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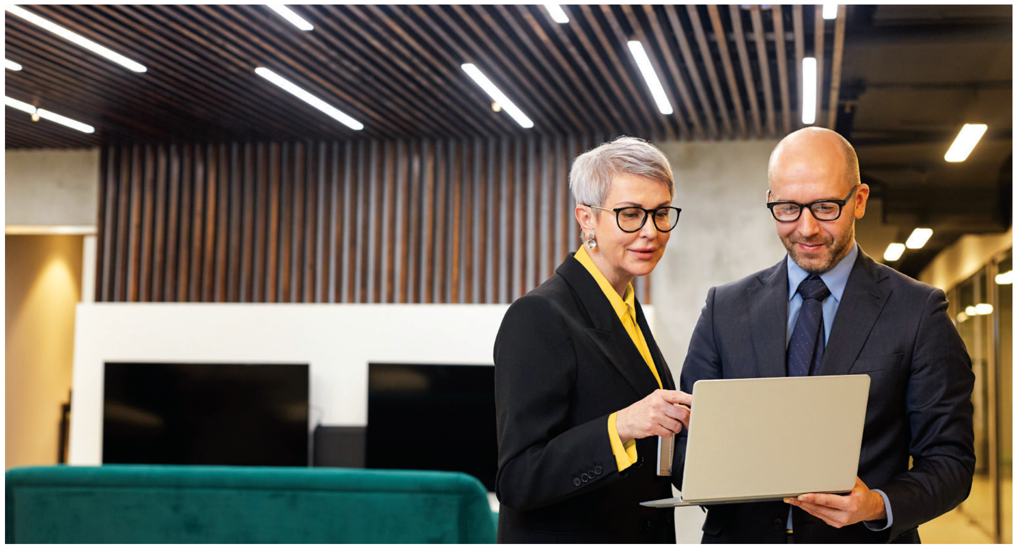

Eleventh Circuit finds fiduciaries' investment decisions not objectively imprudent

Plan participants did not establish that the failure of plan fiduciaries to prudently investigate and evaluate plan investments caused alleged losses from excess fees and subpar investment returns, according to the U.S. Court of Appeals in Atlanta (*Pizarro v. The Home Depot, Inc.*, 111 F.4th 1165 (11th Cir. 2024)). The participants, the court explained, did not prove that the fiduciaries' investment decisions were objectively imprudent, regardless of whether the right process was used to evaluate and monitor the options. The decision aligns with the position of the Sixth, Seventh, Ninth and Tenth Circuits. However, the decision conflicts with the view of the First, Fourth, Fifth and Eighth Circuits, as well as the Department of Labor.

Participants allege fiduciary breach from excess fee and underperforming funds

Home Depot sponsors and administers a 401(k) plan for its employees. The plan is one of the largest in the country, covering 230,000 participants and holding $9 billion in assets as of year-end 2019. The plan is managed by an in-house administrative committee and an investment committee. Recordkeeping services were provided by Aon-Hewitt Investment Consultants (currently Alight Financial Advisors).

The plan also engaged professionally managed account service providers, which established data sharing arrangements with the recordkeeper. The plan initially engaged Merrill Lynch but transitioned, in March 2011, to Financial Engines (FE) Advisors, LLC, to provide more integrated professional management to the plan. However, the plan committees (fiduciaries) did not conduct a request for proposal before entering into the agreement with FE.

FE charged plan participants two fees for its services:

- A mandatory annual flat platform fee to all participants for retirement evaluation and online advice
- An asset-based fee imposed only on participants who opted to enroll in professional management based on the amount of assets under management

The plan offered a variety of investment options during the class period. Among the options were the JPMorgan Stable Value Fund, the BlackRock LifePath Target Date Funds (TDFs), the TS&W Small Cap Value Fund and the Stephens Small Cap Growth Fund. The funds had different purposes and goals (employing varying glide paths) and were assessed against different benchmarks. Significantly, in evaluating the BlackRock TDFs, the fiduciaries relied on custom benchmarks administered by BlackRock, which reflected allocations of specific vintages of BlackRock TDFs.

Plan participants brought suit, charging that the plan fiduciaries failed to:

- Prudently monitor the investment advisory services offered by the professional managed account services providers, resulting in excessive fees
- Prudently monitor and remove specific plan investment options that performed poorly compared to other available investment options

Initially, the trial court noted that the participants needed to prove the Home Depot plan fiduciaries breached their ERISA duties and the breach proximately caused a loss to the plan. Determining whether a loss occurred because of the fiduciary breach, the court explained, required a comparison between the challenged plan's actual performance and the performance that would have otherwise occurred (performance according to reasonable models or benchmarks).

In addressing the pivotal loss causation issue, the court ruled that, under the applicable summary judgment framework, the plan fiduciaries were not required to prove loss causation with respect to either of the participants' claims. Rather, the fiduciaries were merely required to show the absence of any evidence supporting either breach or loss causation, or that no reasonable factfinder could find breach or loss causation as a matter of law. Thus, the court stressed, the plan fiduciaries did not have the burden of establishing:

- The absence of causation by proving that the participants' claimed losses could not have resulted from the breach
- A prudent fiduciary, as a matter of law, would have agreed to pay the same fees to FE and the recordkeeper and retained the challenged investment funds

Although evidence indicated deficiencies in the process by which plan fiduciaries monitored fees paid to service providers (including an alleged kickback arrangement between the providers), the court found that the plan participants were not able to produce factual proof to indicate the plan incurred a loss by paying fees that exceeded those of other clients of the service providers. Similarly, while evidence regarding the plan fiduciaries' procedural prudence in retaining allegedly underperforming investment options (including BlackRock TDFs) was inconclusive, the participants failed to produce evidence establishing that the retention of the challenged funds caused a loss to the plan and was thereby objectively imprudent. Accordingly, the fiduciaries were awarded summary judgment on both the alleged excess fee and investment option claims.

Automatic consent for non-life insurance companies to revoke section 831(b) election

The IRS has provided a streamlined procedure for non-life insurance companies that have elected the application of the alternative tax under Code Sec. 831(b) to obtain automatic consent to revoke the election (Rev. Proc. 2025-13).

Background

Code Sec. 831(b) provides an alternative tax to the tax imposed by Code Sec. 831(a) for certain non-life insurance companies. The alternative tax applies to every non-life insurance company if its net written premiums (or, if greater, direct written premiums) for the tax year do not exceed $2.2 million (adjusted for inflation), it meets the diversification requirements in Code Sec. 831(b)(2)(B) and it makes an election to apply the alternative tax for the tax year.

The non-life insurance company must make a Code Sec. 831(b) election by the due date (taking into account any extensions of time to file) of the tax return for the first tax year for which the election is effective. A Section 831(b) election applies to the tax year for which it is made and all subsequent tax years for which the election requirements are met. Once made, it may be revoked only with the IRS' consent. To secure consent, taxpayers had been required to submit a request for a letter ruling under the procedures set forth in Rev. Proc. 2025-1, 2025-1 I.R.B. 1 (or successor) and pay a user fee.

Comments on proposed regulations that would designate certain micro-captive transactions as listed transactions (REG-109309-22) requested a streamlined process for the IRS to approve requests for revocation of a Section 831(b) election.

Procedure to obtain automatic consent to revoke Code Sec. 831(b) election

In response to the comments received on the proposed regulations, Rev. Proc. 2025-13 provides a streamlined procedure for a taxpayer to obtain automatic consent to revoke a Section 831(b) election, effective for the tax year for which consent is sought. The revocation year may be the tax year in which consent is sought or the first preceding tax year, provided the taxpayer timely submits the revocation request described in section 4.02 of this revenue procedure.

Rev. Proc. 2025-13 applies to a taxpayer that has made a Section 831(b) election that has not been revoked and has no net operating losses arising in a tax year to which the election applied that can be carried over to the revocation year.

A taxpayer within the scope of Rev. Proc. 2025-13 may obtain automatic consent to revoke its Section 831(b) election by submitting the revocation request described in section 4.02 of the revenue procedure. A user fee is not required for this revocation request.

A revocation request must meet the following requirements:

- Identify the taxpayer and contain its taxpayer identification number, address and telephone number
- State that the taxpayer requests automatic consent to revocation of its Section 831(b) election under this revenue procedure
- Identify the revocation year
- Include representations that the taxpayer:
  - Has made a Section 831(b) election that is in effect as of the date of filing the request
  - Has no net operating losses arising in a tax year that was prior to the revocation year to which the Section 831(b) election applied that can be carried over to the revocation year
  - Is timely submitting the request (as provided in Section 4.02(3) of this revenue procedure) no later than the date on which it files its timely-filed (including extensions) federal income tax return for the revocation year
  - Will not make a Section 831(b) election for the five tax years following the revocation year
- Be signed in accordance with Rev. Proc. 2025-1 (or successor), dated and submitted no later than the date on which the taxpayer files its timely-filed (including extensions) federal income tax return for the revocation year
- Be accompanied by a declaration provided in this revenue procedure that is signed in accordance with Rev. Proc. 2025-1 (or successor)

> "A Section 831(b) election applies to the tax year for which it is made and all subsequent tax years for which the election requirements are met."

A model revocation request letter is also provided in section 5 of the revenue procedure.

Taxpayers within the scope of this revenue procedure may choose not to seek automatic consent to revoke their Section 831(b) election under this revenue procedure and instead may submit a request for a letter ruling granting consent to revoke the election under Rev. Proc. 2025-1 (or successor) and pay the applicable user fee.

Deduction limit for compensation over $1 million to five highest-paid employees

The Treasury Department and IRS have issued proposed regulations that would amend Reg. §1.162-33 to incorporate the changes to the definition of "covered employee" under Code Sec. 162(m) by the American Rescue Plan Act of 2021 (P.L. 117-2) (Proposed Regulations, NPRM REG-118988-22). The act increased the number of employees subject to the Code Sec. 162(m) $1 million compensation deduction limit by adding the five highest-compensated employees to the definition of covered employee, effective for tax years beginning after Dec. 31, 2026. The proposed regulations also include a technical correction to Example 23 in Reg. §1.162-33(c)(1)(vi)(W)(2).

Background

Code Sec. 162(m) limits a publicly held corporation's deduction for compensation paid to covered employees to $1 million per tax year. Currently, an employee is a covered employee if any of the following are true:

1. The employee is the principal executive officer (PEO) or principal financial officer (PFO) of the corporation anytime during the tax year or is an individual acting in such a capacity.
2. The total compensation of the employee for the tax year must be reported to shareholders under the Securities Exchange Act of 1934 because the employee is among the three highest-compensated officers for the tax year (other than employees that satisfy requirement 1).
3. The employee was a covered employee of the taxpayer corporation (or any predecessor) under requirement 1 or 2 for any preceding tax year beginning after Dec. 31, 2016.

"Code Sec. 162(m) limits a publicly held corporation's deduction for compensation paid to covered employees to $1 million per tax year."

The American Rescue Plan Act expanded the definition of a covered employee to include those among the five highest-paid employees for tax years beginning after Dec. 31, 2026. The amendment to include the five highest-compensated employees is in addition to those already treated as covered employees. The effect of this change is that, beginning in 2027, covered employees will include the eight highest-paid employees plus the PEO and PFO.

Note that the five highest-compensated employees may change on an annual basis, and they are not subject to requirement 3 above.

Five highest-compensated employees

The proposed regulations adopt the current regulation's definition of compensation to determine the five highest-compensated employees. However, they use Code Sec. 3401(c) to define an employee. Under Code Sec. 3401(c), an employee includes both common law employees and officers of a corporation. Thus, an employee who is not an officer in the corporation may be a covered employee as one of the five highest-paid employees. Accordingly, under the proposed regulations, a covered employee may include an individual who is both one of the five highest-compensated employees for the current tax year and a covered employee on the basis of having been one for a preceding tax year.

For purposes of the proposed regulations, employees also include individuals who are not employed by the taxpayer corporation or affiliated group but function as employees of the publicly held corporation. In those circumstances, amounts paid by the taxpayer corporation to the individual or a third party to obtain the individual's services are considered compensation for purposes of Code Sec. 162(m).

The proposed regulations clarify that any employee of an affiliated group of the taxpayer corporation may be one of the five highest-compensated employees and use the current regulation's definition of an affiliated group. The IRS notes that an individual may perform services for members of an affiliated group that contains more than one publicly held corporation and also one or more corporations that are not publicly held. Thus, the proposed regulations provide that an individual's status as a covered employee for purposes of being one of the five highest-paid employees is determined separately for each publicly held corporation in an affiliated group.

Because an affiliated group may include a foreign corporation, compensation and other expenses of a foreign corporation may be disallowed under Code Sec. 162(m) in certain circumstances. To assist taxpayers with compliance, the proposed regulations include a rule regarding remuneration paid by a controlled foreign corporation that is a member of a publicly held corporation's affiliated group.

Applicability dates

The proposed regulations would apply to compensation that is otherwise deductible for tax years beginning after the later of Dec. 31, 2026, or the publication date of a Treasury Decision adopting them as final regulations in the Federal Register. The technical correction of the current regulations would apply to tax years ending on or after the date the regulations are published as final in the Federal Register.

Automatic approval procedures for certain exempt entities to change tax year

The IRS has provided procedures for certain entities to receive automatic approval to change their annual accounting period. The procedures apply to entities that are not required to file either a federal income tax return or an annual information return but previously filed a Form 990-T solely to make an elective payment election (Rev. Proc. 2025-6).

Background

The regulations under Code Sec. 6417 provide that an applicable entity that is not required to file a federal income tax return under Code Sec. 6011 or an annual information return under Code Sec. 6033(a), but that is filing an annual return solely to make an elective payment election under Code Sec. 6417, adopts a tax year when filing an initial Form 990-T. The applicable entity may choose to adopt either a calendar or fiscal year. It must maintain adequate books and records, including reconciliation of any differences between its regular books of account and those using its chosen tax year, to support making an elective payment election based on its chosen tax year.

A taxpayer that wants to change its annual accounting period and use a new tax year generally must obtain the approval of the Commissioner. To secure approval, a taxpayer generally must file Form 1128, *Application to Adopt, Change, or Retain a Tax Year.*

In-scope applicable entity

An applicable entity must be one of the following:

- An organization exempt from the tax imposed by subtitle A of the Code because it is the government of any U.S. territory or a political subdivision thereof
- A state, the District of Columbia, or political subdivision thereof
- A tribal entity that is a tribal government or a subdivision thereof, a tribe incorporated under §17 of the Indian Reorganization Act of 1934, as amended, or incorporated under §3 of the Oklahoma Indian Welfare Act, as amended, or a wholly owned entity organized or incorporated under the laws of the tribal government(s) that owns it
- An agency of an above applicable entity

"A taxpayer that wants to change its annual accounting period and use a new tax year generally must obtain the approval of the Commissioner."

An applicable entity described above must satisfy the following conditions to qualify as an in-scope applicable entity:

- It is not required to file either a federal income tax return under Code Sec. 6011 or an annual information return under Code Sec. 6033(a).
- It has adopted a tax year by filing a Form 990-T for the sole purpose of making an elective payment election under §6417.
- It desires to change its tax year to match the accounting period used in its books and records.

This revenue procedure does not apply to entities that have filed either a federal income tax return under Code Sec. 6011 or an annual information return under Code Sec. 6033(a) and were required to use their established tax year when making an elective payment election under Code Sec. 6417.

Procedure

An in-scope applicable entity that desires to change its tax year may do so by timely filing Form 990-T for the first effective year with the appropriate Internal Revenue Service Center. The Form 990-T generally must be filed by the 15th day of the fifth month following the close of the short period. The Form 990-T should indicate that a change of annual accounting period is being made and state the present and proposed annual accounting periods. The in-scope applicable entity is not required to file Form 1128 with the Form 990-T.

An in-scope applicable entity that complies with all applicable provisions will obtain the approval of the Commissioner for a change in annual accounting period, beginning with the first effective year.

The books and records of the in-scope applicable entity must be closed as of the last day of the first effective year. The entity must continue to maintain adequate books and records.

An in-scope applicable entity that timely files Form 8868, *Application for Extension of Time to File an Exempt Organization Return or Excise Taxes Related to Employee Benefit Plans*, is granted an automatic extension of six months from the original due date of Form 990-T to request a change in accounting period. If the entity is also filing Form 990-T to make an elective payment election, Form 8868 extends the due date for that election as well.

IRS final regulations for withholding on pension and annuity income delivered outside U.S.

IRS final regulations provide guidance in question-and-answer format on the income tax withholding rules for certain periodic payments and nonperiodic distributions from employer deferred compensation plans, individual retirement plans and commercial annuities delivered outside of the United States. The new rule expands on prior IRS guidance (IRS Notice 87-7, 1987-1 C.B. 420). An employer deferred compensation plan includes any pension, annuity, profit sharing or stock bonus plan or other plan deferring the receipt of compensation.

Deferred income sent outside U.S.

Pension, annuity and other similar deferred income payments are subject to mandatory withholding if the payments are delivered outside the U.S. or U.S. possessions. Taxpayers receiving these payments generally cannot elect out of withholding. Mandatory withholding does not apply, however, if the recipient certifies to the payor that he or she is not a U.S. citizen, resident alien or tax-avoidance expatriate under I.R.C. 877.

Notice 87-7 addresses the mandatory withholding duties of payors on distributions to payees who have:

- Provided payors with a residence address outside the U.S.
- Provided payors with a residence address in the U.S.
- Not provided payors with a residence address

The final regulation is based on Notice 87-7 but also clarifies the withholding rules for:

- Payees who provide payors with an Army Post Office (APO), Fleet Post Office (FPO) or Diplomatic Post Office (DPO) address
- Payees who provide payors with a residence address in the U.S. but also provide payment instructions requesting that the distribution be delivered to a financial institution or other person outside the U.S.
- Payees who have a residence address outside the United States or have not provided a residence address
- Payments subject to withholding under Subchapter A of Chapter 3, including U.S.-source distributions to nonresident aliens from a qualified plan trust

The final regulations do not apply to eligible rollover distributions.

The 2025-2026 All-Star Tax Series schedule

Date	Course topic
May 7 & 15, 2025	Tax professionals' guide to TCJA extenders and the status of tax reform in 2025
June 4 & 12, 2025	Health Savings Accounts and other tax-favored health plans
June 18 & 24, 2025	Calculating partner basis/capital accounts and S corp shareholder stock/debt basis
July 16 & 24, 2025	Critical issues for general tax practitioners regarding IRAs and retirement plans
Aug. 6 & 14, 2025	How to effectively represent clients under audit by the IRS
Aug. 20 & 26, 2025	Current status of 2025 tax legislation
Sept. 17 & 25, 2025	Understanding Form 1099-DA, Form 1099-K and other Form 1099 issues
Oct. 22 & 28, 2025	Year-end tax planning strategies for individuals and small and medium-sized businesses
Nov. 5 & 13, 2025	What tax practitioners need to know about Medicare and Social Security
Nov. 19 & 25, 2025	Individual tax update and planning strategies
Dec. 10 & 17, 2025	Business tax update and planning strategies
Jan. 14 & 22, 2026	Getting ready for tax season: New IRS forms and compliance requirements

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2025-2026 All-Star Tax Series information

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