased highway property is defined as property subject to an applicable lease and placed in service before the date of such lease. An applicable lease is defined as an arrangement between the taxpayer and a State or political subdivision thereof, or any agency or instrumentality of either, under which the taxpayer leases a highway and associated improvements, receives a right-of-way on the public lands underlying such highway and improvements, and receives a grant of a franchise or other intangible right permitting the taxpayer to receive funds relating to the operation of such highway. As under present law, a contract that purports to be a service contract or other arrangement (including a partnership or other passthrough entity) is treated as a lease if the contract or arrangement is properly treated as a lease.[118]

Effective date.−The provision is effective for leases entered into, and private activity bonds issued, after the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

[117] Sec. 147(e).

[118] Sec. 7701(e).

M. Transfers to Federal Old-Age and Survivors Insurance Trust Fund and Federal Disability Insurance Trust Fund (sec. 40314 of the Senate amendment)

Present Law

To finance Social Security and Medicare benefits, taxes under the Federal Insurance Contributions Act ("FICA") are imposed on employers and employees with respect to employee wages.[119] Similar taxes are imposed under the Self-Employment Contributions Act ("SECA") on self-employed individuals with respect to their self-employment income.[120] These taxes consist of two parts: (1) old-age, survivors, and disability insurance ("OASDI"), which correlates to the Social Security program that provides monthly benefits after retirement, death or disability; and (2) Medicare hospital insurance ("HI").

House Bill

No provision.

Senate Amendment

Under the Senate amendment, the following amounts are transferred from the General Fund to the OASDI Trust Funds: $27 million in fiscal year 2012, and $82 million in fiscal year 2014.

Effective date.−The Senate amendment provision is effective on the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

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[119] Secs. 3101 and 3111.

[120] Sec. 1401.

N. Modify Rules that Apply to Sales of Life Insurance Contracts (secs. 100112-4 of the Senate amendment and new sec. 6050X of the Code)

Present Law

An exclusion from Federal income tax is provided for amounts received under a life insurance contract paid by reason of the death of the insured.[121]

Under rules known as the transfer for value rules, if a life insurance contract is sold or otherwise transferred for valuable consideration, the amount paid by reason of the death of the insured that is excludable generally is limited.[122] Under the limitation, the excludable amount may not exceed the sum of (1) the actual value of the consideration, and (2) the premiums or other amounts subsequently paid by the transferee of the contract. Thus, for example, if a person buys a life insurance contract, and the consideration he pays combined with his subsequent premium payments on the contract are less than the amount of the death benefit he later receives under the contract, then the difference is includable in the buyer's income.

Exceptions are provided to the limitation on the excludable amount. The limitation on the excludable amount does not apply if (1) the transferee's basis in the contract is determined in whole or in part by reference to the transferor's basis in the contract,[123] or (2) the transfer is to the insured, to a partner of the insured, to a partnership in which the insured is a partner, or to a corporation in which the insured is a shareholder or officer.[124]

IRS guidance sets forth more details of the tax treatment of a life insurance policyholder who sells or surrenders the life insurance contract and the tax treatment of other sellers and of buyers of life insurance contracts. The guidance relates to the character of taxable amounts (ordinary or capital) and to the taxpayer's basis in the life insurance contract.

[121] Sec. 101(a)(1). In the case of certain accelerated death benefits and viatical settlements, special rules treat certain amounts as amounts paid by reason of the death of an insured (that is, generally, excludable from income). Sec. 101(g). The rules relating to accelerated death benefits provide that amounts treated as paid by reason of the death of the insured include any amount received under a life insurance contract on the life of an insured who is a terminally ill individual, or who is a chronically ill individual (provided certain requirements are met). For this purpose, a terminally ill individual is one who has been certified by a physician as having an illness or physical condition which can reasonably be expected to result in death in 24 months or less after the date of the certification. A chronically ill individual is one who has been certified by a licensed health care practitioner within the preceding 12-month period as meeting certain ability-related requirements. In the case of a viatical settlement, if any portion of the death benefit under a life insurance contract on the life of an insured who is terminally ill or chronically ill is sold to a viatical settlement provider, the amount paid for the sale or assignment of that portion is treated as an amount paid under the life insurance contract by reason of the death of the insured (that is, generally, excludable from income). For this purpose, a viatical settlement provider is a person regularly engaged in the trade or business of purchasing, or taking assignments of, life insurance contracts on the lives of terminally ill or chronically ill individuals (provided certain requirements are met).

[122] Sec. 101(a)(2).

[123] Sec. 101(a)(2)(A).

[124] Sec. 101(a)(2)(B).

In Revenue Ruling 2009-13,[125] the IRS ruled that income recognized under section 72(e) on surrender to the life insurance company of a life insurance contract with cash value is ordinary income. In the case of sale of a cash value life insurance contract, the IRS ruled that the insured's (seller's) basis is reduced by the cost of insurance, and the gain on sale of the contract is ordinary income to the extent of the amount that would be recognized as ordinary income if the contract were surrendered (the "inside buildup"), and any excess is long-term capital gain. Gain on the sale of a term life insurance contract (without cash surrender value) is long-term capital gain under the ruling.

In Revenue Ruling 2009-14,[126] the IRS ruled that under the transfer for value rules, a portion of the death benefit received by a buyer of a life insurance contract on the death of the insured is includable as ordinary income. The portion is the excess of the death benefit over the consideration and other amounts (*e.g.*, premiums) paid for the contract. Upon sale of the contract by the purchaser of the contract, the ruling concludes that the gain is long-term capital gain, and in determining the gain, the basis of the contract is not reduced by the cost of insurance.

House Bill

No provision.

Senate Amendment

In general

The provision imposes reporting requirements in the case of the purchase of an existing life insurance contract in a reportable policy sale and imposes reporting requirements on the payor in the case of the payment of reportable death benefits. The provision sets forth rules for determining the basis of a life insurance or annuity contract. Lastly, the provision modifies the transfer for value rules in a transfer of an interest in a life insurance contract that is a reportable policy sale.

Reporting requirements for acquisitions of life insurance contracts

Reporting upon acquisition of life insurance contract

The reporting requirement applies to every person who acquires a life insurance contract, or any interest in a life insurance contract, in a reportable policy sale during the taxable year. A reportable policy sale means the acquisition of an interest in a life insurance contract, directly or indirectly, if the acquirer has no substantial family, business, or financial relationship with the insured (apart from the acquirer's interest in the life insurance contract). An indirect acquisition includes the acquisition of an interest in a partnership, trust, or other entity that holds an interest in the life insurance contract.

[125] 2009-21 I.R.B. 1029.

[126] 2009-21 I.R.B. 1031.

Under the reporting requirement, the acquiror of the contract reports information about the acquisition to the IRS, to the insurance company that issued the contract, and to the person or persons receiving a payment. The information reported by the acquiror about the acquisition of the contract is (1) the acquiror's name, address, and taxpayer identification number ("TIN"), (2) the name, address, and TIN of each recipient of payment in the reportable policy sale, (3) the date of the reportable policy sale, (4) the name of the issuer and the policy number of the life insurance contract, and (5) the amount of each payment.

The statement the acquiror provides to any issuer of a life insurance contract is not required to include the amount of the payment or payments for the acquisition of the contract. The statement the acquiror provides to any issuer of a life insurance contract or recipient of a payment in the reportable policy sale also includes the name, address, and phone number of the acquiror's information contact.

Reporting of seller's basis in the life insurance contract

On receipt of a report described above, or on any notice of the transfer of a life insurance contract to a foreign person, each issuer is required to report to the IRS and to the seller or transferor (1) the basis of the contract (*i.e.*, the investment in the contract within the meaning of section 72(e)(6)), (2) the name, address, and TIN of the seller or the transferor to a foreign person, and (3) the policy number of the contract. Notice of the transfer of a life insurance contract to a foreign person is intended to include any sort of notice, including information provided for nontax purposes such as change of address notices for purposes of sending statements or for other purposes, or information relating to loans, premiums, or death benefits with respect to the contract.

The statement the issuer provides to any seller or transferor to a foreign person also includes the name, address, and phone number of the issuer's information contact.

Reporting with respect to reportable death benefits

When a reportable death benefit is paid under a life insurance contract, the payor insurance company is required to report information about the payment to the IRS and to the payee. Under this reporting requirement, the payor reports (1) the payor's name, address, and TIN; (2) the name, address, and TIN of each recipient of payment; (3) the date of each payment; and (4) the amount of each payment. A reportable death benefit means an amount paid by reason of the death of the insured under a life insurance contract that has been transferred in a reportable policy sale.

The statement the payor provides to any payee also includes the name, address, and phone number of the payor's information contact.

Payment

For purposes of these reporting requirements, payment means the amount of cash and the fair market value of any consideration transferred in a reportable policy sale.

Determination of basis

The provision provides that in determining the basis of a life insurance or annuity contract, no adjustment is made for mortality, expense, or other reasonable charges incurred under the contract (known as "cost of insurance"). This reverses the position of the IRS in Revenue Ruling 2009-13 that on sale of a cash value life insurance contract, the insured's (seller's) basis is reduced by the cost of insurance.

Scope of transfer for value rules

The provision provides that the exceptions to the transfer for value rules do not apply in the case of a transfer of a life insurance contract, or any interest in a life insurance contract, in a reportable policy sale. Thus, some portion of the death benefit ultimately payable under such a contract may be includable in income.

Effective date

Under the provision, the reporting requirement is effective for reportable policy sales occurring after December 31, 2012, and reportable death benefits paid after December 31, 2012. The clarification of the basis rules for life insurance and annuity contracts is effective for transactions entered into after August 25, 2009. The modification of exception to the transfer for value rules is effective for transfers occurring after December 31, 2012.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

O. Authorizing Special Measures against Foreign Jurisdictions, Financial Institutions, and Others that Significantly Impede U.S. Tax Enforcement (sec. 100201 of the Senate amendment and 31 U.S.C. sec. 5138A)

Present Law

Cross-border transfers of assets to, and interests held in, foreign bank accounts or foreign entities are subject to reporting requirements under Title 31 (the Bank Secrecy Act) of the United States Code. The Bank Secrecy Act requires both financial institutions and account holders to report information that has "a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings."[127] Citizens and residents of the United States as well as persons doing business in the United States are required to keep records and file reports that contain the following information "in the way and to the extent the Secretary prescribes" if they enter into a transaction or maintain an account with a foreign financial agency: (1) the identity and address of participants in a transaction or relationship; (2) the legal capacity in which a participant is acting; (3) the identity of real parties in interest; and (4) a description of the transaction, as specified by the Secretary.[128] Regulations promulgated pursuant to broad regulatory authority granted to the Secretary in the Bank Secrecy Act[129] provide additional guidance regarding the disclosure obligation with respect to foreign accounts.

As part of a series of reforms directed at international financing of terrorism,[130] the Bank Secrecy Act authorizes the Secretary of Treasury to impose special measures on certain domestic institutions or agencies if, after consultation with the Secretary of State and the Attorney General, the Secretary of Treasury determines that there are reasonable grounds to conclude that a jurisdiction or institution operating outside the United States, or accounts or transactions involving such jurisdictions or institutions, are of primary money laundering concern.[131]

In determining whether a particular jurisdiction is of primary money laundering concern, the Secretary considers multiple factors that may evidence that the jurisdiction lacks adequate transparency and may be a haven for criminal activities. Evidence that groups involved in organized crime, international terrorism or proliferation of weapons of mass destruction have transacted business in that jurisdiction as well as the degree of corruption among high-level

[127] 31 U.S.C. sec. 5311.

[128] 31 U.S.C. sec. 5314. The term "agency" in the Bank Secrecy Act includes financial institutions.

[129] 31 U.S.C. sec. 5314(a) provides: "Considering the need to avoid impeding or controlling the export or import of monetary instruments and the need to avoid burdening unreasonably a person making a transaction with a foreign financial agency, the Secretary of the Treasury shall require a resident or citizen of the United States or a person in, and doing business in, the United States, to keep records, file reports, or keep records and file reports, when the resident, citizen, or person makes a transaction or maintains a relation for any person with a foreign financial agency."

[130] See, *e.g.*, Title III of the USA PATRIOT Act, Pub. L. No. 107-56 (October 26, 2001) (sections 351 through 366).

[131] 31 USC sec. 5318A.

officials must be considered. With respect to assessing the fiscal transparency of the jurisdiction, factors include the domestic laws of that jurisdiction and their administration; the reputation of the jurisdiction as an offshore banking haven by credible international organizations; the extent to which the jurisdiction offers regulatory advantages to nonresidents; and whether the United States has a Mutual Legal Assistance Treaty ("MLAT") with the jurisdiction, and if so, experience of U.S. officials in obtaining information under that agreement.

In determining whether to apply one or more special measure to a particular institution, or with respect to a type of account or transaction, the Secretary considers whether the transactions, accounts or institutions facilitate money laundering through a particular jurisdiction. The Secretary also looks at evidence that organized criminal groups or terrorists have been able to avail themselves of such institution, accounts or transactions. The extent to which legitimate business is conducted through the accounts or institutions is also considered

The selection of the specific measures is made after consultation with other financial regulatory agencies and the Secretary of State.[132] The factors that must be considered in selecting which of the measures to invoke are enumerated and include U.S. national security and foreign policy; the cost and burden of compliance with the measures; whether U.S. financial institutions will be placed at a competitive disadvantages as a result; the impact of the measure on the international payment, clearance and settlement system; and whether any similar sanction has been imposed by another nation or multilateral group. Increased reporting obligations with respect to types of transactions or accounts involving a foreign jurisdiction, mandatory collection of information about beneficial ownership of certain types of accounts, and prohibitions against opening or maintaining payable-through or correspondent accounts with a nexus to foreign jurisdictions are among the measures permitted. These measures may be imposed separately or in combination.

Cross-border payment flows are also subject to reporting obligations for tax purposes.[133] Those reporting obligations and related provisions are commonly referred to as FATCA,[134] which added new Chapter 4, a reporting and withholding regime, to Subtitle A of the Code. Chapter 4 requires reporting of specific information by third parties for certain U.S. accounts held in foreign financial institutions ("FFIs").[135] Information reporting is encouraged through

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[132] Section 5318A(4)(A) requires consultation with Board of the Governors of the Federal Reserve System, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the National Credit Union Administration Board, any other appropriate Federal banking agency and any other interested party identified by the Secretary.

[133] Hiring Incentives to Restore Employment Act ("HIRE"), Pub. L. No. 111-147 (2010).

[134] Subtitle A of Title V of the HIRE Act, entitled "Foreign Account Tax Compliance," was based on legislative proposals in the Foreign Account Tax Compliance Act ("FATCA"), a bill introduced in both the House and Senate on October 27, 2009. See H.R. 3933 and S. 1934, respectively.

[135] Under section 1471(c), an FFI must report (1) the name, address, and taxpayer identification number of each U.S. person or a foreign entity with one or more substantial U.S. owners holding an account, (2) the account number, (3) the account balance or value, and (4) except as provided by the Secretary, the gross receipts and gross withdrawals or payments from the account.

the withholding of tax on payments to FFIs unless the FFI enters into and complies with an information reporting agreement with the Secretary of the Treasury.[136]

Access to the foreign-based documents necessary to combat money laundering and tax evasion is secured through information exchanges with foreign jurisdictions under the terms of various treaties and international agreements, such as MLAT, tax treaties, or tax information exchange agreements ("TIEA").[137] International norms regarding fiscal transparency and exchange of information for tax administration purposes are reflected in the standards developed by the Organization for Economic Cooperation and Development ("OECD"). The OECD Standards have been endorsed by the G-20 Ministers of Finance. Whether by tax treaty or TIEA, the OECD Standards require that a jurisdiction (1) exchange information where it is "foreseeably relevant" to the administration and enforcement of the domestic laws of a requesting State; (2) not restrict exchanges on the basis of bank secrecy or domestic tax interest requirements; (3) have powers to enforce access to reliable information; (4) respect taxpayer rights; and (5) maintain strict confidentiality of information exchanged.[138]

House Bill

No provision.

Senate Amendment

The provision expands the special measures powers under the Bank Secrecy Act by authorizing use of the powers based on a finding, made in consultation with the Commissioner of the IRS, the Secretary of State and the Attorney General, that an institution, jurisdiction or international transaction is significantly impeding tax enforcement. In making such a finding, cooperation of an institution or jurisdiction with the implementation of FATCA may be favorably considered. The information and consultations to be considered in making a finding to support use of the special measures on the basis of either money-laundering or tax enforcement concerns are expanded to require consideration of U.S. experience with administrative assistance requests under a tax treaty or tax information exchange agreement. Furthermore, a number of conforming changes are made to the enumeration of considerations to ensure that factors relevant to tax enforcement are considered.

The process for selection of special measures to be taken and the considerations for their selection remain the same as under present law, except for the identity of the persons or agencies to be consulted in the process when the use of special measures is based on a finding that U.S. tax enforcement is being significantly impeded. In that case, the Secretary of Treasury is

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[136] The information reporting requirement under the HIRE Act generally applies to payments made after December 31, 2012.

[137] TIEAs are entered into by the Administration, without the advice and consent of the Senate. In contrast to the bilateral tax treaties, TIEAs are generally limited in scope to mutual exchange of information. Since the 1980s, the United States has entered into over 20 such agreements.

[138] Overview of the OECD's Work on International Tax Evasion (A note by the OECD Secretariat), p. 3, March 23, 2009.

required to consult only with the Commissioner of IRS, the Secretary of State and the Attorney General. The Secretary of Treasury has sole discretion whether to consult any other agencies.

All special measures under present law are available for both anti-money-laundering and tax enforcement-based findings. The ability to prohibit or impose conditions on the use of correspondent or payable-through accounts is expanded to include the authorization, approval or use in the United States of a credit card, charge card, debit card or other similar financial instrument.

Effective date.−The provision is effective upon date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

P. Delay in Application of Worldwide Interest
(sec. 1801 of the Senate amendment and sec. 864(f) of the Code)

Present Law

In general

To compute the foreign tax credit limitation, a taxpayer must determine the amount of its taxable income from foreign sources. Thus, the taxpayer must allocate and apportion deductions between items of U.S.-source gross income, on the one hand, and items of foreign-source gross income, on the other.

In the case of interest expense, the rules generally are based on the approach that money is fungible and that interest expense is properly attributable to all business activities and property of a taxpayer, regardless of any specific purpose for incurring an obligation on which interest is paid.[139] For interest allocation purposes, all members of an affiliated group of corporations generally are treated as a single corporation (the so-called "one-taxpayer rule") and allocation must be made on the basis of assets rather than gross income. The term "affiliated group" in this context generally is defined by reference to the rules for determining whether corporations are eligible to file consolidated returns.

For consolidation purposes, the term "affiliated group" means one or more chains of includible corporations connected through stock ownership with a common parent corporation that is an includible corporation, but only if: (1) the common parent owns directly stock possessing at least 80 percent of the total voting power and at least 80 percent of the total value of at least one other includible corporation; and (2) stock meeting the same voting power and value standards with respect to each includible corporation (excluding the common parent) is directly owned by one or more other includible corporations.

Generally, the term "includible corporation" means any domestic corporation except certain corporations exempt from tax under section 501 (for example, corporations organized and operated exclusively for charitable or educational purposes), certain life insurance companies, corporations electing application of the possession tax credit, regulated investment companies, real estate investment trusts, and domestic international sales corporations. A foreign corporation generally is not an includible corporation.

Subject to exceptions, the consolidated return and interest allocation definitions of affiliation generally are consistent with each other. For example, both definitions generally exclude all foreign corporations from the affiliated group. Thus, while debt generally is considered fungible among the assets of a group of domestic affiliated corporations, the same rules do not apply as between the domestic and foreign members of a group with the same degree of common control as the domestic affiliated group.

Banks, savings institutions, and other financial affiliates

[139] However, exceptions to the fungibility principle are provided in particular cases, some of which are described below.

The affiliated group for interest allocation purposes generally excludes what are referred to in the Treasury regulations as "financial corporations."[140] A financial corporation includes any corporation, otherwise a member of the affiliated group for consolidation purposes, that is a financial institution (described in section 581 or section 591), the business of which is predominantly with persons other than related persons or their customers, and which is required by State or Federal law to be operated separately from any other entity that is not a financial institution.[141] The category of financial corporations also includes, to the extent provided in regulations, bank holding companies (including financial holding companies), subsidiaries of banks and bank holding companies (including financial holding companies), and savings institutions predominantly engaged in the active conduct of a banking, financing, or similar business.[142]

A financial corporation is not treated as a member of the regular affiliated group for purposes of applying the one-taxpayer rule to other nonfinancial members of that group. Instead, all such financial corporations that would be so affiliated are treated as a separate single corporation for interest allocation purposes.

Worldwide interest allocation

In general

The American Jobs Creation Act of 2004 ("AJCA")[143] modified the interest expense allocation rules described above (which generally apply for purposes of computing the foreign tax credit limitation) by providing a one-time election (the "worldwide affiliated group election") under which the taxable income of the domestic members of an affiliated group from sources outside the United States generally is determined by allocating and apportioning interest expense of the domestic members of a worldwide affiliated group on a worldwide-group basis (i.e., as if all members of the worldwide group were a single corporation). If a group makes this election, the taxable income of the domestic members of a worldwide affiliated group from sources outside the United States is determined by allocating and apportioning the third-party interest expense of those domestic members to foreign-source income in an amount equal to the excess (if any) of (1) the worldwide affiliated group's worldwide third-party interest expense multiplied by the ratio that the foreign assets of the worldwide affiliated group bears to the total assets of the worldwide affiliated group,[144] over (2) the third-party interest expense incurred by foreign members of the group to the extent such interest would be allocated to foreign sources if the

[140] Temp. Treas. Reg. sec. 1.861-11T(d)(4).

[141] Sec. 864(e)(5)(C).

[142] Sec. 864(e)(5)(D).

[143] Pub. L. No. 108-357, sec. 401.

[144] For purposes of determining the assets of the worldwide affiliated group, neither stock in corporations within the group nor indebtedness (including receivables) between members of the group is taken into account.

principles of worldwide interest allocation were applied separately to the foreign members of the group.[145]

For purposes of the new elective rules based on worldwide fungibility, the worldwide affiliated group means all corporations in an affiliated group as well as all controlled foreign corporations that, in the aggregate, either directly or indirectly,[146] would be members of such an affiliated group if section 1504(b)(3) did not apply (i.e., in which at least 80 percent of the vote and value of the stock of such corporations is owned by one or more other corporations included in the affiliated group). Thus, if an affiliated group makes this election, the taxable income from sources outside the United States of domestic group members generally is determined by allocating and apportioning interest expense of the domestic members of the worldwide affiliated group as if all of the interest expense and assets of 80-percent or greater owned domestic corporations (i.e., corporations that are part of the affiliated group, as modified to include insurance companies) and certain controlled foreign corporations were attributable to a single corporation.

Financial institution group election

Taxpayers are allowed to apply the bank group rules to exclude certain financial institutions from the affiliated group for interest allocation purposes under the worldwide fungibility approach. The rules also provide a one-time "financial institution group" election that expands the bank group. At the election of the common parent of the pre-election worldwide affiliated group, the interest expense allocation rules are applied separately to a subgroup of the worldwide affiliated group that consists of (1) all corporations that are part of the bank group, and (2) all "financial corporations." For this purpose, a corporation is a financial corporation if at least 80 percent of its gross income is financial services income (as described in section 904(d)(2)(D)(ii) and the regulations thereunder) that is derived from transactions with unrelated persons.[147] For these purposes, items of income or gain from a transaction or series of transactions are disregarded if a principal purpose for the transaction or transactions is to qualify any corporation as a financial corporation.

In addition, anti-abuse rules are provided under which certain transfers from one member of a financial institution group to a member of the worldwide affiliated group outside of the financial institution group are treated as reducing the amount of indebtedness of the separate financial institution group. Regulatory authority is provided with respect to the election to provide for the direct allocation of interest expense in circumstances in which such allocation is appropriate to carry out the purposes of these rules, to prevent assets or interest expense from

[145] Although the interest expense of a foreign subsidiary is taken into account for purposes of allocating the interest expense of the domestic members of the electing worldwide affiliated group for foreign tax credit limitation purposes, the interest expense incurred by a foreign subsidiary is not deductible on a U.S. return.

[146] Indirect ownership is determined under the rules of section 958(a)(2) or through applying rules similar to those of section 958(a)(2) to stock owned directly or indirectly by domestic partnerships, trusts, or estates.

[147] See Treas. Reg. sec. 1.904-4(e)(2).

being taken into account more than once, or to address changes in members of any group (through acquisitions or otherwise) treated as affiliated under these rules.

Effective date of worldwide interest allocation

The common parent of the domestic affiliated group must make the worldwide affiliated group election. It must be made for the first taxable year beginning after December 31, 2020, in which a worldwide affiliated group exists that includes at least one foreign corporation that meets the requirements for inclusion in a worldwide affiliated group.[148] The common parent of the pre-election worldwide affiliated group must make the election for the first taxable year beginning after December 31, 2020, in which a worldwide affiliated group includes a financial corporation. Once either election is made, it applies to the common parent and all other members of the worldwide affiliated group or to all members of the financial institution group, as applicable, for the taxable year for which the election is made and all subsequent taxable years, unless revoked with the consent of the Secretary of the Treasury.

House Bill

No provision.

Senate Amendment

The provision delays the effective date of the worldwide interest allocation rules for one year, until taxable years beginning after December 31, 2021. The required dates for making the worldwide affiliated group election and the financial institution group election are changed accordingly.

Effective date.−The provision is effective on the date of enactment.

Conference Agreement

The conference agreement does not include the Senate amendment provision.

[148] As originally enacted under AJCA, the worldwide interest allocation rules were effective for taxable years beginning after December 31, 2008. However, section 3093 of the Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, delayed the implementation of the worldwide interest allocation rules for two years, until taxable years beginning after December 31, 2010; section 15 of the Worker, Homeownership, and Business Assistance Act of 2009, Pub. L. No. 111-92, delayed the implementation of the worldwide interest allocation rules for seven years, until taxable years beginning after December 31, 2017; and section 551 of the Hiring Incentives to Restore Employment Act, Pub. L. No. 111-126, further delayed implementation of the worldwide interest allocation rules for three years, until taxable years beginning after December 31, 2020.

PART IV − TAX COMPLEXITY ANALYSIS

Section 4022(b) of the Internal Revenue Service Reform and Restructuring Act of 1998 (the "IRS Reform Act") requires the Joint Committee on Taxation (in consultation with the Internal Revenue Service and the Department of the Treasury) to provide a tax complexity analysis. The complexity analysis is required for all legislation reported by the Senate Committee on Finance, the House Committee on Ways and Means, or any committee of conference if the legislation includes a provision that directly or indirectly amends the Internal Revenue Code (the "Code") and has widespread applicability to individuals or small businesses.

The staff of the Joint Committee on Taxation has determined that a complexity analysis is not required under section 4022(b) of the IRS Reform Act because the bill contains no provisions that have "widespread applicability" to individuals or small businesses.

A. PBGC Premiums (secs. 40221-40222 of the conference agreement and ERISA sec. 4006)

Present Law

Defined benefit plans subject to ERISA are covered by the Pension Benefit Guaranty Corporation ("PBGC") insurance program and related premium requirements.

In the case of a single-employer defined benefit plan, flat-rate premiums apply at a rate of $35.00 per participant for 2012. Single-employer flat-rate premium rates are indexed for inflation.

If a single-employer defined benefit plan has unfunded vested benefits, variable-rate premiums also apply at a rate of $9 per $1,000 of unfunded vested benefits divided by the number of participants. Variable-rate premiums are not indexed for inflation. For purposes of determining variable-rate premiums, unfunded vested benefits are equal to the excess (if any) of (1) the plan's funding target for the year, as determined under the minimum funding rules, but taking into account only vested benefits, over (2) the fair market value of plan assets. In determining the plan's funding target for this purpose, the interest rates used are segment rates determined as under the minimum funding rules, but determined on a monthly basis, rather than using a 24-month average of corporate bond rates.

In the case of a multiemployer defined benefit plan, flat-rate premiums apply at a rate of $9.00 per participant for 2012. Multiemployer flat-rate premium rates are indexed for inflation and are expected to increase to $10 for 2013.

House Bill

No provision.

Senate Amendment

No provision.

Conference Agreement

The conference agreement increases PBGC premiums for single-employer plans and multiemployer plans.

Single-employer plan flat-rate premiums are increased to $42 per participant for 2013 and $49 per participant for 2014 with indexing thereafter.

For plan years beginning after 2012, the rate for variable-rate premiums ($9 per $1,000 of unfunded vested benefits) is indexed and the per-participant variable-rate premium is subject to a limit. The limit is $400 for 2013 with indexing thereafter. In addition, the rate for variable-rate premiums per $1,000 of unfunded vested benefits is increased by $4 for 2014 and another $5 for 2015. These increases are applied to the rate applicable for the preceding year (that is, $9 as indexed for the preceding year per $1,000 of unfunded vested benefits) and indexing continues to apply thereafter.

Multiemployer plan flat-rate premiums are increased by $2 per participant for 2013.

B. Improvements of PBGC (secs. 40231-40234 of the conference agreement and ERISA sec. 4002, new sec. 4004 and sec. 4005) - Draft of 6/27/12, 9:00 PM

Present Law

The Pension Benefit Guaranty Corporation ("PBGC"), which was created by the Employee Retirement Income Security Act of 1974 ("ERISA"), insures benefits provided under defined benefit plans covered by ERISA, collects premiums with respect to such plans, and manages assets and pays benefits with respect to certain terminated plans. PBGC's purposes are to encourage the continuation and maintenance of voluntary private defined benefit plans, provide timely and uninterrupted payment of pension benefits to participants and beneficiaries, and maintain premiums at the lowest level consistent with carrying out its obligations under ERISA.[149]

PBGC is administered by a director, who is appointed by the President with the advice and consent of the Senate. PBGC's board of directors consists of the Secretary of the Treasury, the Secretary of Labor, and the Secretary of Commerce, with the Secretary of Labor serving as chair. An advisory committee has been established for the purpose of advising the PBGC as to various policies and procedures. ERISA contains general provisions as to the board of directors and advisory committee.

House Bill

No provision.

Senate Amendment

No provision.

Conference Agreement

PBGC governance improvement

The conference agreement expands the ERISA provisions relating to the PBGC board of directors, advisory committee, director and other PBGC officials.

With respect to the board of directors, the conference agreement addresses timing and procedures for meetings (including a joint meeting with the advisory committee). It also ensures that the PBGC inspector general has direct access to the board, clarifies the role of the General Counsel, and provides authority to the board to hire its own employees, experts and consultants as may be required to enable the board to perform its duties. The conference agreement includes specific rules on conflicts of interest with respect to the board of directors and the director of PBGC and provides for the PBGC to have a risk management officer. It further clarifies that the PBGC board of directors is ultimately responsible for overseeing PBGC and that the director is directly accountable to the board of directors and can be removed by the

[149] ERISA sec. 4002(a).

board of directors or the president.   It also sets the director's term at five years unless removed before the expiration of the term by the President or the board of directors.

The conference agreement states the sense of Congress that (1) the board of directors should form committees, including an audit committee and an investment committee composed of at least two members, to enhance the overall effectiveness of the board, and (2) the advisory committee should provide the board with policy recommendations regarding changes to the law that would be beneficial to the PBGC or the voluntary private pension system.

The conference agreement also directs the PBGC, not later than 90 days after enactment, to contract with the National Academy of Public Administration to conduct a study of the PBGC to include (1) a review of governance structures of organizations (governmental and nongovernmental) that are analogous to the PBGC and (2) recommendations with respect to various topics relating to the board of directors, such as composition, procedures, and policies to enhance Congressional oversight. The results of the study are to be reported within a year of initiation of the study to the Committee on Health, Education, Labor, and Pensions and Committee on Finance of the Senate and the Committee on Education and the Workforce and Committee on Ways and Means of the House of Representatives.

Participant and plan sponsor advocate

The conference agreement establishes a new Participant and Plan Sponsor Advocate. The Advocate is chosen by the Board of Directors from the candidates nominated by the advisory committee. This individual will act as a liaison between the corporation and participants in terminated pension plans. The Advocate will ensure that participants receive everything they are entitled to under the law. The Advocate will also provide plan sponsors with assistance in resolving disputes with the corporation. Each year, the Advocate will provide a report on their activities to the Committee on Health, Education, Labor, and Pensions and Committee on Finance of the Senate, the Committee on Education and the Workforce of the House of Representatives, and the Committee on Ways and Means of the House of Representatives summarizing the issues raised by participants and plan sponsors and making recommendations for changes to improve the system.

Quality Control Procedures for the PBGC

The conference agreement states that the PBGC will contract with an outside agency (such as the Social Security Administration) to conduct an annual review of the Corporation's Single-Employer and Multiemployer Pension Insurance Modeling Systems ("PIMS"). The first reviews will be initiated no later than 3 months after the enactment of this Act.

The conference agreement also states that the PBGC will make its own efforts to develop review policies to examine actuarial work, management, and record keeping. Finally, the conference agreement instructs the PBGC to provide a specific report addressing outstanding recommendations made by the Office of the Inspector General ("OIG") relating to the Policy, Research, and Analysis Department and the Benefits Administration and Payment Department.

Line of credit repeal

The conference agreement repeals section 4005(c) of ERISA, which provides authority for the PBGC to issue notes or other obligations in an amount up to $100,000,000.

Natural Resource Provisions

Secure Rural Schools

The conference report includes Senate language that extends by one year, through fiscal year 2012, the Secure Rural Schools program. The program funds county outlays for public schools, road improvement and maintenance projects, and forest restoration and improvement projects in and around National Forests. The conference report clarifies that funds for eligible Title III projects under the program must be obligated by the end of the following fiscal year but not necessarily initiated.

Payment-In-Lieu of Taxes

The conference report also includes Senate language to extend by one year, through fiscal year 2013, full funding for the Payment in Lieu of Taxes program. The program provides federal payments to local governments to help offset losses in property taxes due to nontaxable federal land within their boundaries.

Gulf Coast Restoration

The conference report modifies a Senate provision related to Gulf Coast restoration known as the Resources and Ecosystems Sustainability, Tourism Opportunities and Revived Economies of the Gulf Coast States Act of 2012 (RESTORE Act). The provision establishes the Gulf Coast Restoration Trust Fund and places in the Trust Fund 80% of all civil penalties paid by responsible parties in connection with the Deepwater Horizon oil spill. Funding may be used to invest in projects and activities to restore the long-term health of the coastal ecosystem and local economies in the Gulf Coast Region, which includes the states of Mississippi, Louisiana, Alabama, Florida, and Texas. A portion of the funds will be allocated directly and equally to the five Gulf Coast states for ecological and economic recovery along the coast. A portion will be provided to the Gulf Coast Ecosystem Restoration Council established by the bill to develop and fund a comprehensive plan for the restoration of Gulf Coast ecosystems. A portion will be allocated among the states using an impact-based formula to implement state plans that have been approved by the Council. Finally, a portion of the fines will be allocated to a Gulf Coast ecosystem restoration, science, observation, monitoring and technology program and for grants to nongovernmental entities for the establishment of Gulf Coast centers of excellence.

Phased retirement

Present Law

Under current law, Federal agencies may offer part-time employment to retirement-eligible workers, but the employee may not begin receiving accrued pension benefits. Currently, Federal employees face one of three choices upon reaching retirement age: (1) voluntarily retire and collect an annuity based on the pension computation formula, (2) continue to work full time, in most cases increasing the number of service years used in calculating their pension, or (3) voluntarily retire and return to Federal employment as a reemployed annuitant. As a result, most experienced Federal employees elect to retire.

Under Internal Revenue Code section 72(t), certain distributions from a qualified retirement plan prior to age 59½ are subject to an additional tax of 10 percent of the taxable amount of the distribution.

House Bill

No provision.

Senate Amendment

The Senate amendment provides the Office of Personnel Management the authority to establish a phased retirement program for qualified Federal employees. The amendment allows Federal employees to retire from a portion of their full time employment and receive a prorated pension for that service. During phased retirement, Federal employees may work 20 to 80 percent of their full-time schedule and continue to receive a prorated salary and pension credit for the time worked. At least 20 percent of the time worked must be used to mentor new employees. When the phased retiree fully retires, their annuity would be adjusted, increasing the employee's lifetime retirement income. The Senate amendment excludes from eligibility law enforcement officers, firefighters, nuclear materials couriers, air traffic controllers, customs and border protection officers, or members of the Capital Police or Supreme Court Police.

Conference Report

The conference report follows the Senate amendment with three changes. First, Postal Service employees are exempted from the requirement to spend 20 percent of their time mentoring. Second, the provision provides that certain law enforcement officers such as Customs and Border Protection Officers hired before 2008 (when they were granted law-enforcement type status which makes them ineligible for phased retirement under the Senate Amendment because they are subject to mandatory retirement) are eligible for phased retirement. Finally, the conference agreement provides an exception to the additional tax under section 72(t) of the Internal Revenue Code for distributions from federal retirement plans to qualified phased retirees.

Effective Date – The provision is effective on the date the implementing regulations are issued by the Director of the Office of Personnel Management.

Technical Correction to the Disaster Recovery FMAP Provision

The ACA included a provision known as the 'disaster-recovery FMAP' designed to help states adjust to drastic changes in FMAP following a statewide disaster. Once triggered, the policy would provide assistance for as many as seven years following the disaster, as long as the state continued to experience an FMAP drop of more than three percentage points. The Middle Class

Tax Relief and Job Creation Act of 2012 corrected the formula. This policy moves the effective date to October 1, 2012 and adjusts the formula for fiscal year 2013.

Ocean Freight Differential

The United States provides humanitarian food aid to developing countries.   This assistance is subject to an additional cargo preference, which requires 75% of food assistance be shipped from U.S flagged vessels. The Maritime Administration at the Department of Transportation is required to reimburse the U.S. agencies that sponsor food aid shipments for the increased costs associated with the U.S. flag shipping requirement. This proposal would reduce to 50% the incremental ocean freight differential, which would reduce the amount of quarterly payments made by Maritime Administration at the Department of Transportation.

Abandoned Mine Land

This proposal would cap abandoned mine land (AML) reclamation payments to states that have completed all high-priority abandoned coal mine reclamation projects. Under this proposal, payments to those states (certified states) would be capped at $15 million annually.

Pursuant to the order of the House on April 25, 2012, the Speaker appointed the following conferees from the Committee on Transportation and Infrastructure for consideration of the House bill (except section 141) and the Senate amendment (except secs. 1801, 40102, 40201, 40202, 40204, 40205, 40305, 40307, 40309 40312, 100112 100114, and 100116), and modifications committed to conference:

John Mica
Don Young
John Duncan
Bill Shuster
Shelley Moore Capito
Rick Crawford
Jaime Herrera Beutler
Larry Bucshon
Richard Hanna
Steve Southerland
James Lankford
Reid Ribble
Nick Rahall
Peter DeFazio
Jerry Costello
Eleanor Holmes Norton
Jerrold Nadler
Corrine Brown
Elijah Cummings
Leonard Boswell
Tim Bishop

As additional conferees from the Committee on Commerce, for consideration of sec. 142 and titles II and V of the House bill, and secs. 1113, 1201, 1202, subtitles B, C, D, and E of title I of Division C, secs. 32701 32705, 32710, 32713, 40101, and 40301 of the Senate amendment, and modifications committed to conference:

Fred Upton
Ed Whitfield
Henry Waxman

As additional conferees from the Committee on Natural Resources, for consideration of secs. 123, 142, 204, and titles III and VI of the House bill, and sec. 1116, subtitles C, F, and G of title I of Division A, sec. 33009, titles VI and VII of Division C, sec. 40101, subtitles A and B of title I of Division F, and sec. 100301 of the Senate amendment, and modifications committed to conference:

Doc Hastings

Rob Bishop
Ed Markey

As additional conferees from the Committee on Science, Space, and Technology for consideration of secs. 121, 123, 136, and 137 of the House bill, and sec. 1534, subtitle F of title I of Division A, secs. 20013, 20014, 20029, 31101, 31103, 31111, 31204, 31504, 32705, 33009, 34008, and Division E of the Senate amendment, and modifications committed to conference:

Ralph Hall
Chip Cravaack
Eddie Bernice Johnson

As additional conferees from the Committee on Ways and Means, for consideration of secs. 141 and 142 of the House bill, and secs. 1801, 40101, 40102, 40201, 40202, 40204, 40205, 40301 40307, 40309 40314, 100112 100114, and 100116 of the Senate amendment, and modifications committed to conference:

Dave Camp
Pat Tiberi
Earl Blumenauer
Managers on the Part of the House

Barbara Boxer
Max Baucus
John Rockefeller
Dick Durbin
Tim Johnson
Chuck Schumer
Bill Nelson
Robert Menendez
James Inhofe
David Vitter
Orrin Hatch
Richard Shelby
Kay Bailey Hutchison
John Hoeven
Managers on the Part of the Senate