OBBBA Update for Tech Companies

42nd Annual TEI–SJSU High Tech Tax Institute

November 2, 2026

Agenda

- **Introductions**
- IRC 174/174A/41 Updates
- IRC 163(j) Updates
- Bonus Depreciation/QPP Updates
- 1% Charitable Contribution Floor
- Employee Benefit Updates

Presenters



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1. OBBBA - R&E Expenses: Sections 174 and 174A and Related Issues

Section 174: three deduction regimes in five years

Tax years	Domestic R&E deduction treatment	Foreign R&E deduction treatment
Before 2022	Generally current deduction	Generally current deduction
2022–2024	Mandatory 5-year amortization	Mandatory 15-year amortization
2025 onward	Generally current deduction under §174A	15-year amortization under §174

Elective capitalization existed before 2022 and remains available for domestic R&E after 2024.

Congress restored the domestic deduction—but not the pre-2022 regime.

Current domestic R&E: deduction and capitalization choices

Current domestic R&E paid or incurred after 2024

- §174A(a) current deduction — statutory treatment; no election is required.
- §174A(c) election — capitalize and amortize over at least 60 months, beginning when benefits are first realized.
- §59(e) election — 10-year amortization; potentially useful for loss companies.

Separate transition decision for 2022–2024 balances

- One-year recovery, two-year recovery, or continued TCJA §174 amortization.
- By November 2026, most calendar-year 2025 returns have already been filed.
- State conformity and return-method implementation still need to be reconciled.

Evaluate elections with NOLs, §163(j), §280C, CAMT and applicable states.

2022–2024 domestic §174 balances: what the 2025 return decided

2025 treatment	$20M example	2025 filing procedure	2026 consequence
Deduct in full	$20M in 2025	Generally, automatic method change; statement in lieu of Form 3115 where permitted	No remaining balance
Two-year recovery	$10M in 2025 + $10M in 2026	Generally, automatic method change; statement in lieu of Form 3115 where permitted	Deduct second $10M in 2026
Continue TCJA §174 schedule	Existing amortization continues	Generally, no transition election if already on a permissible method	Continue schedule; evaluate available method change relief for 2026

Open §174/174A issues after the 2025 filing season

- §174A(c): project-level election, annual election, or continuing accounting method?
- "First realizes benefits": rolling releases, platform development, failed projects, and abandoned projects.
- Software development versus maintenance, bug fixes, security remediation, and DevOps.
- Contract and intercompany research: which party capitalizes—and can both parties be exposed when one bears risk and the other owns rights?
- Foreign R&E: physical performance, management, and IP ownership may point to different jurisdictions.
- Partnership and disposition questions remain unresolved.
- R&E expenses no longer allocated to GILTI/NCTI basket under section 904(b)(5). Prevents US shareholder's R&E expenses from reducing section 904 limitation on GILTI/NCTI.
- R&E expenses no longer allocated to reduce FDDEI.

Taxpayers are applying current law before comprehensive substantive regulations arrive.

Immediate Domestic R&E Expensing

"Doubling-Up" on R&E Amortization and Section 174A Immediate Expensing

Domestic R&E Deductions								
	2022	2023	2024	2025	2026	2027	2028	2029
Actual R&E Expenditures	$100	$100	$100	$100	$100	$100	$100	$100
Tax amortization for 2022 expenditures	$10	$20	$20	$20	$20	$10		
Tax amortization for 2023 expenditures		$10	$20	$20	$20	$20	$10	
Tax amortization for 2024 expenditures			$10	$20	$20	$20	$20	$10
2025 expensing: §174A				$100				
2026 expensing: §174A					$100			
Total domestic R&E deductions	**$10**	**$30**	**$50**	**$160**	**$160**			

The taxpayer's taxable income is reduced by $160 in 2025 and 2026, even though the taxpayer only had $100 of R&E expenditures in each of those years.

Immediate Domestic R&E Expensing

Collateral Effects of "Doubling-Up" on R&E and Low Taxable Income

FDII and GILTI

- **Issue** – the doubling up of R&E reduces a taxpayer's taxable income so that the section 250(a)(2) limitation is more likely to apply.
- **Effect** – many taxpayers will have their GILTI and FDII deductions reduced under section 250(a)(2).

Overall Domestic Losses (ODL)

- **Issue** – the doubling up of R&E creates an overall domestic loss under section 904, which is then allocated and reduces a taxpayer's GILTI section 904 FTC limitation.
- **Effect** – some taxpayers are unable to credit GILTI foreign taxes, which are then lost because GILTI FTCs cannot be carried forward.

BEAT

- Taxpayers may be less likely to owe BEAT as a result of section 174A because the increased deductions raise the denominator of the 3% limitation fraction (making it more likely that taxpayers will stay below the 3% threshold).
- If taxpayers are already subject to BEAT, however, section 174A may actually increase the amount of BEAT due because of how BEAT is calculated.

Section 38(c) General Business Credit Limitation: taxpayers owe less tax and may have GBC credits that expire.

CAMT: the doubling up of R&E is causing taxpayers to become subject to CAMT.

2. CAMT and Notice 2026-7

Notice 2026-7 – Prior Year R&E Amortization

- Section 5 of Notice 2026-7 allows taxpayers to reduce AFSI by domestic section 174 amortization that is taken into account during the current year.
- Taxpayers must disregard current-year US GAAP research or software development amortization.

Notice 2026-7 – Section 197 Intangibles

- The Notice creates a new rule that allows taxpayers to reduce AFSI with amortization on section 197 intangible property that is deductible for tax but not book purposes.
- Section 197 intangibles will fall into three buckets:

Type of Intangible	AFSI Adjustment?
Section 197 Goodwill	Adjust AFSI to match tax amortization deduction under Sec. 4 of Notice 2026-7
Section 197 intangibles, "the basis of which is not permitted to be amortized or otherwise recorded for AFS purposes"	Adjust AFSI to match tax amortization deduction under Sec. 4 of Notice 2026-7
Section 197 intangibles that are amortizable under US GAAP	No AFSI adjustment, unless taxpayer's CAMT basis in intangible is higher than book basis. See, e.g., Prop. Reg. 1.56A-1(d)(4).

Notice 2026-7 – Section 197 Intangibles

- What happens with:
  - Section 197 intangibles from section 338(g) elections?
  - Section 197 intangibles that have a stepped up basis from taxable transactions within a group?
- "Negative" CAMT basis considerations.

3. R&D Credit: Section 41 Updates

The §174A deduction does not establish the §41 credit

Deduction analysis — §§174 / 174A

- Is the cost research or experimental?
- Is the research domestic or foreign?
- Current deduction, §174A(c), §59(e), or TCJA amortization?

Credit analysis — §41

- Business component and four-part test.
- Statutory exclusions.
- Eligible QRE category and substantiated amount.

Three separate 80% rules

Rule	Population / numerator	Question answered
§41(d) “substantially all”	Research activities that are elements of experimentation ÷ research activities	Does the business component qualify?
Employee wage rule	Qualified services ÷ total services performed by the employee	May 100% of the employee’s wages be treated as QREs?
Form 6765 Section G	QREs reported by business component	How much component-level data must be disclosed?

Form 6765: mandatory 2025 changes and 2026 Section G

Required even when Section G is optional (tax years beginning before 2026)	Generally required for tax years beginning after 2025
• Total number of business components — line 37. • Officer wage QREs — line 38. • Acquisition / disposition indicator — line 39. • New or recharacterized expense categories — line 40. • ASC 730 Directive indicator and QRE summary — line 41 and Section F.	• Section G business-component reporting. • 80% / Top 50 components; aggregate remainder. • Conduct, supervision, and support wages. • Software classification. • Sampling plan plus population-level component reporting.

The form now requires a population-level view even when the credit study relies on sampling.

Research credit cases: key decisions and questions

2021 **Little Sandy Coal Co. v. Commissioner — Tax Court**

How did the Tax Court apply the 80% process-of-experimentation test?

2023 **Little Sandy Coal Co. v. Commissioner — Seventh Circuit**

Can qualifying production, support and supervision activities enter the numerator?

2026 **George v. Commissioner**

Which product-level experiments, operating records and supply costs are substantiated?

2026 **Smith v. Commissioner**

Who bears the payment risk and retains substantial research rights?

PENDING **J.G. Boswell Co. v. Commissioner**

How does Union Carbide Corp. v. Commissioner affect production-process supplies?

Little Sandy Coal | the 80% POE fraction

Same denominator. The Seventh Circuit rejected the Tax Court's categorical numerator exclusion.

Tax Court

T.C. Memo. 2021-15
2021

$$\text{POE \%} = \frac{\text{Direct POE wages + direct POE CR*}}{\text{Eligible research wages (direct + support + supervision) + CR*}} \times 100$$

Direct support and direct supervision: excluded from numerator.

Seventh Circuit

62 F.4th 287
2023

$$\text{POE \%} = \frac{\text{POE wages (direct + support + supervision) + POE CR*}}{\text{Eligible research wages (direct + support + supervision) + CR*}} \times 100$$

Direct support and direct supervision: may enter numerator if POE elements.

Why the numerator matters

The Tax Court calculated a 19.6% ceiling; the Seventh Circuit allowed a broader potential numerator—but still affirmed.

Tax Court tanker illustration

Assuming the tanker was a pilot model:

$$\frac{\$609{,}276}{\$609{,}276 + \$2{,}505{,}491} \times 100 =$$

19.6%

At most—production wages were counted in the denominator only.

Seventh Circuit correction

Potential POE numerator

+ direct research
+ qualifying support
+ qualifying supervision

But no reliable activity-level proof or allocation. Credit still denied.

George v. Commissioner: four lessons for taxpayers

T.C. Memo. 2026-10 | February 3, 2026 | Partial taxpayer victory

Business component. The court accepted an improved poultry product; it did not require a separate business component for each trial.

Contemporaneous evidence. Operational records substantiated certain tests and costs, but undermined other portions of the later R&D study.

Supply QREs. Identified experimental feed costs could qualify without a corresponding claim for research wages.

Base-period substantiation. Missing prior-three-year QRE support limited the alternative simplified credit to the 6% rate.

Smith v. Commissioner: contract terms determine the credit owner

T.C. Memo. 2026-50 | Judge Christian N. Weiler | Filed June 16, 2026 | Six sample architecture contracts

- None of the six contracts made payment sufficiently contingent on successful research.
- Four contracts retained substantial rights; two did not.
- Partial credits remained possible to the extent QREs exceeded the funding received.
- The court rejected the Loper Bright challenge to the funded-research regulations.

Supply costs in production-scale research remain unsettled

- Union Carbide: ordinary costs of producing the same commercial product can be vulnerable when research improves only the production process.
- J.G. Boswell remains pending: approximately $17 million of claimed agricultural supply and labor QREs; the IRS allowed about $885,000.
- In Boswell amicus brief, NAM and ACC invoke Loper Bright to challenge Union Carbide's exclusion of ordinary production supply costs incurred regardless of qualified process research.
- Technology relevance: Pilot models and data centers raise similar questions about research supply costs incurred during production-scale experimentation.

Cloud and GPU computing: the current computer-use test

Amounts paid for the right to use computers can qualify if the arrangement satisfies the regulatory conditions:

1	2	3
The computer is owned and operated by someone other than the taxpayer.	The computer is located off the taxpayer's premises.	The taxpayer is not the computer's primary user.

- Metered cloud, APIs, and AI tokens: allocate qualified research use from production and general business use.
- Reserved GPU capacity: analyze primary-user status and effective control.
- Open question: extraordinary utility charges may fit the supply rules only in limited, fact-specific circumstances.
- OpenAI's request

4. Takeaways and What's to Come

Key takeaways

- **Domestic R&E deductions.** Section 174A restored current expensing, but 2025 transition decisions, accounting methods and state conformity still matter.
- **Court decisions.** Little Sandy Coal, George and Smith focus on qualifying activities, evidence, and the terms of research contracts.
- **Form 6765.** Business-component reporting expands, while the IRS continues to consider Section G and statistical-sampling burdens.
- **Technology claims.** Cloud, GPUs and production-scale R&D must fit the existing Section 41 computer-use, supply and pilot-model framework.
- **Terminology Updates.** OBBBA updated section 41(d)(1) to require that expenses "are treated as domestic research or experimental expenditures under section 174A." Pre-OBBBA section 41(d)(1) referred to expenses that "may be treated" as section 174 expenses.

Proposed legislation and policy frameworks

Introduced bills and policy frameworks

Proposal	Instrument	Status / posture
Wyden package	Incentives + gross receipts	Discussion draft, Oct. 23, 2026.
S. 5054 Warner	Depreciation + disclosure	Introduced. **Democratic**.
H.R. 10448 McDonald Rivet / Davis	Depreciation + Opportunity Zones	Sept. 16, 2026. **Democratic**.
S. 5418 Hawley	Opportunity Zone exclusion	Sept. 17, 2026. **Republican**.
S. 5689 Moreno / RECLAIM	Federal ban + 100% excise	Oct. 15, 2026. **Republican**.
H.R. 10102 Salinas	Electricity excise	Introduced. **Democratic**.
Warren proposal	Energy excise + broader taxes	Op-ed / policy proposal.
H.R. 10044 Casar	Token / services excise	Introduced. **Democratic**.
S. 5518 Kelly	Advertising + usage + excess profits	Sept. 24, 2026. **Democratic**.
S. 4825 Sanders	Equity-paid excise	Introduced. Independent.
H.R. 9340 Ratepayer Protection	Grid-cost allocation	House passed. Senate cloture failed
H.R. 8959 / S. 4750 Semiconductors	Section 48D clarification	Introduced. Bipartisan, bicameral.

How the legislative proposals differ

Different tax bases create different exposures. Scope, administration and interactions matter more than a common AI label.

Proposals	Base / instrument	Coverage focus	Posture	Principal issue
Wyden	Receipts / incentives	Service providers, 25 MW+ sites, private REITs	Discussion draft	Taxpayer identity, imputed receipts
Warner / Rivet / Hawley	Depreciation / OZs	AI use, >50 MW or undefined data center	Introduced	Different tests and transition rules
Moreno / RECLAIM	Federal ban + 100% state/local incentive tax	≥100 MW contracted peak + ≥50% AI accelerators	Introduced (R)	Valuation, ownership, no grandfather rule
Salinas / Warren	Electricity	>1 MW / undefined AI data center	Bill / proposal	Liable person and stacked levies
Casar / Kelly	Tokens, ads, usage, income	Model activity, users and large businesses	Introduced	Valuation, territorial scope, group base
Sanders	Newly issued equity	Covered AI company, >$200M receipts	Introduced	Dilution, separation and governance
Ratepayer / Semiconductors	Grid costs / section 48D	≥100 MW / orbital manufacturing	Bipartisan	Senate hurdle / construction deadline

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§163(j) is friendlier in 2025—and more complex in 2026

- **Core limit —** Business interest deduction generally equals business interest income + 30% of ATI + floor-plan financing interest.
- **2025 and later —** Depreciation, amortization and depletion addbacks are restored—generally increasing ATI.
- **2026 and later —** Specified CFC inclusions and associated deductions are excluded from ATI.
- **2026 ordering —** Capitalized interest generally enters §163(j) before capitalization, except interest under §263(g) and §263A(f).
- **Implication —** Reforecast by entity: deduction and capitalization choices can change current capacity and carryforwards.

- *Sources: P.L. 119-21; IRS Fact Sheet 2025-09 / IR-2025-126.*

Planning starts with ATI, timing and a tax-interest map

- **Increase ATI —** Model valid elections to capitalize eligible prepaids and sales commissions; consider forgoing the de minimis safe harbor.
- **Shift recovery —** Capitalize and depreciate eligible repairs and evaluate other supportable capitalization methods.
- **Coordinate R&E —** Compare §174A current deduction, §174A(c), transition relief and any §59(e) election with interest capacity.
- **Map tax interest —** Book finance-lease interest may not be tax interest when the arrangement is a true tax lease.
- **Debt costs —** Distinguish OID from other issuance costs before applying §163(j) definitions.
- *Sources: IRC §163(j); IRS Fact Sheet 2025-09; method choices require fact-specific analysis.*

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100% bonus is permanent; QPP is powerful but temporary

- **Bonus depreciation —** Permanent 100% additional first-year deduction for qualifying property acquired after Jan. 19, 2025.
- **QPP election —** Up to 100% of eligible basis for qualifying nonresidential real property integral to manufacturing, chemical production, agriculture or refining.
- **Window —** QPP must be placed in service after July 4, 2025 and before Jan. 1, 2031; other construction and acquisition tests apply.
- **File-ready evidence —** Document the activity, substantial transformation, original use / acquisition, cost allocation, placed-in-service date and election.
- **Watch —** Forthcoming proposed regulations and recapture if qualified use changes.
- *Sources: Notices 2026-11 and 2026-16.*

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The 1% floor changes the cadence of corporate giving

- **2026 and later —** A corporation deducts aggregate charitable gifts only to the extent they exceed 1% of modified taxable income; the 10% ceiling remains.
- **Leakage risk —** The below-floor amount may be permanently lost; amounts above the ceiling may carry forward under existing rules.
- **Classification —** Distinguish gifts from sponsorship, advertising or other business expenses based on quid pro quo and the actual facts.
- **Cadence —** Model bunching contributions into selected years while respecting legal commitments and cash objectives.
- **Forecast —** Taxable-income volatility moves both the floor and ceiling—run scenarios before year-end.

- *Sources: P.L. 119-21 §70426; JCT JCS-1-26.*

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Employer benefits: four actions in five minutes

- **§45F child care —** Enhanced employer child-care credit applies in 2026; model facility, direct and referral spend and small-business status.
- **§45S paid leave —** Now permanent; Notice 2026-28 supports wage- or insurance-premium-based approaches with policy and eligibility rules.
- **§127 education / loans —** $5,250 combined annual exclusion covers education and qualifying student-loan payments; indexed after 2026.
- **§128 Trump Accounts —** Employer contributions up to $2,500 per employee or dependent annually; separate written plan and nondiscrimination rules.
- **Action —** Align plan documents, payroll codes, vendors and employee communications before launch.

- *Sources: JCT JCS-1-26; Notice 2026-28; FS-2026-10; proposed §128 regulations (Aug. 2026).*

Wrapping Up

- **R&D —** Choose the §174A posture, inventory open issues and align business-component data.
- **Interest / cost recovery —** Refresh §163(j) and bonus / QPP models using the correct 2025–2026 effective dates.
- **Charitable —** Model the 1% floor and validate the classification of each payment stream.
- **International —** Reconcile PTEP and basis; rerun NCTI / FDDEI and FTC scenarios.
- **Benefits —** Identify required plan amendments, elections and payroll readiness.
- **Discuss —** Which election is hard to reverse? Which data gap would fail under audit? Which pending guidance could move the provision?

- *Sources: Discussion checklist based on cited authorities; facts and elections require taxpayer-specific analysis.*