



July 17, 2017

The Honorable Orrin G. Hatch, Chairman  
Senate Committee on Finance  
219 Dirksen Senate Office Building  
Washington, DC 20510

RE: AICPA Tax Reform Proposals on Business Income Tax

Dear Chairman Hatch:

The American Institute of CPAs (AICPA) applauds the leadership taken by the Senate Committee on Finance on comprehensive tax reform. We recognize the tremendous effort required to analyze the current complexities in the tax law, examine policy trade-offs, and consider the various reform options. This letter on business income tax is submitted in response to your request of June 16, 2017, for comments and recommendations from stakeholders, regarding comprehensive tax reform. In addition to this letter, we are submitting separate letters on the following areas of tax:

- Individuals, Families, and Tax Administration
- International Tax System
- Taxation on Savings and Investments

The AICPA is a long-time advocate for an efficient and effective tax system based on principles of good tax policy.<sup>1</sup> We need a tax system that is administrable, stimulates economic growth, has minimal compliance costs, and allows taxpayers to understand their tax obligations. These features of a tax system are achievable if principles of good tax policy are considered in the design of the system.

In the interest of good tax policy and effective tax administration, we respectfully submit comments on the following key issues related to business income tax:

1. Cash Method of Accounting
2. Tax Rates for Pass-through Entities
3. Distinguishing Compensation Income
4. Limitation on Interest Expense Deduction
5. Definition of "Compensation"
6. Net Operating Losses
7. Increase in Expensing of Startup Expenditures
8. Alternative Minimum Tax Repeal
9. Mobile Workforce

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<sup>1</sup> AICPA, "[Guiding Principles for Good Tax Policy: A Framework for Evaluating Tax Proposals](#)," January 2017.  
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10. Civil Tax Penalties
11. IRS Deadlines Related to Disasters
12. Other Business Income Tax Issues

## **1. Cash Method of Accounting**

The AICPA opposes limiting the use of the cash method of accounting.<sup>2</sup> The cash method of accounting is simpler in application than the accrual method, has fewer compliance costs, and does not require taxpayers to pay tax before receiving the related income. For these reasons, we are concerned with, and oppose, any new limitations<sup>3</sup> on the use of the cash method for service businesses, including those businesses whose income is taxed directly on their owners' individual returns, such as partnerships and S corporations. Requiring businesses to switch to the accrual method upon reaching a gross receipts threshold unnecessarily creates a barrier to growth.<sup>4</sup>

## **2. Tax Rates for Pass-through Entities**

If Congress, through tax reform, lowers the income tax rates for C corporations, all business entity types should also receive a rate reduction. The majority of businesses are structured as pass-through entities (such as partnerships, S corporations, or limited liability companies). Tax reform should not disadvantage these entities or require businesses to engage in complex entity changes to obtain favored tax status.

Congress should continue to encourage, or more accurately, not discourage, the formation of sole proprietorships and pass-through entities, as these business structures provide the flexibility and control desired by many business owners that is not available within the more formal corporate structure. Entrepreneurs generally do not want to create entities that require extra legal obligations (such as holding annual meetings of a board of directors). They prefer business structures that are simple and provide legal and tax advantages.

## **3. Distinguishing Compensation Income**

If Congress provides a reduced income tax rate for active business income of sole proprietorships and pass-through entities, we recognize that it would place additional pressure on the distinction between the profits of the business and the compensation of owner-operators. We recommend determining compensation income by using traditional definitions of "reasonable compensation" supplemented, if necessary, by additional guidance from the United States Department of the Treasury ("Treasury").

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<sup>2</sup> AICPA comment letter, "[Investment in New ventures and Economic Success Today Act of 2017 \(S.1144\)](#)," submitted June 22, 2017.

<sup>3</sup> Chairman Max Baucus, U.S. Senate Committee on Finance, "[Summary of Staff Discussion Draft: Cost Recovery and Accounting](#)," released November 21, 2013.

<sup>4</sup> A required switch to the accrual method affects many small businesses in certain industries, including accounting firms, law firms, medical and dental offices, engineering firms, and farming and ranching businesses.

We encourage Congress to consider codifying the existing judicial guidance on the definition of reasonable compensation, which reflects the type of business (for example, labor versus capital intensive), the time spent by owners in operating the business, owner expertise and experience, and the existence of income-generating assets in the business (such as other employees and owners, capital and intangibles).

Congress should direct the Internal Revenue Service (IRS) to take additional steps to improve compliance and administration in this area. For example, a worksheet maintained with the taxpayer's tax records would allow businesses to indicate the factors considered in determining compensation in a reasonable and consistent manner.

These potential factors include:

- Approximate average hours per week worked by all owners;
- Approximate average hours worked per week by non-owner employees;
- The owners' years of experience;
- Guidance to help determine reasonable compensation for the geographic area and years of experience (e.g., wage data guides from the U.S. Bureau of Labor Statistics); and
- Book value and estimated fair market value of assets that generate income for the business.

Changes to payroll tax rules, such as a requirement for partnerships and proprietorships to charge reasonable compensation for owners' services and to withhold and pay the related income and other taxes, will also facilitate compliance for small businesses. We suggest that partners and proprietors are not treated as "employees," but rather owners subject to withholding – a new category of taxpayer – similar to a partner with a guaranteed payment for services but on whom income tax withholding is required. Similar rules requiring reasonable compensation currently exist in connection with S corporations, and such owners are considered employees of the S corporation. The broader inclusion of partners and proprietors in more well-defined compensation rules should facilitate and enhance the development of appropriate regulations and enforcement in this area.

There are advantages to using the reasonable compensation approach for owners of all business types, including:

- Fairness that respects differences in business types and owner participation levels;
- A reduced reliance by taxpayers and the IRS on quarterly estimated tax payments for timely matching of the earning process and tax collection;
- Diminished reliance on the self-employment tax system (since businesses would include payroll taxes withheld from owners and paid for owners along with their employees); and
- Simplification due to uniformity of collection of employment tax from business entities, and an ability to rely on a deep foundation of case law (in the S corporation and personal service corporation areas) to provide regulatory and judicial guidance.

In former Ways & Means Committee Chairman Dave Camp's 2014 tax reform discussion draft,<sup>5</sup> a proposal was included to treat 70% of pass-through income of an owner-employee as employment income. While this proposal presents a simple method of determining the compensation component, it would provide an inaccurate and inequitable result in many situations. If Congress moves forward with a 70/30 rule, or other percentage split, we recommend making the proposal a safe harbor option. For example, the proposal must make clear that the existence and the amount of the safe harbor is not a maximum amount permitted but that the reasonable compensation standard utilized for corporations will remain available to sole proprietorships and pass-through entities. These rules will provide a uniform treatment among closely-held business entity types. Appropriate recordkeeping when the safe harbor option is not used, would also address the enforcement challenges currently faced by the IRS.

#### **4. Limitation on Interest Expense Deduction**

We oppose any limitation on interest expense deduction. A limitation on the deduction for interest expense (such as to the extent of interest income) would effectively eliminate the benefit of a valid business expense for many small businesses, as well as many professional services firms. If a limit on the interest expense deduction is paired with a proposal to allow for an immediate write-off of acquired depreciable property, it is important to recognize that this combination adversely affects professional service firms and small businesses while offering larger manufacturers, retailers, and other asset-intensive businesses a greater tax benefit.

Currently, small businesses can expense up to \$510,000 of acquisitions per year under section 179<sup>6</sup> and deduct all associated interest expense. A proposal<sup>7</sup> suggests eliminating the benefit of interest expense while allowing immediate expensing of the full cost of new equipment in the first year. However, since small businesses do not usually purchase large amounts of new or high dollar assets, this proposal would generally not provide any new benefit for smaller businesses (relative to what is currently available via the section 179 expensing rule). Instead, it takes away an important deduction for many small businesses which are forced to rely on debt financing to cover their operating and expansion costs.

Equity financing for many start-up businesses is simply not available. New business owners incur interest on small business loans to fund operations prior to revenue generation, working capital needs, equipment acquisition and expansion, and to build credit for larger future loans. These businesses rely on financing to survive.

#### **5. Definition of "Compensation"**

Tax reform discussions have recently considered whether the tax system should use the same definition for taxable compensation of employees as it does for the compensation that employers

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<sup>5</sup> H.R. 1 (113rd Congress), [The Tax Reform Act of 2014](#), Sec. 1502; also [Section-by-Section Summary](#), pages 32-33.

<sup>6</sup> All references in this letter to the Internal Revenue Code are to the Internal Revenue Code of 1986, as amended.

<sup>7</sup> House Republican Tax Reform Task Force, "[A Better Way: Our Vision for a Confident America](#)," June 24, 2016.

may deduct. Businesses may lose some of their current payroll-type deductions if employees are not required to report those same compensation amounts as income.

We are concerned about any decrease of an employer's ability to deduct compensation paid to employees, whether in the form of wages or fringe benefits (health and life insurance, disability benefits, deferred compensation, etc.). We are similarly concerned about expansion of the definition of taxable income for the employees, or removal of the exclusion for fringe benefits. Such changes in the Internal Revenue Code ("Code" or IRC) would substantially impact the small and labor-intensive businesses' ability to build and retain a competitive workforce.

## **6. Net Operating Losses**

We recommend that Congress provide tax relief to businesses in the calculation of benefits related to net operating losses (NOLs). An NOL is generally the amount by which a taxpayer's business deductions exceed its gross income. Corporations currently operating at a loss can benefit from carrying these NOLs back or forward to offset taxable income. According to the current rules, these losses are not deducted in the year generated, but are carried back two years and carried forward 20 years to offset taxable income in such years.

One of the purposes of the NOL carryback and carryover rules is to allow a taxpayer to better reflect its economic position over a longer time period than generally is allowed under the constraint of the annual reporting period. Since 1987, our experience with the 90% Alternative Minimum Tax (AMT) limitation on the use of NOLs shows that this limitation often imposes a tax on corporations, especially businesses in their early growth years, when such businesses are still struggling economically. Therefore, a proposal<sup>8</sup> to place a 90% limitation on NOLs will impose an artificial restriction on a company's use of business losses and discriminate against companies with volatile income. The limitation could result in loss companies paying more tax than companies with an equal amount of steady income over the same period.

We also recommend that Congress simplify the NOL calculation while retaining the carryback option for small businesses. For sole proprietors, the calculation of the NOL is overly complicated. Most startup businesses are formed as pass-through entities<sup>9</sup> and the initial startup losses incurred are "passed down" and reported on the owners' tax returns. Because individual taxpayers report both business and nonbusiness income and deductions on their returns, the required calculations to separate allowed business losses from disallowed personal activities is complex.<sup>10</sup> Individual business owners would benefit from more specific guidance on NOL computations that is simple to understand and calculate.

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<sup>8</sup> *Id.*

<sup>9</sup> Center for American Progress, "[Ending the Pass-Through Tax Loophole for Big Business](#)," August 2016.

<sup>10</sup> IRS Publication [536](#).

## **7. Increase in Expensing of Startup Expenditures**

In the interest of economic growth, we encourage Congress to consider increasing the expensing amount for startup expenditures. Section 195 allows immediate expensing of up to \$5,000 of startup expenditures in the tax year in which the active trade or business begins. This amount is reduced dollar for dollar once total startup expenditures exceed \$50,000, with the excess amortized ratably over 15 years. Thus, once startup expenditures exceed \$55,000, all of the start-up expenditures are amortized over 15 years. The rationale for the \$5,000 expensing was to “help encourage the formation of new businesses that do not require significant startup or organizational costs.”<sup>11</sup> These dollar amounts, which were added in 2004, are not adjusted for inflation. Only for tax years beginning in 2010, the expense limit of \$5,000 was increased to \$10,000 and the \$50,000 phase-out level was increased to \$60,000. This change was described as “promoting entrepreneurship.”<sup>12</sup>

The AICPA recommends increasing the \$5,000 expense limit and \$50,000 phase out amounts of section 195 and adjusting them annually for inflation. These changes will further simplify tax compliance for small businesses by reducing (or eliminating) the number of businesses that must track and report amortization of startup expenses over a 15-year period. In addition, as was suggested in the 2004 and 2010 legislative changes, the larger dollar amounts will better encourage entrepreneurship. Higher dollar amounts also reflect the costs for legal, accounting, investigatory, and travel that are frequently incurred when starting a new business. Also, due to the increased inflation-adjusted dollar amounts under section 179,<sup>13</sup> it is appropriate to similarly increase the section 195 dollar amounts and adjust them annually for inflation.

## **8. Alternative Minimum Tax Repeal**

The AICPA supports the repeal of the AMT.<sup>14</sup> The current system’s requirement for taxpayers to compute their income for purposes of both the regular income tax and the AMT is a significant area of complexity of the Code requiring extra calculations and recordkeeping. The AMT also violates the transparency principle because it masks the amount a taxpayer can deduct or exclude, as well as the taxpayer’s marginal tax rate. Small businesses, including those operating through pass-through entities and certain C corporations, are increasingly at risk of being subject to AMT.

The AMT was created to ensure that all taxpayers pay at least a minimum amount of tax on their economic income. However, businesses suffer a heavy burden because they often do not know whether they are affected by the AMT until they file their tax federal income tax returns.

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<sup>11</sup> P.L. 108-357 (10/22/04), American Jobs Creation Act, Sec. 902; Joint Committee on Taxation, General Explanation of Tax Legislation Enacted In the 108th Congress, [JCS-5-05](#), May 31, 2005, p. 504.

<sup>12</sup> The one year change to the section 195 dollar amounts was made by P.L. 111-240 (9/27/10), the Small Business Jobs Act of 2010, Sec. 2031(a); Joint Committee on Taxation, General Explanation of Tax Legislation Enacted in the 111th Congress, [JCS-2-11](#), March 2011, p. 474.

<sup>13</sup> P.L. 114-113 (12/18/15), Sec. 124(a).

<sup>14</sup> AICPA written testimony before the House Committee on Ways And Means, Subcommittee on Select Revenue Measures, dated March 03, 2011, “[Hearing on Small Businesses and Tax Reform](#),” and AICPA submitted comments to the House Committee on Ways and Means on the [Tax Reform Act of 2014](#), dated January 12, 2015.

Therefore, they must constantly maintain a reserve for possible AMT, which takes away from resources they could allocate to business needs such as hiring, expanding, and giving raises to workers.

The AMT is a separate and distinct tax regime from the “regular” income tax. IRC sections 56 and 57 create AMT adjustments and preferences that require taxpayers to make a second, separate computation of their income, expenses, allowable deductions, and credits under the AMT system. This separate calculation is required for all components of income including business income for sole proprietors, partners in partnerships and shareholders in S corporations. Businesses must maintain annual supplementary schedules, used to compute these necessary adjustments and preferences, for many years in order to calculate the treatment of future AMT items and, occasionally, receive a credit for them in future years. Calculations governing AMT credit carryovers are complex and contain traps for unwary taxpayers.

Sole proprietors who are also owners in pass-through entities must combine the AMT information from all their activities in order to calculate AMT. The computations are extremely difficult for business taxpayers preparing their own returns and the complexity also affects the IRS’s ability to meaningfully track compliance.

## **9. Mobile Workforce**

We urge Congress to pass the Mobile Workforce State Income Tax Simplification Act of 2017, ([S. 540](#), 115<sup>th</sup> Congress) which provides a uniform national standard for non-resident state income tax withholding and a *de minimis* exemption from the multi-state assessment of state non-resident income tax.<sup>15</sup> It also provides a reasonable 30 day *de minimis* threshold before income tax withholding is required.

The current situation of having to withhold and file many state nonresident tax returns for just a few days of work in various states is too complicated for both small businesses and their employees. Businesses that operate interstate are subject to a multitude of burdensome, unnecessary and often bewildering non-resident state income tax withholding rules. These businesses struggle to understand and keep up with the variations from state to state. The issue of employer tracking and complying with all of the different state and local tax laws is quite complicated, consumes nonproductive administrative time and is costly.

## **10. Civil Tax Penalties**

Congress should carefully draft penalty provisions and the Administration should fairly administer the penalties to ensure they deter non-compliant conduct without deterring complaint conduct or punishing innocent businesses owners (*i.e.*, unintentional errors, such as those who committed the inappropriate act without intent to commit such act). Targeted, proportionate penalties that clearly

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<sup>15</sup> For additional details, see AICPA [written statement](#), “AICPA Statement for the Record of the April 13, 2016 Hearing on “Keep it Simple: Small Business Tax Simplification and Reform, Main Street Speaks,” dated April 7, 2016.

articulate standards of behavior and are administered in an even-handed and reasonable manner encourage voluntary compliance with the tax laws. On the other hand, overbroad, vaguely-defined, and disproportionate penalties create an atmosphere of arbitrariness and unfairness that can discourage voluntary compliance.

The AICPA has concerns<sup>16</sup> about the current state of civil tax penalties and offers the following suggestions for improvement:

#### Trend Toward Strict Liability

The IRS discretion to waive and abate penalties where the taxpayer demonstrates reasonable cause and good faith is needed most when the tax laws are complex and the potential sanction is harsh. Legislation should avoid mandating strict liability penalties. Over the past several decades, the number of increasingly severe civil tax penalties have grown, with the Code currently containing eight strict liability penalty provisions (for example, the accuracy penalty on non-disclosed reportable transactions).<sup>17</sup>

#### An Erosion of Basic Procedural Due Process

Taxpayers should know their rights to contest penalties and have a timely and meaningful opportunity to voice their feedback before assessment of the penalty. In general, this process would include the right to an independent review by the IRS Appeals office or the IRS's FastTrack appeals process, as well as access to the courts. Pre-assessment rights are particularly important where the underlying tax provision or penalty standards are complex, the amount of the penalty is high, or fact-specific defenses such as reasonable cause are available.

#### Late Filing Penalties of Sections 6698 and 6699

Sections 6698 and 6699 impose a penalty of \$200 per owner related to late-filed partnership or S corporation returns. The penalty is imposed monthly not to exceed 12 months, unless it is shown that the late filing is due to reasonable cause.

The AICPA proposes that a partnership, comprised of 50 or fewer partners, each of whom are natural persons (who are not nonresident aliens), an estate of a deceased partner, a trust established under a will or a trust that becomes irrevocable when the grantor dies, and domestic C corporations, is considered to have met the reasonable cause test and is not subject to the penalty imposed by section 6698 or 6699 if:

- The delinquency is not considered willful under section 7423;
- All partnership income, deductions and credits are allocated to each partner in accordance with such partner's capital and profits interest in the partnership, on a pro-rata basis; and

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<sup>16</sup> See AICPA whitepaper, "[AICPA Tax Penalties Legislative Proposals](#)," dated April 2013; and the "[AICPA Report on Civil Tax Penalties](#)," submitted April 2013.

<sup>17</sup> Section 6662A, 6664(d).



- Each partner fully reported its share of income, deductions and credits of the partnership on its timely filed federal income tax return.

#### Failure to Disclose Reportable Transactions

We propose an amendment of section 6707A to allow an exception to the penalty if there was reasonable cause for the failure and the taxpayer acted in good faith for all types of reportable transactions, and to allow for judicial review in cases where reasonable cause was denied. Moreover, we propose an amendment of section 6664 to provide a general reasonable cause exception for all types of reportable transactions, irrespective of whether the transaction was adequately disclosed or the level of assurance.

Taxpayers who fail to disclose a reportable transaction are subject to a penalty under section 6707A. The section 6707A penalty applies even if there is no tax due with respect to the reportable transaction that has not been disclosed. There is no reasonable cause exception to this penalty.

Under section 6662A, taxpayers who have understatements attributable to certain reportable transactions are subject to a penalty of 20% (if the transaction was disclosed) and 30% (if the transaction was not disclosed). A more stringent reasonable cause exception for a penalty under section 6662A is provided in section 6664, but only where the transaction is adequately disclosed, there is substantial authority for the treatment, and the taxpayer had a reasonable belief that the treatment was more likely than not proper. In the case of a listed transaction, reasonable cause is not available, similar to the penalty under section 6707A.

#### Form 5471 Penalty Relief

We request that Congress direct the IRS and Treasury to consider penalty relief, particularly for small businesses and loss companies, related to late filings of Form 5471. On January 1, 2009, the IRS began imposing an automatic penalty of \$10,000 for each Form 5471, *Information Return of U.S. Persons with Respect to Certain Foreign Corporations*, filed with a delinquent Form 1120, *U.S. Corporation Income Tax Return*, series return. When imposing the penalty on corporations in particular, the IRS does not distinguish between: a) large public multinational companies, b) small companies; and c) companies that may only have insignificant overseas operations, or loss companies. This one-size-fits-all approach inadvertently places undue hardship on smaller corporations that do not have the same financial resources as larger corporations. The AICPA has submitted recommendations<sup>18</sup> regarding the IRS administration of the penalty provision applicable to Form 5471. Our recommendations focus on the need for relief from automatic penalties assessed upon the late filing of Form 5471 in order to promote the fair and efficient administration of the international penalty provisions of the Code.

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<sup>18</sup> AICPA letter to the IRS, "[Recommendations – Automatic Penalties Assessments Policy with the Late Filing of Form 5471](#)," dated March 26, 2013.

## **11. IRS Deadlines Related to Disasters**

Similar to IRS's authority to postpone certain deadlines in the event of a presidentially-declared disaster, Congress should extend that limited authority to state-declared disasters and states of emergency. Currently, the IRS's authority to grant deadline extensions, outlined in section 7508A, is limited to taxpayers affected by federal-declared disasters. State governors will issue official disaster declarations promptly but often, presidential disaster declarations in those same regions are not declared for days, or sometimes weeks after the state declaration. This process delays the IRS's ability to provide federal tax relief to impacted businesses and disaster victims. Taxpayers have the ability to request waivers of penalties on a case-by-case basis; however, this process causes the taxpayer, tax preparer, and the IRS to expend valuable time, effort, and resources which are already in short supply during times of a disaster. Granting the IRS specific authority to quickly postpone certain deadlines in response to state-declared disasters allows the IRS to offer victims the certainty they need as soon as possible.

The AICPA has long supported a set of permanent disaster relief tax provisions<sup>19</sup> and we acknowledge both Congress's and the IRS's willingness to help disaster victims. To provide more timely assistance, however, we recommend that Congress allow the IRS to postpone certain deadlines in response to state-declared disasters or state of emergencies.

## **12. Other Business Income Tax Issues**

There are several other business tax compliance burden proposals that we support, including:

### Listed Property

We suggest removing "computer or peripheral equipment" from the definition of "listed property" in order to simplify and modernize the traditional tax treatment of computers and laptops.<sup>20</sup> Classifying computers and similar property as "listed property" under section 280F is clearly outdated in a business environment where employees are increasingly expected to work outside of traditional business hours. Various forms of technology, including laptops, tablets and cell phones, are all converging to serve similar purposes. The costs for internet and service plans are now frequently sold in "bundles" and shared among multiple devices and it arguable has become impossible to allocate the cost of these service between devices. A legislative change to update the treatment of mobile devices is the best simplification, similar to section 2043 of the Small Business Jobs Act of 2010, where cell phones were removed from the definition of listed property for taxable years beginning after December 31, 2009.

### Executive Compensation

The AICPA supports the position that section 409A requirements should apply only to public

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<sup>19</sup> AICPA letter, "[Request for Permanent Tax Provisions Related to Disaster Relief](#)," dated November 22, 2013.

<sup>20</sup> AICPA [written statement](#), "Targeted Tax Reform: Solutions to Relieve the Tax Compliance Burden(s) for America's Small Businesses," dated July 22, 2015.

companies.<sup>21</sup> Section 409A, which applies to compensation earned in one year but paid in a future year, was enacted to protect shareholders and other taxpayers from executives guarding their own financial interests without concern for the financial interests of the organization, its shareholders or other creditors.

The rules apply to a broad array of compensation arrangements, including many business arrangements that are not thought of as deferred compensation. Nonpublic companies often want arrangements with employees to allow for sharing equity with, or providing capital accumulation for, long-term employees; constraining the nonpublic business owner with rules designed to protect absentee shareholders should not occur.

Many nonpublic entities have noncompliant plans that are not correctable under the existing administrative correction programs. The cost of a noncompliant 409A plan is excessive given the unintended violations. In addition to accrual based income recognition, an additional 20% tax applies to the recipient, often a person unknowingly affected by the violations. Requiring private companies to pay for the specialized tax guidance needed to ensure that a compensatory arrangement is 409A compliant should not occur. The cost of imposing 409A requirements on nonpublic companies is far in excess of any benefit derived.

#### Increase the Passive Income Percentage to 60% and Eliminate the Three-Year Termination for S Corporations

The AICPA recommends increasing the threshold of an S corporation's income that is considered passive without incurring an entity-level tax to 60% (from 25%).<sup>22</sup> Additionally we recommend eliminating the current rule that terminates an S corporation's pass-through status if the S corporation has excess passive income for three consecutive years.

Currently, if an S corporation has excess passive income for three consecutive years, even though incurring a corporate-level tax is a possibility due to the taxable income limitation, the S election is subject to termination, creating uncertainty in S corporation operations. Under current law, if the S corporation unknowingly has \$1.00 of accumulated earnings and profits, the S election is terminated if the S corporation has excess passive investment income for three consecutive years. The IRS routinely grants waivers of the involuntary termination under section 1362(d)(3). S corporations without C corporation earnings and profits may receive an unlimited amount of passive investment income and are not subject to the S election termination.

#### 9100 Relief

Section 9100 relief, which is currently available with regard to some elections, is extremely valuable for taxpayers who inadvertently miss the opportunity to make certain tax elections. Congress should make section 9100 relief available for all tax elections, whether prescribed by

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<sup>21</sup> *Id.*

<sup>22</sup> For additional details, see "[2017 AICPA Compendium of Tax Legislative Proposals – Simplification and Technical Proposals](#)", December 14, 2016.

regulation or statute. We have compiled a list<sup>23</sup> of elections (not all-inclusive) for which section 9100 relief is not granted by the IRS as the deadline for claiming the elections is set by statute (e.g., section 174(b)(2), the election to amortize certain research and experimental expenditures, and section 280C(c), the election to claim a reduced credit for research activities).

#### Provide Full Deductibility of Health Insurance

We recommend allowing full deductibility of health insurance costs in calculating the self-employment tax for self-employed individuals.<sup>24</sup> This suggestion would provide that deductions allowed in determining income subject to Survivors and Disability Insurance and health insurance taxes remain consistent amongst taxpayers regardless of whether they are employees or self-employed individuals. Currently, employees receive this deduction for their health insurance costs while self-employed individuals are not allowed a deduction in determining their net income subject to these taxes. The calculation of income subject to a particular tax should remain consistent among all taxpayers.

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We understand the challenges that Congress faces as it tackles the complex issues inherent in drafting tax legislation, and note that both taxpayers and tax practitioners are interested in, and need, tax simplification. The AICPA has consistently supported tax reform simplification, as we are convinced it will significantly reduce business compliance costs and fuel economic growth. As Congress drafts tax legislation, we encourage you to provide simplicity, certainty and clarity for business owners.

The AICPA is the world's largest member association representing the accounting profession with more than 418,000 members in 143 countries and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate the opportunity to provide comments on these issues related to business income tax. If you have any questions, please contact me at (408) 924-3508 or [annette.nellen@sjsu.edu](mailto:annette.nellen@sjsu.edu); or Amy Wang, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9264, or [amy.wang@aicpa-cima.com](mailto:amy.wang@aicpa-cima.com).

Sincerely,



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

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<sup>23</sup> AICPA letter, "[Tax Reform Administrative Relief for Various Statutory Elections](#)," dated January 23, 2015.

<sup>24</sup> For additional details, see "[2017 AICPA Compendium of Tax Legislative Proposals – Simplification and Technical Proposals](#)", December 14, 2016.