



[4830-01-P]

DEPARTMENT OF TREASURY

Internal Revenue Service

26 CFR Part 1

[REG-119307-19]

RIN 1545-BP49

Qualified Transportation Fringe, Transportation and Commuting Expenses under Section 274

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document contains proposed regulations to implement legislative changes to section 274 of the Internal Revenue Code (Code) effective for taxable years beginning after December 31, 2017. Specifically, the proposed regulations address the elimination of the deduction under section 274 for expenses related to certain transportation and commuting benefits provided by employers to their employees in taxable years beginning after December 31, 2017. The proposed regulations provide guidance to determine the amount of such expenses that is nondeductible and apply certain exceptions under section 274(e) that may allow such expenses to be deductible. These proposed regulations affect taxpayers who pay or incur such expenses.

**DATES:** Written or electronic comments and requests for a public hearing must be received by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Requests for a public hearing must be submitted as prescribed in the “**Comments and Requests for a Public Hearing**” section.

**ADDRESSES:** Commenters are strongly encouraged to submit public comments electronically. Submit electronic submissions via the Federal Rulemaking Portal at [www.regulations.gov](http://www.regulations.gov) (indicate IRS and REG-119307-19) by following the online instructions for submitting comments. Once submitted to the Federal Rulemaking Portal, comments cannot be edited or withdrawn. The IRS expects to have limited personnel available to process public comments that are submitted on paper through mail. Until further notice, any comments submitted on paper will be considered to the extent practicable. The Department of the Treasury (Treasury Department) and the IRS will publish for public availability any comment submitted electronically, and to the extent practicable any comment submitted on paper, to its public docket. Send paper submissions to: CC:PA:LPD:PR (REG-119307-19), room 5203, Internal Revenue Service, PO Box 7604, Ben Franklin Station, Washington, DC 20044.

**FOR FURTHER INFORMATION CONTACT:** Concerning the proposed regulations, call Patrick Clinton of the Office of Associate Chief Counsel (Income Tax and Accounting), (202) 317-7005; concerning the submission of comments and/or requests for a public hearing, Regina L. Johnson, (202) 317-5177 (not toll-free numbers).

**SUPPLEMENTARY INFORMATION:**

**Background**

This notice of proposed rulemaking contains proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 274 of the Code.

1. Statutory Framework

Section 274 was added to the Code by section 4 of the Revenue Act of 1962, Public Law 87-834 (76 Stat. 960) and has been amended numerous times over the

years. In general, section 274 limits or disallows deductions for certain expenditures that otherwise would be allowable under chapter 1 of the Code (chapter 1), primarily under section 162(a), which allows a deduction for ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

On December 22, 2017, section 274 was amended by section 13304 of Public Law 115-97 (131 Stat. 2054), commonly referred to as the Tax Cuts and Jobs Act (TCJA), to disallow a deduction for the expense of any qualified transportation fringe (QTF) as defined in section 132(f) provided to an employee of the taxpayer, effective for amounts paid or incurred after December 31, 2017.

The TCJA also added section 512(a)(7) providing that a tax-exempt organization's unrelated business taxable income (UBTI) is increased by the amount of the QTF expense for which a deduction is not allowable under section 274, effective for amounts paid or incurred after December 31, 2017. However, on December 20, 2019, section 512(a)(7) was repealed retroactive to the original date of enactment of the TCJA by section 302 of the Taxpayer Certainty and Disaster Tax Relief Act of 2019, enacted as part of the Further Consolidated Appropriations Act, 2020, Pub. L. No. 116-94, 133 Stat. 2534, Div. Q, Title III (2019). Although section 512(a)(7) was retroactively repealed, the rules of section 274 and these proposed regulations apply to tax exempt organizations to the extent the amount of the QTF expenses paid or incurred by an exempt organization is directly connected with an unrelated trade or business conducted by the exempt organization. In such case, the amount of the QTF expenses directly connected with the unrelated trade or business is subject to the disallowance under section 274(a)(4) and, thus, is disallowed as a deduction in calculating the UBTI

attributable to such unrelated trade or business under the general rule of section 512(a)(1). While the examples set forth in proposed §1.274-13 involve taxable entities, tax exempt organizations with unrelated trades or businesses may use the examples to assist in determining the amount of the section 274(a)(4) disallowance for purposes of calculating their UBTI under section 512(a)(1).

Finally, the TCJA added section 274(l), which provides that no deduction is allowed under chapter 1 for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee, effective for transportation and commuting expenses paid or incurred after December 31, 2017.

## 2. Qualified Transportation Fringes

Section 132 generally excludes from employees' gross income the value of certain fringe benefits. Section 132(a)(5) generally provides that gross income does not include any fringe benefit that qualifies as a QTF under section 132(f). QTFs are defined in section 132(f)(1) to mean any of the following provided by an employer to an employee: (1) transportation in a commuter highway vehicle between the employee's residence and place of employment, (2) any transit pass, (3) qualified parking, and (4) any qualified bicycle commuting reimbursement. Section 132(f)(5)(A), (B), (C), and (F)(i) define transit pass, commuter highway vehicle, qualified parking, and qualified bicycle commuting reimbursement, respectively. Section 132(f)(2) provides that the amount of QTFs provided by an employer to any employee that can be excluded from gross income under section 132(a)(5) cannot exceed a maximum monthly dollar

amount, adjusted for inflation. The adjusted maximum monthly excludable amount for 2020 is \$270.

Although section 132(f)(1) includes qualified bicycle commuting reimbursements as a QTF, section 132(f)(8) provides that the inclusion of qualified bicycle commuting reimbursements in the definition of a QTF is suspended for taxable years beginning after December 31, 2017, and before January 1, 2026. Accordingly, for such taxable years, qualified bicycle commuting reimbursements are not excluded from an employee's income as a QTF.

Section 274(a)(4), as added by the TCJA, provides that no deduction is allowed under chapter 1 for the expense of any QTF (as defined in section 132(f)) provided by taxpayers to their employees for expenses paid or incurred after December 31, 2017. Although the value of a QTF is relevant in determining the exclusion under section 132(f) and whether the section 274(e)(2) exception for expenses treated as compensation applies, the deduction disallowed under section 274(a)(4) relates to the expense of providing a QTF, not its value. In addition, the disallowance of a deduction for commuting and transportation expenses under section 274(l) is suspended for any qualified bicycle commuting reimbursement (described in section 132(f)(5)(F)) paid or incurred after December 31, 2017, and before January 1, 2026. Thus, for such period, deductions for qualified bicycle commuting reimbursements are not disallowed under sections 274(a)(4) and 274(l).

#### A. Section 274(e) Exceptions to Section 274(a)(4)

Section 274(e) enumerates nine specific exceptions to section 274(a), three of which, sections 274(e)(2), (e)(7), and (e)(8), are relevant for QTFs. Deductions for

expenses that are within any of the three exceptions in section 274(e) are not disallowed under section 274(a)(4).

Section 274(e)(2) applies to expenses for goods, services, and facilities, to the extent that the expenses are treated by the taxpayer, with respect to the recipient of the entertainment, amusement, or recreation, as compensation to its employees under chapter 1 and as wages to its employees under chapter 24 of the Code (chapter 24). Although the language in section 274(e)(2) refers to a recipient of entertainment, amusement, or recreation, it applies as a specific exception to the application of section 274(a), which, as amended by the TCJA, includes the QTF expense disallowance in section 274(a)(4). Thus, the Treasury Department and the IRS have determined that QTF expenses are included in this exception to the extent that the fair market value of the QTF exceeds the section 132(f)(2) limitation on exclusion and such excess amount is treated by the taxpayer as compensation to the employee on the taxpayer's return of tax under chapter 1 and wages to such employee for purposes of chapter 24. See §1.132-9(b), Q/A-8. This interpretation is consistent with Congressional intent. See H.R. Rep. No.115-409, at 266 (2017) ("As part of its broader tax reform effort, the Committee believes that certain nontaxable fringe benefits should not be deductible by employers if not includible in income of employees.").

Section 274(e)(7) applies to expenses for goods, services, and facilities made available by the taxpayer to the general public. Section 274(e)(8) applies to expenses for goods or services (including the use of facilities) which are sold by the taxpayer in a bona fide transaction for an adequate and full consideration in money or money's worth.

#### B. Qualified parking

As explained earlier in part 2 of this Background, QTFs are defined in section 132(f)(1) to include qualified parking. The term “qualified parking” is defined in section 132(f)(5)(C) as parking provided to an employee on or near the business premises of the employer or on or near a location from which the employee commutes to work. The term does not include any parking on or near property used by the employee for residential purposes.

On December 24, 2018, the Treasury Department and the IRS published Notice 2018-99, 2018-52 I.R.B. 1067, “Parking Expenses for Qualified Transportation Fringes under § 274(a)(4) and § 512(a)(7) of the Internal Revenue Code”. Notice 2018-99 explains that the Treasury Department and the IRS have received questions about how to determine the amount of parking expenses that is nondeductible or treated as UBTI. Notice 2018-99 provides interim guidance for taxpayers to determine the amount of parking expenses for QTFs that is nondeductible under section 274(a)(4) (nondeductible amount) and for tax exempt organizations to determine the corresponding increase in the amount of UBTI under section 512(a)(7) attributable to the nondeductible parking expenses. Because section 512(a)(7) was retroactively repealed, as noted in part 1 of this Background, the following discussion of Notice 2018-99 focuses only on section 274(a)(4).

Under Notice 2018-99, the method for determining the nondeductible amount depends on whether the taxpayer pays a third party to provide parking for its employees or the taxpayer owns or leases a parking facility where its employees park. If a taxpayer pays a third party an amount so that its employees may park at the third party’s parking facility, the section 274(a)(4) disallowance generally is calculated as the

taxpayer's total annual cost of employee parking paid to the third party. However, if the amount the taxpayer pays to a third party for an employee's parking exceeds the section 132(f)(2) monthly limitation on exclusion, which for 2020 is \$270 per employee, that excess amount generally must be treated by the taxpayer as compensation and wages to the employee. As a result, the total of the monthly amount in excess of \$270 per employee that is treated as compensation and wages is excepted from the taxpayer's section 274(a) disallowance amount by section 274(e)(2).

Notice 2018-99 provides that if a taxpayer owns or leases all or a portion of one or more parking facilities where its employees park, the section 274(a)(4) disallowance may be calculated using any reasonable method and provides a four-step methodology that is deemed to be a reasonable method. However, using the value of employee parking to determine expenses allocable to employee parking in a parking facility owned or leased by the taxpayer is not a reasonable method because section 274(a)(4) disallows a deduction for the expense of providing a QTF, regardless of its value. Furthermore, for taxable years beginning on or after January 1, 2019, a method under Notice 2018-99 that fails to allocate expenses to reserved employee spaces cannot be a reasonable method.

For purposes of Notice 2018-99, a "parking facility" includes indoor and outdoor garages and other structures, as well as parking lots and other areas, where employees may park on or near the business premises of the employer or on or near a location from which the employee commutes to work. The term does not include any parking on or near property used by the employee for residential purposes. If a taxpayer owns or leases more than one parking facility in a single geographic location, the taxpayer may

aggregate the number of spaces in those parking facilities. However, if a taxpayer owns or leases parking facilities in more than one geographic location, the taxpayer may not aggregate the spaces in parking facilities that are in different geographic locations.

Also for purposes of Notice 2018-99, “total parking expenses” include, but are not limited to, repairs, maintenance, utility costs, insurance, property taxes, interest, snow and ice removal, leaf removal, trash removal, cleaning, landscape costs, parking lot attendant expenses, security, and rent or lease payments or a portion of a rent or lease payment (if not broken out separately). A deduction for an allowance for depreciation on a parking structure owned by a taxpayer and used for parking by the taxpayer’s employees is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not a parking expense for purposes of Notice 2018-99. *Compare* section 274(a)(1) (disallowing deductions for any “item” with respect to entertainment activities or facilities) *with* section 274(a)(4) (disallowing deductions for the “expense” of any QTF). *See also* *W.L. Schautz v. United States*, 567 F.2d 373, 376 (Ct. Cl. 1977) (noting that section 274(a)(1) applies to deductions broadly, not to expenses), and *Gordon v. Commissioner*, 37 T.C. 986, 987 (1962) (“Any allowance for depreciation is not an ‘expense paid’ or ‘amount paid.’”). Expenses paid or incurred for items not located on or in the parking facility, including items related to property next to the parking facility, such as landscaping or lighting, also are not included.

The term “employee”, as used in Notice 2018-99, is defined in §§1.132-1(b)(2)(i) and 1.132-9(b), Q/A-5, as any individual who is currently employed by the employer; the term includes common law employees and other statutory employees, such as officers of corporations. Section 1.132-9(b), Q/A-24, explains that partners, 2-percent

shareholders of S corporations, sole proprietors, and independent contractors are not employees for purposes of section 132(f).

Notice 2018-99 provides a four-step method deemed to be a reasonable method for calculating the amount of parking expenses that is nondeductible under section 274(a)(4).

i. Step 1

First, the taxpayer calculates the disallowance for reserved employee spaces. A taxpayer that owns or leases all or a portion of one or more parking facilities must identify the number of spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for the taxpayer's employees (reserved employee spaces).

Employee spaces in the parking facility, or portion thereof, may be exclusively reserved for employees by a variety of methods, including, but not limited to, specific signage (for example, "Employee Parking Only") or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access.

The taxpayer must then determine the percentage of reserved employee spaces in relation to total parking spaces and multiply that percentage by the taxpayer's total parking expenses for the parking facility. The product is the amount of the deduction for total parking expenses that is disallowed under section 274(a)(4) for reserved employee spaces.

ii. Step 2

Second, the taxpayer determines the primary use of remaining spaces (primary use test). The taxpayer may identify the remaining parking spaces in the parking facility and determine whether their primary use is to provide parking to the general public. If

the primary use of the remaining parking spaces in the parking facility is to provide parking to the general public, then the remaining total parking expenses for the parking facility are excepted from the section 274(a) disallowance by the general public exception under section 274(e)(7).

For purposes of calculating the disallowance, the term “primary use” means greater than 50 percent of actual or estimated usage of the parking spaces in the parking facility. Primary use of the parking spaces is tested during normal business hours on a typical business day. Nonreserved parking spaces that are available to the general public but empty during normal business hours on a typical business day are treated as provided to the general public. In addition, if the actual or estimated usage of the parking spaces varies significantly between days of the week or times of the year, the taxpayer may use any reasonable method to determine the average actual or estimated usage.

For purposes of Notice 2018-99, the term “general public” includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services to the taxpayer, students of an educational institution, patients of a health care facility, and congregants of a religious organization. As noted in part 1 of the Background, section 512(a)(7) was retroactively repealed, therefore “congregants of a religious organization” is not included in the definition of the “general public” in these proposed regulations. The general public does not include employees, partners, 2-percent shareholders of S corporations, or independent contractors of the taxpayer.

iii. Step 3

Third, the taxpayer calculates the allowance for reserved nonemployee spaces. If the primary use of a taxpayer's remaining parking spaces is not to provide parking to the general public, the taxpayer may identify the number of spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for nonemployees (reserved nonemployee spaces). For example, reserved nonemployee spaces include spaces reserved for visitors and customers, as well as spaces reserved for partners, sole proprietors, and 2-percent shareholders of S corporations.

Notice 2018-99 explains that the number of reserved nonemployee spaces in the parking facility, or portion thereof, may be exclusively reserved for nonemployees by a variety of methods, including, but not limited to, specific signage (for example, "Customer Parking Only") or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access. A taxpayer that has no reserved nonemployee spaces may proceed to Step 4.

A taxpayer that has reserved nonemployee spaces may determine the percentage of reserved nonemployee spaces in relation to the remaining total parking spaces and multiply that percentage by the taxpayer's remaining total parking expenses. The product is the amount of the deduction for remaining total parking expenses that is not disallowed under section 274(a)(4).

#### iv. Step 4

Fourth, the taxpayer determines the remaining use and allocable expenses of any remaining parking spaces. If the taxpayer completes Steps 1 through 3 of the method in Notice 2018-99 and has any remaining parking expenses not specifically categorized as deductible or nondeductible, the taxpayer must reasonably determine

the employee use of the remaining parking spaces during normal business hours on a typical business day and the related expenses allocable to employee parking spaces. Methods to determine employee use of the remaining parking spaces may include specifically identifying the number of employee spaces based on actual or estimated usage. Actual or estimated usage may be based on the number of spaces, the number of employees, the hours of use, or other measures.

### C. Comments on Notice 2018-99

Notice 2018-99 requested comments for future guidance to further clarify the treatment of QTFs under section 274. In particular, the Treasury Department and the IRS requested comments on the definitions of “primary use” and “general public”, whether primary use should be used to determine the extent to which parking is made available to the general public under section 274(e)(7), other methodologies for determining the use of the parking spaces and the related expenses allocable to employee parking, the applicability of section 274(e)(8) to expenses for any goods or services that constitute a QTF sold by the taxpayer to an employee in a bona fide transaction for an adequate and full consideration in money or money's worth, and the circumstances under which such a transaction should be excluded from the term QTF for purposes of section 274(a)(4).

The Treasury Department and the IRS received approximately 500 comments in response to Notice 2018-99. All comments were considered in drafting these proposed regulations and are available at [www.regulations.gov](http://www.regulations.gov) or upon request. Approximately 200 comments addressed issues involving section 512(a)(7), which was retroactively repealed, as explained in part 1 of the Background. Approximately 70 comments

expressed support for the disallowance of parking expenses in section 274(a)(4) on environmental policy grounds and encouraged the Treasury Department and the IRS to further discourage employers from subsidizing employees that drive to work. The majority of the remaining comments requested additional methodologies and simplified rules for taxpayers that own or lease parking facilities to calculate the amount of the parking expense disallowance.

Several of the comments addressing section 274(a)(4) are summarized in the Explanation of Provisions. However, comments recommending statutory revisions or addressing issues outside the scope of these proposed regulations, such as environmental policy issues, are not addressed.

### **Explanation of Provisions**

The proposed regulations describe and clarify the statutory requirements of section 274(a)(4) and 274(l), as well as the applicability of certain exceptions under section 274(e) to QTF expenses. To implement the TCJA's disallowance of deductions for QTF expenses under section 274(a)(4), the proposed regulations create a new §1.274-13 (proposed §1.274-13) to address QTF expenses paid or incurred by an employer, and the application of certain exceptions in section 274(e) to QTF expenses. Further, the proposed regulations create a new §1.274-14 (proposed §1.274-14) to address transportation and commuting expenses paid or incurred by an employer. As discussed in part 2 of the Background, the statutory changes made by the TCJA apply to QTF expenses paid or incurred by employers after December 31, 2017.

## 1. Qualified Transportation Fringes

### A. In General

Proposed §1.274-13 restates the statutory rules under section 274(a)(4), defines relevant terms, and modifies certain guidance in Notice 2018-99, providing a general rule and three simplified methodologies to determine the amount of nondeductible parking expenses when a parking facility is owned or leased by the taxpayer.

Additionally, the proposed regulations build on Notice 2018-99 to include rules addressing the deduction disallowance for expenses related to providing employees transportation in a commuter highway vehicle and transit pass QTFs.

The proposed regulations include special rules to clarify and simplify the calculations underlying the methodologies to determine the amount of QTF parking expenses. In addition, the proposed regulations generally apply the guidance in Notice 2018-99 and the applicable exceptions in section 274(e) to all QTF expenses.

Specifically, as in Notice 2018-99, the proposed regulations provide that if the taxpayer pays a third party for its employee's QTF, the section 274(a)(4) disallowance is generally calculated as the taxpayer's total annual cost of the QTF paid to the third party. With regard to QTF parking expenses, the proposed regulations provide that if the taxpayer owns or leases all or a portion of one or more parking facilities, the section 274(a)(4) disallowance may be calculated using a general rule, as defined below, or any one of three simplified methodologies. Taxpayers may choose to apply the general rule or a simplified methodology for each taxable year and for each parking facility. Special rules and definitions are included in the proposed regulations for allocating certain mixed parking expenses, aggregating parking spaces by geographic location, removing

inventory/unusable spaces from available parking spaces, defining general public for multi-tenant building parking facilities, and disregarding five or fewer reserved parking spaces if the reserved spaces are 5 percent or less of total parking spaces. Taxpayers may use statistical sampling with the general rule or simplified methodologies if they follow the procedures in Rev. Proc. 2011-42, 2011-37 I.R.B. 318, as corrected by Ann. 2013-46, 2013-48 I.R.B. 593.

The general rule in the proposed regulations allows taxpayers to calculate the disallowance based on a reasonable interpretation of section 274(a)(4). However, taxpayers must use the expense paid or incurred in providing a QTF instead of its value to an employee, allocate parking expenses to reserved employee spaces, and properly apply the exception for parking made available to the general public. A special rule for aggregating parking spaces by geographic location may be used with the general rule.

The proposed regulations also include three simplified methodologies that taxpayers may use instead of the general rule. Under the first simplified methodology, the “qualified parking limit methodology,” taxpayers calculate the disallowance by multiplying the total number of spaces used by employees during the peak demand period, or, alternatively, the total number of the taxpayer’s employees, by the section 132(f)(2) monthly per employee limitation on exclusion for qualified parking (\$270), for each month in the taxable year.

The second simplified methodology, the “primary use methodology,” is largely based on the method deemed reasonable in Notice 2018-99, modified in response to comments received. Special rules for allocating certain mixed parking expenses and aggregating parking spaces by geographic location may be used with the primary use

methodology. Definitions in Notice 2018-99 for employee, general public, parking facility, total parking spaces, reserved employee spaces, reserved nonemployee spaces, primary use, and total parking expenses, as modified in response to comments, are also included in the proposed regulations. New definitions for geographic location, inventory/unusable spaces, available parking spaces, peak demand period, and mixed parking expense are included in the proposed regulations to clarify the methodology in response to comments received.

The final simplified methodology is the “cost per space methodology,” which allows taxpayers to calculate the disallowance by multiplying the cost per parking space by the number of available parking spaces to be used by employees during the peak demand period. Cost per space is calculated by dividing total parking expenses (including expenses for inventory/unusable spaces) by total parking spaces (including inventory/unusable spaces). Special rules for allocating certain mixed parking expenses and aggregating parking spaces by geographic location may be used with the cost per space methodology.

## B. Definitions

As described below, the proposed regulations generally include the definitions from Notice 2018-99, modified in response to comments received, along with new definitions to clarify terms as needed.

### i. Qualified Transportation Fringe

The proposed regulations add a definition for the term “qualified transportation fringe.” The definition is based on section 132(f)(1), except that it does not include qualified bicycle commuting reimbursements for the reasons described in part 2 of the

Background. Thus, the proposed regulations provide that the term “qualified transportation fringe” means any of the following provided by an employer to an employee: transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee’s residence and place of employment (as described in sections 132(f)(1)(A) and 132(f)(5)(B)); any transit pass (as described in sections 132(f)(1)(B) and 132(f)(5)(A)); or qualified parking (as described in sections 132(f)(1)(C) and 132(f)(5)(C)).

ii. Employee

The proposed regulations include the definition of the term “employee,” which is taken from §§1.132-1(b)(2)(i) and 1.132-9(b), Q/A-5 and Q/A-24. Commenters have asked whether volunteers are treated as employees under Notice 2018-99, although most of the comments concerning the status of volunteers related to section 512(a)(7), which has been retroactively repealed. The term “employee” for Federal tax purposes generally is understood to refer to a common-law employee (although the regulations under section 132 also include certain statutory employees such as officers of corporations in the definition of employee for purposes of QTFs). Whether a service provider is a common-law employee generally turns on whether the service recipient has the right to direct and control the service provider, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. See, e.g., §31.3121(d)-1(c)(2) of the Employment Taxes and Collection of Income Tax at Source Regulations. The determination does not depend on whether or how the individual is compensated, or by which person. The employment status of a

volunteer depends on the facts and circumstances in each case. Accordingly, the proposed regulations do not address the employment status of volunteers.

### iii. General Public

Commenters raised concerns that, for taxpayers that lease space in a multi-tenant building, Notice 2018-99 did not include employees, partners, 2-percent shareholders of S corporations, independent contractors, clients, or customers of unrelated tenants in the building as members of the general public. In response to these comments, the proposed regulations modify the definition of the term “general public” from Notice 2018-99 to include employees, partners, 2-percent shareholders of S corporations, sole proprietors, independent contractors, clients, or customers of unrelated tenants in multi-tenant buildings, as well as customers, clients, or visitors of the taxpayer, individuals delivering goods or services to the taxpayer, students of an educational institution, and patients of a health care facility.

### iv. Parking Facility

The proposed regulations include a definition of the term “parking facility” that follows the definition of qualified parking in section 132(f)(5)(C) and includes one or more indoor or outdoor garages and other structures, as well as parking lots and other areas where employees may park. Commenters suggested that because qualified parking as defined in section 132(f)(5)(C) and §1.132-9(b), Q/A-4(c) does not include any parking on or near property used by the employee for residential purposes, including parking for resident employees of residential rental buildings, the definition of “total parking spaces” should exclude such spaces. In response to these comments,

the proposed regulations specifically exclude parking spaces on or near property used by the employee for residential purposes from the definition of parking facility.

#### v. Geographic Location

Commenters have asked how a geographic location is defined for purposes of aggregating the number of parking spaces to determine the section 274(a)(4) disallowance using the primary use methodology. Specifically, Notice 2018-99 provides that if a taxpayer owns or leases more than one parking facility in a single geographic location, the taxpayer may aggregate the number of spaces in those parking facilities. However, if a taxpayer owns or leases parking facilities in more than one geographic location, the taxpayer may not aggregate the spaces in parking facilities that are in different geographic locations.

In response to these comments, the proposed regulations add a definition of the term “geographic location” as contiguous tracts or parcels of land owned or leased by the taxpayer. Two or more tracts or parcels of land are contiguous if they share common boundaries or would share common boundaries but for the interposition of a road, street, railroad, stream, or similar property. Tracts or parcels of land which touch only at a common corner are not contiguous. The proposed regulations follow Notice 2018-99 and allow taxpayers to aggregate the number of parking spaces in a single geographic location to determine the section 274(a)(4) disallowance using the general rule, primary use methodology, or cost per space methodology.

#### vi. Total Parking Spaces

The proposed regulations define the term “total parking spaces” as the total number of parking spaces in the parking facility. New terms “available parking spaces”

and “inventory/unusable spaces” are added to the proposed regulations and the definition of the term “parking facility” is clarified in response to comments received.

#### vii. Reserved Employee Spaces

A commenter recommended that the definition of the term “reserved employee spaces” be limited to parking spaces actually used by employees on a typical business day. Because section 274(a)(4) disallows the deduction for the expense of providing a QTF to an individual employee, the commenter reasoned that the taxpayer should identify the expense for each QTF provided to each individual employee when determining the amount that is disallowed.

After considering the comment, the Treasury Department and the IRS have determined that costs allocated to reserved employee spaces should be disallowed regardless of actual use of the reserved spaces. However, a special rule is included in step 1 of the primary use methodology providing that there is no disallowance for reserved employee spaces if the primary use of the available parking spaces is to provide parking to the general public, there are five or fewer reserved employee spaces, and the number of reserved employee spaces is 5 percent or less of the total parking spaces in the parking facility.

#### viii. Reserved Nonemployee Spaces

A commenter suggested that parking spaces reserved for drivers with disabilities be treated as “reserved nonemployee spaces” and as such, any related expenses not be disallowed under section 274(a)(4). After considering the comment, the Treasury Department and the IRS have determined that the proposed regulations should not include parking spaces reserved for drivers with disabilities in the definition of reserved

nonemployee spaces. Unlike parking spaces reserved for customers or visitors, parking spaces reserved for drivers with disabilities may be used by employees (with disabilities), and section 274(a)(4) would then apply to disallow the expense. Parking spaces reserved for drivers with disabilities are also not included in “reserved employee spaces” because they may or may not be exclusively reserved for employees.

#### ix. Inventory/Unusable Spaces

The Treasury Department and the IRS received questions and comments on how parking spaces reserved for, or used by, inventoried vehicles are to be treated for purposes of determining the disallowance. For example, taxpayers asked whether parking spaces reserved exclusively for, or used by, vehicles to be sold or leased to customers at a car dealership or car rental agency are treated as spaces available to the general public.

In response to the comments and questions received, the proposed regulations add a new definition for the term “inventory/unusable spaces” that includes parking spaces used for inventoried vehicles, qualified nonpersonal use vehicles (as described in §1.274-5(k)), other fleet vehicles used in a taxpayer’s trade or business, or otherwise not usable for parking by employees.

Inventory/unusable spaces are specifically excluded from the definitions of “available parking spaces,” discussed later, and “reserved nonemployee spaces,” discussed earlier, under the primary use methodology and primary use test in the proposed regulations. The proposed regulations exclude inventory/unusable spaces because those spaces are generally not available to employees or the general public but are instead used for other purposes. Inventory/unusable spaces are included in

total parking spaces under the cost per space methodology because taxpayers do incur costs in maintaining the spaces.

#### x. Available Parking Spaces

The proposed regulations add a new definition for the term “available parking spaces” to clarify that reserved employee spaces and inventory/unusable spaces are not included in determining primary use under the primary use methodology.

#### xi. Primary Use

The Treasury Department and the IRS received numerous comments on the primary use test used in step 2 of the four-step method in Notice 2018-99 to determine the extent to which parking is made available to the general public under section 274(e)(7). Notice 2018-99 provides that “primary use” means greater than 50 percent of actual or estimated usage by the general public of the parking spaces in the parking facility.

Several commenters suggested that primary use should mean greater than 85, 90, or 95 percent of actual or estimated usage by the general public, thereby applying the exception in section 274(e)(7) only to taxpayers with less than 15 percent actual or estimated usage by employees. Other commenters suggested that 50 percent is fair and reasonable.

After considering the comments received, the Treasury Department and the IRS have decided to retain the primary use test as described in Notice 2018-99 as a reasonable interpretation of the exception in section 274(e)(7) for parking made available to the general public. This interpretation is consistent with recent proposed regulations addressing the application of the section 274(e)(7) exception to the limitation

on deduction for meals and entertainment expenses. See 85 FR 11020 (February 26, 2020). Specifically, the proposed regulations for meals and entertainment expenses (proposed §1.274-11 and §1.274-12) include a definition of the term “primarily consumed” that means greater than 50 percent of actual or reasonably estimated consumption.

#### xii. Total Parking Expenses

Commenters suggested that safety-related expenses, such as lighting, snow and ice removal, leaf removal, trash removal, cleaning, and security, should be excluded from the definition of “total parking expenses.” Commentators reasoned that including the expenses may encourage unsafe parking conditions and neglect of care in maintaining the parking facilities.

Commenters also requested the removal of indirect costs, such as utility costs, insurance, property taxes, snow and ice removal, leaf removal, trash removal, cleaning, parking lot attendant expenses, and security. Multiple commenters also suggested adding depreciation to total parking expenses, reasoning that these are costs of parking facilities.

After considering the comments received, the Treasury Department and the IRS have determined that the proposed regulations should adopt the definition of the term “total parking expenses” from Notice 2018-99. Section 274(a)(4) disallows a deduction for the expense of providing a QTF, without regard to whether the expense is required for safety reasons. Further, QTF parking expenses include indirect costs such as allocable salaries for security and maintenance personnel, property taxes, repairs and maintenance, etc. See Joint Committee on Taxation, *General Explanation of Public*

*Law 115-97 (JCS-1-18)*, at 190, December 2018. However, as explained in Notice 2018-99 and in part 2.B. of the Background, a deduction for an allowance for depreciation is not included in total parking expenses because it is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not a parking expense.

#### xiii. Mixed Parking Expense

Numerous commenters expressed concerns and asked questions about how to determine the amount of expenses allocable to a parking facility if the invoice does not separate parking facility expenses from nonparking facility expenses. Commenters explained that determining and allocating expenses may impose excessive and unduly burdensome recordkeeping requirements on taxpayers and may be difficult for taxpayers and the IRS to administer. Commenters noted that such expenses for parking and nonparking property may include rent or lease payments, repairs, maintenance, utility costs, insurance, property taxes, interest, snow or ice removal, and security. In response to the comments, the Treasury Department and the IRS have included in the proposed regulations a definition for the term “mixed parking expense” and a special rule for allocating certain mixed parking expenses. “Mixed parking expense” is defined as an amount paid or incurred by a taxpayer for both a parking facility and nonparking facility property that a taxpayer owns or leases. The special rule for allocating certain mixed parking expenses to a parking facility is explained in part 1.C of this Explanation of Provisions.

#### xiv. Peak Demand Period

In these proposed regulations, several of the methodologies for determining the section 274(a)(4) disallowance for parking facilities require the taxpayer to determine

the total number of parking spaces used by employees during the peak demand period for employee parking on a typical business day. Thus, the proposed regulations provide that for purposes of proposed §1.274-13, the term “peak demand period” means the period of time on a typical business day when the greatest number of the taxpayer’s employees are utilizing parking spaces in the taxpayer’s parking facility. If a taxpayer’s employees work in shifts, the peak demand period would take into account the shift during which the largest number of employees park in the taxpayer’s parking facility. However, a brief transition period during which two shifts overlap in their use of parking spaces, as one shift of employees is getting ready to leave and the next shift is reporting to work, may be disregarded. Taxpayers may use any reasonable methodology to determine the total number of spaces used by employees during the peak demand period on a typical business day, for example based on periodic inspections or employee surveys.

The recent Coronavirus Disease (COVID-19) pandemic highlights that taxpayers may experience significant variations in employee parking during the taxable year due to a national emergency or other type of disaster. The Treasury Department and the IRS request comments on what additional rules, if any, are needed to address significant variations in employee parking during the taxable year and whether any additional rules should apply to all taxpayers generally or should be triggered only upon certain events.

### C. Special Rules for QTF Parking Expenses

Multiple commenters expressed concerns and asked questions regarding how to allocate mixed parking expenses. Commenters suggested the use of a special rule that

would allow the taxpayer to allocate a certain percentage of the taxpayer's mixed parking expenses, such as 5 percent, to a parking facility. Commenters also recommended that taxpayers be permitted to allocate mixed parking expenses by comparing rent or lease payments for leases with and without parking facilities or comparing the value of similar nonparking facilities with and without parking facilities.

In response to concerns raised by commenters, the proposed regulations include a special rule for certain mixed parking expenses to reduce administrative burdens for taxpayers and simplify calculations in complying with section 274(a)(4). Specifically, the proposed regulations provide that a taxpayer may choose to allocate 5 percent of certain mixed parking expenses to the parking facility. This special rule applies to mixed parking expenses related to payments under a lease or rental agreement, and payments for utilities, insurance, interest and property taxes. The special rule to allocate certain mixed parking expenses may only be used in the primary use methodology and cost per space methodology and may not be used with the general rule or the qualified parking limit methodology. Taxpayers are not required to use the special rule for certain mixed parking expenses and may instead use any reasonable methodology for mixed parking expenses.

The proposed regulations also include a special rule allowing taxpayers to aggregate the number of parking spaces in a single geographic location. The rule generally follows the rule in Notice 2018-99, but in response to comments adds a definition of the term "geographic location," which is based on tracts or parcels of land that are contiguous. The special rule for aggregation of parking spaces in a single geographic location may be used with the general rule, primary use methodology, and

cost per space methodology, but may not be used with the qualified parking limit methodology.

#### D. Calculation of Disallowance of QTF Parking Expenses

The proposed regulations follow Notice 2018-99 and provide that if a taxpayer pays one or more third parties an amount for its employees' QTFs, the section 274(a)(4) disallowance is equal to the taxpayer's total annual cost for the QTFs paid or incurred to third parties. A commenter suggested that if a taxpayer pays a third party for parking spaces that are not assigned to specific employees, some of which are not used (for example, taxpayer leases 10 spaces and only has 8 employees), the disallowance should be limited to parking spaces actually used by employees on a typical business day. After considering the comment, the Treasury Department and the IRS determined that amounts paid to a third party for qualified parking in such situations should be disallowed regardless of actual employee use of the spaces because the taxpayer paid or incurred the expense for its employees' QTFs regardless of employee use.

If instead, the taxpayer owns or leases a parking facility, the taxpayer may use the general rule or choose any of the following three simplified methodologies for each parking facility to determine the section 274(a)(4) disallowance for each taxable year.

##### i. General Rule

Multiple commenters requested guidance on additional methodologies that may be used to calculate the disallowance under section 274(a)(4). In response to these comments, the Treasury Department and the IRS determined that taxpayers may calculate the disallowance using a general rule if the calculation is based on a reasonable interpretation of section 274(a)(4), as long as the taxpayer's methodology

does not use the value of a QTF instead of its expense, fail to allocate parking expense to reserved employee spaces, or improperly apply the exception for qualified parking made available to the public (for example, by treating a parking facility regularly used by employees as available to the public merely because the public has access to the parking facility).

## ii. Qualified Parking Limit Methodology

Multiple commenters suggested that a standard cost per parking space similar to the standard mileage rate or per diem rate be used to determine the disallowance under section 274(a)(4). Other commenters suggested that a national average fair market value per parking space be used.

In response to the comments received, the Treasury Department and the IRS have determined that the maximum monthly dollar amount under section 132(f)(2), adjusted for inflation, may be used as a simple estimate of the taxpayer's monthly total cost per parking space. The adjusted maximum monthly excludable amount for 2020 is \$270 per employee. Using the qualified parking limit methodology, taxpayers may determine the disallowance simply by multiplying the section 132(f)(2) monthly per employee limitation on the exclusion by the total number of spaces used by employees during the peak demand period. Alternatively, the proposed regulations provide that taxpayers using this methodology may instead multiply the section 132(f)(2) monthly per employee limitation on the exclusion by the total number of the taxpayer's employees.

Section 274(e)(2) and proposed §1.274-13(e)(2)(i) provide that the section 274(a)(4) disallowance for QTFs does not apply to the extent that a QTF is treated as compensation to an employee on the taxpayer's return and as wages to the employee.

A taxpayer using this qualified parking limit methodology who has monthly expenses per parking space exceeding the section 132(f)(2) monthly per employee limitation on the exclusion can deduct those excess expenses without regard to how much (if any) of the value of the parking space to the employee exceeds the section 132(f)(2) monthly per employee limitation on exclusion. However, these proposed regulations provide that the qualified parking limit methodology may be used only if the value of the QTF, to the extent it exceeds the sum of the amount paid (if any) by the employee for the QTF and the applicable statutory monthly limit in section 132(f)(2), is included on the taxpayer's Federal income tax return as originally filed as compensation paid to the employee and as wages to the employee for purposes of withholding under chapter 24 (relating to collection of Federal income tax at source on wages).

Section 132(a)(5) excludes from gross income the value of a QTF up to the section 132(f)(2) monthly per employee limitation on exclusion, and therefore no amount for the value of QTFs up to the section 132(f)(2) monthly limitation can be included in an employee's wages. Thus, the exception in section 274(e)(2) and proposed §1.274-13(e)(2)(i)(A) cannot be applied to the value of a QTF that is less than or equal to the monthly per employee limitation on exclusion in section 132(f)(2). Because this qualified parking limit methodology already limits the taxpayer's expenses per parking space to the section 132(f)(2) monthly per employee limitation on exclusion, section 274(e)(2) cannot be used to reduce the disallowed expenses even further. For this reason, the proposed regulations provide that the exception to the disallowance for amounts treated as employee compensation provided for in section 274(e)(2) and in

proposed §1.274-13(e)(2)(i) cannot be applied to reduce a section 274(a)(4) disallowance calculated using this method.

### iii. Primary Use Methodology

The Treasury Department and the IRS received numerous comments on the four-step method in Notice 2018-99. The proposed regulations adopt the four-step method in Notice 2018-99, with revisions in response to comments, and rename it as the “primary use methodology.” Comments received on the definition of primary use in Notice 2018-99 are discussed in part 1.B.xi. of this Explanation of Provisions.

The four-step method in Notice 2018-99 provides that employee use of parking spaces is determined by identifying the actual or estimated usage of the parking spaces during normal business hours on a typical business day. Multiple commenters suggested that taxpayers should instead be required to count the number of parking spaces in the parking facility actually used by employees. The Treasury Department and the IRS considered these comments and determined that, to ease the burden of counting actual spaces used by employees and provide a clearer standard, taxpayers must identify the number of available parking spaces used by employees during the peak demand period.

### iv. Cost Per Space Methodology

Multiple commenters stated that the four-step method in Notice 2018-99 is cumbersome and complex. As an alternative, the Treasury Department and the IRS include in the proposed regulations the cost per space methodology, which allows taxpayers to calculate the disallowance by multiplying the cost per space by the number of spaces used by employees. Taxpayers must identify the number of available parking

spaces used by employees during the peak demand period. Cost per space is calculated by dividing total parking expenses (including expenses related to inventory/unusable spaces) by the total number of spaces (including inventory/unusable spaces).

v. Expenses for Transportation in a Commuter Highway Vehicle and Transit Pass QTFs

Notice 2018-99 addresses only expenses related to parking QTFs. The proposed regulations include rules addressing the disallowance of deductions for expenses for transportation in a commuter highway vehicle and transit pass QTFs, as well as the applicability of certain exceptions under section 274(e).

E. Specific Exceptions to Section 274(a) for QTF Expenses

The Treasury Department and the IRS received multiple questions and comments about whether the exceptions in section 274(e) apply to QTF expenses that are otherwise nondeductible under section 274(a)(4). Section 274(e) provides that the deduction disallowance under section 274(a) does not apply to any expense described in section 274(e). The Treasury Department and the IRS considered the comments and note that while section 274(e) was not amended by the TCJA, it provides that section 274(a) “shall not apply to” deductions for expenses described in section 274(e). Therefore, except as described in part 1.E.i. of this Explanation of Provisions, the proposed regulations provide that the deduction disallowance does not apply to expenditures for QTFs that meet the requirements of sections 274(e)(2), (7) and (8).

Numerous commenters also recommended providing exceptions from the section 274(a)(4) disallowance for QTFs with a zero or a de minimis fair market value, QTFs required to be provided to employees under certain laws, or QTFs provided by small

business taxpayers. Exceptions for QTFs with a zero or a de minimis fair market value, QTFs required under certain laws, and small business taxpayers are not provided for in any of the exceptions under section 274(e) and therefore are not exceptions to the section 274(a)(4) disallowance.

i. Certain QTF Expenses Treated as Compensation under Section 274(e)(2)

Pursuant to section 274(e)(2), the proposed regulations provide that the disallowance under section 274(a) does not apply to expenditures for QTFs to the extent the taxpayer treats the expenses as compensation to the employee on the taxpayer's Federal income tax return as originally filed, and as wages to the employee for purposes of withholding under chapter 24 relating to collection of Federal income tax at source on wages. However, section 132(a)(5) excludes the value of QTFs from an employee's gross income subject to the limitations on exclusion provided by section 132(f)(2). Therefore, in determining whether the section 274(e)(2) exception for expenses treated as compensation applies, the proposed regulations provide that the exception in section 274(e)(2) does not apply to expenses paid or incurred for QTFs the value of which (including a purported value of zero) is excluded from an employee's gross income under section 132(a)(5).

The Treasury Department and the IRS are aware that some taxpayers may attempt to claim a deduction under section 274(e)(2) by including a value that is less than the amount required to be included under §1.61-21, which provides the rules for valuation of fringe benefits, or by including a purported value of zero, as compensation and as wages to the employee. The proposed regulations therefore provide that the exception in section 274(e)(2) does not apply to expenses paid or incurred for QTFs for

which the value that is included in gross income is less than the amount required to be included in gross income under §1.61-21. Similarly, if the amount required to be included in gross income under §1.61-21 is purportedly zero, the exception in section 274(e)(2) and proposed §1.274-13(e)(2)(i) does not apply.

As noted above, section 132(a)(5) excludes the value of QTFs from an employee's gross income subject to the monthly per employee limitations on exclusion provided by section 132(f)(2). Section 132(f)(2) provides that the amount of QTFs that can be excluded from gross income cannot exceed a maximum monthly dollar amount, adjusted for inflation. For taxable years beginning in 2020, the monthly per employee limitation under section 132(f)(2)(A) regarding the aggregate fringe benefit exclusion amount for transportation in a commuter highway vehicle and any transit pass is \$270 per employee. The monthly limitation under section 132(f)(2)(B) regarding the fringe benefit exclusion amount for qualified parking is \$270 per employee. Rev. Proc. 2019-44, 2019-47 I.R.B. 1093. Therefore, if an employer provides an employee with QTFs, the value of which exceeds the sum of the amount, if any, paid by the employee for the fringe benefits and the applicable statutory monthly per employee limit, then the employer must include the value of the benefits provided in excess of the amount paid by the employee and the applicable statutory per employee monthly limit in the employee's wages for income and employment tax purposes. See §1.61-21(b)(1) and §1.132-9(b), Q/A-8. The proposed regulations provide that the employer must follow this treatment in order to rely on the exception in section 274(e)(2).

ii. Expenses for Transportation in a Commuter Highway Vehicle, Transit Pass, or Parking Made Available to the Public

As noted in part 2.A. of the Background, section 274(e)(7) applies to expenses for goods, services, and facilities made available by the taxpayer to the general public. When enacting section 274(n) in 1986 (limiting the deduction for meal and entertainment expenses), Congress indicated that a taxpayer's customers and potential customers are members of the general public for purposes of section 274(e)(7):

The reduction rule [in section 274(n)] does not apply in the case of items, such as samples and promotional activities, that are made available to the general public. For example, if the owner of a hardware store advertises that tickets to a baseball game will be provided to the first 50 people who visit the store on a particular date, or who purchase an item from the store during a sale, then the full amount of the face value of the tickets is deductible by the owner.

H.R. Rep. No. 99-426 (1986), reprinted in 1986-3 (Vol. 2) C.B. 1, 124, and S. Rep. No. 99-313 (1986), reprinted in 1986-3 (Vol. 3) C.B. 1, 72. Thus, the Treasury Department and the IRS have determined that expenses for transportation in a commuter highway vehicle, any transit pass, and parking that otherwise qualify as QTFs and are made available to the general public, which includes a taxpayer's customers and potential customers, are within this exception. However, goods, services, and facilities are not made available to the general public if they are made available only to an exclusive list of guests. See *Churchill Downs, Inc. v. Commissioner*, 307 F.3d 423 (6th Cir. 2002).

Pursuant to section 274(e)(7), the proposed regulations provide that any taxpayer expense for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a QTF under section 132(f)(1) and that is also made available to the general public is not subject to the deduction disallowance under section 274(a) to the extent such transportation, transit pass, or parking is made available to the general public. As described further in part 1.B.iii. of this Explanation of Provisions, "general public" includes, but is not limited to, customers, clients, visitors,

individuals delivering goods or services to the taxpayer, and patients of a health care facility. The general public does not include employees, partners, 2-percent shareholders of S corporations, sole proprietors, or independent contractors of the taxpayer. If a taxpayer owns or leases space in a multi-tenant building, employees, partners, 2-percent shareholders of S corporations, sole proprietors, independent contractors or customers of unrelated tenants in the building are included in the definition of general public.

iii. Expenses for Transportation in a Commuter Highway Vehicle, Transit Pass, or Parking Sold to Customers

As noted in part 2.A. of the Background, section 274(e)(8) applies to expenses for goods or services (including the use of facilities) that are sold by the taxpayer in a bona fide transaction for an adequate and full consideration in money or money's worth. The Treasury Department and the IRS have determined that expenses for transportation in a commuter highway vehicle, any transit pass, and parking that otherwise qualify as QTFs and that are sold by a taxpayer fall within this exception.

Pursuant to section 274(e)(8), the proposed regulations provide that any taxpayer expense for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a QTF under section 132(f)(1) that is sold to customers in a bona fide transaction for an adequate and full consideration in money or money's worth is not subject to the deduction disallowance under section 274(a). The proposed regulations also provide that for purposes of this section, the term "customer" includes an employee of the taxpayer who purchases the transportation in a commuter

highway vehicle, transit pass, or parking in a bona fide transaction for an adequate and full consideration in money or money's worth.

Some commenters have stated that QTFs offered through a compensation reduction agreement should not be subject to the disallowance under section 274(a)(4) because an employer should not be disallowed a deduction for expenses for otherwise deductible compensation when an employee chooses to use that compensation towards the purchase of a QTF through a compensation reduction agreement. Pursuant to section 132(f)(4), no amount for a QTF is included in the gross income of an employee solely because the employee can choose between any QTF (other than a qualified bicycle commuting reimbursement) and compensation that would otherwise be includible in the employee's gross income. Thus, an employee who is offered this choice and who elects QTFs is not required to include the foregone cash compensation in income if the election is made pursuant to a compensation reduction agreement and the relevant requirements are met. See §1.132-9(b), Q/A-11 through 15. In other words, an employer who provides an employee a QTF through a compensation reduction agreement is incurring an expense for an excludible QTF (assuming the relevant requirements are met), rather than an expense for the compensation that was reduced. Therefore, the Treasury Department and the IRS do not adopt this approach because a QTF is subject to the section 274(a)(4) disallowance regardless of whether the benefit is provided by the employer in-kind, through a bona fide cash reimbursement arrangement, or through a compensation reduction agreement.

## 2. Transportation and Commuting Expenses

Proposed §1.274-14 addresses the disallowance of deductions under section 274(l) for amounts paid or incurred after December 31, 2017, for any expense incurred to provide any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence and place of employment, except as necessary for ensuring the safety of the employee. Travel between the employee's residence and place of employment includes travel that originates at a transportation hub near the employee's residence or place of employment. For example, an employee who commutes to work by airplane from an airport near the employee's residence to an airport near the employee's place of employment is traveling between the residence and place of employment.

Responding to comments received, the proposed regulations provide a definition for an employee's "residence," referencing the definition of the term "residence" in §1.121-1(b)(1). Under §1.121-1(b)(1), whether property is used by the taxpayer as the taxpayer's residence depends upon all the facts and circumstances. A property used by the taxpayer as the taxpayer's residence may include a houseboat, a house trailer, or the house or apartment that the taxpayer is entitled to occupy as a tenant-stockholder in a cooperative housing corporation. The proposed regulations also define the term "safety of the employee," referencing the description of a bona fide business-oriented security concern in §1.132-5(m).

Commentators have asked whether section 274(l) applies to expenses for QTFs provided to an employee of the taxpayer for which a deduction would be disallowed under section 274(a)(4) except that one of the exceptions under section 274(e) applies.

The Treasury Department and the IRS have determined that section 274(l) does not apply to deductions for such expenses.

The Treasury Department and the IRS also received comments suggesting that the exception in section 274(e)(2) for expenses treated as compensation should apply to section 274(l) transportation and commuting expenses. However, the exceptions in section 274(e) apply only to amounts that are disallowed under section 274(a), and not to those disallowed under section 274(l). The Joint Committee on Taxation's Bluebook on the TCJA confirms that the exception in section 274(e)(2) does not apply to section 274(l) expenses:

The provision is intended to include qualified transportation fringe expenses in the exception to the deduction disallowance for expenses that are treated as compensation. Any expenses incurred for providing any form of transportation which are not qualified transportation fringes (or any payment or reimbursement) for commuting between the employee's residence and place of employment, even if included in compensation, are not eligible for this exception.

Joint Committee on Taxation, *General Explanation of Public Law 115-97* (JCS-1-18), at 190, December 2018. Thus, the proposed regulations do not apply the section 274(e)(2) exception to section 274(l) expenses.

### **Request for Comments**

The Treasury Department and the IRS request comments on all aspects of these proposed regulations. Regarding QTF parking expenses under proposed §1.274-13, comments are specifically requested on other methodologies for determining the use of parking spaces and the related expenses allocable to employee parking. Comments are also requested on additional guidance needed to determine the amount of commuter highway vehicle and transit pass expenses for QTFs that is nondeductible under section 274(a)(4), including whether any specific examples should be addressed.

Regarding transportation and commuting expenses under proposed §1.274-14, comments are specifically requested on additional guidance needed to determine whether transportation is necessary for ensuring the safety of the employee, and how to define an employee's residence and place of employment. Comments are also requested on whether any specific examples of transportation and commuting expenses should be addressed.

### **Proposed Applicability Date**

These regulations are proposed to apply for taxable years beginning on or after the date these regulations are published as final regulations in the **Federal Register**. Pending the issuance of the final regulations, a taxpayer may rely on these proposed regulations for QTF expenses and transportation and commuting expenses, as applicable, that are paid or incurred in taxable years beginning after December 31, 2017. Alternatively, a taxpayer may choose to rely on the guidance in Notice 2018-99 until these proposed regulations are finalized.

### **Special Analyses**

These proposed regulations are not subject to review under section 6(b) of Executive Order 12866 pursuant to the Memorandum of Agreement (April 11, 2018) between the Treasury Department and the Office of Management and Budget regarding review of tax regulations.

In accordance with the Regulatory Flexibility Act (5 U.S.C. chapter 6), it is hereby certified that this proposed rule will not have a significant economic impact on a substantial number of small entities. Although the rule may affect a substantial number of small entities, the economic impact of the regulations is not likely to be significant.

Data are not readily available about the number of taxpayers affected, but the number is likely to be substantial for both large and small entities because the rule affects any entity that provides QTFs or certain commuting benefits to employees. The economic impact of these regulations is not likely to be significant, however, because these proposed regulations substantially incorporate prior guidance and otherwise clarify the application of the TCJA changes to section 274 related to QTFs and certain commuting benefits. The proposed regulations will assist taxpayers in understanding the changes to section 274 and make it easier for taxpayers to comply with those changes. Notwithstanding this certification, the Treasury Department and the IRS welcome comments on the impact of these regulations on small entities.

Pursuant to section 7805(f), these proposed regulations have been submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on their impact on small business.

#### Unfunded Mandates Reform Act

Section 202 of the Unfunded Mandates Reform Act of 1995 (UMRA) requires that agencies assess anticipated costs and benefits and take certain other actions before issuing a final rule that includes any Federal mandate that may result in expenditures in any one year by a state, local, or tribal government, in the aggregate, or by the private sector, of \$100 million (updated annually for inflation). This rule does not include any Federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of that threshold.

#### Executive Order 13132: Federalism

Executive Order 13132 (entitled “Federalism”) prohibits an agency from publishing any rule that has federalism implications if the rule either imposes substantial, direct compliance costs on state and local governments, and is not required by statute, or preempts state law, unless the agency meets the consultation and funding requirements of section 6 of the Executive order. This proposed rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Executive order.

### **Comments and Requests for a Public Hearing**

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are submitted timely to the IRS as prescribed in this preamble under the “**ADDRESSES**” heading. Any electronic comments submitted, and to the extent practicable any paper comments submitted, will be made available at <http://www.regulations.gov> or upon request.

A public hearing will be scheduled if requested in writing by any person who timely submits electronic or written comments. Requests for a public hearing are also encouraged to be made electronically and can also be made as prescribed in this preamble under the “**ADDRESSES**” heading. If a public hearing is scheduled, notice of the date and time for the public hearing will be published in the **Federal Register**. Announcement 2020-4, 2020-17 IRB 1, provides that until further notice, public hearings conducted by the IRS will be held telephonically. Any telephonic hearing will be made accessible to people with disabilities.

### **Statement of Availability of IRS Documents**

IRS Revenue Procedures, Revenue Rulings, and Notices cited in this preamble are published in the Internal Revenue Bulletin (or Cumulative Bulletin) and are available from the Superintendent of Documents, U.S. Government Publishing Office, Washington, DC 20402, or by visiting the IRS web site at <http://www.irs.gov>.

### **Drafting Information**

The principal author of this proposed regulation is Patrick Clinton, Office of the Associate Chief Counsel (Income Tax & Accounting). Other personnel from the Treasury Department and the IRS participated in their development.

### **List of Subjects in 26 CFR Part 1**

Income Taxes, Reporting and recordkeeping requirements.

### **Proposed Amendments to the Regulations**

Accordingly, 26 CFR part 1 is proposed to be amended as follows:

#### **Part 1--INCOME TAX**

Paragraph 1. The authority citation for part 1 is amended by adding sectional authorities for §§1.274-13 and 1.274-14 in numerical order to read in part as follows:

Authority: 26 U.S.C. 7805.

\* \* \* \* \*

Section 1.274-13 also issued under 26 U.S.C. 274.

Section 1.274-14 also issued under 26 U.S.C. 274.

\* \* \* \* \*

Par. 2. Sections 1.274-13 and 1.274-14 are added to read as follows:

§1.274-13 Disallowance of deductions for certain qualified transportation fringe expenditures.

(a) In general. Except as provided in this section, no deduction otherwise allowable under chapter 1 of the Internal Revenue Code (Code) is allowed for any expense of any qualified transportation fringe as defined in paragraph (b)(1) of this section.

(b) Definitions. The following definitions apply for purposes of this section:

(1) Qualified transportation fringe. The term qualified transportation fringe means any of the following provided by an employer to an employee: transportation in a commuter highway vehicle if such transportation is in connection with travel between the employee's residence and place of employment (as described in sections 132(f)(1)(A) and 132(f)(5)(B)); any transit pass (as described in sections 132(f)(1)(B) and 132(f)(5)(A)); or qualified parking (as described in sections 132(f)(1)(C) and 132(f)(5)(C)).

(2) Employee. The term employee means a common law employee or other statutory employee, such as an officer of a corporation, who is currently employed by the taxpayer. See §1.132-9 Q/A-5. Partners, 2-percent shareholders of S corporations, sole proprietors, and independent contractors are not employees of the taxpayer for purposes of this section.

(3) General public. The term general public includes, but is not limited to, customers, clients, visitors, individuals delivering goods or services to the taxpayer, students of an educational institution, and patients of a health care facility. If a taxpayer owns or leases space in a multi-tenant building, the term general public includes employees, partners, 2-percent shareholders of S corporations, sole proprietors, independent contractors, clients, or customers of unrelated tenants in the building. The

term general public does not include individuals that are employees, partners, 2-percent shareholders of S corporations, sole proprietors, or independent contractors of the taxpayer. Also, an exclusive list of guests is not the general public.

(4) Parking facility. The term parking facility includes indoor and outdoor garages and other structures, as well as parking lots and other areas, where a taxpayer provides qualified parking (as defined in section 132(f)(5)(C)) to one or more of its employees. The term parking facility may include one or more parking facilities but does not include parking spaces on or near property used by an employee for residential purposes.

(5) Geographic location. The term geographic location means contiguous tracts or parcels of land owned or leased by the taxpayer. Two or more tracts or parcels of land are contiguous if they share common boundaries or would share common boundaries but for the interposition of a road, street, railroad, stream, or similar property. Tracts or parcels of land which touch only at a common corner are not contiguous.

(6) Total parking spaces. The term total parking spaces means the total number of parking spaces, or the taxpayer's portion thereof, in the parking facility.

(7) Reserved employee spaces. The term reserved employee spaces means the spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for the taxpayer's employees. Employee spaces in the parking facility, or portion thereof, may be exclusively reserved for employees by a variety of methods, including, but not limited to, specific signage (for example, "Employee Parking Only") or a separate facility or portion of a facility segregated by a barrier to entry or limited by terms of access. Inventory/unusable spaces are not included in reserved employee spaces.

(8) Reserved nonemployee spaces. The term reserved nonemployee spaces means the spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for nonemployees. For example, such parking spaces may include, but are not limited to, spaces reserved exclusively for visitors, customers, partners, sole proprietors, 2-percent shareholders of S corporations, vendor deliveries, and passenger loading/unloading. Nonemployee spaces in the parking facility, or portion thereof, may be exclusively reserved for nonemployees by a variety of methods, including, but not limited to, specific signage (for example, "Customer Parking Only") or a separate facility, or portion of a facility, segregated by a barrier to entry or limited by terms of access. Inventory/unusable spaces are not included in reserved nonemployee spaces.

(9) Inventory/unusable spaces. The term inventory/unusable spaces means the spaces in the parking facility, or the taxpayer's portion thereof, exclusively used or reserved for inventoried vehicles, qualified nonpersonal use vehicles described in §1.274-5(k), or other fleet vehicles used in the taxpayer's business, or that are otherwise not usable for parking by employees. Examples of such parking spaces include, but are not limited to, parking spaces for vehicles that are intended to be sold or leased at a car dealership or car rental agency, parking spaces for vehicles owned by an electric utility used exclusively to maintain electric power lines, or parking spaces occupied by trash dumpsters (or similar property).

(10) Available parking spaces. The term available parking spaces means the total parking spaces, less reserved employee spaces and less inventory/unusable spaces, that are available to employees and the general public.

(11) Primary use. The term primary use means greater than 50 percent of actual or estimated usage of the available parking spaces in the parking facility.

(12) Total parking expenses. The term total parking expenses means all expenses of the taxpayer related to total parking spaces in a parking facility including, but not limited to, repairs, maintenance, utility costs, insurance, property taxes, interest, snow and ice removal, leaf removal, trash removal, cleaning, landscape costs, parking lot attendant expenses, security, and rent or lease payments or a portion of a rent or lease payment (if not broken out separately). A deduction for an allowance for depreciation on a parking facility owned by a taxpayer and used for parking by the taxpayer's employees is an allowance for the exhaustion, wear and tear, and obsolescence of property, and not included in total parking expenses for purposes of this section. Expenses paid or incurred for nonparking facility property, including items related to property next to the parking facility, such as landscaping or lighting, also are not included in total parking expenses.

(13) Mixed parking expense. The term mixed parking expense means a single expense amount paid or incurred by a taxpayer that includes both parking facility and nonparking facility expenses for a property that a taxpayer owns or leases.

(14) Peak demand period. The term peak demand period refers to the period of time on a typical business day when the greatest number of the taxpayer's employees are utilizing parking spaces in the taxpayer's parking facility. If a taxpayer's employees work in shifts, the peak demand period would take into account the shift during which the largest number of employees park in the taxpayer's parking facility. However, a brief transition period during which two shifts overlap in their use of parking spaces, as one

shift of employees is getting ready to leave and the next shift is reporting to work, may be disregarded. Taxpayers may use any reasonable methodology to determine the total number of spaces used by employees during the peak demand period on a typical business day. A reasonable methodology may include periodic inspections or employee surveys.

(c) Special rules for calculating disallowance of deductions for qualified transportation fringe parking expenses; taxpayer owned or leased parking facilities.

Either or both of the following special rules may be used for determining total parking expenses and total parking spaces in calculating the disallowance of deductions for qualified transportation fringe parking expenses under the methodologies in paragraph (d)(2)(ii)(B) and (C) of this section. The special rule in paragraph (c)(2) of this section may be used for determining total parking spaces in calculating the disallowance of deductions for qualified transportation fringe parking expenses under the methodology in paragraph (d)(2)(i) of this section.

(1) Calculation of mixed parking expenses. For purposes of determining total parking expenses, a taxpayer may use any reasonable methodology to allocate the applicable portion of mixed parking expenses to a parking facility. A taxpayer may choose to allocate 5 percent of the following mixed parking expenses to a parking facility: lease or rental agreement expenses, property taxes, interest expense, and expenses for utilities and insurance.

(2) Aggregation of spaces by geographic location. If a taxpayer owns or leases more than one parking facility in a single geographic location, the taxpayer may aggregate the number of spaces in those parking facilities for purposes of calculating

the disallowance of deductions for certain qualified transportation fringe expenses. For example, parking spaces at an office park or an industrial complex in the geographic location may be aggregated. However, a taxpayer may not aggregate parking spaces in parking facilities that are in different geographic locations.

(d) Calculation of disallowance of deductions for qualified transportation fringe expenses--(1) Taxpayer pays a third party for parking qualified transportation fringe. If a taxpayer pays a third party an amount for its employees' parking qualified transportation fringe, the section 274(a)(4) disallowance generally is calculated as the taxpayer's total annual cost of employee parking qualified transportation fringes paid to the third party.

(2) Taxpayer provides parking qualified transportation fringe at a parking facility it owns or leases. If a taxpayer owns or leases all or a portion of one or more parking facilities where its employees park, the section 274(a)(4) disallowance may be calculated using the general rule in paragraph (d)(2)(i) of this section or any of the simplified methodologies in paragraph (d)(2)(ii) of this section. A taxpayer may choose to use the general rule or any of the following methodologies for each taxable year and for each parking facility.

(i) General rule. A taxpayer that uses the general rule in this paragraph (d)(2)(i) must calculate the disallowance of deductions for qualified transportation fringe parking expenses for each employee receiving the qualified transportation fringe based on a reasonable interpretation of section 274(a)(4). A taxpayer that uses the general rule in this paragraph (d)(2)(i) may not use the special rule in paragraph (c)(1) of this section but may use the special rule in paragraph (c)(2) of this section. An interpretation of

section 274(a)(4) is not reasonable unless the taxpayer applies the following rules when calculating the disallowance under this paragraph (d)(2)(i).

(A) A taxpayer must not use value to determine expense. A taxpayer may not use the value of employee parking to determine expenses allocable to employee parking that is either owned or leased by the taxpayer because section 274(a)(4) disallows a deduction for the expense of providing a qualified transportation fringe, regardless of its value.

(B) A taxpayer must not deduct expenses related to reserved employee spaces. A taxpayer must determine the allocable portion of total parking expenses that relate to any reserved employee spaces. No deduction is allowed for the parking expenses that relate to reserved employee spaces.

(C) A taxpayer must not improperly apply the exception for qualified parking made available to the public. A taxpayer must not improperly apply the exception in section 274(e)(7) or paragraph (e)(2)(ii) of this section to parking facilities, for example, by treating a parking facility regularly used by employees as available to the general public merely because the general public has access to the parking facility.

(ii) Additional simplified methodologies. Instead of using the general rule in paragraph (d)(2)(i) of this section for a taxpayer owned or leased parking facility, a taxpayer may use a simplified methodology under paragraph (d)(2)(ii)(A), (B), or (C) of this section.

(A) Qualified parking limit methodology. A taxpayer that uses the qualified parking limit methodology in this paragraph (d)(2)(ii)(A) must calculate the disallowance of deductions for qualified transportation fringe parking expenses by multiplying the total

number of spaces used by employees during the peak demand period, or the total number of taxpayer's employees, by the section 132(f)(2) monthly per employee limitation on exclusion (adjusted for inflation), for each month in the taxable year. The result is the amount of the taxpayer's expenses that are disallowed under section 274(a)(4). This methodology may be used only if the taxpayer includes the value of the qualified transportation fringe in excess of the sum of the amount, if any, paid by the employee for the qualified transportation fringe and the applicable statutory monthly limit in section 132(f)(2) on the taxpayer's Federal income tax return as originally filed as compensation paid to the employee and as wages to the employee for purposes of withholding under chapter 24 of the Code (relating to collection of Federal income tax at source on wages). In addition, the exception to the disallowance for amounts treated as employee compensation provided for in section 274(e)(2) and in paragraph (e)(2)(i) of this section cannot be applied to reduce a section 274(a)(4) disallowance calculated using this method. A taxpayer using this methodology may not use either of the special rules in paragraph (c) of this section.

(B) Primary use methodology. A taxpayer that uses the primary use methodology in this paragraph (d)(2)(ii)(B) must use the following four-step methodology to calculate the disallowance of deductions for qualified transportation fringe parking expenses for each parking facility. A taxpayer may use either or both of the special rules in paragraph (c) of this section for determining total parking expenses and total parking spaces.

(1) Step 1 - Calculate the disallowance for reserved employee spaces. A taxpayer must identify the total parking spaces in the parking facility, or the taxpayer's

portion thereof, exclusively reserved for the taxpayer's employees. The taxpayer must then determine the percentage of reserved employee spaces in relation to total parking spaces and multiply that percentage by the taxpayer's total parking expenses for the parking facility. The product is the amount of the deduction for total parking expenses that is disallowed under section 274(a)(4) for reserved employee spaces. There is no disallowance for reserved employee spaces if the primary use (as defined in paragraphs (b)(11) and (d)(2)(ii)(B)(2) of this section) of the available parking spaces is to provide parking to the general public, and there are five or fewer reserved employee spaces in the parking facility and the reserved employee spaces are 5 percent or less of the total parking spaces.

(2) Step 2 - Determine the primary use of available parking spaces. A taxpayer must identify the available parking spaces in the parking facility and determine whether their primary use is to provide parking to the general public. If the primary use of the available parking spaces in the parking facility is to provide parking to the general public, then total parking expenses allocable to available parking spaces at the parking facility are excepted from the section 274(a)(4) disallowance by the general public exception under section 274(e)(7) and paragraph (e)(2)(ii) of this section. Primary use of available parking spaces is based on the number of available parking spaces used by employees during the peak demand period. Nonreserved parking spaces that are available to the general public but empty during normal business hours on a typical business day are treated as provided to the general public.

(3) Step 3 - Calculate the allowance for reserved nonemployee spaces. If the primary use of a taxpayer's available parking spaces is not to provide parking to the

general public, the taxpayer must identify the number of available parking spaces in the parking facility, or the taxpayer's portion thereof, exclusively reserved for nonemployees. A taxpayer that has no reserved nonemployee spaces may proceed to Step 4 in paragraph (d)(2)(ii)(B)(4) of this section. If the taxpayer has reserved nonemployee spaces, it may determine the percentage of reserved nonemployee spaces in relation to remaining total parking spaces and multiply that percentage by the taxpayer's remaining total parking expenses. The product is the amount of the deduction for remaining total parking expenses that is not disallowed because the spaces are not available for employee parking.

(4) Step 4 - Determine remaining use of available parking spaces and allocable expenses. If a taxpayer completes Steps 1 - 3 in paragraph (d)(2)(ii)(B) of this section and has any remaining total parking expenses not specifically categorized as deductible or nondeductible, the taxpayer must reasonably allocate such expenses by determining the total number of available parking spaces used by employees during the peak demand period.

(C) Cost per space methodology. A taxpayer using the cost per space methodology in this paragraph (d)(2)(ii)(C) must calculate the disallowance of deductions for qualified transportation fringe parking expenses by multiplying the cost per space by the total number of available parking spaces used by employees during the peak demand period. The product is the amount of the deduction for total parking expenses that is disallowed under section 274(a)(4). A taxpayer may calculate cost per space by dividing total parking expenses by total parking spaces. A taxpayer using this

methodology may use either or both of the special rules in paragraph (c) of this section for determining total parking expenses and total parking spaces.

(3) Expenses for transportation in a commuter highway vehicle or transit pass. If a taxpayer pays a third party an amount for its employees' commuter highway vehicle or a transit pass qualified transportation fringe, the section 274(a)(4) disallowance generally is equal to the taxpayer's total annual cost of employee commuter highway vehicle or a transit pass qualified transportation fringes paid to the third party. If a taxpayer provides transportation in a commuter highway vehicle or transit pass qualified transportation fringes in kind directly to its employees, the taxpayer must calculate the disallowance of deductions for expenses for such fringes based on a reasonable interpretation of section 274(a)(4). However, a taxpayer may not use the value of the qualified commuter highway vehicle or transit pass fringe to the employee to determine expenses allocable to such fringe because section 274(a)(4) disallows a deduction for the expense of providing a qualified transportation fringe, regardless of its value to the employee.

(e) Specific exceptions to disallowance of deduction for qualified transportation fringe expenses--(1) In general. The provisions of section 274(a)(4) and paragraph (a) of this section (imposing limitations on deductions for qualified transportation fringe expenses) are not applicable in the case of expenditures set forth in paragraph (e)(2) of this section. Such expenditures are deductible to the extent allowable under chapter 1 of the Code. This paragraph (e) cannot be construed to affect whether a deduction under section 162 or 212 is allowed or allowable. The fact that an expenditure is not covered by a specific exception provided for in this paragraph (e) is not determinative of

whether a deduction for the expenditure is disallowed under section 274(a)(4) and paragraph (a) of this section.

(2) Exceptions to disallowance. The expenditures referred to in paragraph (e)(1) of this section are set forth in paragraphs (e)(2)(i) through (iii) of this section.

(i) Certain qualified transportation fringe expenses treated as compensation--(A)  
In general. Under section 274(e)(2) and this paragraph (e)(2)(i), any expense paid or incurred by a taxpayer for a qualified transportation fringe is not subject to the disallowance of deductions provided for in paragraph (a) of this section to the extent that the expense is treated by the taxpayer—

(1) On the taxpayer's Federal income tax return as originally filed, as compensation paid to the employee; and

(2) As wages to the employee for purposes of withholding under chapter 24 (relating to collection of Federal income tax at source on wages).

(B) Limitation on exception. The exception in section 274(e)(2) and paragraph (e)(2)(i) of this section does not apply to expenses paid or incurred for qualified transportation fringes the value of which (including a purported value of zero) is less than the sum of the amount, if any, paid by the employee for the fringe benefits and any amount excluded from gross income under section 132(a)(5). Thus, if an employer provides an employee with qualified transportation fringes the value of which is less than the applicable statutory monthly per employee limit under section 132(a)(5), the exception in section 274(e)(2) and paragraph (e)(2)(i) of this section does not apply to expenses paid or incurred for the fringe benefits.

(C) Expenses for which value is improperly included. The exception in section 274(e)(2) and paragraph (e)(2)(i) of this section does not apply to expenses paid or incurred for qualified transportation fringes for which the value that is included in gross income of the employee is less than the amount required to be included in gross income under §1.61-21. Similarly, if the amount required to be included in gross income under §1.61-21 is purportedly zero, the exception in section 274(e)(2) and paragraph (e)(2)(i) of this section does not apply.

(D) Required inclusion in wages. The exception in section 274(e)(2) and paragraph (e)(2)(i) of this section applies to expenses paid or incurred for qualified transportation fringes the value of which exceeds the sum of the amount, if any, paid by the employee for the fringe benefits and any amount excluded from gross income under section 132(a)(5), if treated as compensation on the taxpayer's Federal income tax return as originally filed and as wages to the employee for purposes of withholding under chapter 24. Thus, assuming no other statutory exclusion applies, if an employer provides an employee with qualified transportation fringes the value of which exceeds the applicable statutory monthly limit and the employee does not make any payment, the value of the benefits provided in excess of the applicable statutory monthly limit must be included in the employee's wages for income and employment tax purposes in accordance with section 274(e)(2) and paragraph (e)(2)(i) of this section. See §1.61-21(b)(1) and §1.132-9(b), Q/A-8.

(ii) Expenses for transportation in a commuter highway vehicle, transit pass, or parking made available to the public. Under section 274(e)(7) and this paragraph (e)(2)(ii), any expense paid or incurred by a taxpayer for transportation in a commuter

highway vehicle, a transit pass, or parking that otherwise qualifies as a qualified transportation fringe and that is also made available to the general public, is not subject to the disallowance of deductions provided for in paragraph (a) of this section to the extent that such transportation, transit pass, or parking is made available to the general public. With respect to parking, this exception applies to the entire amount of the taxpayer's parking expense, less any expenses specifically attributable to employees (for example, expenses allocable to reserved employee spaces), if the primary use of the parking is by the general public. If the primary use of the parking is not by the general public, this exception applies only to the costs attributable to the parking used by the general public.

(iii) Expenses for transportation in a commuter highway vehicle, transit pass, or parking sold to customers. Under section 274(e)(8) and this paragraph (e)(2)(iii), any expense paid or incurred by a taxpayer for transportation in a commuter highway vehicle, a transit pass, or parking that otherwise qualifies as a qualified transportation fringe to the extent such transportation, transit pass, or parking is sold to customers in a bona fide transaction for an adequate and full consideration in money or money's worth, is not subject to the disallowance of deductions provided for in paragraph (a) of this section. For purposes of this paragraph (e)(2)(iii), the term customer includes an employee of the taxpayer who purchases the transportation in a bona fide transaction for an adequate and full consideration in money or money's worth.

(f) Examples. The following examples illustrate the provisions of this section related to parking expenses for qualified transportation fringes. For each example, assume the parking expenses are otherwise deductible expenses paid or incurred

during the 2020 taxable year; all or some portion of the expenses relate to a qualified transportation fringe under section 132(f); the section 132(f)(2) monthly per employee limitation on an employee's exclusion is \$270; all taxpayers are calendar-year taxpayers; and the length of the 2020 taxable year is 12 months.

(1) Example 1. Taxpayer A pays B, a third party who owns a parking garage adjacent to A's place of business, \$100 per month per parking space for each of A's 10 employees to park in B's garage, or \$12,000 for parking in 2020 ( $(\$100 \times 10) \times 12 = \$12,000$ ). The \$100 per month paid for each of A's 10 employees for parking is excludible under section 132(a)(5), and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable. Thus, the entire \$12,000 is subject to the section 274(a)(4) disallowance under paragraphs (a) and (d)(1) of this section.

(2) Example 2. (i) Assume the same facts as in paragraph (f)(1) of this section (Example 1), except A pays B \$300 per month for each parking space, or \$36,000 for parking for 2020 ( $(\$300 \times 10) \times 12 = \$36,000$ ). Of the \$300 per month paid for parking for each of 10 employees, \$270 is excludible under section 132(a)(5) for 2020 and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount. A properly treats the excess amount of \$30 ( $\$300 - \$270$ ) per employee per month as compensation and wages. Thus, \$32,400 ( $(\$270 \times 10) \times 12 = \$32,400$ ) is subject to the section 274(a)(4) disallowance under paragraphs (a) and (d)(1) of this section.

(ii) The excess amount of \$30 per employee per month is not excludible under section 132(a)(5). As a result, the exceptions in section 274(e)(2) and paragraph (e)(2)(i) of this section are applicable to this amount. Thus, \$3,600 ( $\$36,000 - \$32,400 = \$3,600$ ) is not subject to the section 274(a)(4) disallowance and remains deductible.

(3) Example 3. (i) Taxpayer C leases 200 parking spaces from a third party at a rate of \$500 per space, per month in 2020. C's annual lease payment for the parking spaces is \$1,200,000 ( $(200 \times \$500) \times 12 = \$1,200,000$ ). The number of available parking spaces used by C's employees during the peak demand period is 200.

(ii) C uses the qualified parking limit methodology described in paragraph (d)(2)(ii)(A) of this section to determine the disallowance under section 274(a)(4). Under this methodology, the section 274(a)(4) disallowance is calculated by multiplying the number of available parking spaces used by employees during the peak demand period, 200, the section 132(f)(2) monthly per employee limitation on exclusion, \$270, and 12, the number of months in the applicable taxable year. The amount subject to the section 274(a)(4) disallowance is \$648,000 ( $200 \times \$270 \times 12 = \$648,000$ ). This amount is excludible from C's employees' gross incomes under section 132(a)(5) and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount. The excess \$552,000 ( $\$1,200,000 - \$648,000$ ) for which C is not disallowed a

deduction under 274(a)(4) is included in C's employees' gross incomes because it exceeds the section 132(f)(2) monthly per employee limitation on exclusion.

(4) Example 4—(i) Facts. Taxpayer D, a big box retailer, owns a surface parking facility adjacent to its store. D incurs \$10,000 of total parking expenses for its store in the 2020 taxable year. D's parking facility has 510 spaces that are used by its customers, employees, and its fleet vehicles. None of D's parking spaces are reserved. The number of available parking spaces used by D's employees during the peak demand period is 50. Approximately 30 nonreserved parking spaces are empty during normal business hours on a typical business day. D's fleet vehicles occupy 10 parking spaces.

(ii) Methodology. D uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) Step 1. Because none of D's parking spaces are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spaces under paragraph (d)(2)(ii)(B)(1) of this section.

(iv) Step 2. D's number of available parking spaces is the total parking spaces reduced by the number of reserved employee spaces and inventory/unusable spaces or 500 ( $510 - 0 - 10 = 500$ ). The number of available parking spaces used by D's employees during the peak demand period is 50. Of the 500 available parking spaces, 450 are used to provide parking to the general public, including the 30 empty nonreserved parking spaces that are treated as provided to the general public. The primary use of D's available parking spaces is to provide parking to the general public because 90% ( $450 / 500 = 90\%$ ) of the available parking spaces are used by the general public under paragraph (d)(2)(ii)(B)(2) of this section. Because the primary use of the available parking spaces is to provide parking to the general public, the exception in section 274(e)(7) and paragraph (e)(2)(ii) of this section applies and none of the \$10,000 of total parking expenses is subject to the section 274(a)(4) disallowance.

(5) Example 5—(i) Facts. Taxpayer E, a manufacturer, owns a surface parking facility adjacent to its plant. E incurs \$10,000 of total parking expenses in 2020. E's parking facility has 500 spaces that are used by its visitors and employees. E reserves 25 of these spaces for nonemployee visitors. The number of available parking spaces used by E's employees during the peak demand period is 400.

(ii) Methodology. E uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) Step 1. Because none of E's parking spaces are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spaces under paragraph (d)(2)(ii)(B)(1) of this section.

(iv) Step 2. The primary use of E's parking facility is not to provide parking to the general public because 80% ( $400 / 500 = 80\%$ ) of the available parking spaces are used by its employees. Thus, expenses allocable to those spaces are not excepted from the section 274(a) disallowance by section 274(e)(7) and paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(2) of this section.

(v) Step 3. Because 5% ( $25 / 500 = 5\%$ ) of E's available parking spaces are reserved nonemployee spaces, up to \$9,500 ( $\$10,000 \times 95\% = \$9,500$ ) of E's total parking expenses are subject to the section 274(a)(4) disallowance under this step as provided in paragraph (d)(2)(ii)(B)(3) of this section. The remaining \$500 ( $\$10,000 \times 5\% = \$500$ ) of expenses allocable to reserved nonemployee spaces is excepted from the section 274(a) disallowance and continues to be deductible.

(vi) Step 4. E must reasonably determine the employee use of the remaining parking spaces by using the number of available parking spaces used by E's employees during the peak demand period and determine the expenses allocable to employee parking spaces under paragraph (d)(2)(ii)(B)(4) of this section.

(6) Example 6—(i) Facts. Taxpayer F, a manufacturer, owns a surface parking facility adjacent to its plant. F incurs \$10,000 of total parking expenses in 2020. F's parking facility has 500 spaces that are used by its visitors and employees. F reserves 50 spaces for management. All other employees park in nonreserved spaces in F's parking facility; the number of available parking spaces used by F's employees during the peak demand period is 400. Additionally, F reserves 10 spaces for nonemployee visitors.

(ii) Methodology. F uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) Step 1. Because F reserved 50 spaces for management, \$1,000 ( $(50 / 500) \times \$10,000 = \$1,000$ ) is the amount of total parking expenses that is nondeductible for reserved employee spaces under section 274(a)(4) and paragraphs (a) and (d)(2)(ii)(B)(1) of this section. None of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount.

(iv) Step 2. The primary use of the remainder of F's parking facility is not to provide parking to the general public because 89% ( $400 / 450 = 89\%$ ) of the available parking spaces in the facility are used by its employees. Thus, expenses allocable to these spaces are not excepted from the section 274(a)(4) disallowance by section 274(e)(7) and paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(2) of this section.

(v) Step 3. Because 2% ( $10 / 450 = 2.22\%$ ) of F's available parking spaces are reserved nonemployee spaces, the \$180 allocable to those spaces ( $(\$10,000 - \$1,000) \times 2\%$ ) is not subject to the section 274(a)(4) disallowance and continues to be deductible under paragraph (d)(2)(ii)(B)(3) of this section.

(vi) Step 4. F must reasonably determine the employee use of the remaining parking spaces by using the number of available parking spaces used by F's employees during the peak demand period and determine the expenses allocable to employee parking spaces under paragraph (d)(2)(ii)(B)(4) of this section.

(7) Example 7—(i) Facts. Taxpayer G, a financial services institution, owns a multi-level parking garage adjacent to its office building. G incurs \$10,000 of total parking expenses in 2020. G's parking garage has 1,000 spaces that are used by its visitors and employees. However, one floor of the parking garage is segregated by an electronic barrier that can only be accessed with a card provided by G to its employees. The segregated parking floor contains 100 spaces. The other floors of the parking garage are not used by employees for parking during the peak demand period.

(ii) Methodology. G uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) Step 1. Because G has 100 reserved spaces for employees, \$1,000 ( $(100 / 1,000) \times \$10,000 = \$1,000$ ) is the amount of total parking expenses that is nondeductible for reserved employee spaces under section 274(a)(4) and paragraph (d)(2)(ii)(B)(1) of this section. None of the exceptions in section 274(e) or paragraph (e) of this section are applicable to this amount.

(iv) Step 2. The primary use of the available parking spaces in G's parking facility is to provide parking to the general public because 100% ( $900 / 900 = 100\%$ ) of the available parking spaces are used by the public. Thus, expenses allocable to those spaces, \$9,000, are excepted from the section 274(a)(4) disallowance by section 274(e)(7) and paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(2).

(8) Example 8—(i) Facts. Taxpayer H, an accounting firm, leases a parking facility adjacent to its office building. H incurs \$10,000 of total parking expenses related to the lease payments in 2020. H's leased parking facility has 100 spaces that are used by its clients and employees. None of the parking spaces are reserved. The number of available parking spaces used by H's employees during the peak demand period is 60.

(ii) Methodology. H uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4).

(iii) Step 1. Because none of H's leased parking spaces are exclusively reserved for employees, there is no amount to be specifically allocated to reserved employee spaces under paragraph (d)(2)(ii)(B)(1) of this section.

(iv) Step 2. The primary use of H's leased parking facility under paragraph (d)(2)(ii)(B)(2) of this section is not to provide parking to the general public because 60% ( $60 / 100 = 60\%$ ) of the lot is used by its employees. Thus, H may not utilize the

general public exception from the section 274(a)(4) disallowance provided by section 274(e)(7) and paragraph (e)(2)(ii) of this section.

(v) Step 3. Because none of H's parking spaces are exclusively reserved for nonemployees, there is no amount to be specifically allocated to reserved nonemployee spaces under paragraph (d)(2)(ii)(B)(3) of this section.

(vi) Step 4. H must reasonably determine the use of the parking spaces and the related expenses allocable to employee parking. Because the number of available parking spaces used by H's employees during the peak demand period is 60, H reasonably determines that 60% ( $60 / 100 = 60\%$ ) of H's total parking expenses or \$6,000 ( $\$10,000 \times 60\% = \$6,000$ ) is subject to the section 274(a)(4) disallowance under paragraph (d)(2)(ii)(B)(4) of this section.

(9) Example 9—(i) Facts. Taxpayer I, a large manufacturer, owns multiple parking facilities adjacent to its manufacturing plant, warehouse, and office building at its complex in the city of X. All of I's tracts or parcels of land at its complex in city X are located in a single geographic location. I owns parking facilities in other cities. I incurs \$50,000 of total parking expenses related to the parking facilities at its complex in city X in 2020. I's parking facilities at its complex in city X have 10,000 total parking spaces that are used by its visitors and employees of which 500 are reserved for management. All other spaces at parking facilities in I's complex in city X are nonreserved. The number of nonreserved spaces used by I's employees other than management during the peak demand period at I's parking facilities in city X is 8,000.

(ii) Methodology. I uses the primary use methodology in paragraph (d)(2)(ii)(B) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4). I chooses to apply the special rule in paragraph (c)(2) of this section to aggregate all parking facilities in the geographic location that comprises its complex in city X. However, I may not aggregate parking facilities in other cities with its parking facilities in city X because they are in different geographic locations.

(iii) Step 1. Because 500 spaces are reserved for management, \$2,500 ( $(500 / 10,000) \times \$50,000 = \$2,500$ ) is the amount of total parking expenses that is nondeductible for reserved employee spaces for I's parking facilities in city X under section 274(a)(4) and paragraphs (a) and (d)(2)(ii)(B)(1) of this section.

(iv) Step 2. The primary use of the remainder of I's parking facility is not to provide parking to the general public because 84% ( $8,000 / 9,500 = 84\%$ ) of the available parking spaces in the facility are used by its employees. Thus, expenses allocable to these spaces are not excepted from the section 274(a)(4) disallowance by section 274(e)(7) or paragraph (e)(2)(ii) of this section under the primary use test in paragraph (d)(2)(ii)(B)(2) of this section.

(v) Step 3. Because none of I's parking spaces in its parking facilities in city X are exclusively reserved for nonemployees, there is no amount to be specifically

allocated to reserved nonemployee spaces under paragraph (d)(2)(ii)(B)(3) of this section.

(vi) Step 4. I must reasonably determine the use of the remaining parking spaces and the related expenses allocable to employee parking for its parking facilities in city X. Because the number of available parking spaces used by I's employees during the peak demand period in city X during an average workday is 8,000, I reasonably determines that 84.2% ( $8,000 / 9,500 = 84.2\%$ ) of I's remaining parking expense or \$39,900 ( $(\$50,000 - \$2,500) \times 84\% = \$39,900$ ) is subject to the section 274(a)(4) disallowance under paragraph (d)(2)(ii)(B)(4) of this section.

(10) Example 10. (i) Taxpayer J, a manufacturer, owns a parking facility and incurs mixed parking expenses along with other parking expenses. J uses the special rule in paragraph (c)(1) of this section to allocate 5% of certain mixed parking expenses to its parking facility. Applying the special rule, J determines that it incurred \$100,000 of total parking expenses in 2020. J's parking facility has 500 spaces that are used by its visitors and employees. The number of available parking spaces used by J's employees during the peak demand period is 475.

(ii) J uses the cost per space methodology described in paragraph (d)(2)(ii)(C) of this section to determine the amount of parking expenses that are disallowed under section 274(a)(4). Under this methodology, J multiplies the cost per space by the number of available parking spaces used by J's employees during the peak demand period. J calculates the cost per space by dividing total parking expenses by the number of parking spaces ( $\$100,000 / 500 = \$200$ ). J determines that \$95,000 ( $\$200 \times 475 = \$95,000$ ) of J's total parking expenses is subject to the section 274(a)(4) disallowance and none of the exceptions in section 274(e) or paragraph (e) of this section are applicable.

(g) Applicability date. This section applies for taxable years that begin on or after [date final rule is published in the **Federal Register**].

#### §1.274-14 Disallowance of deductions for certain transportation and commuting benefit expenditures.

(a) General rule. Except as provided in this section, no deduction is allowed for any expense incurred for providing any transportation, or any payment or reimbursement, to an employee of the taxpayer in connection with travel between the employee's residence, as defined in §1.121-1(b)(1), and place of employment. Travel between the employee's residence and place of employment includes travel that

originates at a transportation hub near the employee's residence or place of employment. For example, an employee who commutes to work by airplane from an airport near the employee's residence to an airport near the employee's place of employment is traveling between the residence and place of employment. These transportation and commuting expenses do not include any expenditure of any qualified transportation fringe (as defined in section 132(f)) provided to an employee of the taxpayer. All qualified transportation fringe expenses are required to be analyzed under section 274(a)(4) and §1.274-13.

(b) Exception. The disallowance for the deduction for expenses incurred for providing any transportation or commuting in paragraph (a) of this section does not apply if the transportation or commuting expense is necessary for ensuring the safety of the employee. The transportation or commuting expense is necessary for ensuring the safety of the employee if a bona fide business-oriented security concern, as described in §1.132-5(m), exists for the employee.

(c) Applicability date. This section applies for taxable years that begin on or after [date final rule is published in the **Federal Register**].

Sunita Lough

Deputy Commissioner for Services and Enforcement.

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