

Current Federal Tax Developments

Week of November 8, 2021

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CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF NOVEMBER 8, 2021
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SECTION: 415
COST OF LIVING RETIREMENT AND FRINGE BENEFIT
AMOUNTS FOR 2022 PUBLISHED BY THE IRS

Citation: Notice 2021-61, 11/4/21

The IRS issued inflation adjusted retirement plan and fringe benefit numbers for 2022 in Notice 2021-61.¹

| Item | 2022 | 2021 |
|---|------------|------------|
| Annual Benefit Under a Defined Contribution Plan (IRC §415(b)(1)(A)) | \$ 245,000 | \$ 230,000 |
| Limitation for Defined Contribution Plans (IRC §415(c)(1)(A)) | 61,000 | 58,000 |
| Limitation on Exclusion for Elective Deferrals (IRC §402(g)) | 20,500 | 19,500 |
| Annual Compensation Limit (IRC §§401(a)(17), 404(l), 408(k)(3)(C), and 408(k)(6)(D)(ii)) | 305,000 | 290,000 |
| Key Employee in a Top Heavy Plan (IRC §416(i)(1)(A)(i)) | 200,000 | 185,000 |
| Highly Compensated Employee (IRC §414(q)(1)(B)) | 135,000 | 130,000 |
| Catch-up Contributions to Employer Plans Other than SIMPLEs (IRC §414(v)(2)(B)(i)) | 6,500 | 6,500 |
| Catch-up Contributions to SIMPLE-IRAs and SIMPLE-401(k)s (IRC §414(v)(2)(B)(ii)) | 3,000 | 3,000 |
| Annual Compensation Limitation for Certain Governmental Plans (IRC §401(a)(17)) | 450,000 | 430,000 |

¹ Notice 2021-61, November 4, 2021, <https://www.irs.gov/pub/irs-drop/n-21-61.pdf>

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| Item | 2022 | 2021 |
|--|---------|---------|
| Compensation Amount for Participation in a SEP (IRC §408(k)(2)(C)) | 650 | 650 |
| Deferral Limitation for SIMPLE Retirement Accounts (IRC §408(p)(2)(E)) | 14,000 | 13,500 |
| Limitation on Deferrals under IRC §457(e)(15) Governmental Plans and Tax-Exempt Organizations | 20,500 | 19,500 |
| Compensation Amount for an Officer Control Employee for Fringe Benefits (Reg. §1.61-21(f)(5)(i)) | 120,000 | 115,000 |
| Compensation Amount for a Control Employee Based Solely on Compensation Reg. §1.61-21(f)(5)(iii)) | 245,000 | 235,000 |
| IRA Deductible Contribution Amounts (IRC §219(b)(5)(A)) | 6,000 | 6,000 |

The Notice defines the ranges over which deductible IRA contributions phase out for individuals who are active participants in a qualified retirement plan are provided as:

| Item | 2022 | 2021 |
|---|------------------------|------------------------|
| Married participants filing a joint return or qualifying widow(er) | \$109,000 to \$119,000 | \$105,000 to \$115,000 |
| Other statuses except married filing separate | \$68,000 to \$78,000 | \$66,000 to \$76,000 |
| Married filing separate | \$0 to \$10,000 | \$0 to \$10,000 |
| Married individual filing a joint who is not an active participant but whose spouse is an active participant | \$204,000 to \$214,000 | \$198,000 to \$208,000 |

The adjusted gross income range over which the ability of a taxpayer to make a Roth IRA contribution phases out is as follows:

| Item | 2022 | 2021 |
|--|------------------------|------------------------|
| Married participants filing a joint return or qualifying widow(er) | \$204,000 to \$214,000 | \$198,000 to \$208,000 |
| Single and head of household | \$129,000 to \$144,000 | \$125,000 to \$140,000 |
| Married filing separate | \$0 to \$10,000 | \$0 to \$10,000 |

SECTION: NEW LAW
CONGRESS PASSES INFRASTRUCTURE INVESTMENT AND JOBS ACT, SENT TO THE PRESIDENT FOR SIGNATURE

Citation: Infrastructure Investment and Jobs Act, 11/5/21

The House of Representatives on November 5, 2021 passed the Infrastructure Investment and Jobs Act, accepting the amendments the Senate had made to the bill. The Act is being sent to the President who is expected to sign the bill.

Although not primarily a tax bill, the Infrastructure Investment and Jobs Act (IIJA) does contain some provisions that have a tax impact.

For each provision the effective date of the provision is noted. For those items whose effective date is tied to the date of enactment, that date will be the date that the President signs the bill, assuming that he does so.

Relief for Taxpayers Affected by Disasters or Other Critical Events

The Act adds provisions for taxpayers impacted by disasters and other critical events.

Modification of Automatic Extension of Certain Deadlines in the Case of Taxpayers Affected by Federally Declared Disasters (IRC §7508A, Act §80501)

Effective date: The amendment made by this section shall apply to federally declared disasters declared after the date of enactment of this Act.²

² Infrastructure Investment and Jobs Act §80501(b)

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The special rules extending the time to perform certain tax acts under IRC §7508A are modified to automatically provide that the time to perform the following acts for the period from the earliest incident date for the disaster until the date which is 60 days after the later of the earliest incident date for the disaster or the date the disaster declaration is declared:

- Filing any return of income, estate, gift, employment, or excise tax;
- Payment of any income, estate, gift, employment, or excise tax or any installment thereof or of any other liability to the United States in respect thereof;
- Filing a petition with the Tax Court, or filing a notice of appeal from a decision of the Tax Court;
- Allowance of a credit or refund of any tax;
- Filing a claim for credit or refund of any tax; and
- Bringing suit upon any such claim for credit or refund.³

If there are multiple declarations relating to a disaster area which are issued within a 60-day period, a separate period shall be determined with respect to each such declaration.⁴

The Act also revises the definition of a disaster area for purposes of IRC §7508A. Previously, the provision referenced the definition found at IRC §165(i)(5)(B), but it now will use the following definition specific to this provision:

(3) DISASTER AREA.—For purposes of this subsection, the term ‘disaster area’ means an area in which a major disaster for which the President provides financial assistance under section 408 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5174) occurs.⁵

Modifications of Rules for Postponing Certain Acts by Reason of Service in Combat Zone or Contingency Operation (IRC §7508, Act §80502)

Effective date: The amendments made by this section shall apply to any period for performing an act which has not expired before the date of the enactment of this Act.

³ IRC §7508A(d)(1)(B) as revised by the Infrastructure Investment and Jobs Act §80501; IRC §7508(a)(1)(A)-(F) as revised by the Infrastructure Investment and Jobs Act

⁴ IRC §7508A(d)(g) as revised by the Infrastructure Investment and Jobs Act §80501

⁵ IRC §7508A(d)(3) as revised by the Infrastructure Investment and Jobs Act §80501

The Act changes the text for the Tax Court related items that are granted an extension of time for those serving in a combat zone. Prior to the change, the provision read:

(C) Filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court;⁶

The new language removes the “review” language and specifically limits the extension of time to filing a notice of appeal from a decision of the Tax Court:

(C) Filing a petition with the Tax Court, or filing a notice of appeal from a decision of the Tax Court;⁷

Similarly, the Act clarifies that the extension of time also gives the United States the same additional time in respect to filing a suit recovering an erroneous refund in addition to a suit in respect of a tax liability.⁸

Tolling of Time for Filing a Petition with the Tax Court. (IRC §7451, Act §80503)

Effective date.—The amendments made by this section shall apply to petitions required to be timely filed (determined without regard to the amendments made by this section) after the date of enactment of this Act.

The Act changes the title of IRC §7451 from “Fee for filing petition” to “Petitions.” The change in title is made as the provision is revised to, in addition to authorizing the Tax Court to charge a fee for filing a petition, to add a new tolling provision when the filing location is inaccessible or otherwise unavailable to the public on the date the petition is due. The new provision, found at new IRC §7451(b), reads:

(b) Tolling of time in certain cases.—

(1) IN GENERAL.—Notwithstanding any other provision of this title, in any case (including by reason of a lapse in appropriations) in which a filing location is inaccessible or otherwise unavailable to the general public on the date a petition is due, the relevant time period for filing such petition shall be tolled for the number of days within the period of inaccessibility plus an additional 14 days

(2) FILING LOCATION.—For purposes of this subsection, the term ‘filing location’ means—

(A) the office of the clerk of the Tax Court, or

⁶ IRC §7508(a)(1)(C) before revision by the Infrastructure Investment and Jobs Act

⁷ IRC §7508(a)(1)(C) after revision by the Infrastructure Investment and Jobs Act

⁸ IRC §7508(a)(1)(J) after revision by the Infrastructure Investment and Jobs Act

(B) any on-line portal made available by the Tax Court for electronic filing of petitions.⁹

Authority to Postpone Certain Tax Deadlines by Reason of Significant Fires. (IRC §7508A, Act §8054)

Effective date.—The amendments made by this section shall apply to fires for which assistance is provided after the date of the enactment of this Act.

The Act adds a “significant fire” to the items that triggered the relief provisions for performing certain acts found in IRC §7508A in addition to a disaster or terroristic or military action.¹⁰

The Act defines a *significant fire* as “any fire with respect to which assistance is provided under section 420 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act.”¹¹

Other Tax Related Provisions

The Act also contained various other tax related provisions.

Modification of Tax Treatment of Contributions to the Capital of a Corporation. (IRC §118, Act §80601)

*Effective date.—The amendments made by this section shall apply to contributions made after December 31, 2020.*¹²

IIJA adds a special exclusion from income for qualified contributions to the capital of a corporation for certain regulated public water and sewage disposal utilities.¹³

A *regulated public utility* for these purposes means a corporation engaged in the furnishing or sale of water or sewage services if the rates for such furnishing or sale, as the case may be, have been established or approved by

- A State or political subdivision thereof,
- By an agency or instrumentality of the United States,
- By a public service or public utility commission or other similar body of the District of Columbia or of any State or political subdivision thereof, or
- By a foreign country or an agency or instrumentality or political subdivision thereof.

⁹ IRC §7451(b) as added by the Infrastructure Investment and Jobs Act

¹⁰ IRC §7508A(a)(1) and (b) as revised by the Infrastructure Investment and Jobs Act

¹¹ IRC §7508A(e) as added by the Infrastructure Investment and Jobs Act

¹² Infrastructure Investment and Jobs Act §80601(b)

¹³ IRC §118(c) as added by the Infrastructure Investment and Jobs Act

Such a corporation is not required to provide water or sewage disposal services to members of the general public in its service area.¹⁴

A *contribution in aid of construction* will be defined by regulations promulgated by the Treasury Department except that the term shall not include amounts paid as service charges for starting or stopping services.¹⁵

The Act provides that an excludable contribution to capital includes any amount of money or other property received from any person (whether or not a shareholder) by a regulated public utility which provides water or sewerage disposal services if—

- The amount is —
 - A *contribution in aid of construction*, or
 - A contribution to the capital of such utility by a governmental entity providing for the protection, preservation, or enhancement of drinking water or sewerage disposal services,
- In the case of a contribution in aid of construction which is property other than water or sewerage disposal facilities, such amount meets the requirements of the *expenditure rule*, and
- Such amount (or any property acquired or constructed with such amount) is not included in the taxpayer's rate base for ratemaking purposes.¹⁶

The *expenditure rule*, noted above for construction of other than water or sewerage disposal facilities, is met if —

- An amount equal to such amount is expended for the acquisition or construction of tangible property that qualifies as §1231 property used in a trade or business—
 - Which is the property for which the contribution was made or is of the same type as such property, and
 - Which is used predominantly (80% or more) in the trade or business of furnishing water or sewerage disposal services,
- The expenditure occurs before the end of the second taxable year after the year in which such amount was received, and
- Accurate records are kept of
 - The amounts contributed and expenditures made,
 - The expenditures to which contributions are allocated, and

¹⁴ IRC §118(c)(3)(C) as modified by the Infrastructure Investment and Jobs Act, IRC §7701(a)(33)

¹⁵ IRC §118(c)(3)(A) as modified by the Infrastructure Investment and Jobs Act

¹⁶ IRC §118(c)(1) as modified by the Infrastructure Investment and Jobs Act

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- The year in which the contributions and expenditures are received and made.¹⁷

Not unexpectedly since the item is excluded from income, the corporation will not be able to claim certain tax benefits. Specifically:

- No deduction or credit shall be allowed for, or by reason of, any expenditure which constitutes a contribution in aid of construction excluded from income under this rule and
- The adjusted basis of any property acquired with such contributions in aid of construction shall be zero.¹⁸

Taxpayers will be required in some cases to notify the IRS they are making use of this provision or the statute of limitations on assessing taxes related to this provision will not begin to run until such disclosure is made. The Act provides that if the taxpayer for any taxable year treats an amount as a contribution to the capital of the taxpayer, then—

- The statutory period for the assessment of any deficiency attributable to any part of such amount shall not expire before the expiration of 3 years from the date the IRS is notified by the taxpayer (in such manner as the IRS may prescribe) of—
 - The amount of the expenditure for construction of qualifying tangible §1231 property,
 - The taxpayer’s intention not to make the expenditures for such property, or
 - A failure to make such expenditure for the property before the end of the second taxable year after the year in which it received the amount, and
- Such deficiency may be assessed before the expiration of such 3-year period notwithstanding the provisions of any other law or rule of law which would otherwise prevent such assessment.¹⁹

Extension of Interest Rate Stabilization. (IRC §430, Act §80602)

*Effective date.—The amendments made by this section shall apply with respect to plan years beginning after December 31, 2021.*²⁰

The interest rate stabilization table related to the minimum funding standards for single-employer defined benefit plans found at IRC §430(h)(2)(C)(iv)(II) is changed to extend for an additional five years the amounts for the applicable minimum percentage

¹⁷ IRC §118(c)(2) and (3)(B) as modified by the Infrastructure Investment and Jobs Act

¹⁸ IRC §118(c)(4) as modified by the Infrastructure Investment and Jobs Act

¹⁹ IRC §118(d) as modified by the Infrastructure Investment and Jobs Act

²⁰ Infrastructure Investment and Jobs Act §80602(c)

and applicable maximum percentages that were scheduled to expire at the end of 2025 for another five years.²¹ The new table provides:

| If the calendar year is: | The applicable minimum percentage is: | The applicable maximum percentage is: |
|--|---------------------------------------|---------------------------------------|
| Any year in the period starting in 2012 and ending in 2019 | 90% | 110% |
| Any year in the period starting in 2020 and ending in 2030 | 95% | 105% |
| 2031 | 90% | 110% |
| 2032 | 85% | 115% |
| 2033 | 80% | 120% |
| 2034 | 75% | 125% |
| After 2034 | 70% | 130% |

The same revisions are made to the same table found at subclause (II) of section 303(h)(2)(C)(iv) of the Employee Retirement Income Security Act of 1974 (ERISA).²²

Information Reporting for Brokers and Digital Assets. (IRC §§6045 & 6045A, Act §80603)

Effective date.—The amendments made by this section shall apply to returns required to be filed, and statements required to be furnished, after December 31, 2023.

One of the most discussed tax provisions of the IIJA with concerns being raised about the breadth of the transactions and entities that would be covered by these rules on *digital assets*, including concerns expressed by the Chairman of the Senate Finance Committee as the bill was nearing a Senate vote. Chairman Wyden proposed revised language, but an agreement was not reached before the bill came up for a vote.

As the provision does not take effect until returns filed in 2024 covering 2023, it is very possible these provisions will be subject to changes in future legislation.

²¹ IRC §430(h)(2)(C)(iv)(II) as modified by the Infrastructure Investment and Jobs Act

²² Infrastructure Investment and Jobs Act §80602(b)

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For purposes of these rules, a *digital asset* is—

Except as otherwise provided by the Secretary, the term ‘digital asset’ means any digital representation of value which is recorded on a cryptographically secured distributed ledger or any similar technology as specified by the Secretary.²³

For purposes of the information reporting rules related to brokers under IRC §6045, the IIJA adds to the definition of brokers the following class of entities:

(D) any person who (for consideration) is responsible for regularly providing any service effectuating transfers of digital assets on behalf of another person.²⁴

The Act also removes the word “other person” from the class that includes any person who “regularly acts as a middleman with respect to property or services.”²⁵ This would allow dealers, barter exchanges and digital asset transfer entities to also qualify under this middleman category.

The Act also adds *digital assets* to the list of specified securities that currently includes stocks, bonds and other evidence of indebtedness, commodities and other financial instruments.²⁶ These items are subject to the special reporting rules of this section, generally requiring issuance of Forms 1099B regarding their sale and the basis of such item sold.

The *applicable date* for digital assets for these rules (generally the date of acquisition on or after which the basis of the asset must be reported on the Form 1099B when the asset is sold) is January 1, 2023 for any *digital asset*,²⁷ which is in line with the effective date of these rules. The first reports will be required for calendar year 2023 which are to be filed by February 15, 2024.

IRC §6045A is modified by the Act to add the following reporting requirements for affected entities handling *digital assets*—

(d) Return requirement for certain transfers of digital assets not otherwise subject to reporting.—Any broker, with respect to any transfer (which is not part of a sale or exchange executed by such broker) during a calendar year of a covered security which is a digital asset from an account maintained by such broker to an account which is not maintained by, or an address not associated with, a person that such broker knows or has reason to know is also a broker, shall make a return for such calendar year, in such form as determined by the

²³ IRC §6045(g)(3)(D) as modified by the Infrastructure Investment and Jobs Act

²⁴ IRC §6045(c)(1)(D) as modified by the Infrastructure Investment and Jobs Act

²⁵ IRC §6045(c)(1)(C) as modified by the Infrastructure Investment and Jobs Act

²⁶ IRC §6045(g)(3)(B)(iv) as modified by the Infrastructure Investment and Jobs Act

²⁷ IRC §6045(g)(3)(C)(iv) as modified by the Infrastructure Investment and Jobs Act

Secretary, showing the information otherwise required to be furnished with respect to transfers subject to subsection (a).²⁸

IRC §6045(a) defines transfers subject to its requirements as follows—

Every applicable person which transfers to a broker (as defined in section 6045(c)(1)) a covered security (as defined in section 6045(g)(3)) in the hands of such applicable person shall furnish to such broker a written statement in such manner and setting forth such information as the Secretary may by regulations prescribe for purposes of enabling such broker to meet the requirements of section 6045(g).²⁹

Failure to file the required information returns and provide them to customers will subject the entity to penalties. However, such penalties can be waived for reasonable cause under IRC §6724.³⁰

The Act provides that *digital assets* will be treated as cash for purposes of the cash transaction reporting rules of IRC §6050I.³¹ The section requires trade or businesses that receive cash transactions in excess of \$10,000 to report such transactions to the Treasury, so customers will not be able to avoid reporting by using digital assets to purchase items and keep the transaction from being reported to the U.S. government.

The Act contains a special “rule of construction” that provides:

(d) Rule of construction.—Nothing in this section or the amendments made by this section shall be construed to create any inference, for any period prior to the effective date of such amendments, with respect to—

(1) whether any person is a broker under section 6045(c)(1) of the Internal Revenue Code of 1986, or

(2) whether any digital asset is property which is a specified security under section 6045(g)(3)(B) of such Code.³²

Termination of Employee Retention Credit for Employers Subject to Closure Due to COVID-19. (IRC §3134, Act §80604)

Effective date.—The amendments made by this section shall apply to calendar quarters beginning after September 30, 2021.

The Act denies access to the employee retention tax credit in the fourth quarter of 2021 to employers other than those that qualify as “recovery startup businesses” under IRC

²⁸ IRC §6045A(d) as modified by the Infrastructure Investment and Jobs Act

²⁹ IRC §6045A(a) as modified by the Infrastructure Investment and Jobs Act

³⁰ IRC §6724(d)(1)(B)(xxvii) as modified by the Infrastructure Investment and Jobs Act

³¹ IRC §6050(d)(3) as modified by the Infrastructure Investment and Jobs Act

³² Infrastructure Investment and Jobs Act §80602(d)

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§3134(c)(5). Such employers that continue to qualify for the final quarter of 2021 are those that —

- Began carrying on any trade or business after February 15, 2020, and
- For which the average annual gross receipts of such employer (as determined under rules similar to the rules under IRC §448(c)(3)) for the 3-taxable-year period ending with the taxable year which precedes the calendar quarter for which the credit is determined does not exceed \$1,000,000.³³

Such businesses will qualify as recovery startup businesses even if they were subject to a full or partial suspension of their business (as defined by IRC §3134(c)(2)(A)(ii)(I)) or had a decline in gross receipts of greater than 20% in either the 3rd or 4th quarter of 2021 as compared to the same quarter in 2019 (see IRC §3134(c)(2)(A)(ii)(II)).³⁴

Originally if the employer had met at least one of those tests to qualify for the credit, they no longer could claim the credit as a recovery startup business for the quarter. But as those options to qualify for the credit no longer exist for the fourth quarter of 2021, the Act no longer looks to those tests to see if an entity is barred from being a recovery startup business for the fourth quarter of 2021.

Although the Senate passed the Act containing this provision well before the 4th quarter of 2021 began, issues in the House caused that chamber's vote in favor of the Act to be delayed until late in the evening of November 5, 2021, over a month after the 4th quarter began. For now, it's not clear if employers who would have qualified due to the drop in gross receipts tests or full/partial suspension test and reduced their payroll tax deposits prior to passage of the Act will face late deposit penalties for the payroll taxes they failed to deposit.

While the law as written would appear to apply those penalties, IRS relief in this area seems very likely, though not assured. Advisers should watch for IRS guidance on this issue to see if any relief is offered and, if so, when the employers who did reduce their payroll tax deposits will be required to pay over the funds that they had not paid over in anticipation of receiving the tax credit for the fourth quarter of 2021.

³³ IRC §3134(c)(5) as modified by the Infrastructure Investment and Jobs Act

³⁴ IRC §3134(c)(5) as modified by the Infrastructure Investment and Jobs Act