



April 2, 2018

The Honorable David J. Kautter  
Assistant Secretary for Tax Policy  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

Mr. William M. Paul  
Acting Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

**Re: Request for Immediate Guidance Regarding IRC Section 274 – Disallowance of Certain Entertainment, Etc., Expenses (Pub. L. No. 115-97, Sec. 13304)**

Dear Messrs. Kautter and Paul:

The American Institute of CPAs (AICPA) respectfully requests that the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) provide immediate guidance on the changes to Internal Revenue Code (IRC or “Code”) section 274 as enacted under Pub. L. No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA) related to the disallowance of entertainment, amusement, recreation and qualified transportation fringe expenses. Taxpayers require clarification in order to account for the changes in deductibility of these items and revise their accounting systems and expense and reimbursement policies and to comply with them on their 2018 tax returns and financial statements.

Specifically, the AICPA recommends that Treasury and the IRS provide guidance on the following issues related to the changes to section 274:

- I. Client-Related Business Meals
  1. With Current and Prospective Clients Incurred at Times Other Than Before, During or After an Entertainment Event
  2. With Current and Prospective Clients Incurred Before, During or After an Entertainment Event
- II. Employer-Provided Business Meals
  1. Related to Restaurant and Food Service Workers
  2. Definition of Facility
- III. Employer-Provided Snacks and Other Food Products
- IV. Employer-Hosted Recreational, Social, and Similar Activities
- V. Advertising

- VI. Charitable Contributions
- VII. Qualified Transportation
- VIII. Transportation and Commuting
- IX. Membership Dues

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please contact me at (408) 924-3508, or [annette.nellen@sjsu.edu](mailto:annette.nellen@sjsu.edu); Kathy Petronchak, Chair, AICPA Meals and Entertainment Task Force, at (713) 548-2281, or [kathy.petronchak@alliantgroup.com](mailto:kathy.petronchak@alliantgroup.com); or Kristin Esposito, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9241, or [kristin.esposito@aicpa-cima.com](mailto:kristin.esposito@aicpa-cima.com).

Sincerely,



Annette Nellen, CPA, CGMA, Esq.  
Chair, AICPA Tax Executive Committee

cc: The Honorable David J. Kautter, Acting Commissioner, Internal Revenue Service  
Mr. Thomas A. Barthold, Chief of Staff, Joint Committee on Taxation  
Mr. Robert Neis, Benefits Tax Counsel, Department of the Treasury  
Mr. Stephen LaGarde, Attorney-Advisor, Office of Benefits Tax Counsel, Department of the Treasury  
Mr. Christopher W. Call, Attorney-Advisor (Tax Legislation), Office of Tax Policy, Department of the Treasury  
Ms. Veena Murthy, Legislation Counsel, Joint Committee on Taxation

**AMERICAN INSTITUTE OF CPAs**

**Request for Immediate Guidance Regarding  
IRC Section 274 – Disallowance of Certain Entertainment, Etc., Expenses  
(Pub. L. No. 115-97, Sec. 13304)**

**Developed by the AICPA Meals and Entertainment Task Force**

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**AMERICAN INSTITUTE OF CPAs**

**Request for Immediate Guidance Regarding  
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**I. Client-Related Business Meals**

Overview

It is a common business practice for a taxpayer to incur expenditures for food and/or beverages furnished outside of a formal office or business setting. Generally, the participants in the meal are actively engaged in business discussions or negotiations. These expenses are primarily incurred for the purpose of furthering the taxpayer’s trade or business and not for social or personal reasons.

Prior to the enactment of Pub. L. No. 115-97, commonly referred to as the Tax Cuts and Jobs Act (TCJA), under Internal Revenue Code (IRC or “Code”) section 274(k),<sup>1 2</sup> taxpayers were entitled to a 50% deduction for expenses related to business meals that were not lavish or extravagant under the circumstances and the taxpayer or an employee of the taxpayer was present.

Per section 274(a)(1)(A),<sup>3</sup> entertainment expenses associated with a taxpayer’s trade or business are no longer deductible under the TCJA, which has caused taxpayer confusion as to the deductibility of business meals. Therefore, taxpayers require definitive assurance that the deductibility of business meals are not limited due to the changes to section 274(a)(1)(A).

**1. With Current and Prospective Clients Incurred at Times Other Than Before, During or After an Entertainment Event**

Recommendation

The American Institute of CPAs (AICPA) requests that the United States Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) confirm that business meals, which (1) take place between a business owner or employee and a current or prospective client; (2) are not lavish or extravagant under the circumstances; and (3) where the taxpayer has a reasonable expectation of deriving income or other specific trade or business benefit from the encounter, are not disallowed under section 274(k).

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<sup>1</sup> Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

<sup>2</sup> See section 274(k) Business meals. – section 274(k)(1) In general. – No deduction shall be allowed under this section chapter for the expense of any food or beverage unless– 274(k)(1)(A) such expense is not lavish or extravagant under the circumstances, and section 274(k)(1)(B), the taxpayer (or an employee of the taxpayer) is present at the furnishing of the food or beverages.

<sup>3</sup> See section 274(a)(1), In general – No deduction otherwise allowable under this chapter shall be allowed for any item –. See also section 274(a)(1)(A), Activity – with respect to an activity which is of a type generally considered to constitute entertainment, amusement, or recreation.

## Analysis

Due to the significant number of taxpayers who in the normal course of business, have business-related discussions in a non-formal setting where food and beverages are furnished, it is critical that taxpayers receive immediate confirmation that business meals between a taxpayer (or employee of the taxpayer) and current or prospective clients are not disallowed under section 274(k).

The following examples illustrate scenarios<sup>4</sup> in which the deduction under section 162 should continue to apply without disallowance pursuant to section 274(k):

### Example 1

A business owner holds a meeting with a current client at a restaurant. During the meal, several topics are discussed including the health of each other and their families, recent political developments, business news affecting the client's industry, as well as the current and expected future projects for the client. The meal consists of food and beverages that are not lavish or extravagant.

Since the business owner is present at the time that the food and beverages are furnished, the cost of the food and beverages is not lavish or extravagant and discussions with a business purpose occur, the taxpayer is entitled to a 50% deduction for the cost of the meals.

### Example 2

An employee of a taxpayer holds a meeting with a prospective client at a restaurant. During the meal, several topics are discussed including recent political developments, business news affecting the client's industry, and the state of the prospective client's business. The meal consists of food and beverages that are not lavish or extravagant.

Since an employee of the business owner is present at the time that the food and beverages are furnished, the cost of the food and beverages is not lavish or extravagant and discussions with a business purpose occur, the taxpayer is entitled to a 50% deduction for the cost of the meals.

## **2. With Current or Prospective Clients Incurred Before, During or After an Entertainment Event**

## Recommendation

The AICPA recommends that Treasury and the IRS provide guidance stating that business meals, *which are separately charged* while a taxpayer or an employee of the taxpayer attends an entertainment event, remain 50% deductible under the rules of sections 274(n) and 162.

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<sup>4</sup> All examples provided in this letter are meant as a reference and are not inclusive of every deductible scenario or area in need of guidance.

## Analysis

A significant number of taxpayers in the normal course of business extend business-related discussions to a setting which includes elements of both business and entertainment. It is critical that taxpayers have immediate confirmation that business meals furnished to current and prospective clients before, during or after an entertainment event remain allowable deductions under section 162 pursuant to the rules of section 274(n) if separately charged either on one or more bills/invoices. If the cost of the meals is not separately charged and is included in the total cost of the event venue, then it should not qualify as a deduction as a business meal.

The following examples illustrate scenarios which should remain deductible under section 162, pursuant to the rules of 274(n):

### Example 1

A business owner or employee of the business takes a current or prospective client to a sporting event. They dine at a restaurant outside of the event venue directly preceding or following the sporting event. During the meal, several topics are discussed including the health of each other and their families, recent political developments, business news affecting the client's industry, as well as current and prospective projects for the client or prospective client. The meal consists of food and beverages that are not lavish or extravagant.

Since the business owner (or an employee of the business owner) is present at the time that the food and beverages are furnished, the cost of the meal is separately charged from the cost of the sporting event, the cost of the food and beverages is not lavish or extravagant and discussions with a business purpose occur, the taxpayer is entitled to a 50% deduction for the cost of the meals.

### Example 2

A business owner or employee of the business, takes a current or prospective client to a sporting event. They leave their seats during the sporting event to dine at a restaurant inside the event venue. During the meal, several topics are discussed including the health of each other and their families, recent political developments, business news affecting the client's industry, and current and prospective projects for the client or prospective client. The meal consists of food and beverages that are not lavish or extravagant.

Since the business owner (or employee of the business owner) is present at the time that the food and beverages are furnished, the cost of the meal is separately charged from the cost of the sporting event and the cost of the food and beverages is not lavish or extravagant and discussions with a business purpose occur, the taxpayer is entitled to a 50% deduction for the cost of the meals.

## **II. Employer-Provided Business Meals**

### **1. Related to Restaurant and Food Service Workers**

#### Overview

It is a common business practice for employers of restaurant and food service workers to provide meals, served on its business premises, at no cost or at a discount, to their employees, for the convenience of the employer. Prior to the enactment of the TCJA, the value of such a meal was 100% deductible to the employer.

Upon enactment of the TCJA, section 274(n)<sup>5</sup> limits the deduction for employer-provided meals under section 119 to 50% of the amount paid from 2018 through 2025 and new section 274(o)<sup>6</sup> disallows such deductions after December 31, 2025.

#### Recommendation

The AICPA recommends that for administrative convenience and ease of compliance, Treasury and the IRS provide a safe harbor method for an employer to calculate the nondeductible portion of the cost of food or beverages provided at no cost or at a discount to their employees who are required to remain on the business premises. An example of a possible safe harbor is a flat dollar amount per employee, similar to the existing per diem rules which vary by geographic location and season.

#### Analysis

In order to comply with the changes to the deductibility of employer-provided meals, employers must track the cost of the meal to ensure that only 50% of the cost of the meal is deducted from 2018-2025 and that no tax deduction is taken beginning in 2026. The application of a safe harbor method will facilitate compliance with the new rules.

### **2. Definition of Facility**

#### Overview

It is a common business practice for employers to serve meals to their employees at an employer-provided eating facility. Previously, an employer was entitled to a deduction of 100% of the cost of such meals if they were for the convenience of the employer.

Under section 274(n) of the TCJA, meals are 50% deductible after December 31, 2017. Also, per new section 274(o) employer-provided meals are non-deductible after December 31, 2025, including the costs of the eating facility.

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<sup>5</sup> See section 274(n), Only 50 percent of meal expenses allowed as deduction.

<sup>6</sup> See section 274(o), Meals provided at convenience of employer. – “No deduction shall be allowed under this chapter for – (1) any expense for the operation of a facility described in section 132(e)(2), and any expense for food or beverages, including under section 132(e)(1), associated with such facility, or...”

## Recommendations

The AICPA recommends that Treasury and the IRS define the term “facility” for purposes of new section 274(o). We suggest continuing to use the Treas. Reg. § 1.132-7(a)(2) definition of “employer-operating eating facility” for this purpose.

The AICPA also suggests providing an exception to section 274(o) for facilities in which over 90% of the meals are provided to employees of an employer while the employees are traveling away from home overnight and are otherwise deductible meal expenses.

## Analysis

An exception is appropriate in the case of an employer-provided training or conference facility containing an on-site cafeteria where over 90% of the meals are served to employees or others who are traveling overnight away from home. Since employee business travel is involved, the employer is otherwise entitled to deduct 50% of the cost of the reimbursement of the employee meals if the employee eats at a restaurant other than one that is employer-provided. The deduction should continue if the employee eats at the employer-provided facility.

### Example

An employer customarily sends their employees from many different geographic areas to attend training courses at an employer-owned or leased training or conference facility. The campus contains training rooms and an on-site cafeteria, where the employees are able to eat breakfast, lunch and dinner while attending training or business meetings. Over 90% of the meals served at the on-site cafeteria are to employees of the employer who are away from home overnight. Meals are also served to instructors who are not employees and to other business associates.

Since the meals are provided during travel away from home overnight for business purposes, the employer is entitled to deduct 50% of the costs of providing the meals, including the cost of the employer-provided eating facility.

## **III. Employer-Provided Snacks and Other Food Products**

### Overview

It is a common business practice for employers to provide its employees coffee, soft drinks, bottled water and snacks on its business premises. These snacks are often provided in a pantry, break room or copy room. Under prior law, the value of employer-provided snacks and beverages was 100% deductible to the employer under the rules of section 274(e)(1) and 274(n)(2)(B).

Upon enactment of the TCJA, under the rules of section 274 (n),<sup>7</sup> certain employer-provided meals are 50% deductible from 2018 through 2025. Meals provided in employer operated eating facilities (described in section 132(e)(2)) or for the convenience of the employer (as described in

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<sup>7</sup> See section 274(n), Only 50 percent of meal expenses allowed as deduction.



section 119, under new section 274(o))<sup>8</sup> are non-deductible after December 31, 2025. Expenses for recreational, social or similar activities are not subject to these new disallowances. However, it is unclear whether the employer beverage and snack expenses meet the exception and are 100% deductible, 50% deductible as food or beverages provided under the *de minimis* rules or disallowed under section 274(o).

Since providing snacks and beverages to employees is a common business practice to enhance worker morale and productivity, businesses need clarity as to the deductibility of these expenses.

### Recommendations

The AICPA recommends that Treasury and the IRS confirm that snacks and beverages provided to employees in break rooms, pantries or copy rooms are 50% deductible under section 274(n)(1). Alternatively, the section 274(e)(4) exception to the section 274(n) rules may apply, which would entitle the employer to a 100% deduction.

The expenses related to employee snacks and beverages are not taxable compensation as *de minimis* fringe benefits. Since the snacks are sometimes provided in situations (e.g., break rooms) where employees are socializing, the section 274(e)(4) exception for recreational type employee expenses may also apply in certain circumstances, making the expenses 100% deductible.

### Analysis

The changes to section 274(n) and the addition of section 274(o) by the TCJA have created questions related to the deduction of employer-provided snacks and beverages provided to employees in locations other than an employer provided eating facility as described in section 132(e)(2). Therefore, we request guidance regarding the deductibility of these amounts.

## **IV. Employer-Hosted Recreational, Social and Similar Activities**

### Overview

Many employers host recreational, social, and similar activities for their employees and their families (e.g., holiday parties, picnics, etc.) to show employee appreciation, boost morale and help employees get to know each other better. Oftentimes, companies take the opportunity at these “all employee” events to showcase business, individual or team accomplishments.

Under prior law pursuant to section 274(e)(4),<sup>9</sup> an employer-provided social or recreational event was not limited by section 274(n) and the employer was entitled to deduct 100% of the costs incurred to host a recreational, social or similar event as long as the activity was open to all employees and did not discriminate in favor of highly compensated employees.

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<sup>8</sup> See section 274(o), Meals provided at convenience of employer. – “No deduction shall be allowed under this chapter for – (1) any expense for the operation of a facility described in section 132(e)(2), and any expense for food or beverages, including under section 132(e)(1), associated with such facility, or...”

<sup>9</sup> Section 274 (e)(4) allows a deduction for “expenses for recreational, social, or similar activities (including facilities therefor) primarily for the benefit of employees (other than employees who are highly compensated employees...)”

While section 274(e)(4) remains in place, per section 274(a)(1)(A), entertainment expenses are no longer deductible under the TCJA. The loss of deductibility of entertainment expenses is triggering questions as to the deductibility of expenses related to an employer-provided social outing for their employees.

### Recommendation

The AICPA recommends that the IRS confirm that certain expenditures (e.g., meals, venue, and related entertainment) incurred by an employer in hosting a holiday party or similar activity for their employees and employees' families remain 100% deductible pursuant to the section 274(e)(4) exception to the section 274(n) rules.

### Analysis

Although section 274(e)(4) was not changed by the TCJA, the loss of deductibility of entertainment expenses has created uncertainty as to the continued deduction of these types of expenditures. Therefore, taxpayers require definitive assurance that the deductibility of expenditures (e.g., venue, contracted entertainment) related to hosting a recreational, social or other similar activity are not limited by section 274(a)(1)(A), which was changed by the TCJA.

The following example illustrates a scenario in which the costs associated with an employer-hosted event should remain deductible to the employer under section 274(e)(4):

#### Example

A business hosts a nondiscriminatory holiday party at a children's museum for all of its employees and the employees' families. The children and grandchildren of the employees are specifically invited to attend the party. The business hires a clown to entertain the children and create balloon animals. The business has the party catered and serves pizza and juice.

The entire cost of the holiday party is fully deductible as a business expense since the expenditures all qualify as integral elements of a nondiscriminatory holiday party under section 274(e)(4).

## **V. Advertising**

### Overview

It is common for a business to advertise using a variety of methods in order to promote its products and/or services. There are times when an advertising activity is integrated with an entertainment event.

Prior to the passage of the TCJA, advertising expenses integrated with an entertainment event were deductible under section 162(a). However, since the TCJA disallows the deductibility of

entertainment expenses, there is taxpayer confusion as to the continued deductibility of advertising expenses that are associated with an entertainment event.

### Recommendation

The AICPA requests that Treasury and the IRS confirm that the treatment of expenditures for advertising, although related to an entertainment event, remain deductible under section 162.

### Analysis

Under section 162(a), taxpayers are allowed a deduction for all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. A taxpayer can generally deduct reasonable advertising expenses that are directly related to its business activities. These expenditures, while primarily directed toward current sales of a taxpayer's product are considered ordinary within the meaning of section 162 and are not capitalized even though some lasting benefit is incidental to the advertising program.

The amounts specified for advertising costs as part of an otherwise non-deductible entertainment expense should remain deductible regardless of the current language in Treas. Reg. § 1.274-2(b)(1)(ii)<sup>10</sup> concerning the definition of entertainment.

The following example illustrates a scenario for which the advertising expenses should remain deductible under section 162, although an element of entertainment exists:

#### Example

Company A is a sponsor for a charitable sporting event. In exchange for a sponsorship payment, Company A receives a billboard with its name displayed at the event. It also receives 4 tickets to the event for its employees. The cost of a billboard is \$1,000 and the cost of each ticket is \$200. Company A paid \$2,000 for the sponsorship.

Company A is entitled to a \$1,000 deduction, under section 162, for the cost of the billboard as an advertising expense, though the cost of the tickets is generally nondeductible.

## **VI. Charitable Contributions**

### Overview

The sponsorship of charitable events represents a significant funding source for qualified nonprofit organizations and an important marketing strategy for businesses. The identification with a

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<sup>10</sup> See Treas. Reg. § 1.274-2(b)(1)(ii). Objective test. An objective test shall be used to determine whether an activity is of a type generally considered to constitute entertainment. Thus, if an activity is generally considered to be entertainment, it will constitute entertainment for all purposes of this section and section 274(a) regardless of whether the expenditure can also be described otherwise, and even though the expenditure relates to the taxpayer alone. This objective test precludes arguments such as that "entertainment" means only entertainment of others or that an expenditure for entertainment should be characterized as an expenditure for advertising or public relations.

charitable activity is valuable to businesses seeking to boost publicity, to expand markets, and to enhance its image as a supporter of its community in the field of sports, arts, music, and/or cause-related events.

A business is entitled to deduct payments made for sponsorship of a charitable activity if the expenditure meets the profit motive tests under section 162, which allows deductions for ordinary and necessary trade or business expenses paid or incurred during a taxable year. Additionally, under section 170, payments made by a taxpayer to a nonprofit organization are deductible under the rules for charitable contributions. Therefore, there are situations when a donor who makes a contribution to a nonprofit organization is entitled to a deduction under section 162(a) rather than under section 170.

Since the TCJA disallows the deductibility of entertainment expenses, there is uncertainty as to the continued deductibility of expenses related to charitable sponsorships when an element of entertainment is present.

### Recommendations

The AICPA recommends that Treasury and the IRS provide guidance stating that when a business makes a charitable contribution to a nonprofit organization in support of a charitable event, the contribution qualifies as an advertising expense under section 162(a) and is not limited by the charity's actual use of the funds for expenditures in support of the event (e.g., to pay for an entertainment venue or performers).

The AICPA also recommends that the entire contribution to the charity qualifies as a deductible expense when the donor otherwise meets the test of business purpose under section 162(a).

### Analysis

The costs incurred by businesses in support of charitable events are often substantial. Although section 162 and section 170 were not changed by the TCJA, taxpayers require confirmation that expenses incurred by a business in relation to a charitable sponsorship in which an element of entertainment is present, remain deductible under section 162(a).

#### Example

The mission of a section 501(c) organization is to share and showcase innovative and compelling stories from Native American perspectives through film, art, music and literature celebrating the diversity and vitality of contemporary Native American culture in our community.

The section 501(c) organization hosts a charitable event in which it rents a playhouse stage venue. It hires and solicits Native American volunteer performers in the fields of music, performing arts, and literature. It sells tickets to the public.

The section 501(c) organization uses a business sponsor's donation in support of the event (e.g., to pay for advertising, leasing the venue, compensating performers, printing advertising and program materials). The business sponsor meets the tests under section 162(a) of expenditures related to the business that have a reasonable expectation to commensurately further its business financially.

The entire contribution by the business to the charity qualifies as a business expense since business donor otherwise meets the business purpose test under section 162(a).

## **VII. Qualified Transportation**

### Overview

Many employers provide transportation benefits (e.g., parking, transit passes, etc.) to their employees, the value of which is often excludable from the employees' income under section 132(f). Prior to the enactment of the TCJA, an employer was entitled to deduct certain expenses related to the value of providing its employees with parking or transit passes by paying for qualified transportation directly, allowing employees to make salary reduction contributions to pay for it, or a combination of both.

Under the TCJA, section 274(a)(4) disallows the deduction of expenses associated with the section 132(f) qualified transportation exclusion. If the employer provides free parking to employees or allows them to pay for parking with pre-tax salary reduction amounts, the employee exclusion will apply, nevertheless, the expenses are no longer deductible to the employer.

Under Treas. Reg. § § 1.61-21(a) and (b) and section 132(f), if the fair market value (FMV) of parking or transit provided by an employer to its employees is above the section 132(f) limits, the employee is taxed on the value of the qualified parking benefit received less the excludible amounts.

Under Treas. Reg. § 1.162-25T, when an employer provides a fringe benefit to an employee and the cost to the employer is lower than the FMV of the benefit to the employee, the employer is only entitled to take a deduction up to the cost of providing the benefit. For example, if an employer owns a parking lot in an area where the FMV of parking is \$100 per month and the costs of owning and maintaining the parking lot is \$40 per month, Treas. Reg. § 1.162-25T limits the employer's deduction to the costs of providing the benefit, rather than allowing the employer to claim a deduction equal to the FMV of the benefit to the employee.

If the employer purchases parking space or transit passes at FMV, it appears that the loss of the deduction is limited to the section 132(f) amount, since any amount above the section 132(f) amount is considered taxable compensation to the employee.

Taxpayers need clarification as to the limitation on deductibility of transportation expenses where section 132(f) provides for a salary reduction arrangement (e.g., the employee elects to reduce salary by \$100 per month under section 132(f) to pay for the use of the parking lot, while the employer's cost to provide the benefit is \$40 per month).

## Recommendations

The AICPA recommends that Treasury and the IRS provide guidance related to the calculation of the loss of the transportation deduction, including the rules under Treas. Reg. § 162-25T, due to the changes in section 274(a)(4), as follows:

- a. Confirm that if an employee is partially taxed on the FMV of parking (for amounts above the section 132(f) limit), the employer is entitled to a 100% tax deduction for the amount includable in taxable compensation.
- b. Provide that to the extent that part or all of the section 132(f) exclusion is related to a salary reduction arrangement under which the employee pays for the parking or transit passes on a pre-tax basis, the amount subject to the section 132(f) salary reduction arrangement (which is not paid as salary) is nondeductible under section 274(a)(4). However, if the pre-tax salary reduction amount exceeds the employer's cost of providing the parking, only the employer's cost of providing the parking is nondeductible.
- c. Pursuant to Notice 94-3, where an area that has ample parking available to employees, clients, contractors and other visitors at no charge, such as where an employer is a tenant in a mall and the mall, as part of the tenancy arrangement, provides free parking to all employees, customers and contractors (with no preferential parking), we suggest clarifying that there is no loss of deduction under section 274(a)(4). In this case, the employee has no taxable compensation and does not use section 132(f) because the value of the parking provided is \$0.

## Analysis

The TCJA made changes to the deductibility of transportation expenses under section 274(a)(4) that require further clarification. We provide the following examples to illustrate:

### Example 1

Employer provides free parking to employees in a leased parking garage. Under a long-term lease, the employer pays \$50 per month for each employee parking space. The FMV of parking in the surrounding area is \$100 per month. The employer pays no other costs for use of the garage and the employees do not pay for parking. The amount excluded from employee income under section 132(f) is \$100 per month.

Since the employer's costs are limited to \$50 per month per space, the employer's loss of deduction is limited to the \$50 per month per space cost.

### Example 2

Employer provides parking to employees at a leased parking garage. Under the long-term lease, the employer pays \$50 per month for each parking space. The cost of parking in the surrounding area is \$100 per month. The employees make salary reduction elections under

section 132(f) to pay \$75 for the parking (and the employer uses section 132(f) to exclude the remaining FMV of the parking from the employees' income).

The employer's loss of deduction as a qualified transportation fringe is the employer's cost, which is \$50. In addition, the employer is not entitled to deduct the employee's salary reduction amount of \$75.

### Example 3

Employer provides parking to employees at a parking garage owned by the employer. The employer's usual costs for providing parking to employees is \$50 per month for each parking space. Parking in the surrounding area is \$100 per month. The employees make salary reduction elections under section 132(f) to pay \$75 for the parking and the employer uses section 132(f) to exclude the remaining FMV of the parking from the employees' income.

In 2020, the employer must make major repairs on the garage and the employer's cost for the parking for a month increases to \$110. However, the FMV of parking in the area is still \$100.

The employer's loss of deduction is limited to no more than the FMV of the parking or the amount that is excludable from employee income under section 132(f), which, in this example is \$100 per space.

## **VIII. Transportation and Commuting**

### Overview

Many employers cover a part or all of their employees' transportation and commuting costs related to travel between the employee's residence and place of employment. Under prior law, these costs were deductible by the employer under section 162 and nontaxable to the employee up to certain dollar limits as qualified transportation fringe benefits.

New section 274(l), under the TCJA repealed an employer's deductions for the expenses incurred for providing transportation, payment or reimbursement to the employee, in connection with travel between the employee's residence and place of employment. There is an exception in section 274(l)(1) for expenses paid that are necessary for ensuring the safety of the employee.

Under Treas. Reg. § 1.132-6(d)(ii), occasional transportation from work to home, generally during overtime hours, paid or reimbursed by the employer is excluded from an employee's income (e.g., an employee usually takes the train but occasionally works beyond 9:00 pm, and on those days the employer pays for their alternative transportation expenses for commuting home). The amount paid by the employer is excluded from the employee's income and is generally viewed as being provided for safety reasons.

Additionally, Treas. Reg. § 1.132-6(d)(iii) provides that where an employer location is in an unsafe area (determined based on the crime statistics), the employer can provide routine transportation from the employer's worksite to another location (such as a transit station), and the employees are charged, or have imputed taxable income, of \$1.50 per ride. However, the remaining costs of the transportation are tax-free to the employees. The amount paid by the employer is also viewed as a safety exception.

Finally, under Treas. Reg. § 1.61-21, where the employer pays for an employee's commute that is not excluded under section 132, the FMV of the benefit provided is treated as taxable compensation.

It is unclear whether section 274(l) applies to limit the tax deduction when employee commuting expenses are included in the employee's taxable compensation. It is also unclear when and how the safety rules apply.

### Recommendations

The AICPA requests that Treasury and the IRS clarify that to the extent an employer includes the value of employee commuting costs in the employee's taxable compensation, the amount included in employee taxable income is tax deductible as compensation (similar to the section 1.132-5(t) regulations providing for a tax deduction for the costs of spousal travel, provided the employer timely includes the cost of spousal travel in the employee's taxable compensation).

The AICPA also requests that Treasury and the IRS clarify the meaning of the language in section 274(l)(1), "*except as necessary for ensuring the safety of the employee.*" We suggest tying the definition of the term to the language in Treas. Reg. § 1.132-6(d)(2)(ii)<sup>11</sup> and (iii) and to the extent that amounts are excluded from income under these sections, the amounts remain fully tax deductible.

Likewise, to the extent that an employee is under an independent security study demonstrating business-oriented security concerns (following the requirements of Treas. Reg. § 1.132-5(m)), the cost of providing transportation from the home to the office pursuant to the recommendations in the security study are "necessary for ensuring the safety of the employee" and thus still deductible.

The AICPA also suggests that Treasury and the IRS provide guidance on the implementation of section 274(l) in general.

### Analysis

Currently, there is an exception from the general rule for employers that incur transportation or commuting expenses while ensuring the safety of their employees. However, the language,

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<sup>11</sup> Per Treas. Reg. § 1.132-6(d)(2)(ii), "...If, for a bona fide business-oriented security concern, an employer provides an employee vehicle transportation, that is specially designed for security (for example, the vehicle is equipped with bulletproof glass and armor plating), and the conditions of § 1.132-5(m) are satisfied, the value of the special security design is excludable from gross income as a working condition fringe if the employee would not have had such special security design but for the bona fide business-oriented security concern."



“except as necessary for ensuring the *safety of the employee*,” without specific examples, is challenging for taxpayers to implement.

The existing language in Treas. Reg. § 1.132-6(d)(2)(ii) and Treas. Reg. § § 1.132-6(d)(2)(iii)(A),<sup>12</sup> (B)<sup>13</sup> and (C)<sup>14</sup> provide guidance that Treasury and the IRS should consider as the basis for the implementation of new section 274(l)(1) and to clarify the term “*safety of the employee*.” A narrower interpretation of 274(l)(1) could conflict with the existing *de minimis* fringe benefit rules, place unnecessary recordkeeping requirements on taxpayers, and penalize those subject to it.

The following examples illustrate scenarios in which the cost of transportation incurred is for the “*safety of the employee*” and should qualify as deductible to the employer per Treas. Reg. § 1.132-6(d)(2)(ii) and Treas. Reg. § § 1.132-6(d)(2)(iii)(A), (B), and (C):

*Example 1 (related to the definition of “safety of the employee”)*

A taxpayer’s employees are asked to work outside of their normal working hours to finalize a client project with a specific deadline. Due to working the extra hours, the employees leave the office several hours later than normal. The employees normally drive to and from work and park in a garage that is located several blocks from the office but is lower in cost than garages closer to the office. There is no security in the lower cost parking garage that is farther from the office.

In this example, the conditions are unsafe for the employees and the employer is allowed a tax deduction for the excess cost of alternate transportation arrangements (such as parking in a higher cost garage closer to the office or providing a car service) incurred on behalf of its employees.

*Example 2 (related to the definition of “safety of the employee”)*

A taxpayer requires their employees to work beyond normal working hours on an infrequent basis. The employees use public transportation to and from work. The transit stop is located several blocks from the office. There is no security provided to walk the employees to the transit stop and no police presence in the area.

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<sup>12</sup> Per Treas. Reg. § 1.132-6(d)(2)(iii)(A), If an employer provides transportation (such as taxi fare to an employee for use in commuting to and/or from work because of unusual circumstances, and because, based on the facts and circumstances, it is unsafe for the employee to use other available means of transportation, the excess of the value of each one-way trip over \$1.50 commute is excludable from gross income. The rule of this paragraph is not available to a control employee as defined in § 1.61-21(f)(5) & (6).

<sup>13</sup> Treas. Reg. § 1.132-6(d)(2)(iii)(B), Unusual circumstances are determined with respect to the employee receiving the transportation and are based on all facts and circumstances. An example of unusual circumstances would be when an employee is asked to work outside of his normal work hours (such as being called to the workplace at 1 am when the employee normally works from 8 am to 4 pm). Another example of unusual circumstances is a temporary change in the employee’s work schedule (such as working from 12 midnight to 8 am rather than from 8 am to 4 pm for a two-week period).

<sup>14</sup> Per Treas. Reg. § 1.132-6(d)(2)(iii)(C), factors indicating whether it is unsafe for an employee to use other available means of transportation are history of crime in the geographic area surrounding the employee’s workplace or residence and the time of day which the employee must commute.

In this example, the conditions are unsafe for the employees and the employer is allowed a tax deduction for the excess cost of alternate transportation arrangements (such as parking in a garage closer to the office than the public transportation stop or providing a car service) incurred on behalf of its employees.

Example 3 (related to the definition of “safety of the employee”)

An employer assigns an employee to an area that is considered unsafe (subject to State Department warnings, and where the kidnapping risk as judged by an independent safety study is high). The employer provides a trained driver to take the employee to and from a safe living area to the worksite while the employee is posted to the dangerous area. The employer follows the recommendations of the security study.

In this example, the cost of the transportation, pursuant to the independent security study, is for the safety of the employee and is within the safety exclusion under section 274(l).

Example 4 (related to general section 274(l) commuting rules)

An employer occupies several buildings within an extended work area. The employer provides a transit bus that generally moves in a set route between the various employer buildings during the work day. In the morning and evening, the bus also stops at a nearby transit station.

In this example, the cost of the transit bus that travels between the extended work locations during the day is not part of the employee “commuting” costs. However, the costs of the additional travel to the transit station are section 274(l) commuting costs subject to the section 274(l) disallowance. The employer will need to determine the percentage of the total bus costs and the costs of providing the trips to the transit station; the portion related to the cost of the trips to the transit station are disallowed.

## **IX. Membership Dues**

### Overview

Many professionals join business leagues, trade associations and other professional organizations (e.g., American Institute of CPAs) to enhance their professional development by widening their network, keeping up to date on the latest industry innovations, research and trends, and furthering their career. They also join civic-minded organizations such as the Kiwanis and Rotary clubs, to give back to their community or serve others. In order to join an organization, a participant is generally required to pay membership dues.

The TCJA repealed section 274(a)(2)(c), which allowed a deduction for club dues if the taxpayer established that the facility was used primarily for the furtherance of the taxpayer’s trade or business and the item was directly related to the active conduct of the trade or business. The repeal of this section has created confusion among taxpayers as to whether Treas. Reg. § 1.274-

(2)(a)(2)(iii) and Treas. Reg. § 1.274-(2)(a)(2)(iii)(b) still apply to the deductibility of dues paid for memberships to civic organizations.

Treasury Reg. § 1.274-(2)(a)(2)(iii) disallows a deduction for membership fees to clubs organized for business, pleasure, recreation, or other social purpose. Treasury Reg. § 1.274-(2)(a)(2)(iii)(b) provides an exception to the disallowance of the deduction for business leagues, trade associations, chambers of commerce, boards of trade, real estate boards, professional organizations (such as bar associations and medical associations), **and civic** or public service organizations.

### Recommendation

The AICPA requests that Treasury and the IRS confirm that the treatment of membership dues for 501(c)(4) civic organizations such as the Kiwanis and Rotary clubs and other business organizations under Treas. Reg. § 1.274-(2)(a)(2)(iii) as well as the list of related exceptions under Treas. Reg. § 1.274-(2)(a)(2)(iii)(b) have not changed under the TCJA.

### Analysis

A significant number of professionals pay membership dues to one or more professional or civic type organizations. Taxpayers require confirmation that the dues paid to certain organizations remain deductible after the passage of the TCJA.