



ACCOUNTING

CONTINUING EDUCATION

PPP Round Two and Other Year-End
Tax Developments
(PPL4)

PPP Round Two and Other Year-End Tax Developments

January 7, 2021

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PPP ROUND TWO AND OTHER YEAR-END TAX DEVELOPMENTS
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PPP ROUND TWO AND OTHER YEAR-END TAX DEVELOPMENTS

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Unit

1

How We Ended Up With the Final Bill

When Congress passed the *Consolidated Appropriations Act, 2021* on December 21, 2020 by an overwhelming margin, most observers believed that a signature from the President was a mere formality. And that wasn't based on no evidence—the following morning Treasury Secretary Mnuchin was stating that the new recovery rebate checks would begin to be sent out the following week.

PRESIDENT'S RESPONSE

However, in the early evening of December 22, the President indicated that he had various issues with the package, including wanting the checks to be \$2,000 per person, not the \$600 that had been negotiated and wanting various spending provisions stripped out of the bill. He stated in the video he posted making these statements that he would not sign the bill unless these changes were made, although he stopped short of stating he would veto the bill.

The question of what the President would do remained unsettled for days following the video, as well as what action (if any) Congress might take. One real possibility was that the President would exercise the rather unique opportunity presented in this case to kill the bill via a pocket veto if he didn't get the changes he wants.

However, in the evening on Sunday, December 27, 2020 the President signed the bill into law. Thus, all references to “date of enactment” in the bill are referring to December 27, 2020.

The President, in a release accompanying the announcement that he had signed the bill, reported that the House had agreed to vote on a \$2,000 check and that the Senate would begin the process toward a vote on that issue, a repeal of an unrelated provision governing liability for certain tech companies and a study of voter fraud. He also said he would send over a red-lined copy of the bill for appropriations he wanted removed.

However, given this Congress would exist for only a few days after the date the bill was signed, it's not clear that any of these would end up leading to any substantive legislation being passed, at least not until after the new Congress is seated on January 3.

WHAT IS THE CONSOLIDATED APPROPRIATIONS ACT, 2021?

The *Consolidated Appropriations Act, 2021* is, like the 2020 Act with a very similar name, a collection of a large number of separate bills. For purposes of today's session, we are concerned primarily with the following bills contained inside of the 5,593 page complete Act:

- Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act
- COVID-related Tax Relief Act of 2020 and
- Taxpayer Certainty and Disaster Tax Relief Act of 2020

Unit 2

Paycheck Program Loan Revisions and Second Draw Loans

LEARNING OBJECTIVES

- Assist clients in applying the revised rules for the paycheck protection program in applying for a PPP loan or additional amount of the original PPP loan and determining the forgivable amount of the loan
- Recognize businesses that qualify for the second draw loans under the PPP loan program and advise such businesses on the application and forgiveness process

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* passed as part of the *Consolidated Appropriations Act, 2021* restarted the original Paycheck Program (PPP) Loan system and established a new Second Draw PPP program.

Except as otherwise provided, provisions in this chapter take effect on the date of enactment (December 27, 2020) of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* and apply to loans and grants made on or after the date of enactment of the Act.¹

TIME PERIOD FOR RESTARTED PROGRAM

The dates for the new loan program are found in the section of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* that modifies the end date of the PPP program's funding authorization, along with adding the new second draw program, to March 31, 2021.²

Thus, funding would again be available from the day the President signed the *Consolidated Appropriations Act, 2021* until the end of the first quarter. However, it will take some additional time for lenders to actually be able to start lending under either program.

¹ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §348

² Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §323(a)

TAX TREATMENT OF PPP AND SECOND DRAW DEBT FORGIVENESS

A major concern for many CPAs and their clients was the status of any deduction for expenses used to pay PPP loans. The IRS had indicated in Notice 2020-32 that expenditures that were used to obtain PPP forgiveness would not be deductible for income tax purposes and, in Revenue Ruling 2020-27., ruled that this would apply even if forgiveness had not been obtained by year end so long as the taxpayer reasonably expected the expenditures to result in forgiveness.

Section 276 of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* revises the original §1106(i)³ of the CARES Act that provided that the forgiveness would not be taxable, clarifying that, as well, no deductions would be denied based on that forgiveness. Specifically:

- No amount shall be included in the gross income of the eligible recipient by reason of forgiveness of PPP loan indebtedness, and
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income of that amount.⁴

The same rules will apply to PPP second draw loans.⁵

For partnerships and S corporations, any amount of cancellation of indebtedness income under the program will be treated as tax-exempt income for purposes of IRC §§705 and 1366, thus meaning the amount will increase the equity holder's basis in his/her interest.⁶ And, except as provided for by the IRS, any increase in the adjusted basis of a partner's interest in a partnership due to that tax-exempt income will be equal to the partner's distributive share of the forgiven expenses that lead to the debt cancellation.⁷

The IRS may provide an exception from having to file information returns otherwise required by a lender for amounts excluded from income by SBA §7A(i) (the PPP loan forgiveness) or §§276(b), 277 or 278 of the *COVID-related Tax Relief Act of 2020*.⁸

REPEAL OF EIDL ADVANCE REDUCTION OF PPP FORGIVENESS

Under the original CARES Act, §1106(e) provided that a borrower's PPP loan forgiveness would be reduced by any EIDL advance (often referred to as a grant) received by the borrower. The EIDL grant was meant to provide a quick infusion of up to \$10,000 to affected businesses, an amount that was not required to be repaid.

That provision reducing the PPP forgiveness by the amount of the EIDL advance is repealed by the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* §333(c).

³ The entirety of §1106 of the CARES Act is also moved to §7A of the Small Business Act, so references to §7A are references to §1106 of the CARES Act.

⁴ SBA §7A(i)(1) and (2) (previously CARES Act §1106) as amended by COVID-Related Tax Relief Act of 2020 §276(a)

⁵ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §276(b)

⁶ SBA §7A(i)(3)(A) (previously CARES Act §1106) as amended by COVID-Related Tax Relief Act of 2020 §276(a)

⁷ SBA §7A(i)(3)(B) (previously CARES Act §1106) as amended by COVID-Related Tax Relief Act of 2020 §276(a)

⁸ COVID-related Tax Relief Act of 2020 §279

If an EIDL Advance had already been deducted from a borrower's forgiveness amount, the SBA will pay to the lender the amount of the reduction, along with any interest to date.⁹

MODIFICATIONS TO THE ORIGINAL PPP LOAN PROGRAM

The law contains a number of modifications to the original PPP loan program, many of which apply retroactively to the start of the program.

Reopening Original PPP Loan Program

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* reopens access to the original Paycheck Protection Program loans, but with some changes to the program.

In the Act, the funding authorization for both the PPP loan program and the second draw program applies through March 31, 2021, marking the last day that such loans can be paid out. Previously payments were barred after August 8, 2020, so this provision serves to open up both programs for the first quarter of 2021.¹⁰

As well, the definition of "covered period" for a PPP loan received after the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* is revised to end on March 31, 2020 as opposed to December 31, 2020 for loans obtained before that date.¹¹

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* also allows a borrower to apply for an increased loan amount if an Interim Final Rule issued by the SBA qualified the borrower for a larger loan amount. This is true even if:

- The initial covered loan amount has been fully disbursed; or
- The lender of the initial covered loan has submitted to the Administration a Form 1502 report related to the covered loan.¹²

Finally, the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* provides that the SBA is to issue guidance within 7 days after enactment that will enable a borrower who:

- Returns amounts disbursed under the covered loan or
- Does not accept the full amount of the covered loan for which the eligible recipient was approved

to be able to again gain access to the PPP loan program. The provision provides:

- In the case of an eligible recipient that returned all or part of a covered loan, the eligible recipient may reapply for a covered loan for an amount equal to the difference between the amount retained and the maximum amount applicable; and

⁹ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, B.14, January 6, 2021

¹⁰ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §323(a)

¹¹ SBA §7(a)(36)(A)(iii) after amendment by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §343(a)(a)

¹² Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §312(c)

- In the case of an eligible recipient that did not accept the full amount of a covered loan, the eligible recipient may request a modification to increase the amount of the covered loan to the maximum amount applicable, subject to the requirements of the PPP loan program.¹³

In a January 6, 2021 interim final rule the SBA provided the following details about such additional applications:

The following borrowers can reapply or request an increase in their PPP loan amount:

- a. If a borrower returned all of a PPP loan, the borrower may reapply for a PPP loan in an amount the borrower is eligible for under current PPP rules.
- b. If a borrower returned part of a PPP loan, the borrower may reapply for an amount equal to the difference between the amount retained and the amount previously approved.
- c. If a borrower did not accept the full amount of a PPP loan for which it was approved, the borrower may request an increase in the amount of the PPP loan up to the amount previously approved.

Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds. SBA will issue additional guidance on the process to reapply or request a loan increase under subsections D.6, D.7, and D.8.¹⁴

The SBA Interim Final Rule provides information on the payment of an increased amount to a partnership that failed to include compensation for partners:

If a partnership received a PPP loan that only included amounts necessary for payroll costs of the partnership's employees and other eligible operating expenses, but did not include any amount for partner compensation, the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount to include appropriate partner compensation, even if the loan has been fully disbursed and even if the lender's first SBA Form 1502 report to SBA on the PPP loan has already been submitted. In no event can the increased loan amount exceed the maximum loan amount allowed under the PPP Program, which is \$10 million for an individual borrower or \$20 million for a corporate group. Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase. Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds.¹⁵

¹³ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §312(b)

¹⁴ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, D.8, January 6, 2021

¹⁵ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, C.6, January 6, 2021

Definition of a Seasonal Employer and Option for Additional Draw on PPP Loan

Although the original PPP loan program made reference to a “seasonal employer,” the term was not defined in the CARES Act. The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* now provides a definition of what it means to be a seasonal employer. A seasonal employer is one that:

- Does not operate for more than 7 months in any calendar year; or
- During the preceding calendar year, had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts of the employer for the other 6 months of that year.¹⁶

This definition applies as if it had originally been in the CARES Act—and thus may trip up some borrowers who may have treated themselves as seasonal employers but do not meet this new definition.¹⁷

The interim final rule allows a seasonal employer to receive an additional draw on the first PPP loan if the calculated maximum amount of the loan is now increased. The rule provides:

If a seasonal employer received a PPP loan before December 27, 2020, and such employer would be eligible for a higher maximum loan amount under section 336 of the Economic Aid Act, as described in subsection B.4.c., the lender may electronically submit a request through SBA’s E-Tran Servicing site to increase the PPP loan amount, even if the loan has been fully disbursed and even if the lender’s first SBA Form 1502 report to SBA on the PPP loan has already been submitted. In no event can the increased loan amount exceed the maximum PPP loan amount (\$10 million for an individual borrower or \$20 million for a corporate group). Additionally, the borrower must provide the lender with required documentation to support the calculation of the increase. Any request for an increase must be submitted electronically in E-Tran on or before March 31, 2021, and is subject to the availability of funds.¹⁸

Increased Date Range for Computation of Maximum Loan for PPP Loan for Seasonal Employer

The Act expands the time period over which an employer may select for the 12-week period. Before changes due to this Act, the seasonal employer could optionally select either:

- The 12-week period beginning February 15, 2019 or
- The time period between March 1, 2019 and ending June 30, 2019.¹⁹

¹⁶ SBA Act §7(a)(36)(A)(xiii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §315

¹⁷ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §315(c)

¹⁸ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, C.7, January 6, 2021

¹⁹ SBA Act §7(a)(36)(E)(i)(I)(aa)(AA) before amendment by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §336(a)

The Act changes the above to provide that a seasonal employer “shall use the average total monthly payments for payroll for any 12-week period selected by the seasonal employer between February 15, 2019 and February 15, 2020.”²⁰

The revision applies as if it had been included in the original CARES Act, except it will not apply to loans on which the borrower had received forgiveness prior to the enactment date (December 31, 2020) of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.²¹

Time Periods Considered for Payroll Costs When Applying for PPP Loans in 2021

The SBA has indicated that borrowers that are not self-employed (including sole proprietorships and independent contractors) are permitted to choose the following periods upon which to calculate their payroll costs:

- 2019 calendar year;
- 2020 calendar year; or
- the precise 1-year period before the date on which the loan is made.²²

A self-employed person is similarly allowed to use either their 2019 or 2020 Schedule C to calculate their amount of “payroll cost” for a PPP loan,²³ while partners are similarly allowed to self-employment income from the partnership for 2019 or 2020.²⁴

Addition of Certain §501(c)(6) Organizations to List of Those Eligible for Loans

§501(c)(6) organizations that meet certain criteria are added to the list of those eligible to obtain PPP loans by the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*. The law provides that §501(c)(6) organizations (excluding professional sports leagues and organizations with the purpose of promoting or participating in a political campaign or other activity) are eligible to receive a PPP loan if

- The organization does not receive more than 15 percent of its receipts from lobbying activities;
- The lobbying activities of the organization do not comprise more than 15 percent of the total activities of the organization;
- The cost of the lobbying activities of the organization did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and

²⁰ SBA Act §7(a)(36)(E)(i)(I)(aa)(AA) after amendment by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §336(a)

²¹ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §336(b)

²² SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, B.4, January 6, 2021

²³ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, B.4.b, January 6, 2021

²⁴ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, B.4.e, January 6, 2021

- The organization employs not more than 300 employees.²⁵

A carve out from the general §501(c)(6) rules is made for certain destination marketing organizations. Despite not qualifying under the above rules, such organizations nevertheless will be eligible if:

- The destination marketing organization does not receive more than 15 percent of its receipts from lobbying activities;
- The lobbying activities of the destination marketing organization do not comprise more than 15 percent of the total activities of the organization;
- The cost of the lobbying activities of the organization did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020;
- The destination marketing organization employs not more than 300 employees; and
- The destination marketing organization —
 - is described in section 501(c) of the Internal Revenue Code and is exempt from taxation under section 501(a) of such Code; or
 - is a quasi-governmental entity or is a political subdivision of a State or local government, including any instrumentality of those entities.²⁶

A *destination marketing organization* means a nonprofit entity that is:

- an organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; or
- a State, or a political subdivision of a State (including any instrumentality of such entities)—
 - engaged in marketing and promoting communities and facilities to businesses and leisure travelers through a range of activities, including—
 - assisting with the location of meeting and convention sites;
 - providing travel information on area attractions, lodging accommodations, and restaurants;
 - providing maps; and
 - organizing group tours of local historical, recreational, and cultural attractions; or
 - that is engaged in, and derives the majority of the operating budget of the entity from revenue attributable to, providing live events.²⁷

²⁵ SBA Act §7(a)(36)(A)(vii)(I) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §318

²⁶ SBA Act §7(a)(36)(A)(vii)(II) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §318

²⁷ SBA Act §7(a)(36)(A)(xv) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §318

Housing Cooperatives Added to List of Eligible Borrowers

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* expands the list of eligible borrowers to include housing cooperatives.²⁸

A qualified housing cooperative is “a cooperative housing corporation (as defined in section 216(b) of the Internal Revenue Code of 1986) that employs not more than 300 employees...”²⁹

In an Interim Final Rule published on January 6, 2021, the SBA gave the following guidance for housing cooperatives:

Housing cooperatives (as defined in section 216(b) of the Internal Revenue Code of 1986) that employ not more than 300 employees are eligible to apply for PPP loans as long as other eligibility requirements are met. In addition, the provisions applicable to affiliation, described in section 3, apply to housing cooperatives in the same manner as with respect to a small business concern.³⁰

Public Companies Barred from Obtaining a PPP Loan

Beginning on the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* public companies will no longer be eligible to receive PPP loans.³¹

Entities That Are Permanently Closed Barred from Obtaining a PPP Loan

SBA Interim Final Rules bar a business that is permanently closed from obtaining a PPP loan.³² The agency explains the justification for this rule in a footnote:

This provision prohibits an entity that has gone out of business and has no intention of reopening from receiving a PPP loan. The Administrator, in consultation with the Secretary, has determined this provision is necessary to maintain program integrity, prevent abuse, and prevent PPP loans being made to businesses that have permanently closed. Preserving funds for businesses in operation is necessary because only businesses that are still in operation will retain employees, which is a primary purposes of the PPP. PPP was not intended to support businesses that have permanently closed. A borrower that has temporarily closed or temporarily suspended its business but intends to reopen remains eligible for a PPP loan.³³

²⁸ SBA §7(a)(36)(D)(i) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §316

²⁹ SBA §7(a)(36)(A)(xiv) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §316

³⁰ SBA Interim Final Rule, RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, Section B.1.g.v., January 6, 2021, <https://home.treasury.gov/system/files/136/PPP-IFR-Paycheck-Protection-Program-as-Amended-by-Economic-Aid-Act.pdf> (retrieved January 7, 2021)

³¹ SBA §7(a)(36)(D)(viii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

³² SBA Interim Final Rule, RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, Section B.2.a.ix

³³ SBA Interim Final Rule, RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, Section B.2.a.ix, Footnote 34

Additional Eligible Expenses

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* adds the following items to the list of non-payroll funds on which PPP loan proceeds can be spent and which will qualify towards non-payroll forgivable costs.³⁴ These new expenses are detailed in the following paragraphs.

Covered Operations Expenditures

The first new category is a *covered operations expenditure* which is defined as:

a payment for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses...³⁵

Covered Property Damage Costs

Covered property damage costs are defined as:

a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation...³⁶

Covered Supplier Costs

A *covered supplier cost* is:

...an expenditure made by an entity to a supplier of goods for the supply of goods that—

(A) are essential to the operations of the entity at the time at which the expenditure is made; and

(B) is made pursuant to a contract, order, or purchase order—

(i) in effect at any time before the covered period with respect to the applicable covered loan; or

(ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan...³⁷

Covered Worker Protection Expenditures

The final new category added is a *covered worker protection expenditure* which is defined as:

³⁴ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(a)

³⁵ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(v)

³⁶ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(vi)

³⁷ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(vii)

...an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19...³⁸

The law then lists items that specifically are included in this category as including:

- The purchase, maintenance, or renovation of assets that create or expand —
 - A drive-through window facility;
 - An indoor, outdoor, or combined air or air pressure ventilation or filtration system;
 - A physical barrier such as a sneeze guard;
 - An expansion of additional indoor, outdoor, or combined business space;
 - An onsite or offsite health screening capability; or
 - Other assets relating to the compliance with the requirements or guidance, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and
- The purchase of —
 - covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation. Such materials are listed in 44 CFR 328.103(a) as:
 - Surgical N95 Filtering Facepiece Respirators, including devices that are disposable half-face-piece non-powered air-purifying particulate respirators intended for use to cover the nose and mouth of the wearer to help reduce wearer exposure to pathogenic biological airborne particulates;
 - PPE surgical masks, including masks that cover the user’s nose and mouth and provide a physical barrier to fluids and particulate materials;
 - PPE nitrile gloves, including those defined at 21 CFR 880.6250 (exam gloves) and 878.4460 (surgical gloves) and such nitrile gloves intended for the same purposes; and
 - Level 3 and 4 Surgical Gowns and Surgical Isolation Gowns that meet all of the requirements in ANSI/AAMI PB70 and ASTM F2407-06 and are classified by Surgical Gown Barrier Performance based on AAMI PB70.

³⁸ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(viii)

- Particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or
- Other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor.³⁹

However, covered worker protective equipment does not include residential real property or intangible property.⁴⁰

These changes do not have retroactive effect—they only apply with respect to loans for which forgiveness is granted after the effective date of the Act (December 27, 2020).⁴¹

Group Insurance Payments

The law clarifies that “group life, disability, vision, or dental insurance” expenditures are to be considered an allowed payroll cost.⁴² This provision applies as if it were originally in the CARES Act.

Employee Retention Credit Available to Employers Who Obtain a Paycheck Protection Program Loan

Congress has removed the provision in the CARES Act that barred an employer who received a Paycheck Protection Program loan from claiming the employee retention credit.⁴³

This change is effective as if it was included in the CARES Act.⁴⁴

Payroll Costs for Loan Forgiveness Will Not Include Amounts on Which an Employee Retention Credit is Claimed

In the *Taxpayer Certainty and Disaster Relief Act of 2020* Congress removed the previous bar on an employer claiming the employee retention credit under CARES Act §2301 if the employer received a PPP loan. Now the law provides that such payroll costs will not include amounts taken into account in claiming:

- The employee retention credit under CARES Act §2301 or
- The disaster employee retention credit allowed under §303(a) or (d) of the *Taxpayer Certainty and Disaster Relief Act of 2020*.⁴⁵

³⁹ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(viii)

⁴⁰ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(viii)

⁴¹ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(c)

⁴² Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §308

⁴³ Removal of CARES Act §2301(j) by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)

⁴⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(1)

⁴⁵ SBA §7A(a)(12) as amended by the Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)

Clarification of Application of \$100,000 Cash Compensation Limit Over Covered Period

The Act provides a clarification for the application of the \$100,000 annualization limitation for cash compensation for a single employee over a covered period of what may be a variable number of weeks selected by the borrower between 8 and 24 weeks. The Act clarifies the limit is to be calculated by limiting the cash compensation of an employee to “\$100,000 on an annualized basis, as prorated for the period during which the compensation is paid or the obligation to pay the compensation is incurred.”⁴⁶

Bar on Use of PPP Loan Funds for Lobbying

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* adds SBA §7(a)(36)(F)(iv) which bars the use of proceeds of a PPP2 loan for:

- Lobbying activities, as defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602);
- Lobbying expenditures related to a State or local election; or
- Expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before Congress or any State government, State legislature, or local legislature or legislative body.⁴⁷

Special Maximum PPP Loan Amounts for Farmers and Ranchers

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* adds a special maximum loan calculation for farmers and ranchers.⁴⁸

To come under this provision, the borrower must meet the following criteria:

- Operates as a sole proprietorship or as an independent contractor, or is an eligible self-employed individual;
- Reports farm income or expenses on a Schedule F (or any equivalent successor schedule); and
- Was in business as of February 15, 2020.⁴⁹

The maximum loan for a farmer or rancher *without employees* is computed as the lesser of

- the sum of—
 - the product obtained by multiplying—

⁴⁶ SBA §7(a)(36)(A)(viii)(I)(bb) and (II) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §344

⁴⁷ SBA §7(a)(36)(F)(vi) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §319

⁴⁸ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

⁴⁹ SBA §7(a)(36)(V) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

- the gross income of the covered recipient in 2019 or 2020⁵⁰, as reported on a Schedule F (or any equivalent successor schedule), that is not more than \$100,000, divided by 12; and
 - 2.5; and
- the outstanding amount of a loan under SBA §7(b)(2) that was made during the period beginning on January 31, 2020 and ending on April 3, 2020 that the borrower intends to refinance under the covered loan, not including any amount of any advance under the loan that is not required to be repaid; *or*
- \$2,000,000.⁵¹

If the qualified farmer or rancher has employees, then the standard maximum loan computation shall be used (2.5 months of payroll costs plus the §7(b)(2) loan to be refinanced in the PPP loan), with 2.5 months of gross income from the 2019 Schedule F being added to that total.⁵²

The provision also allows the qualified farmer or rancher who received a PPP loan to request that the lender recalculate the maximum covered loan using this new formula and provide the qualified farmer or rancher with additional loan proceeds based on this calculation. However, the statute is worded that the lender *may* make such an additional advance, not the lender *must* make this additional advance if the borrower requests.⁵³

The farmer and rancher maximum loan provision is effective as if it had been included in the original CARES Act⁵⁴ except the provision does not apply to loans that have already been forgiven prior to the date of enactment (December 27, 2020) of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.⁵⁵

Selection of Covered Period for Forgiveness

The covered period has been modified before by Congress as part of the Paycheck Protection Program Flexibility Act and then the SBA indicated that borrowers who applied for forgiveness before the end of their statutory covered period would have a shorter covered period, ending on the date of forgiveness.

⁵⁰ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, B.4.d, January 6, 2021

⁵¹ SBA §7(a)(36)(V)(ii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

⁵² SBA §7(a)(36)(V)(iii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

⁵³ SBA §7(a)(36)(V)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

⁵⁴ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313(b)(1)

⁵⁵ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313(b)(2)

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* modifies the rules again, essentially moving the SBA rule for those who wish to apply early into the law. Now the covered period:

- Begins on the date the loan proceeds are received by the borrower and
- Ends on a date selected by the borrower that falls between
 - Eight weeks after the date the funds were received by the borrower and
 - Twenty-four weeks after the date the funds were received by the borrower.⁵⁶

Elimination of the Alternative Covered Period for Payroll Costs

Due to the change in the definition of the covered period found in the Act, the SBA in Interim Final Rules issued on January 6, 2021 has determined that it will no longer provide for an alternative covered period for payroll costs.⁵⁷ Since the borrower can pick the date on which the covered period may end, there is no longer any simplifying advantage in “aligning” the start of the covered period for payroll with the beginning of a pay period, since the borrower can eliminate any allocation of the final payroll by ending the covered period on the ending date of a pay period.

Simplified Application for Forgiveness of Loans Up to \$150,000

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* removes entirely the need for applicants who received loans of \$150,000 or less to comply with the detailed documentation requirements found at CARES Act §1106(e). While the SBA carved out some administrative relief for borrowers with loans of \$50,000 or less, or those that could meet certain safe harbors, the Act now puts into the law a much simplified forgiveness application process for borrowers with loans up to \$150,000.

For loans up to \$150,000, the loan shall be forgiven if the borrower

(i) signs and submits to the lender a certification, to be established by the Administrator not later than 24 days after the date of enactment of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (December 27, 2020), which—

(I) shall be not more than 1 page in length; and

(II) shall only require the eligible recipient to provide—

(aa) a description of the number of employees the eligible recipient was able to retain because of the covered loan;

(bb) the estimated amount of the covered loan amount spent by the eligible recipient on payroll costs; and

⁵⁶ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §306

⁵⁷ SBA Interim Final Rule RIN 3245-AH62, Business Loan Program Temporary Changes; Paycheck Protection Program as Amended by Economic Aid Act, B.14, January 6, 2021.

- (cc) the total loan value;
- (ii) attests that the eligible recipient has—
 - (I) accurately provided the required certification; and
 - (II) complied with the requirements under section 7(a)(36) (that is, the general PPP loan program requirements); and
- (iii) retains records relevant to the form that prove compliance with such requirements—
 - (I) with respect to employment records, for the 4-year period following submission of the form; and
 - (II) with respect to other records, for the 3-year period following submission of the form.⁵⁸

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* provides that no other information will be required to be submitted with the application for the covered loan of \$150,000 or less.⁵⁹

Note that the law only discusses full forgiveness. It would appear that if a borrower had determined he/she was not eligible for full forgiveness, the use of this form would not be allowed.

As well, the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* did not contain the special reduced documentation application process for borrowers with loans of more than \$150,000 but less than \$2,000,000 that was originally found in the proposed *Emergency Coronavirus Relief Act of 2020* that served as the starting point for negotiations for the eventual bill that was enacted.⁶⁰ Similarly, the application for those with loans of up to \$150,000 are required to provide additional information under the final bill as compared to what was in the initial proposal.

Requirement to Have Been in Operation on February 15, 2020

Businesses must have been in operation on February 15, 2020 in order to receive an original PPP loan. The provision applies as if it had originally been in the CARES Act to all loans, including those made before the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*⁶¹

⁵⁸ CARES Act 1106(l)(A) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §307

⁵⁹ CARES Act 1106(l)(B) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §307

⁶⁰ Full text downloaded from <https://www.cassidy.senate.gov/imo/media/doc/BAI20965.pdf>, retrieved December 19, 2020.

⁶¹ SBA §7(a)(36)(I) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §310

Entities Receiving Shuttered Venue Operator Grants Not Eligible for PPP Loans

Entities that receive Shuttered Venue Operator Grants under the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* are not eligible for a PPP loan.⁶² Note there is a drafting error in the copy of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* released on December 21, referring to such grants as being under Section 24 of the Act, rather than Section 324 where the grant provision is found. That error may be, or have been, corrected before the Act becomes law.

CARES Act §1106 Moved into Small Business Act at §7A

The law moves CARES Act §1106, which had existed solely as text in the law, into the United States Code by designating it as Section 7A of the Small Business Act.⁶³ Noting this change, which is easy to overlook, makes it a lot easier to interpret the language found in the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.

Modification to FTE Safe Harbor 2

The Act modifies FTE safe harbor 2 as it is called on the forgiveness application form, which was the only FTE safe harbor found in the CARES Act, for loans made on or after the date of enactment (December 27, 2020) of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.⁶⁴

So now the taxpayer must meet the following criteria for this FTE safe harbor:

- The borrower must have had a reduction in FTE in the period from February 15, 2020 to April 26, 2020 when compared to FTE at February 15, 2020 *and*
- The borrower has eliminated the reduction by December 31, 2020 except for loans made on or after the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* (December 27, 2020) where the borrower will have until the last day of the covered period for the loan. ⁶⁵

The same change in the ending date for the restoration test is made for a taxpayer who had a reduction in either the hourly wage rate or annualized salary for an employee in the period from February 15, 2020 to April 26, 2020 when compared to February 15, 2020.⁶⁶

Modification for Exemption Based on Employee Availability

As was true for the FTE Safe Harbor 2 ending date, the end date of the exemption based on employee availability formerly found in CARES Act 1106(d)(7) is moved for loans received after the

⁶² SBA §7(a)(36)(U) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §310

⁶³ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(1)

⁶⁴ CARES Act 1106(d)(5)(B) as amended by the Act

⁶⁵ SBA §7A(d)(5)(B) (formerly CARES Act §1106) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

⁶⁶ SBA §7A(d)(5)(B) (formerly CARES Act §1106) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

effective date (December 27, 2020) of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.

Now the law provides that during the period beginning on February 15, 2020 and ending on

- December 31, 2020 for loans obtained prior to the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* and
- The last day of the covered period for loans obtained on or after the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*

the amount of loan forgiveness under this section shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith is able to document

- An inability to rehire individuals who were employees on February 15, 2020 and
- An inability to hire similarly qualified employees for unfilled positions on or before
 - December 31, 2020 for loans obtained prior to the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* and
 - The last day of the covered period for loans obtained on or after the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.⁶⁷

Unable to Return to Same Level of Activity

To complete the adjustments to the safe harbors, the time period during which a taxpayer is unable to return to the same level of activity is also extended for those who receive loans after the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* which qualifies a taxpayer for FTE safe harbor 1.

The provision now reads that the amount of loan forgiveness shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith “is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020 (or, with respect to a covered loan made on or after the date of enactment of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, not later than the last day of the covered period with respect to such covered loan), related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.”⁶⁸

⁶⁷ SBA §7A(d)(7)(A) (formerly CARES Act §1106) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

⁶⁸ SBA §7A(d)(7)(B) (formerly CARES Act §1106) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

PPP SECOND DRAW LOANS

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* creates a new class of SBA §7(a) loans,⁶⁹ found at SBA §7(a)(37), just after the original PPP loan provision. The new loan is meant to provide a second loan for those who have exhausted their original PPP loan but have been impacted by a significant decrease in revenue. Thus, this program has very explicit need qualifications, not just a good faith belief that the loan is necessary.

For simplicity in this manual, we'll refer to the Paycheck Protection Program Second Draw loans as PPP2 loans. We will continue to refer to loans under the original provision (SBA §7(a)(36)) as PPP loans.

The SBA, in January 6, 2021 Interim Final Rules indicated that, with regard to PPP2 loans:

Frequently Asked Questions and other guidance issued by SBA or by SBA in consultation with the Department of the Treasury with respect to PPP loans under section 7(a)(36) of the Small Business Act (15 U.S.C. 636(a)(36)) (“First Draw PPP Loans”) apply to Second Draw PPP Loans, except as otherwise provided in this section.⁷⁰

Definitions

Unfortunately, the new loans use terms identical to those used under the first program—including ones such as “covered period”. The terms, and the way we will refer to them, are listed below.

- *Covered loan* (PPP2 covered loan) means a loan made under this program.⁷¹
- *Covered mortgage obligation, covered operating expenditure, covered property damage cost, covered rent obligation, covered supplier cost, covered utility payment, and covered worker protection* have the same meaning as they do under the original PPP program.⁷²

Eligible Entity

The entities that may obtain a PPP2 loan are defined at SBA §7(a)(37)(A)(iv). It begins with the following set of basic criteria. The entity means any

- Business concern,
- Nonprofit organization,
- Housing cooperative
- Veterans organization,

⁶⁹ Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁷⁰ SBA Interim Final Rule RIN 3245-AH63 Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, b(2), January 6, 2021

⁷¹ SBA §7(a)(37)(A)(ii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁷² SBA §7(a)(37)(A)(iii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

- Tribal business concern,
- Eligible self-employed individual,
- Sole proprietor,
- Independent contractor, or
- Small agricultural cooperative

That meets the remaining requirements.⁷³

The entity must also attest that it:

- Employs not more than 300 employees (down from 500 for the original PPP loan program) and
- Meets one of the following reduction in gross receipts tests:
 - Had gross receipts during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter in 2020, that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the same quarter in 2019;
 - If the entity was not in business during the first or second quarter of 2019, but was in business during the third and fourth quarter of 2019, had gross receipts during the first, second, or third quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the third or fourth quarter of 2019;
 - If the entity was not in business during the first, second, or third quarter of 2019, but was in business during the fourth quarter of 2019, had gross receipts during the first, second, or third quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the fourth quarter of 2019; or
 - If the entity was not in business during 2019, but was in operation on February 15, 2020, had gross receipts during the second or third quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the first quarter of 2020.⁷⁴

In Interim Final Rules issued on January 6, 2021, the SBA defined gross receipts for these purposes as follows:

Gross receipts includes all revenue in whatever form received or accrued (in accordance with the entity’s accounting method) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered “total income” (or in the case of a sole proprietorship, independent contractor, or self-employed individual “gross income”) plus “cost of goods sold,” and excludes

⁷³ SBA §7(a)(37)(A)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁷⁴ SBA §7(a)(37)(A)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

net capital gains or losses as these terms are defined and reported on IRS tax return forms.⁷⁵

The IFR continues on to exclude the following items from gross receipts:

Gross receipts do not include the following: taxes collected for and remitted to a taxing authority if included in gross or total income (such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees); proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from gross receipts.⁷⁶

For borrowers with affiliates, the SBA IFR provides the following:

Gross receipts of affiliates are calculated as follows:

(A) Gross receipts of a borrower with affiliates is calculated by adding the gross receipts of the business concern with the gross receipts of each affiliate.

(B) If a borrower has acquired an affiliate or been acquired as an affiliate during 2020, gross receipts includes the receipts of the acquired or acquiring concern. This aggregation applies for the entire period of measurement, not just the period after the affiliation arose. However, if a concern acquired a segregable division of another business concern during 2020, gross receipts do not include the receipts of the acquired division prior to the acquisition.

(C) The gross receipts of a former affiliate are not included. This exclusion of gross receipts of such former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a borrower sold a segregable division during 2020, the gross receipts will continue to include the receipts of the division that was sold.

(D) All terms in this subsection shall have the meaning attributed to them by the IRS.⁷⁷

The amount of any forgiven original PPP loan will not be included toward any borrower gross receipts.⁷⁸

⁷⁵ SBA Interim Final Rule RIN 3245-AH63 Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, c(2)(i), January 6, 2021

⁷⁶ SBA Interim Final Rule RIN 3245-AH63 Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, c(2)(i), January 6, 2021

⁷⁷ SBA Interim Final Rule RIN 3245-AH63 Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, c(2)(ii), January 6, 2021

⁷⁸ SBA Interim Final Rule RIN 3245-AH63 Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, c(2)(iv), January 6, 2021

As well, §501(c)(6) organizations that were first made eligible for the original PPP loans under the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* will be eligible to qualify for the second loan (except the 150 employee limitation will still apply).⁷⁹

However, certain organizations that otherwise would seem to qualify for the PPP2 loan are barred from receiving such loans. Banned entities include:

- Any entities that are:
 - Financial businesses primarily engaged in the business of lending, such as banks, finance companies, and factors (pawn shops, although engaged in lending, may qualify in some circumstances);
 - Passive businesses owned by developers and landlords that do not actively use or occupy the assets acquired or improved with the loan proceeds (except Eligible Passive Companies under § 120.111);
 - Life insurance companies;
 - Businesses located in a foreign country (businesses in the U.S. owned by aliens may qualify);
 - Pyramid sale distribution plans;
 - Businesses engaged in any illegal activity;
 - Loan packagers earning more than one third of their gross annual revenue from packaging SBA loans;
 - Businesses with an Associate who is incarcerated, on probation, on parole, or has been indicted for a felony or a crime of moral turpitude;
 - Businesses in which the Lender or CDC, or any of its Associates owns an equity interest;
 - Businesses which:
 - Present live performances of a prurient sexual nature; or
 - Derive directly or indirectly more than de minimis gross revenue through the sale of products or services, or the presentation of any depictions or displays, of a prurient sexual nature;
 - Unless waived by SBA for good cause, businesses that have previously defaulted on a Federal loan or Federally assisted financing, resulting in the Federal government or any of its agencies or Departments sustaining a loss in any of its programs, and businesses owned or controlled by an applicant or any of its Associates which previously owned, operated, or controlled a business which defaulted on a Federal loan (or guaranteed a loan which was defaulted) and caused the Federal government or any of its agencies or Departments to

⁷⁹ SBA §7(a)(37)(A)(iv)(II) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

sustain a loss in any of its programs. For purposes of this section, a compromise agreement shall also be considered a loss;

- Speculative businesses (such as oil wildcatting)⁸⁰
- Any business concern or entity primarily engaged in political or lobbying activities, which shall include any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents;⁸¹
- Any business concern or entity:
 - for which an entity created in or organized under the laws of the People’s Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People’s Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or
 - that retains, as a member of the board of directors of the business concern, a person who is a resident of the People’s Republic of China;⁸² or
 - any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612).⁸³
- Any entity that received a grant under the Shuttered Venue Operator Grants under the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* are not eligible for a PPP2 loan.⁸⁴

For purposes of computing gross receipts for nonprofit and veterans organizations, gross receipts means gross receipts within the meaning of IRC Section 6033 used for tax reporting.⁸⁵

A simplified certification of gross receipts will apply to loans up to \$150,000. In such a case, the entity:

- May submit a certification attesting that the eligible entity meets the applicable revenue loss requirement; but

⁸⁰ SBA §7(a)(37)(A)(v)(III)(aa) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸¹ SBA §7(a)(37)(A)(v)(III)(bb) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸² SBA §7(a)(37)(A)(v)(III)(cc) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸³ SBA §7(a)(37)(A)(v)(III)(dd) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸⁴ SBA §7(a)(37)(A)(v)(III)(ee) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸⁵ SBA §7(a)(37)(I)(ii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

- If the eligible entity submits the simplified certification, the entity shall, on or before the date on which the eligible entity submits an application for forgiveness of the PPP2 loan, produce adequate documentation that the eligible entity met such revenue loss standard.⁸⁶

An entity can only receive a single PPP2 loan.⁸⁷

Requirement to Have First Received a PPP Loan to Get a PPP2 Loan

The PPP2 loans are meant to be a second loan to entities that have received and exhausted the funds from the original PPP loans under SBA §7(a)(36). Specifically, a PPP2 loan can only be made to an entity that:

- Received a loan under the original PPP loan program and
- On or before the expected date on which the covered loan under this paragraph is disbursed to the eligible entity, has used, or will use, the full amount of the entity's original PPP loan funds.⁸⁸

Maximum Loan Amount

PPP2 loans are subject to similar maximum loan amounts as the original PPP loans except that they are capped at \$2 million rather than \$10 million.⁸⁹ The loans are generally going to be offered on the same terms, conditions and processes as the original PPP loan.⁹⁰

Borrowers generally get to use either 2019 or 2020 numbers to apply for the Second Draw PPP loan.⁹¹

General Rule

Most borrowers are covered by the general rule, which sets the maximum loan for the borrower at the lesser of the product obtained by multiplying at the election of the eligible entity,

- the average total monthly payment for payroll costs incurred or paid by the eligible entity during—
 - the 1-year period before the date on which the loan is made; or
 - calendar year 2019 or 2020⁹²; by

⁸⁶ SBA §7(a)(37)(I)(i) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸⁷ SBA §7(a)(37)(F) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸⁸ SBA §7(a)(37)(O) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁸⁹ SBA §7(a)(37)(C) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁹⁰ SBA §7(a)(37)(B) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

⁹¹ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f), January 6, 2021

⁹² SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(1), January 6, 2021

- 2.5; or
- \$2,000,000.⁹³

Farmer and Rancher Special Borrowing

The special maximum borrowing rule for a farmer or rancher operating as a sole proprietorship or as independent contractor, or is an eligible self-employed individual.⁹⁴

Seasonal Employers

Seasonal employers have a maximum loan that consists of the lesser of the product obtained by multiplying —

- at the election of the eligible entity, the average total monthly payments for payroll costs incurred or paid by the eligible entity for any 12-week period during the period between February 15, 2019 and February 15, 2020 by 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 at the time of disbursement, 3.5)⁹⁵; or
- \$2,000,000.⁹⁶

New Entities

Another special rule applies to new entities that did not exist during the 1-year period preceding February 15, 2020. For such entities, the maximum loan is the lesser of:

- the product obtained by multiplying —
 - the quotient obtained by dividing —
 - the sum of the total monthly payments by the eligible entity for payroll costs paid or incurred by the eligible entity as of the date on which the eligible entity applies for the covered loan; by
 - the number of months in which those payroll costs were paid or incurred; by
 - 2.5 (or, only for a borrower assigned a NAICS code beginning with 72 at the time of disbursement, 3.5);⁹⁷ or

⁹³ SBA §7(a)(37)(C)(i) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

⁹⁴ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(6), January 6, 2021

⁹⁵ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(3), January 6, 2021

⁹⁶ SBA §7(a)(37)(C)(ii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

⁹⁷ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(4), January 6, 2021

- \$2,000,000.⁹⁸

NAICS 72 Entities (Accommodation and Food Industries)

The maximum amount of a covered loan made to an eligible entity that is assigned a North American Industry Classification System code beginning with 72 (accommodation and food industries) at the time of disbursement is the lesser of—

- the product obtained by multiplying—
 - at the election of the eligible entity, the average total monthly payment for payroll costs incurred or paid by the eligible entity during—
 - the 1-year period before the date on which the loan is made; or
 - calendar year 2019 or 2020;⁹⁹ by
- 3.5; or
- \$2,000,000.¹⁰⁰

The option to use 3.5 months is also available to self-employed individuals¹⁰¹ and partnerships¹⁰² with NAICS code 72.

The SBA provides the following requirement for an entity to use this classification:

For purposes of calculating a borrower’s maximum payroll costs, a borrower may multiply its average monthly payroll costs by 3.5 only if the borrower is in the Accommodation and Food Services sector and has reported a NAICS code beginning with 72 as its business activity code on its most recent IRS income tax return.¹⁰³

Remove Two Certifications

Borrowers will no longer be required to certify that they do not have an application pending for the same purpose and duplicative of amounts for the PPP2 loan.¹⁰⁴ This proved to be a problem during the initial rollout of the PPP loans, as many potential borrowers found their applications “stuck” and

⁹⁸ SBA §7(a)(37)(C)(iii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

⁹⁹ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(1), January 6, 2021

¹⁰⁰ SBA §7(a)(37)(C)(iv) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

¹⁰¹ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(7), January 6, 2021

¹⁰² SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(8), January 6, 2021

¹⁰³ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (f)(10), January 6, 2021

¹⁰⁴ SBA §7(a)(37)(G) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

not moving forward at a financial institution they had applied at. Such borrowers would then move to another lender who was timely processing applications, which violated this provision.

To date the SBA appears to have turned a blind eye in most of these cases so long as the borrower did not actually obtain multiple loans. It appears Congress realizes that the new program may face similar issues, and so have limited the rules to just limit a borrower to one such loan rather than having to certify they have no application pending elsewhere.

PPP2 borrowers also will not have to certify that they have not received amounts under the program for the same purpose and duplicative of the amounts received under another PPP loan—presumably because the new loan may be based on the same prior payroll costs as one obtained under the first program and it would be used for much the same purpose.¹⁰⁵

Applying for the PPP2 Loan

The January 6, 2021 Interim Final Rule provides the following information about filing for the loan:

(1) The applicant must submit to the lender SBA Form 2483-SD (Paycheck Protection Program Second Draw Borrower Application Form) or the lender's equivalent form including the required certifications and the documentation in subsection (g)(2).

(2) At the time an applicant submits its loan application form, it must submit the following unless the documentation was submitted to the lender for the First Draw PPP Loan (i.e., the applicant used calendar year 2019 figures to determine both its First Draw PPP Loan amount and its Second Draw PPP Loan amount, and the lender for the applicant's Second Draw PPP Loan is the same as the lender that made the applicant's First Draw PPP Loan):

(i) If the applicant is not self-employed, the applicant's Form 941 (or other tax forms containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever was used to calculate payroll), as applicable, or equivalent payroll processor records, along with evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions, must be provided. A partnership must also include its IRS Form 1065 K-1s

(ii) If the applicant is self-employed and has employees, the applicant's 2019 or 2020 (whichever was used to calculate loan amount) IRS Form 1040 Schedule C, Form 941 (or other tax forms or equivalent payroll processor records containing similar information) and state quarterly wage unemployment insurance tax reporting forms from each quarter in 2019 or 2020 (whichever was used to calculate loan amount), as applicable, or equivalent payroll processor records, along with evidence of any retirement and employee group health, life, disability, vision and dental insurance contributions, if applicable, must be provided. A payroll statement or similar documentation from the pay period that covered February 15, 2020

¹⁰⁵ SBA §7(a)(37)(G) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

must be provided to establish the applicant was in operation on February 15, 2020.

(iii) If the applicant is self-employed and does not have employees, the applicant must provide (a) its 2019 or 2020 (whichever was used to calculate loan amount) Form 1040 Schedule C, (b) a 2019 or 2020 (whichever was used to calculate loan amount) IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record that establishes that the applicant is self-employed; and (c) a 2020 invoice, bank statement, or book of record to establish that the applicant was in operation on or around February 15, 2020.

(iv) For loans with a principal amount greater than \$150,000, documentation sufficient to establish that the applicant experienced a reduction in revenue, as provided in subsection(c)(1)(iv), must be provided at the time of application, which may include relevant tax forms, including annual tax forms, or, if relevant tax forms are not available, a copy of the applicant's quarterly income statements or bank statements.

(v) For loans with a principal amount of \$150,000 or less, the applicant must submit documentation sufficient to establish that the applicant experienced a reduction in revenue as provided in subsection (c)(1)(i) of this section at the time of application, on or before the date the borrower submits an application for loan forgiveness, or, if the borrower does not apply for loan forgiveness, at SBA's request. Such documentation may include relevant tax forms, including annual tax forms, or, if relevant tax forms are not available, a copy of the applicant's quarterly income statements or bank statements.

(3) On the Second Draw PPP Loan borrower application, an authorized representative of the applicant must make the certifications listed in subsection (B)(12) of the Consolidated First Draw PPP IFR, except:

(i) instead of the certification in subsection (B)(12)(v) of the Consolidated First Draw PPP IFR, the applicant must certify that the applicant has not and will not receive another Second Draw Paycheck Protection Program Loan; and

(ii) an authorized representative of the applicant must also certify:

(A) The Applicant has realized a reduction in gross receipts in excess of 25% relative to the relevant comparison time period. For loans greater than \$150,000, Applicant has provided documentation to the lender substantiating the decline in gross receipts. For loans of \$150,000 or less, Applicant will provide documentation substantiating the decline in gross receipts upon or before seeking loan forgiveness for the Second Draw Paycheck Protection Program Loan or upon SBA request.

(B) The Applicant received a First Draw Paycheck Protection Program Loan and, before the Second Draw Paycheck Protection Program Loan is disbursed, will have used the full loan amount

(including any increase) of the First Draw Paycheck Protection Program Loan only for eligible expenses.

(C) The Applicant is not a business concern or entity (a) for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or (b) that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China.

(D) The Applicant is not required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612).

(E) The Applicant is not a business concern or entity primarily engaged in political or lobbying activities, including any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents.

(4) A lender must submit SBA Form 2484-SD (Paycheck Protection Program Lender's Application – Second Draw Loan Guaranty) electronically in accordance with program requirements and maintain the forms and supporting documentation in its files.¹⁰⁶

Borrowers with Unresolved Issues Regarding First Draw PPPP Loans

The SBA published special procedures for applicants that have unresolved issues with First Draw PPP Loans in the January 6, 2021 Interim Final Rule:

(1) If a First Draw PPP Loan is under review pursuant to PPP rules and/or information in SBA's possession indicates that the borrower may have been ineligible for the First Draw PPP Loan it received or for the loan amount received by the borrower, the lender will receive notification from SBA when the lender submits an application for guaranty of a Second Draw PPP Loan ("unresolved borrower").

(2) If the lender receives notification that the Applicant for a Second Draw PPP Loan is an unresolved borrower, the lender will not receive an SBA loan number. SBA will resolve the issue related to the unresolved borrower expeditiously and will notify the lender of the process to obtain an SBA loan number for the Second Draw PPP Loan, if appropriate.¹⁰⁷

¹⁰⁶ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (g), January 6, 2021

¹⁰⁷ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (h), January 6, 2021

Loan Forgiveness for PPP2 Loans

For a PPP2 loan, the covered period for forgiveness is the same as it for PPP loans, following the modifications made by the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*. That covered period is the period:

- Beginning on the date of the origination of a covered loan; and
- Ending on a date selected by the eligible recipient of the covered loan that occurs during the period
 - Beginning on the date that is 8 weeks after such date of origination; and
 - Ending on the date that is 24 weeks after such date of origination.¹⁰⁸

Generally, except as provided for below, PPP2 loan borrowers are eligible for forgiveness of a PPP2 loan in the same manner as was true for the original PPP loans.¹⁰⁹ That includes the special simplified application for forgiveness for those with loans of \$150,000 or less.¹¹⁰

An entity with a PPP2 loan is eligible for forgiveness in an amount equal to the total of the following costs incurred or expenditures made during the PPP2 covered period:

- Payroll costs (excluding those taken into account in computing the employee retention credit under §2301 of the CARES Act or the revised employee retention credit for employers affected by natural disasters added by §303 of the *Taxpayer Certainty and Disaster Relief Act of 2020*).
- Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).
- Any payment on any covered rent obligation.
- Any covered utility payment.
- Any covered operations expenditure.
- Any covered property damage cost.
- Any covered supplier cost.
- Any covered worker protection expenditure.¹¹¹

¹⁰⁸ SBA §7A(a)(5), §7(a)(37)(J)(i) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

¹⁰⁹ SBA §7(a)(37)(J)(i) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

¹¹⁰ SBA Interim Final Rule RIN 3245-AH63, Business Loan Program Temporary Changes; Paycheck Protection Program Second Draw Loans, (i), January 6, 2021

¹¹¹ SBA §7(a)(37)(J)(iii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

However, the amount forgiven can be no more than the lesser of

- The total of the above expenses or
- The amount equal to the quotient obtained by dividing —
 - The amount of the covered loan used for payroll costs during the covered period; by
 - 0.60.¹¹²

The law notes that those who received loans of \$150,000 or less based on simply certifying they had a qualifying revenue reduction may be required to submit documentation to substantiate the drop in revenue when they apply for forgiveness.¹¹³

¹¹² SBA §7(a)(37)(J)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

¹¹³ SBA §7(a)(37)(J)(v) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

Unit 3

Business COVID-Related Relief

LEARNING OBJECTIVES

- Explain the differences between the 2020 (as revised) and 2021 employee retention credits and advise clients on taking advantage of the credit
- Advise clients on the types of food and beverage expenditures that will qualify for a 100% deduction in 2020 and 2021
- Apply the special rules on the taxability of amounts received under various CARES Act programs

The *Consolidated Appropriations Act, 2021* contains a number of provisions meant to provide relief to businesses impacted by the COVID-19 pandemic.

PAYROLL TAX CREDIT REVISIONS

Congress extended and revised the key payroll tax credits found in the *Families First Coronavirus Relief Act* and the CARES Act. Basically, these changes result in:

- A somewhat revised employee retention credit (ERC) that will apply for 2020 wages and for which employers may still qualify to claim even if they received a PPP loan;
- A more heavily revised version of the ERC that will apply to wages paid in the first six months of 2021;
- An extension of the credit to employers to pay for leave provided for under the Families First Coronavirus Relief Act but no longer is the employer required to offer such leave; and
- Allowing employee payroll taxes deferred from paychecks issued between September 1, 2020 and December 31, 2020 to be repaid through the end of 2021 rather than just the first four months.

Clarifications and Technical Improvements to CARES Act Employee Retention Credit Effective Retroactive to Enactment of CARES Act (the 2020 ERC Changes)

The *Taxpayer Certainty and Disaster Relief Act of 2020* contains a number of significant changes to the employee retention credit (ERC) found at §2301 of the CARES Act which have retroactive effect, along with a second set that apply for wages paid in 2021. The revisions below, found in §206 of the Act, will apply to 2020 wages (and will continue on along with other changes for 2021 wages).

Gross Receipts for a Tax Exempt Organization

The revision clarifies that gross receipts for a tax-exempt organization for the credit will be determined by reference to gross receipts within the meaning of IRC §6033, which is the IRC provision governing returns filed by such exempt organizations.¹¹⁴

Health Care Costs

The new law rearranges the definitions, treating health care costs as wages, making it clear that such payments by themselves would represent wages even if an employee was not otherwise currently employed by the employer.¹¹⁵

Availability for Employers That Obtained PPP and/or PPP2 Loan

The major change found in the “clarifications and technical improvements” section of the law relates to the interaction of the Paycheck Protection Program (PPP) loans and the ERC. Under the CARES Act, employers who received a Paycheck Protection Program loan were barred from claiming the ERC. Congress has decided to simply block the ability for an employer to both claim the ERC on a payment to the employee and use that same payment as part of the wages used to claim forgiveness of the PPP2 loan.

Congress has removed the provision in the CARES Act that barred an employer who received a Paycheck Protection Program loan from claiming the employee retention credit.¹¹⁶

The law provides that any amounts used to claim an ERC cannot be used as payroll costs when claiming forgiveness for either the PPP or PPP2 loan.¹¹⁷

In order to enable a business to coordinate between the PPP loan forgiveness and the ERC, the law provides that an employer will be able to elect not to take into account a portion of the wages paid that otherwise would qualify for ERC credit in computing the credit. The law provides that the IRS can prescribe how and when this election is to be made.¹¹⁸

¹¹⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §206(a)

¹¹⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §206(b)

¹¹⁶ Removal of CARES Act §2301(j) by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)

¹¹⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(1) revising SBA §7A(a)(12)

¹¹⁸ CARES Act §2301(g)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)(A)

As well, the provision provides:

The Secretary, in consultation with the Administrator of the Small Business Administration, shall issue guidance providing that payroll costs paid during the covered period shall not fail to be treated as qualified wages under this section by reason of an election under paragraph (1) to the extent that a covered loan of the eligible employer is not forgiven by reason of a decision under section 7A(g) of the Small Business Act. Terms used in the preceding sentence which are also used in section 7A of the Small Business Act shall have the same meaning as when used in such section.¹¹⁹

The *Taxpayer Certainty and Disaster Relief Act of 2020* authorizes the IRS to write regulations “to prevent the avoidance of the purposes of the limitations under this section, including through the leaseback of employees.”¹²⁰

Provisions in This Section Retroactive to Enactment of CARES Act

These changes are effective as if they had been part of the original CARES Act.¹²¹ This means that many taxpayers who received a PPP loan now will be able to claim an ERC credit for wages paid in 2020.

To reduce the additional work involved with amending multiple forms 941 from 2020, the Act provides for an election by an employer to claim the credit on its next filed Form 941:

For purposes of section 2301 of the CARES Act, an employer who has filed a return of tax with respect to applicable employment taxes (as defined in section 2301(c)(1) of division A of such Act) before the date of the enactment of this Act may elect (in such manner as the Secretary of the Treasury (or the Secretary’s delegate) shall prescribe) to treat any applicable amount as an amount paid in the calendar quarter which includes the date of the enactment of this Act.¹²²

The *applicable amount* to be claimed as a payment on the next filed Form 941 is defined as the amount of wages which are:

- Defined as wages for purposes of ERC or
- Permitted to be treated as qualified wages under guidance issued pursuant to the regulations allowing wages to be treated as qualified for ERC when PPP loan forgiveness is not obtained as described earlier.¹²³

And those wages were:

- Paid in a calendar quarter beginning after December 31, 2019 and before October 1, 2020 and

¹¹⁹ CARES Act §2301(g)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)(A)

¹²⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §206(d)

¹²¹ Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(1)

¹²² Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(2)(A)

¹²³ Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(2)(B)

- Were not taken into account by the taxpayer in calculating the ERC credit for such calendar quarter.¹²⁴

Extension and Modifications of Employee Retention and Rehiring Tax Credit First Effective in 2021

The second set of revisions to the original ERC do not take effect until 2021. Note that these apply *in addition* to the modifications that took effect in 2020 that were part of §206 of this Act.

Extension of ERC Program into First Half of 2021

First, the ending date for the ERC is pushed forward from the fourth quarter of 2020 to the second quarter of 2021.¹²⁵

Increase in the Credit Percentage

The amount of the credit is also increased from 50% of qualified wages paid to 70% of qualified wages paid beginning with the first quarter of 2021.¹²⁶

\$10,000 per Employee Test Applied on a Per Quarter Basis

In 2021 the per employee wage limit also is modified, no longer limiting the qualified wages per employee to \$10,000 over the lifetime of the ERC to \$10,000 per quarter that the ERC is claimed.¹²⁷

80% Test for Substantial Reduction in Gross Receipts

The revisions effective in 2021 also make it easier for a taxpayer to qualify for the credit based on a reduction in revenue for a quarter. Under the 2020 version of the ERC, a taxpayer had to show a decrease below 50% of revenue for the same quarter in 2019. In the new version, a quarter where revenue is less than 80% of the revenue for the same quarter in 2019 will begin to qualify a taxpayer for the credit.

However, now each quarter is tested on its own. The prior rule provided that the credit applied until the first quarter *after* the taxpayer's revenues (computed under the rules for §448(c)) were more than 80% of the same period in 2019.¹²⁸

¹²⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(2)(B)

¹²⁵ CARES Act §2301(m) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(a)(1)

¹²⁶ CARES Act §2301(a) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(b)

¹²⁷ CARES Act §2301(b)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(c)

¹²⁸ CARES Act §2301(c)(2)(A)(ii)(II) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(1)(A)

Employers Not in Existence in 2019

If an employer was not in existence in 2019, the following special rule applies:

With respect to any employer for any calendar quarter, if such employer was not in existence as of the beginning of the same calendar quarter in calendar year 2019, clause (ii)(II) shall be applied by substituting ‘2020’ for ‘2019’.¹²⁹

Essentially, such taxpayers will begin comparing the quarter in 2021 vs. the quarter in 2020.

Election to Use Prior Quarter for Revenue Testing

The revised ERC also contains the option to allow an employer to elect to test the decrease in revenue based upon the preceding rather than current calendar quarter.¹³⁰ Nothing in the section forces a taxpayer to use this election for both quarters, so it seems to allow the taxpayer the “extra” quarter that resulted from the 2020 ERC rule that allowed a taxpayer to keep using the credit until the quarter after the taxpayer exceeded 80% of revenues in the same quarter in 2019.

The effect of this, though, would be to limit the ability of a taxpayer that had exceeded 80% of 2019’s revenue for the fourth quarter in the fourth quarter of 2020 to continue to use the credit unless that taxpayer’s first quarter 2021 revenue was less than 80% of the first quarter of 2019.

Certain Governmental Entities Qualify for ERC

While CARES Act §2301(f) still generally bars governmental entities from receiving the ERC, the new law provides a list of certain governmental entities that will be allowed to receive the ERC in 2021 if they otherwise qualify.

These governmental entities include:

- Any §501(c)(3) organization exempt from tax under IRC §501(a);
- A college or university; and
- An entity where the principal purpose or function of the entity is providing medical or hospital care.¹³¹

Changes to Computation of Qualified Wages (Increase in Small Business Employee Limit)

The Act revises the definition of a large employer by raising the number of employees from 100 to 500.¹³² Thus, more employers will be able to claim the ERC for wages paid to employees who are performing services for the employer during the periods the employer qualifies for the credit, rather than, as a large employer, only being able to claim the credit for amounts paid to employees performing no services for the employer.

¹²⁹ CARES Act §2301(c)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(1)(B)

¹³⁰ CARES Act §2301(c)(2)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(2)(A)

¹³¹ CARES Act §2301(f)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(3)

¹³² CARES Act §2301(c)(3)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(e)(1)

The Act also removes the original limitation that provided that qualified wages for an employee could not exceed the amount the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period.¹³³

Double Benefit Rule Simplified

The Act removes two provisions that 1) denied any credit for any quarter in which the employer claimed the work opportunity credit under IRC §51 and 2) prohibited taking a credit under §45S (credit for paid family or medical leave) for any wages on which the ERC was claimed. They are replaced with a single, broader bar on claiming a double benefit.

Any wages taken into account in determining the ERC may not be taken into account in computing a credit under:

- IRC §41 (Credit for increasing research activities);
- IRC §45A (Indian employment credit);
- IRC §45P (Employer wage credit for employees who are active duty members of the uniformed services);
- IRC §45S (Employer credit for paid family and medical leave);
- IRC §51 (Work opportunity credit); and
- IRC §1396 (Empowerment zone employment credit).¹³⁴

Advance Payment of Employee Retention Credit

A new provision has been added to the ERC by the Act allowing small employers to elect to obtain an advance payment of the ERC. For these purposes a small employer is one who did not employ more than 500 employees in 2019—larger employers are barred from receiving such payments.¹³⁵

The advance credit is not to exceed 70% of the average wages paid by the employer in 2019.¹³⁶

Special rules apply to seasonal employers and those not in existence in 2019. For seasonal employers the special provision provides:

In the case of any employer who employs seasonal workers (as defined in section 45R(d)(5)(B) of the Internal Revenue Code of 1986), the employer may elect to substitute ‘the wages for the calendar quarter in 2019 which corresponds to the calendar quarter to which the election relates’ for ‘the average quarterly wages paid by the employer in calendar year 2019’¹³⁷

¹³³ Repeal of CARES Act §2301(c)(3)(B)

¹³⁴ CARES Act §2301(h)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(f)

¹³⁵ CARES Act §2301(j)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

¹³⁶ CARES Act §2301(j)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

¹³⁷ CARES Act §2301(j)(2)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

For employers not in existence in 2019, the above rules shall be applied by substituting 2020 for 2019 as the base period being evaluated for the advance payment amount.¹³⁸

The ERC for the quarter shall be reduced (but not below zero) by the amount of the advance credit. A failure to reduce the credit by the advance payment shall be treated as a mathematical or clerical error under IRC §6213(b)(1).¹³⁹

If an excess advance payment exists for a quarter, the FICA or Railroad Retirement Tax Act tax imposed on the employer shall be increased by the amount of the excess.¹⁴⁰

Third Party Payors

The Act provides the following provision related to third party payors (such as certified professional employer organizations):

Any forms, instructions, regulations, or guidance described in paragraph (2) shall require the customer to be responsible for the accounting of the credit and for any liability for improperly claimed credits and shall require the certified professional employer organization or other third party payor to accurately report such tax credits based on the information provided by the customer.¹⁴¹

Public Awareness Campaign

The law requires the IRS to conduct a public awareness campaign in coordination with the Small Business Administration to provide information regarding the availability of the ERC.¹⁴² As part of that campaign the IRS shall

- Provide to all employers which reported not more than 500 employees on the most recently filed return of applicable employment taxes a notice about the credit allowed under this section and the requirements for eligibility to claim the credit,¹⁴³ and
- Not later than 30 days after the date of the enactment of this subsection, provide to all employers educational materials relating to the credit allowed under this section, including specific materials for businesses with not more than 500 employees.¹⁴⁴

Effective Date – Quarters Beginning in 2021

A key issue to remember about all changes described in this second ERC section is they only become effective for calendar quarters beginning in 2021.¹⁴⁵ Thus, unlike the first set of changes, none of these changes apply retroactively to quarters back to the enactment of the CARES Act.

¹³⁸ CARES Act §2301(j)(2)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

¹³⁹ CARES Act §2301(j)(3)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

¹⁴⁰ CARES Act §2301(j)(3)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

¹⁴¹ CARES Act §2301(l) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(h)

¹⁴² CARES Act §2301(n)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(i)

¹⁴³ CARES Act §2301(n)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(i)

¹⁴⁴ CARES Act §2301(n)(2)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(i)

¹⁴⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §207(k)

Extension of Credits for Paid Sick and Family Leave

The *COVID-related Tax Relief Act of 2020* provides for an extension of the credit offered for employer paid sick and family leave, but does not extend the mandate to provide such leave beyond December 31, 2020.¹⁴⁶

The credits are revised so they are now available:

- When such sick leave is required to be paid by reason of the Emergency Paid Sick Leave Act and
- Would be required if the mandate ended on March 31, 2021 when all other requirements for such leave are met.¹⁴⁷

Time Period Over Which Deferred Employee FICA is to Be Withheld in 2021

Congress orders in the Act that the IRS shall modify Notice 2020-65 to provide that any amount of employee FICA deferred during the period September 1, 2020 to December 31, 2020 will be recovered from employees' pay checks over the entirety of 2021, not just the first four months of the year and penalties will only apply to amounts not transmitted to the IRS by January 1, 2022.¹⁴⁸

MISCELLANEOUS BUSINESS-RELATED TAX ISSUES

The Acts have various other business-related issues.

Restaurant Provided Business Meals Fully Deductible in 2021 and 2022

The Act provides for a limited and temporary suspension of the 50% reduction in the deduction for most business food and beverages under IRC §274(n) during 2021 and 2022. The temporary allowance of the full deduction is:

- For food or beverages provided by a restaurant, and
- Paid or incurred before January 1, 2023.¹⁴⁹

The provision applies to amounts paid or incurred after December 31, 2020.¹⁵⁰

Election to Waive Application of Certain Modifications to Farm Losses

Taxpayers with farming losses from 2018 and later years prior to the CARES Act had the ability to carry back losses two years, but the CARES Act retroactively removed that option and made the

¹⁴⁶ COVID-related Tax Relief Act of 2020 §286

¹⁴⁷ COVID-related Tax Relief Act of 2020 §286(a)(1) and (3)

¹⁴⁸ COVID-related Tax Relief Act of 2020 §274

¹⁴⁹ IRC §274(n)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §210(a)

¹⁵⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §210

carry back period for all businesses five years. While for most non-farm businesses this was a positive development—they could either go back five years or elect to carry forward the loss as they had been required to under the Tax Cuts and Jobs Act changes—for farms they could not maintain the two-year carryback even if that was the most advantageous option.

Congress has decided that farmers should be allowed to elect to keep the two year carry back, so a taxpayer may elect to ignore the changes made by the CARES Act to net operating losses, keeping the two year carry back period.¹⁵¹ Such an election shall be made in the manner specified by the IRS and once made will be irrevocable.¹⁵²

The general timing rules for making this election are defined as follows:

An election under this paragraph shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxpayer's first taxable year ending after the date of the enactment of the COVID-related Tax Relief Act of 2020.¹⁵³

For taxpayers that had already filed affected returns before the date of enactment of the *COVID-related Tax Relief Act of 2020* the following provisions apply:

In the case of any taxable year for which the taxpayer has filed a return of Federal income tax before the date of the enactment of the COVID-related Tax Relief Act of 2020 which disregards the amendments made by subsections (a) and (b), such taxpayer shall be treated as having made an election under this paragraph unless the taxpayer amends such return to reflect such amendments by the due date (including extensions of time) for filing the taxpayer's return for the first taxable year ending after the date of the enactment of the COVID-related Tax Relief Act of 2020.¹⁵⁴

An election to waive a carry back under IRC §172(b)(3) may be revoked for any election:

- Which was made before the date of the enactment of the COVID-related Tax Relief Act of 2020, and
- Which relates to the carryback period provided under section 172(b)(1)(B) of such Code with respect to any net operating loss arising in taxable years beginning in 2018 or 2019.¹⁵⁵

Residential Property in an Electing Real Property Trade or Business Depreciated Over 30-Year Period

The *Taxpayer Certainty and Disaster Relief Act of 2020* provided some retroactive relief for an electing real property trade or business holding residential property.

Under the *Tax Cuts and Jobs Act* (TCJA), certain real property trades and businesses have the option to avoid the application of the business interest rules of IRC §163(j) by making an election. In such a case, all real property of the business is required to be depreciated using the alternative depreciation

¹⁵¹ IRC §170(e)(1) as amended by the COVID-related Tax Relief Act of 2020 §281(c)(1)

¹⁵² IRC §170(e)(2) as amended by the COVID-related Tax Relief Act of 2020 §281(c)(1)

¹⁵³ IRC §170(e)(1)(B)(ii)(I) as amended by the COVID-related Tax Relief Act of 2020 §281(a)

¹⁵⁴ IRC §170(e)(1)(B)(ii)(II) as amended by the COVID-related Tax Relief Act of 2020 §281(a)

¹⁵⁵ IRC §170(e)(2) as amended by the COVID-related Tax Relief Act of 2020 §281(a)

recovery (ADR) system. TCJA reduced the ADR life for residential real property to 30 years from 40, but it only applied to assets placed in service after September 27, 2017.

Thus, a business that made the electing real property trade or business election with residential buildings held before that date faced a much longer extra depreciation period than ones that acquired a building after September 27, 2017. The new law remedies this situation for residential real estate.

The new 30-year ADR life will be used for residential rental property that meets the following requirements:

- Which was placed in service before January 1, 2018,
- Which is held by an electing real property trade or business (as defined in section 163(j)(7)(B) of the Internal Revenue Code of 1986), and
- For which subparagraph (A), (B), (C), (D), or (E) of section 168(g)(1) (which would have already required the use of ADR depreciation) of the Internal Revenue Code of 1986 did not apply prior to such date.¹⁵⁶

The revision retroactively applies to all taxable years beginning after December 31, 2017.¹⁵⁷

NON-PPP LOAN FORGIVENESS TAXATION

The law provides relief for the taxation of loan forgiveness and similar support under various federal COVID-19 programs.

Nontaxability of Forgiveness of Indebtedness Under United States Treasury Program Management Authority

For the United States Treasury Program Management Authority assistance:

- No amount shall be included in the gross income of a borrower by reason of forgiveness of indebtedness described in section 1109(d)(2)(D) of the CARES Act,
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided under the prior bullet and
- In the case of a borrower that is a partnership or S corporation—
 - Any amount excluded from income by reason of the first bullet shall be treated as tax exempt income for purposes of sections 705 and 1366 of the Internal Revenue Code of 1986, and
 - Except as provided by the Secretary of the Treasury (or the Secretary's delegate), any increase in the adjusted basis of a partner's interest in a partnership under section 705 of the Internal Revenue Code of 1986 with respect to any amount described in the prior bullet shall

¹⁵⁶ TCJA §13204(b)(3) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §202

¹⁵⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §202

equal the partner's distributive share of deductions resulting from costs giving rise to forgiveness described in section 1109(d)(2)(D) of the CARES Act.¹⁵⁸

Tax Status of Emergency EIDL Grants and Targeted EIDL Advances

For purposes of the Internal Revenue Code:

- Any EIDL Emergency Grant or any funding under section 331 of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* shall not be included in the gross income of the person that receives such advance or funding,
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by the first bullet, and
- In the case of a partnership or S corporation that receives such advance or funding—
 - Any amount excluded from income by reason of the first bullet shall be treated as tax exempt income for purposes of sections 705 and 1366 of the Internal Revenue Code of 1986, and
 - The Secretary of the Treasury (or the Secretary's delegate) shall prescribe rules for determining a partner's distributive share of any amount described in the prior bullet for purposes of section 705 of the Internal Revenue Code of 1986.¹⁵⁹

Tax Status of Loan Payments Made by SBA for Borrowers

For purposes of the Internal Revenue Code:

- Any payment of various SBA loans described in section 1112(c) of the CARES Act shall not be included in the gross income of the person on whose behalf such payment is made,
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by the first bullet, and
- In the case of a partnership or S corporation on whose behalf of a payment described in section 1112(c) of the CARES Act is made—
 - Any amount excluded from income by reason of the first bullet shall be treated as tax exempt income for purposes of sections 705 and 1366 of the Internal Revenue Code of 1986, and
 - Except as provided by the Secretary of the Treasury (or the Secretary's delegate), any increase in the adjusted basis of a partner's interest in a partnership under section 705 of the Internal Revenue Code of 1986 with respect to any amount described in the prior bullet shall equal the sum of the partner's distributive share of deductions resulting from interest and fees described in section 1112(c) of the CARES Act and the partner's share, as determined

¹⁵⁸ COVID-related Tax Relief Act of 2020 §278(a)

¹⁵⁹ COVID-related Tax Relief Act of 2020 §278(b)

under section 752 of the Internal Revenue Code of 1986, of principal described in section 1112(c) of the CARES Act.¹⁶⁰

SBA guidance issued to lenders prior to the enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* had indicated that these payments would be reported to borrowers on Form 1099MISC and be taxable to the borrower.¹⁶¹ As was noted in the section on PPP loans, those information returns no longer have to be filed and, as was described above, these payments will not give rise to taxable income.

Tax Status of Grants for Shuttered Venue Operators

For purposes of the Internal Revenue Code:

- Any grant made under section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Grants for Shuttered Venue Operators) shall not be included in the gross income of the person that receives such grant,
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by the first bullet, and
- In the case of a partnership or S corporation that receives such grant—
 - Any amount excluded from income by reason of the first bullet shall be treated as tax exempt income for purposes of sections 705 and 1366 of the Internal Revenue Code of 1986, and
 - The Secretary of the Treasury (or the Secretary’s delegate) shall prescribe rules for determining a partner’s distributive share of any amount described in the prior bullet for purposes of section 705 of the Internal Revenue Code of 1986.¹⁶²

EMPLOYEE BENEFIT PLAN RELATED RELIEF

As Congress did in the CARES Act, Congress continues to make some revisions to qualified plan rules in these bills.

Minimum Age for Distributions During Working Retirement for Some Workers in the Construction Industry

A narrow expansion was created for certain workers in long-standing multiemployer retirement plans. Generally IRC §401(a)(36) provides a qualified plan may allow workers who have attained 59 ½ to take distributions while continuing to work. The new provision allows that age to be reduced to age 55 if:

- The individual was a participant in the plan on or before April 30, 2013;

¹⁶⁰ COVID-related Tax Relief Act of 2020 §278(c)

¹⁶¹ See Ed Zollars, CPA, “Guidance on Information Reporting Responsibilities for Payments Under CARES Act §1112 Made by SBA,” *Current Federal Tax Developments* website, December 12, 2020, <https://www.currentfederaltaxdevelopments.com/blog/2020/12/12/guidance-on-information-reporting-responsibilities-for-payments-under-cares-act-1112-made-by-sba> (retrieved December 17, 2020)

¹⁶² COVID-related Tax Relief Act of 2020 §278(d)

- The plan was in existence prior to January 1, 1970; and
- Before December 31, 2011, at a time when the plan provided that distributions may be made to an employee who has attained age 55 and who is not separated from employment at the time of such distribution, the plan received at least 1 written determination from the Internal Revenue Service that the plan constituted a qualified retirement plan.¹⁶³

The provision applies to distributions made before, on, or after the date of enactment.¹⁶⁴

Temporary Rule Preventing Partial Plan Termination

A COVID-19 related rule has been added to prevent plans from being treated as having a partial plan termination in 2020 within the meaning of IRC §411(d)(3). Generally, if an employer lays off more than 20% of its employees in a year, that constitutes a partial termination of the plan and, under IRC §411(d)(3), requires all such affected employees' balances in their retirement accounts to be treated as fully vested.

§209 of the *Taxpayer Certainty and Disaster Relief Act of 2020* provides that a plan “shall not be treated as having a partial termination (within the meaning of 411(d)(3) of the Internal Revenue Code of 1986) during any plan year which includes the period beginning on March 13, 2020, and ending on March 31, 2021, if the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the number of active participants covered by the plan on March 13, 2020.”¹⁶⁵

Temporary Modification of Rules for Health and Dependent Care Flexible Spending Arrangements

The COVID-19 pandemic became a serious issue in the United States in March of 2020, well after employees had made their deferral elections related to health and dependent care flexible spending arrangements in their employer's cafeteria plans under IRC §125. In many cases, taxpayers may have ended 2020 with a substantial amount of unused funds in such accounts.

Plan May Adopt Unlimited Carryover of Amounts from 2020 to 2021

Congress has enacted a special provision allowing plans, *if the plan decides to do so*, to allow participants to carry unused 2020 balances in such flexible spending arrangements in full into the following plan year. The provision reads:

(a) CARRYOVER FROM 2020 PLAN YEAR.—For plan years ending in 2020, a plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement permits participants to carry over (under rules similar to the rules applicable to health flexible spending arrangements) any unused benefits or contributions remaining in any such flexible spending arrangement from such plan year to the plan year ending in 2021.

¹⁶³ IRC §401(a)(36) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §208(a)

¹⁶⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §208(b)

¹⁶⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §209

(b) CARRYOVER FROM 2021 PLAN YEAR.—For plan years ending in 2021, a plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement permits participants to carry over (under rules similar to the rules applicable to health flexible spending arrangements) any unused benefits or contributions remaining in any such flexible spending arrangement from such plan year to the plan year ending in 2022.¹⁶⁶

Option to Provide an Extension of Grace Periods for Cafeteria Plans

Similar to the unlimited carryover rule, the law also provides for cafeteria plans with a grace period to extend that grace period for a plan year ending in 2020 or 2021 to 12 months after the end of the plan year. Again, a plan is not required to do this, but rather a plan is allowed to make this revision.

The provision reads:

A plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement extends the grace period for a plan year ending in 2020 or 2021 to 12 months after the end of such plan year, with respect to unused benefits or contributions remaining in a health flexible spending arrangement or a dependent care flexible spending arrangement.¹⁶⁷

Option to Allow for Post-Termination Reimbursements from Health FSAs

The Act allows plans to adopt provisions to allow for post-termination reimbursements from health FSAs for participants that cease participation in 2020 or 2021. The rule reads:

A plan that includes a health flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement allows (under rules similar to the rules applicable to dependent care flexible spending arrangements) an employee who ceases participation in the plan during calendar year 2020 or 2021 to continue to receive reimbursements from unused benefits or contributions through the end of the plan year in which such participation ceased (including any grace period, taking into account any modification of a grace period permitted under paragraph (1)).¹⁶⁸

Special Carry Forward Rule for Dependent Care Flexible Spending Arrangements Where the Dependent Aged Out During Pandemic

Another situation that may have impacted some participants in dependent care FSAs was that their child “aged out” of eligibility for dependent care coverage while funds set in the account unspent. For those participants, merely allowing the funds to be carried over would not serve to solve their problem—the child is now too old for the expenditure from the FSA to be treated as an eligible dependent care benefit.

¹⁶⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §214(a) and (b)

¹⁶⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §214(c)(1)

¹⁶⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §214(c)(2)

For purposes of benefits carried over for eligible employees only, the maximum age for dependent care benefits will be temporarily increased from age 13 to age 14.¹⁶⁹

An *eligible employee* means any employee who is:

- is enrolled in a dependent care flexible spending arrangement for the last plan year with respect to which the end of the regular enrollment period for such plan year was on or before January 31, 2020, and
- has one or more dependents (as defined in section 152(a)(1) of the Internal Revenue Code of 1986) who attain the age of 13—
 - during such plan year, or
 - in the case of an employee who (after the application of this section) has an unused balance in the employee’s account under such arrangement for such plan year (determined as of the close of the last day on which, under the terms of the plan, claims for reimbursement may be made with respect to such plan year), the subsequent plan year.¹⁷⁰

Change in Election Amount

As well, a plan can add a provision allowing for prospective changes in contributions to an FSA without regard to a change in status for plan years ending in 2021:

For plan years ending in 2021, a plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement allows an employee to make an election to modify prospectively the amount (but not in excess of any applicable dollar limitation) of such employee’s contributions to any such flexible spending arrangement (without regard to any change in status).¹⁷¹

Timing of Plan Amendments

As was noted, all of these provisions merely allow a plan to offer such benefits. If the employer does wish to offer such benefits, the cafeteria plan will need to be amended eventually, although not before the employer begins offering these benefits. The law provides for the following delayed amendment option:

A plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement is amended pursuant to a provision under this section and such amendment is retroactive, if—

- (1) such amendment is adopted not later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective, and

¹⁶⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §214(d)(1) and (2)

¹⁷⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §214(d)(3)

¹⁷¹ Taxpayer Certainty and Disaster Relief Act of 2020 §214(e)

(2) the plan or arrangement is operated consistent with the terms of such amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted.¹⁷²

ENERGY RELATED RELIEF

A number of energy related provisions made their way into the various bills that were part of the *Consolidated Appropriations Act, 2021*.

Waste Energy Recovery Property Eligible for Energy Credit

Waste energy recovery property is added to the list of energy property eligible for the 30% IRC §48 energy credit.¹⁷³ The property is subject to the phase-out found at IRC §48(a)(7).¹⁷⁴

Waste energy recovery property is defined as:

...property that generates electricity solely from heat from buildings or equipment if the primary purpose of such building or equipment is not the generation of electricity.¹⁷⁵

Such property also must meet a capacity limitation:

The term ‘waste energy recovery property’ shall not include any property which has a capacity in excess of 50 megawatts.¹⁷⁶

The following “no double benefit” rule applies to such property:

Any waste energy recovery property (determined without regard to this subparagraph) which is part of a system which is a combined heat and power system property shall not be treated as waste energy recovery property for purposes of this section unless the taxpayer elects to not treat such system as a combined heat and power system property for purposes of this section.¹⁷⁷

In order to qualify as waste energy recovery property construction must begin before January 1, 2024.¹⁷⁸

These changes apply to periods after December 31, 2020, “under rules similar to the rules of section 48(m) as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990.”¹⁷⁹

¹⁷² Taxpayer Certainty and Disaster Relief Act of 2020 §214(g)

¹⁷³ IRC §48(a)(3)(A)(viii) and §48(a)(2)(A)(i)(V) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(a)

¹⁷⁴ IRC §48(a)(7) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(c)

¹⁷⁵ IRC §48(c)(5)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

¹⁷⁶ IRC §48(c)(5)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

¹⁷⁷ IRC §48(c)(5)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

¹⁷⁸ IRC §48(c)(5)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

¹⁷⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §203(e)

Extension of Energy Credit for Offshore Wind Facilities

The energy credit for offshore wind facilities is separately extended so that a credit for this type of facility is available for construction which begins before January 1, 2026, the phase-out reduction of the percentage credit for wind facilities will not apply to offshore wind facilities, and for purposes of the qualified facility definition of IRC §45(d)(1), the date that construction must begin by is pushed back to January 1, 2026.¹⁸⁰

A *qualified offshore wind facility* is defined as:

...a qualified facility (within the meaning of section 45) described in paragraph (1) of section 45(d) (determined without regard to any date by which the construction of the facility is required to begin) which is located in the inland navigable waters of the United States or in the coastal waters of the United States.¹⁸¹

These changes apply to periods after December 31, 2016, “under rules similar to the rules of section 48(m) as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990.”¹⁸²

¹⁸⁰ IRC §48(a)(5)(F) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §204(a)

¹⁸¹ IRC §48(a)(5)(F)(ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §204(a)

¹⁸² Taxpayer Certainty and Disaster Relief Act of 2020 §204(b)

Chapter 4

Individual Provisions

LEARNING OBJECTIVES

- Advise clients on their qualification for the second round of recovery credit rebate checks and compute the amount the client is eligible to receive
- Apply the rules for the revisions to above the line deductions for charitable contributions and educator expenses found in this Act

A number of individual provisions were contained in the various bills making up the year-end package of bills.

RECOVERY CREDIT AND REBATES

One of the headline items of the package (at least in the minds of most Americans) is the inclusion of a second run of recovery rebate checks to taxpayers. While the Act has these payments at a level of \$600 per person, the President initially refused to sign the bill until the amount was raised to \$2,000. However, in the end the President signed the bill without having the amount raised, although the House was poised to attempt to pass a bill to raise these payments.

At the time this material was written, a bill to raise the rebate had passed the House but seemed unlikely to pass the Senate before the 116th United State Congress adjourned for good. Thus, for purposes of this material we'll assume the per-person amount for the recovery credit will be \$600.

Additional Recovery Rebates for Individuals

The *COVID-related Tax Relief Act of 2020* added new IRC §6428A, titled “Additional 2020 Recovery Rebates for Individuals”, to the law with the aim of sending out a second batch of advance rebate checks to taxpayers.

Base Credit Amount

The base credit amount is reduced from the original bill, both in terms of the amount for the taxpayers and restricting dependents that qualify for the credit to qualifying children only.

The credit will be, for the first tax year of the taxpayer beginning in 2020:

- \$600 (\$1,200 for a married couple filing a joint return), plus
- \$600 for each qualifying child of the taxpayer.¹⁸³

Unlike the original credit, this time other dependents of the taxpayer will not serve to increase the credit received. As well, the amount of credit for the taxpayer and spouse is reduced by 50% compared to the original credit.

Phase-Out Based on Adjusted Gross Income

The new credit has the same phase-out ranges as the original credit found in the CARES Act. The credit shall be reduced, but not below zero, by 5% of the excess of the taxpayer's adjusted gross income over:

- \$150,000 for a joint return or surviving spouse;
- \$112,500 in the case of a taxpayer filing as head of household; and
- \$75,000 in the case of any other filing status.¹⁸⁴

Ineligible Individuals

Individuals who are not eligible for the credit are the same as they were for the original CARES Act credit. They are:

- Any nonresident alien individual;
- Any individual *eligible* to be claimed as a dependent on another taxpayer's return, even if the individual is not actually claimed as a dependent on that person's return; and
- An estate or trust.¹⁸⁵

Coordination with Advance Refunds of Credit

Again, this credit (like the last one) is to be reduced, *but not below zero*, by the amount of any advance refund of credit received by the taxpayer.¹⁸⁶

Identification Number Requirement for Credit

The identification number requirements are a bit different for this credit than for the first one.

¹⁸³ IRC §6428A(a) as amended by the COVID-related Tax Relief Act of 2020 §272(a) and later amended by the Caring for Americans with Supplemental Help Act of 2020 §2

¹⁸⁴ IRC §6428A(c) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁸⁵ IRC §6428A(d) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁸⁶ IRC §6428A(e)(1) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

For a return other than a joint return, the \$600 amount for the taxpayer is reduced to zero unless the taxpayer includes a valid identification number of the taxpayer on the return of tax for the taxable year.¹⁸⁷

In the original CARES Act, for most joint returns a failure to provide a valid identification number for either spouse eliminated the credit entirely. This time, the rule is modified so that the \$1,200 amount for a joint return is treated as being:

- \$600 if the valid identification number of only one spouse is included on the return of tax for the taxable year, and
- Zero if the valid identification number of neither spouse is so included.¹⁸⁸

However, special rules apply for joint returns where one spouse is a member of the U.S. Armed Services. In that case, a valid identification number only needs to be supplied for one spouse to obtain the full \$1,200 payment for the spouses.¹⁸⁹

A qualifying child will not be taken into account in computing the amount of the credit unless:

- The taxpayer includes the valid identification number of such taxpayer (or, in the case of a joint return, the valid identification number of at least 1 spouse) on the return of tax for the taxable year, and
- The valid identification number of such qualifying child is included on the return of tax for the taxable year.¹⁹⁰

A valid identification number generally means a social security number.¹⁹¹ However, for a qualifying child who is adopted or placed for adoption, the adoption identification number of the child will be accepted as a valid identification number.¹⁹²

Checks Issued to the Taxpayer – Advance Refund of Additional 2020 Recovery Credit

The much-awaited checks again represent an advance payment of the taxpayer's 2020 additional recovery credit.

The law provides that 2019 generally will be the year used to compute the advance refund:

Each individual who was an eligible individual for such individual's first taxable year beginning in 2019 shall be treated as having made a payment against the tax imposed by chapter 1 for such taxable year in an amount equal to the advance refund amount for such taxable year.¹⁹³

¹⁸⁷ IRC §6428A(g)(1) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁸⁸ IRC §6428A(g)(2) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁸⁹ IRC §6428A(g)(5)

¹⁹⁰ IRC §6428A(g)(3) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁹¹ IRC §6428A(g)(4)(A) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁹² IRC §6428A(g)(4)(B) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁹³ IRC §6428A(f)(1) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

As was true with the initial payments, this payment will be computed using the credit computed using 2019 return figures:

For purposes of paragraph (1), the advance refund amount is the amount that would have been allowed as a credit under this section for such taxable year if this section (other than subsection (e) and this subsection) had applied to such taxable year.¹⁹⁴

Deceased Taxpayers

The issue of how to deal with deceased taxpayers caused much confusion in the first round of checks. This time Congress decided to include explicit rules about dealing with deceased taxpayers and the credit.

- If an individual died before January 1, 2020, he/she will be treated like an individual that did not provide a valid identification number (so, for instance, on a joint return the payment would be reduced by the \$600 allocable to that individual) and
- No advance payment will be issued with respect to a qualifying child of a taxpayer if
 - The taxpayer was deceased before January 1, 2020 if other than a joint return was filed *or*
 - If a joint return was filed, both taxpayers were deceased before January 1, 2020.¹⁹⁵

Date by Which Payment Must Be Made

The Treasury Department is instructed to issue these checks as rapidly as possible after enactment of the law, but generally no checks will be issued after January 15, 2021.¹⁹⁶ Thus, the IRS has a very short time period in which to process and issue all payments to taxpayers.

An exception is provided for mirror code territories (Guam, Commonwealth of the Northern Mariana Islands and US Virgin Islands) no refund will be made after the earlier of:

- A date determined appropriate by the U.S. Treasury Secretary or
- September 30, 2021.¹⁹⁷

No interest is to be paid on the advance payment.¹⁹⁸

Payments by Electronic Means

The IRS may send these payments by electronic means, rather than by check, to:

- Any account to which the payee authorized, on or after January 1, 2019, the delivery of a refund of taxes under this title or of a Federal payment;

¹⁹⁴ IRC §6428A(f)(2) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁹⁵ IRC §6428A(f)(2) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁹⁶ IRC §6428A(f)(3)(A)(I) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁹⁷ IRC §6428A(f)(3)(A)(II) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

¹⁹⁸ IRC §6428A(f)(4) as amended by the COVID-related Tax Relief Act of 2020t §272(a)

- Any account belonging to a payee from which that individual, on or after January 1, 2019, made a payment of taxes under this title; or
- Any Treasury-sponsored account (Treasury-sponsored account means a Direct Express card account, a U.S. Debit Card account, or another account established pursuant to 31 CFR § 208.5 or 31 CFR § 208.11).¹⁹⁹

Individuals Who Did Not File a 2019 Income Tax Return

If an individual did not file a 2019 return, the IRS may use information for an individual provided by:

- For social security and supplemental security recipients, the Commissioner of Social Security;
- For railroad retirement recipients, the Railroad Retirement Board, and
- For veterans beneficiaries, the Secretary of Veterans Affairs.²⁰⁰

Payments Made to Representative Payees and Fiduciaries

If a payment is issued to a representative payee or fiduciary, the entire payment with respect to the individual must be used only for the benefit of that individual who is entitled to the payment.²⁰¹

Notice to Taxpayer When Payment is Made

The IRS is to provide a notice to a taxpayer when an advance payment is made, sent to the taxpayer's last known address. The law provides:

Such notice shall indicate the method by which such payment was made, the amount of such payment, and a phone number for the appropriate point of contact at the Internal Revenue Service to report any failure to receive such payment.²⁰²

Revisions to Original CARES Act Recovery Rebates in IRC §6428

The *COVID-related Tax Relief Act of 2020* made revisions to the original CARES Act recovery rebates found at IRC §6428.

The \$150,000 adjusted gross income amount at which the §6428 recovery rebate begins to phase out for joint taxpayers will now also apply to surviving spouse filing status.²⁰³

A new provision is added regarding payments to representative payees and fiduciaries:

In the case of any individual for which payment information is provided to the Secretary by the Commissioner of Social Security, the Railroad Retirement Board, or the Secretary of Veterans Affairs, the payment by the Secretary under paragraph (3)

¹⁹⁹ IRC §6428A(f)(3)(B) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

²⁰⁰ IRC §6428A(f)(5)(A) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

²⁰¹ IRC §6428A(f)(5)(H) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

²⁰² IRC §6428A(h)(6) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

²⁰³ IRC §6428(c)(1) as amended by the COVID-related Tax Relief Act of 2020 §273(a)(1)

with respect to such individual may be made to such individual's representative payee or fiduciary and the entire payment shall be—

- (i) provided to the individual who is entitled to the payment, or
- (ii) used only for the benefit of the individual who is entitled to the payment.²⁰⁴

Identification Number Changes

A number of revisions were made to the original CARES Act identification number provisions.

For a return other than a joint return, the \$1,200 amount for the taxpayer is reduced to zero unless the taxpayer includes a valid identification number of the taxpayer on the return of tax for the taxable year.²⁰⁵

In the original CARES Act, for most joint returns a failure to provide a valid identification number for either spouse eliminated the credit entirely. In this Act, the rule is modified so that the \$2,400 amount for a joint return is treated as being:

- \$1,200 if the valid identification number of only one spouse is included on the return of tax for the taxable year, and
- Zero if the valid identification number of neither spouse is so included.²⁰⁶

For the advance refunds, the identification number requirements are revised to provide that no refund is payable to an individual who does not include on the return of tax for the taxable year:

- Such individual's valid identification number,
- In the case of a joint return, the valid identification number of such individual's spouse, and
- In the case of any qualifying child, the valid identification number of such qualifying child.²⁰⁷

The same rules discussed under the additional recovery rebate for individuals apply for purposes of determining what is a valid identification number for the original recovery rebate and credit.²⁰⁸

OPTIONS TO USE PRIOR YEAR NUMBERS

Some of the provisions allow taxpayers to use 2019 rather than 2020 numbers for certain tax items where loss of income may lead to a negative tax result.

²⁰⁴ IRC §6428(f)(6) as amended by the COVID-related Tax Relief Act of 2020 §273(a)(2)(C)

²⁰⁵ IRC §6428(g)(1)(A) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

²⁰⁶ IRC §6428A(g)(1)(B) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

²⁰⁷ IRC §6428(g)(2)(A) and (B) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

²⁰⁸ IRC §6428(g)(3) and (4) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

Temporary Special Rule for Determination of Earned Income for EITC and Child Tax Credit

Due to loss of income, some taxpayers might find they qualify for a lesser amount of earned income tax credit under IRC §32 and the refundable portion of the tax credit under IRC §24(d). For this reason, if the earned income (as determined under IRC §32)²⁰⁹ of a taxpayer for the first taxable year beginning in 2020 is less than the taxpayer's earned income for the preceding year, the earned income tax credit and the refundable child tax credit may, at the election of the taxpayer, be determined by:

- Using the earned income for the prior year (generally 2019 calendar year) *or*
- Using the earned income for the current taxable year (generally 2020 calendar year).²¹⁰

For taxpayers filing a joint return, the earned income for the prior taxable year will be the sum of the earned income for each spouse—that is, you can't make separate elections for each spouse.²¹¹

The election of the taxpayer has no impact on the computation of gross income or any other item on the return other than the computation of these two credits.²¹²

CHARITABLE TAX PROVISIONS

For charitable issues, Congress mainly extended CARES items that were only to apply to 2020 to now carry into 2021, though for the above-the-line deduction for charitable contributions Congress made some interesting modifications to the item.

Charitable Deduction for Non-Itemizers Extended to Cover 2021

In the CARES Act, Congress added a provision that allowed taxpayers a \$300 above the line deduction for charitable contributions if the taxpayer did not itemize deductions in 2020. The IRS, per the draft Form 1040 instructions, interpreted this rule to mean that even those filing a joint tax return would only qualify for a single \$300 above the line deduction.

In this Act, Congress has decided to extend the deduction for one more year and allow joint filers to claim a \$600 deduction—but that increase only applies to the 2021 tax year. The law provides:

In the case of any taxable year beginning in 2021, if the individual does not elect to itemize deductions for such taxable year, the deduction under this section shall be equal to the deduction, not in excess of \$300 (\$600 in the case of a joint return), which would be determined under this section if the only charitable contributions taken into account in determining such deduction were contributions made in cash during such taxable year...²¹³

However, such deductions cannot be made to

- An IRC §509(a)(3) supporting organization or

²⁰⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §211(b)(1)

²¹⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §211(a)

²¹¹ Taxpayer Certainty and Disaster Relief Act of 2020 §211(b)(2)

²¹² Taxpayer Certainty and Disaster Relief Act of 2020 §211(c)(2)

²¹³ IRC §170(p) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(a)

- For the establishment of a new, or maintenance of an existing, donor advised fund.²¹⁴

Apparently concerned that many taxpayers will use this provision to claim charitable deductions they did not actually make, Congress has raised the understatement penalty to 50% for an overstatement of this above the line deduction. The 50% penalty will be applied to the portion of the understatement of tax on the return related to the overstatement of this above the line deduction.²¹⁵

The special 50% underpayment penalty under this provision is also exempted from the supervisory approval of the assessment of the penalty under IRC §6751(b)(2)(A).²¹⁶

The rule only applies to tax years beginning in 2021.²¹⁷

Increased Charitable Contributions Provisions Continued into 2021

Under the CARES Act cash charitable contributions of an individual were not subject to the 60% of adjusted gross income limits that normally apply to such contributions and the corporate contribution of food inventory limit was raised to 25% of taxable income from 15%. In both cases, these changes only applied to contributions made during 2020.

The Act continues this provision into 2021 but makes no other changes to these provisions.²¹⁸

OTHER INDIVIDUAL TAX PROVISIONS

The bills contain a number of other provisions that impact individuals.

Educator Expense Deduction Includes Payments for Personal Protective Equipment

The IRS is directed to provide regulations or other guidance clarifying that the payment by a qualified educator for personal protective equipment, disinfectant and other supplies used for the prevention of the spread of COVID-19 qualify for the above the line deduction of an educator's expenses under IRC §62(a)(2)(D)(ii). This rule will apply for expenses paid or incurred after March 12, 2020.²¹⁹

Exclusion from Income for Students Receiving Qualified Emergency Financial Aid Grant

In the case of a student receiving a qualified emergency financial aid grant:

- Such grant shall not be included in the gross income of such individual for purposes of the Internal Revenue Code of 1986, and

²¹⁴ IRC §170(p)(1) and (2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(a)

²¹⁵ IRC §6662(b)(8) and (l) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(b)(1) and (2)

²¹⁶ IRC §6751(b)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(b)(3)

²¹⁷ IRC §170(p) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(a)

²¹⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §213(a)

²¹⁹ COVID-related Tax Relief Act of 2020 §275

- Such grant shall not be treated for purposes of the American Opportunity or Lifetime Learning Credit as
 - A qualified scholarship which is excludable from gross income under section 117,
 - An educational assistance allowance under chapter 30, 31, 32, 34, or 35 of title 38, United States Code, or under chapter 1606 of title 10, United States Code, and
 - A payment for such individual’s educational expenses, or attributable to such individual’s enrollment at an eligible educational institution, which is excludable from gross income under any law of the United States.²²⁰

Credit for Sick Leave and Family Leave of Self-Employed Individuals

The credits for sick leave and family leave for self-employed individuals are extended through March 31, 2021. Now the credits are available if the self-employed person:

- Would be entitled to paid leave during the taxable year pursuant to the Emergency Paid Sick Leave Act if the individual were an employee of an employer (other than him/herself) or
- Would be so entitled if that mandate applied through March 31, 2021.²²¹

As well, if a self-employed taxpayer so elects, the taxpayer may elect to use the prior year rather than the current year for purposes of the credits for paid sick and family leave.²²²

²²⁰ COVID-related Tax Relief Act of 2020 §277

²²¹ COVID-related Tax Relief Act of 2020 §286(a)(2) and (4)

²²² COVID-related Tax Relief Act of 2020 §287

Unit

5

Extenders

LEARNING OBJECTIVES

- List the tax provisions that had been scheduled to expire in 2020 that have been extended for various periods of time by Congress
- Assist clients in making use of these provisions in years after 2020

Congress addressed a number of expiring tax provisions in the *Taxpayer Certainty and Disaster Relief Act of 2020*.

ITEMS MADE PERMANENT

Congress took some items off the extender list and made them permanently part of the law as part of this law. Of course “permanent” merely means they have no explicit expiration date, not that Congress might not change them later. But for now these issues no longer are something advisers will have to wonder every so often if they will be renewed at a fixed date in the future.

Medical Expense Deduction Floor

Congress has now made permanent the 7.5% floor on the deduction of medical expenses on Schedule A.²²³ The floor had been scheduled to increase to 10% for all taxpayers, a level that previously had applied to taxpayers under age 65.

Energy Efficient Commercial Building Deduction under IRC §179D

Congress both made permanent²²⁴ and revised the energy efficient commercial building deduction under IRC §179D.

For tax years beginning after 2020, the maximum amount of the deduction under IRC §179D(b) and the computation of a partial allowance under IRC §179D(d)(1)(A) will be increased by an amount calculated by multiplying the amounts by the general cost of living adjustments found at IRC §1(f)(3) for the calendar year in which the taxable year begins, using calendar year 2019 as the base year.²²⁵

²²³ IRC §213(a) and (f) as amended by the Taxpayer Certainty and Disaster Relief Act of 2020 §101.

²²⁴ Deletion of existing IRC §179D(h) by the Taxpayer Certainty and Disaster Relief Act of 2020 §102

²²⁵ IRC §179D(g) after amendment by the Taxpayer Certainty and Disaster Relief Act of 2020 §102

As well, various technical standards used in the section are updated.²²⁶

The amendments apply to property placed in service after December 31, 2020.²²⁷

Benefits to Volunteer Firefighters and Emergency Medical Responders Excluded from Gross Income

A provision that had been missing from the law for many years before being brought back into the law last year for a single year has now been made a permanent part of the law.²²⁸ IRC §139B, which treats certain *qualified State and local tax benefits* and *qualified payments* made to volunteer firefighters and emergency medical responders as not part of gross income, was scheduled to expire at the end of 2020.

A *qualified state and local tax benefit* is any reduction or rebate of the following taxes:

- State and local real property taxes.
- State and local personal property taxes.
- State and local income, war profits, and excess profits taxes

provided by a State or political division thereof on account of services performed as a member of a qualified volunteer emergency response organization.²²⁹

A *qualified payment* is any payment provided by a State or political division thereof on account of the performance of services as a member of a qualified volunteer emergency response organization. The amount of the excludable payment is capped at \$50 times the number of months the taxpayer performs these services.²³⁰

A *qualified volunteer emergency response organization* is any volunteer organization:

- which is organized and operated to provide firefighting or emergency medical services for persons in the State or political subdivision, as the case may be, and
- which is required (by written agreement) by the State or political subdivision to furnish firefighting or emergency medical services in such State or political subdivision.²³¹

Transition from a Deduction for Qualified Tuition and Related Expenses to an Increased Income Limitation on the Lifetime Learning Credit

In the case of the deduction for qualified tuition, Congress did not decide to make the deduction permanent, despite putting this provision in a Subtitle of the bill entitled “Certain Provisions Made

²²⁶ IRC §179D(d)(2) and (e) after amendment by the Taxpayer Certainty and Disaster Relief Act of 2020 §102

²²⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §102(d)

²²⁸ IRC §139D(d) removed by Taxpayer Certainty and Disaster Relief Act of 2020 §103(a)

²²⁹ IRC §139D(c)(1)

²³⁰ IRC §139D(c)(2)

²³¹ IRC §139D(c)(3)

Permanent.” Rather, Congress decided to replace the deduction by expanding the income level at which taxpayers will qualify to claim the Lifetime Learning Credit.²³²

What Congress ends up doing is aligning the phase-outs for the American Opportunity Tax Credit and the Lifetime Learning Credit. Now the Lifetime Learning Credit will phase out between modified adjusted gross income of:

- \$80,000 to \$90,000 for individuals other than those filing a joint return and
- \$160,000 to \$180,000 for taxpayers filing a joint return.²³³

The Act removes the inflation adjustment to IRC §25A numbers previously found at IRC §25A(h).²³⁴

The qualified tuition and fees deduction found at IRC §222 is removed from the law.²³⁵

The changes are effective for tax years beginning after December 31, 2020.²³⁶

Railroad Track Maintenance Credit

The railroad tax maintenance credit found at IRC §45G is made permanent by the Act.²³⁷

The credit rate is being reduced beginning with taxable years beginning after December 31, 2022 to 40% from 50%.²³⁸

PROVISIONS EXTENDED THROUGH 2025

A number of provisions were extended through 2025, the date that most of the individual provisions in the Tax Cuts and Jobs Act are scheduled to expire. That means these items will not be revisited for a number of years, but adds to the issue that will be faced at the end of 2025 as a large number of provisions leave the law.

Look-Thru Rule for Related Controlled Foreign Corporations

The look-thru rule for related controlled foreign corporations under IRC §954(c)(6) is extended through years ending December 31, 2025.²³⁹

New Markets Tax Credit

The new markets tax credit under IRC §45 is extended at the limitation of \$5,000,000,000 for each of calendar years 2021-2025.²⁴⁰

²³² Taxpayer Certainty and Disaster Relief Act of 2020 §104

²³³ IRC §25D(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §104(a)(1)

²³⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §104(a)(2)

²³⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §104(b)

²³⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §104(c)

²³⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §105(a) striking IRC §45G(h)

²³⁸ IRC §45G(b) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §105(b)

²³⁹ IRC §954(c)(6)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §111(a)

²⁴⁰ IRC §45D(f)(1)(H) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §112(a)

The carryover period found in IRC §45(f)(3) is extended to 2030.²⁴¹

Work Opportunity Credit

The work opportunity credit found at IRC §51 is extended for amounts paid or incurred to an eligible individual who begins work for the employer on or before December 31, 2025.²⁴²

Exclusion from Gross Income of Discharge of Qualified Principal Residence Indebtedness

The exclusion under IRC §108(a)(1)(E) for discharge of qualified principal residence indebtedness now applies to debts discharged:

- Before January 1, 2026, or
- Subject to an arrangement that is entered into and evidenced in writing before January 1, 2026.²⁴³

However, this extension comes with a major reduction in the amount of such debt that is taken into account for this exclusion, limiting it to \$750,000 (\$375,000 for a married couple filing a separate return).²⁴⁴ This reduced exclusion will apply to discharges of indebtedness after December 31, 2020.²⁴⁵

7-Year Recovery Period for Motorsports Entertainment Complexes

The 7-year recovery period for motorsports entertainment complexes will remain available for property placed in service through December 31, 2025.²⁴⁶

Expensing Rules for Certain Productions

The election under §181 to treat the cost of any qualified film or television production, and any qualified live theatrical production as an expense has been extended for any such production commencing on or before December 31, 2025.²⁴⁷

Empowerment Zone Tax Incentives

The date through which the designation of an empowerment zone shall remain effective per IRC §1391 has been extended through December 31, 2025.²⁴⁸

²⁴¹ IRC §45D(f)(3) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §112(b)

²⁴² IRC §51(c)(4) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §113(a)

²⁴³ IRC §108(e)(1)(E) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §114(a)

²⁴⁴ IRC §108(h)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §114(b)

²⁴⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §114(c)

²⁴⁶ IRC §168(i)(15)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §115(a)

²⁴⁷ IRC §181(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §116(a)

²⁴⁸ IRC §1391(d)(1)(A)(i) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §118(a)

However, the increase in §179 expensing for an enterprise zone business shall end on December 31, 2020.²⁴⁹ Similarly, the nonrecognition of gain on rollover of empowerment zone investments under §1397B will terminate for sales in taxable years beginning after December 31, 2020.²⁵⁰

In the case of a designation of an empowerment zone the nomination for which included a termination date which is contemporaneous with December 31, 2020 (formerly the required latest termination of empowerment zone status prior to these amendments), that termination date will no longer apply if, after the date of the enactment of the *Taxpayer Certainty and Disaster Relief Act of 2020*, the entity which made such nomination amends the nomination to provide for a new termination date in such manner as the IRS may provide.²⁵¹

Employer Credit for Paid Family Leave

The employer credit for paid leave under the Family Medical Leave Act found at IRC §45S of between 12.5% and 25% of qualified wages paid to an employee during such leave has been extended for wages paid for taxable years beginning on or before December 31, 2025.²⁵²

Exclusion for Certain Employer Payment of Student Loans

The CARES Act had added payment of principal and interest on qualified student loans as an eligible reimbursement under an employer's §127 plan for 2020. The *Taxpayer Certainty and Disaster Relief Act of 2020* continues that category of allowed reimbursable expense under such plans for payments made before January 1, 2026.²⁵³

Extension of Carbon Oxide Sequestration Credit

The carbon oxide sequestration credit under IRC §45Q has been extended to allow construction of a facility to begin before January 1, 2026, rather than January 1, 2024 as had been the law prior to this change.²⁵⁴

EXTENSIONS OF OTHER PROVISIONS

Other provisions are extended for various periods of time, not linked to the expiration of many Tax Cuts and Jobs Act Provisions.

Credit for Electricity Produced from Certain Renewable Resources

The credit under IRC §45(d) for various items are extended to cover construction that begins before January 1, 2022, one year beyond the prior expiration date. The categories covered are:

- Wind facilities;
- Closed-loop biomass facilities;

²⁴⁹ IRC §1397A(c) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §118(b)

²⁵⁰ IRC §1397B(c) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §118(c).

²⁵¹ Taxpayer Certainty and Disaster Relief Act of 2020 §118(d)

²⁵² IRC §45S(i) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §119(a)

²⁵³ IRC §127(c) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §120(a)

²⁵⁴ IRC §45Q(d)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §121(a)

- Open-loop biomass facilities;
- Geothermal or solar energy facilities;
- Landfill gas facilities;
- Trash facilities;
- Qualified hydropower facility; and
- Marine and hydrokinetic renewable energy facilities.²⁵⁵

The election to treat qualified facilities as energy property under §48(a)(5)(C)(ii) is extended to cover property where construction begins before January 1, 2022.²⁵⁶

The phase-out percentages provisions found at IRC §§45(b)(5)(D) and 48(a)(5)(E)(iv) are amended to conform to the new dates above.²⁵⁷

Extension and Phase-Out of Energy Credit

A number of extensions and revision are made to the energy credit at IRC §48.

The date by which construction must begin on

- Equipment which uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight;²⁵⁸
- Equipment which uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure;²⁵⁹
- Qualified fuel cell property;²⁶⁰
- Qualified microturbine property;²⁶¹
- Combined heat and power system property;²⁶² and
- Qualified small wind energy property.²⁶³

has been pushed back to beginning before January 1, 2024, two years later than under previous law.

²⁵⁵ IRC §45(d)(1), (2)(A), 3(A), 4(B), (6), (7), (9) and (11)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §131(a)

²⁵⁶ IRC §48(a)(5)(C)(ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §131(b)

²⁵⁷ IRC §§45(b)(5)(D) and 48(a)(5)(E)(iv) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §131(c)

²⁵⁸ IRC §§48(a)(2)(A)(i)(II) and (3)(A)(ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

²⁵⁹ IRC §48(a)(3)(A)(vii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

²⁶⁰ IRC §48(c)(1)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

²⁶¹ IRC §48(c)(2)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

²⁶² IRC §48(c)(3)(A)(iv) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

²⁶³ IRC §48(c)(4)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

The various related phase-outs in §48 to the above items are also updated to reflect the new end date for the credits.²⁶⁴

Treatment of Mortgage Insurance Premiums as Qualified Residence Interest

The treatment of mortgage insurance premiums for contracts issued after January 1, 2007 as qualified residence interest is extended for amounts paid or accrued through December 31, 2021.²⁶⁵

Credit for Health Insurance of Qualified Individuals

The credit for health insurance of qualified individuals under IRC §35 is extended for one additional year, for months beginning before January 1, 2022.²⁶⁶

Indian Employment Credit

The Indian employment credit under §45A(f) is extended for one year, now applying to tax years beginning before or on December 31, 2020.²⁶⁷

Mine Rescue Team Training Credit

The mine rescue team training credit under IRC §45N is extended for one year, now applying to tax years beginning before or on December 31, 2020.²⁶⁸

Classification of Certain Race Horses as 3-Year Property

The classification of certain race horses as 3-year MACRS property is extended to apply to horses:

- Placed in service by January 1, 2022 and
- Placed in service after December 31, 2021 and which is more than 2 years old at the time such horse is placed in service by such purchaser.²⁶⁹

Accelerated Depreciation for Business Property on Indian Reservations

The special lives for accelerated depreciation for property placed in service on an Indian reservation will apply to property placed in service through December 31, 2021.²⁷⁰

²⁶⁴ IRC §48(a)(6)(A), (A)(i), A(ii), (B) and §48(a)(7)(A)(i) and (ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §113(b)

²⁶⁵ IRC §163(h)(3)(iv)(I) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §133(a)

²⁶⁶ IRC §35(b)(1)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §134(a)

²⁶⁷ IRC §45A(b) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §135(a)

²⁶⁸ IRC §45N(e) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §136(a)

²⁶⁹ IRC §168(e)(3)(A)(i) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §137(a)

²⁷⁰ IRC §168(j)(9) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §138(a)

American Samoa Economic Development Credit

The American Samoa economic development credit is extended for one additional year.²⁷¹

Nonbusiness Energy Property Credit

The nonbusiness energy property credit under IRC §25C is extended for one year, applying to property placed in service through December 31, 2021.²⁷²

Qualified Fuel Motor Vehicles Credit

The alternative motor vehicle credit on a new qualified fuel cell motor vehicle is extended by one year, applying to such a vehicle purchased by December 31, 2021.²⁷³

Alternative Fuel Refueling Property Credit

The alternative fuel refueling property credit under IRC §30C is extended for one year, for property placed in service by December 31, 2021.²⁷⁴

2-Wheeled Plug-In Electric Vehicle Credit

The 2-wheeled plug-in electric vehicle credit under IRC §30D is extended for one year, for property acquired by December 31, 2021.²⁷⁵

Production Credit for Indian Coal Facilities

The production credit for Indian coal facilities under IRC §45 is revised to extend the production period to the 16-year period beginning on January 1, 2006.²⁷⁶

Energy Efficient Homes Credit

The energy efficient homes credit under IRC §45L is extended for one year, applying to qualified energy efficient homes acquired by December 31, 2021.²⁷⁷

Extension of Residential Energy-Efficient Property Credit and Inclusion of Biomass Fuel Property Expenditures

The residential energy efficient property credit under IRC §25D is extended for two years, for property placed in service by December 31, 2023.²⁷⁸

²⁷¹ Section 119(d) of division A of the Tax Relief and Health Care Act of 2006 as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §139(a)

²⁷² IRC §25C(g)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §141(a)

²⁷³ IRC §30B(k)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §142(a)

²⁷⁴ IRC §30C(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §143(a)

²⁷⁵ IRC §30D(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §144(a)

²⁷⁶ IRC §45(e)(10)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §145(a)

²⁷⁷ IRC §45L(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §146(a)

²⁷⁸ IRC §25D(h) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(a)(1)

The applicable percentage at IRC §25D(g) is now set at:

- In the case of property placed in service after December 31, 2016, and before January 1, 2020, 30 percent,
- In the case of property placed in service after December 31, 2019, and before January 1, 2023, 26 percent, and
- In the case of property placed in service after December 31, 2022, and before January 1, 2024, 22 percent.²⁷⁹

The Act also adds a new category of property qualifying for the credit, *qualified biomass fuel property expenditures*.²⁸⁰

Qualified biomass fuel property expenditures are expenditures for property:

- Which uses the burning of biomass fuel to heat a dwelling unit located in the United States and used as a residence by the taxpayer, or to heat water for use in such a dwelling unit, and
- Which has a thermal efficiency rating of at least 75 percent (measured by the higher heating value of the fuel).²⁸¹

Biomass fuel is defined as “any plant-derived fuel available on a renewable or recurring basis.”²⁸²

To deny taxpayers a double-benefit via a non-business property credit under IRC §25C, the law removes from the list of energy-efficient building property a stove which uses the burning of biomass fuel to heat a dwelling unit located in the United States and used as a residence by the taxpayer, or to heat water for use in such a dwelling unit, and which has a thermal efficiency rating of at least 75 percent.²⁸³

The provisions related to an expenditure for qualified biomass fuel property expenditures takes effect for tax years beginning after December 31, 2020.²⁸⁴

²⁷⁹ IRC §25D(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(a)(2)

²⁸⁰ IRC §25D(a)(6) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(1)

²⁸¹ IRC §25D(d)(6)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(2)

²⁸² IRC §25D(d)(6)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(2)

²⁸³ IRC §25D(d)(3) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(3)

²⁸⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §148(c)(2)

Unit 6

Disaster Provisions

LEARNING OBJECTIVES

- List the various 2020 disaster related relief provisions enacted by Congress
- Understand the differences between the qualified disaster employee retention credit and the employee retention credit found in the CARES Act

Congress added to the bill a section dealing with disaster tax relief for disasters other than disasters declared solely related to COVID-19 in the *Taxpayer Certainty and Disaster Relief Act of 2020*. This section is similar in nature to the disaster provisions found in the 2019 year-end bill.

KEY DEFINITIONS

One of the key issues those reading law text must be aware of is that most often there are terms that are given a specific meaning when interpreting a portion of the law, so a reader must look first to see if there are special definitions that apply to the piece of law that is being interpreted. The reader must be aware of the existence of the definitions, as well as the exact bits of law to which the definition applies.

These very specific definitions override any common meaning the term might otherwise have. As well, they often are used to create a “shorthand” for a much larger concept (such as when you see a term that begins with the word “qualified” as many of the definitions we are about to discuss do).

The following definitions apply for the disaster tax relief provisions found in the *Taxpayer Certainty and Disaster Relief Act of 2020* at §§301-306.

Qualified Disaster Area

A qualified disaster area is:

...any area with respect to which a major disaster was declared, during the period beginning on January 1, 2020, and ending on the date which is 60 days after the date of the enactment of this Act, by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act if the incident period of the

disaster with respect to which such declaration is made begins on or after December 28, 2019, and on or before the date of the enactment of this Act.²⁸⁵

However, these provisions are not meant to cover the COVID-19 pandemic as the Act provides the term:

...shall not include any area with respect to which such a major disaster has been so declared only by reason of COVID-19.²⁸⁶

Qualified Disaster Zone

A qualified disaster zone is:

...that portion of any qualified disaster area which was determined by the President, during the period beginning on January 1, 2020, and ending on the date which is 60 days after the date of the enactment of this Act, to warrant individual or individual and public assistance from the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the qualified disaster with respect to such disaster area.²⁸⁷

Qualified Disaster

A qualified disaster means:

...with respect to any qualified disaster area, the disaster by reason of which a major disaster was declared with respect to such area.²⁸⁸

Incident Period

Incident period means:

...with respect to any qualified disaster, the period specified by the Federal Emergency Management Agency as the period during which such disaster occurred (except that for purposes of this title such period shall not be treated as ending after the date which is 30 days after the date of the enactment of this Act).²⁸⁹

QUALIFIED RETIREMENT PLAN DISASTER RELIEF

The retirement plan relief offered to disaster victims is very similar to the COVID-19 disaster plan relief that was added in the CARES Act.

²⁸⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §301(1)

²⁸⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §301(1)

²⁸⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §301(2)

²⁸⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §301(3)

²⁸⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §301(4)

Tax Favored Withdrawals from Retirement Plans

A *qualified disaster distribution* is any distribution from an *eligible retirement plan* made:

- On or after the first day of the incident period of a qualified disaster and before the date which is 180 days after the date of the enactment of this Act, and
- To an individual
 - Whose principal place of abode at any time during the incident period of such qualified disaster is located in the qualified disaster area with respect to such qualified disaster and
 - Who has sustained an economic loss by reason of such qualified disaster.²⁹⁰

An *eligible retirement plan* is:

- An individual retirement account described in section 408(a),
- An individual retirement annuity described in section 408(b) (other than an endowment contract),
- A qualified trust (an employees' trust described in section 401(a) which is exempt from tax under section 501(a), more generally referred to as an employer sponsored qualified retirement plan),
- An annuity plan described in section 403(a),
- An eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(c)(1)(A), and
- An annuity contract described in section 403(b).²⁹¹

Dollar Limit on Qualified Disaster Distributions

The total amount of qualified disaster distributions for an individual, from all retirement plans, is limited to the excess of:

- \$100,000, over
- the aggregate amounts treated as qualified disaster distributions received by such individual for all prior taxable years.²⁹²

If an individual is impacted by more than one disaster, the above limit is to be applied separately for each qualified disaster.²⁹³

²⁹⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(4)(A)

²⁹¹ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(4)(B) and IRC §402(c)(8)(A) and (B)

²⁹² Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(2)(A)

²⁹³ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(2)(D)

The law also provides that a qualified plan is allowed to make such a distribution, so long as certain conditions are met:

If a distribution to an individual would (without regard to subparagraph (A)) be a qualified disaster distribution, a plan shall not be treated as violating any requirement of the Internal Revenue Code of 1986 merely because the plan treats such distribution as a qualified disaster distribution, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds \$100,000.²⁹⁴

Exemption from Tax on Premature Distributions

The 10% tax on premature distributions found at IRC §72(t) will not apply to any *qualified disaster distribution*.

Election to Spread Income Over a 3-Year Period

Much like the CARES Act Coronavirus-related distributions, a qualified disaster distribution will be ratably included in income over three years unless the taxpayer elects not to take advantage of this rule. In general:

In the case of any qualified disaster distribution, unless the taxpayer elects not to have this paragraph apply for any taxable year, any amount required to be included in gross income for such taxable year shall be so included ratably over the 3-taxable-year period beginning with such taxable year.²⁹⁵

Option to Rollover Qualified Disaster Distribution for 3 Years

Just as with the CARES Act Coronavirus-related distributions, qualified disaster distributions may be rolled over for three years. The law provides:

Any individual who receives a qualified disaster distribution may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make 1 or more contributions in an aggregate amount not to exceed the amount of such distribution to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), of the Internal Revenue Code of 1986, as the case may be.²⁹⁶

Generally, the amount is treated by the receiving plan as if it were an eligible rollover distribution. For distributions from qualified retirement plans the law provides:

For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to subparagraph (A) with respect to a qualified disaster distribution from an eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received the qualified disaster distribution in an eligible rollover distribution (as

²⁹⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(2)(B)

²⁹⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(5)(A)

²⁹⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(3)(A)

defined in section 402(c)(4) of such Code) and as having transferred the amount to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.²⁹⁷

For distributions from an IRA, the following rules apply:

For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to subparagraph (A) with respect to a qualified disaster distribution from an individual retirement plan (as defined by section 7701(a)(37) of such Code), then, to the extent of the amount of the contribution, the qualified disaster distribution shall be treated as a distribution described in section 408(d)(3) of such Code and as having been transferred to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.²⁹⁸

However, the rollover is not available to the extent the distribution represents a required minimum distribution.²⁹⁹

Qualified Disaster Distributions Exempted from Trustee to Trustee Transfer and Rollover Rules

A qualified rollover distribution is exempted from the rules governing trustee to trustee transfers and mandatory withholding that otherwise would apply under IRC §§401(a)(31), 402(f) and 3405 that would otherwise apply to eligible rollover distributions.³⁰⁰

Qualified Rollover Distributions Treated as Meeting Plan Distribution Requirements

The law also provides relief that these plans meet plan distribution requirements:

For purposes of the Internal Revenue Code of 1986, a qualified disaster distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A) of such Code and section 8433(h)(1) of title 5, United States Code, and, in the case of a money purchase pension plan, a qualified disaster distribution which is an in-service withdrawal shall be treated as meeting the distribution rules of section 401(a) of such Code.³⁰¹

Recontributions of Withdrawals for Home Purchases

As was found in prior disaster relief bills, the *Taxpayer Certainty and Disaster Relief Act of 2020* provides relief to allow taxpayers to recontribute amounts to plans that were withdrawn in anticipation of a home purchase.

²⁹⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(3)(B)

²⁹⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(3)(C)

²⁹⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(5)(B) and IRC §408(d)(3)(E)

³⁰⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(6)(A)

³⁰¹ Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(6)(B)

Qualified Distribution

A *qualified distribution* for purposes of the recontribution of withdrawals for home purchases is defined as any distribution:

- That is:
 - A §401(k) hardship distribution (§401(k)(2)(B)(i)(IV));
 - Where contributions are made to a §403(b) plan pursuant to a salary reduction agreement, where the participant encounters financial hardship (§403(b)(7)(A)(i)(V))
 - §403(b) hardship distribution (§403(b)(11)(B)); or
 - A first-time homebuyer distribution from an IRA (IRC §72(t)(2)(F))
- Which was to be used to purchase or construct a principal residence in a qualified disaster area, but which was not so used on account of the qualified disaster with respect to such area, and
- Which was received during the period beginning on the date which is 180 days before the first day of the incident period of such qualified disaster and ending on the date which is 30 days after the last day of such incident period.³⁰²

Applicable Period

The law defines *applicable period* for this distribution:

For purposes of this subsection, the term “applicable period” means, in the case of a principal residence in a qualified disaster area with respect to any qualified disaster, the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the date of the enactment of this Act.³⁰³

Recontributions Under This Provision

The law added a rule to allow recontributions during the *applicable period* defined earlier. The law provides:

Any individual who received a qualified distribution may, during the applicable period, make 1 or more contributions in an aggregate amount not to exceed the amount of such qualified distribution to an eligible retirement plan (as defined in section 402(c)(8)(B) of the Internal Revenue Code of 1986) of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), of such Code, as the case may be.³⁰⁴

³⁰² Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(2)

³⁰³ Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(3)

³⁰⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(1)(A)

The rollovers are treated under rules similar to those used for recontributions of *qualified disaster distributions*.³⁰⁵

Loans from Retirement Plans

As with earlier disaster bills, this one provides for a temporary increase in the loans allowed to be taken from a qualified employer retirement plan.

Qualified Individuals for the Loan Rules

A *qualified individual* for the disaster plan loan rules is any individual:

- Whose principal place of abode at any time during the incident period of any qualified disaster is located in the qualified disaster area with respect to such qualified disaster, and
- Who has sustained an economic loss by reason of such qualified disaster.³⁰⁶

Increase in Limit on Loans Not Treated as a Distribution

For any loan from a qualified employer (per IRC §72(p)(4)) to a *qualified individual* made during the 180 day period beginning on the date of enactment of the *Taxpayer Certainty and Disaster Relief Act of 2020*:

- The maximum dollar amount for a loan under IRC §72(p)(2)(A)(i) is raised to \$100,000 from \$50,000 and
- The maximum percentage of a participant's account that can be borrowed found at IRC §72(p)(2)(A)(ii) is raised from 50% to 100%.³⁰⁷

Thus, if a plan decides to allow these larger loan amounts, an employee could qualify for the *lower* of those two limits on his/her plan loan.

Delay of Repayment of Plan Loans

The law also provides for a delay in the repayment of loans to the qualified plan should the plan decide to adopt these changes. In that case, for any *qualified individual* with an outstanding loan on the first day of the incident period of the qualified disaster from an employer qualified plan:

- If a due date on the plan loan for any repayment with respect to such loan occurs during the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the last day of such incident period, such due date shall be delayed for 1 year (or, if later, until the date which is 180 days after the date of the enactment of this Act),
- Any subsequent repayments with respect to any such loan shall be appropriately adjusted to reflect the delay in the due date discussed in the prior bullet and any interest accruing during such delay, and

³⁰⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(1)(B)

³⁰⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §302(c)(3)

³⁰⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §302(c)(1)

- In determining the 5-year period and the term of the loan under the standard plan loan rules, the delay period described in the first bullet shall be disregarded.³⁰⁸

Plan Amendments to Implement These Provisions

A plan may operate under these provisions prior to formally amending the plan document, so long as the plan is timely amended under these rules.

General Deadline for Adopting a Plan Amendment

The special rules apply to an amendment to a plan or annuity contract for these provisions, or regulations adopted by the IRS or Department of Labor related to these provisions which is made on or before the last day of the first plan year beginning on or after January 1, 2022 (January 1, 2024 for a governmental plan defined at IRC §414(d)), or such later date as the IRS may prescribe.³⁰⁹

Conditions for Delayed Amendment Rules to Apply

The delayed amendment rules apply for a period if:

- During the period:
 - Beginning on the date that these provisions or regulations to implement them take effect (or in the case of a plan or contract amendment not required by this section or such regulation, the effective date specified by the plan), and
 - Ending on the last date for a plan amendment specified in the prior section

the plan or contract is operated as if the amendment is in effect and

- The plan or contract amendment applies retroactively for such period.³¹⁰

EMPLOYEE RETENTION CREDIT (ERC) FOR EMPLOYERS AFFECTED BY QUALIFIED DISASTERS

The disaster bill this year sees the addition of a variant of a credit first seen in the CARES Act—an employee retention credit. This version is not quite the same as the COVID-19 variant, either the one in effect for 2020 or the one that applies for 2021.

Basic Computation

The basic qualified disaster employee retention credit (QDERC) for a *qualified employer* is an “amount equal to 40 per-cent of the *qualified wages* with respect to each *eligible employee* of such employer for such taxable year.”³¹¹

³⁰⁸ Taxpayer Certainty and Disaster Relief Act of 2020

³⁰⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §302(d)(2)(A)

³¹⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §302(d)(2)(B)

³¹¹ Taxpayer Certainty and Disaster Relief Act of 2020 §303(a)

The maximum amount of *qualified wages* for any employee is \$6,000 and, unlike the COVID-19 2021 employee retention credit, the QDERC limit does not reset each quarter, nor does it even get reset if a new tax year begins.³¹²

Definitions

The following definitions are to be used in applying the QDERC.

Eligible Employer

An *eligible employer* is any employer:

- Which conducted an active trade or business in a qualified disaster zone at any time during the incident period of the qualified disaster with respect to such qualified disaster zone, and
- With respect to whom the trade or business is inoperable at any time during the period beginning on the first day of the incident period of such qualified disaster and ending on the date of the enactment of this Act, as a result of damage sustained by reason of such qualified disaster.³¹³

Eligible Employee

An *eligible employee* is an employee of the eligible employer:

...whose principal place of employment with such eligible employer (determined immediately before the qualified disaster referred to in paragraph (1)) was in the qualified disaster zone referred to in such paragraph.³¹⁴

Qualified Wages

The term *qualified wages* refers to:

- FUTA wages (without regard to any dollar limit) plus payments made for a plan providing medical or hospitalization expenses in connection with sickness or accident disability³¹⁵
- Paid or incurred by an eligible employer with respect to an eligible employee at any time on or after the date on which the trade or business first became inoperable at the principal place of employment of the employee (determined immediately before the qualified disaster referred to in such paragraph) and before the earlier of:
 - The date on which such trade or business has resumed significant operations at such principal place of employment, or
 - The date which is 150 days after the last day of the incident period of the qualified disaster.³¹⁶

³¹² Taxpayer Certainty and Disaster Relief Act of 2020 §303(a)

³¹³ Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(1)

³¹⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(2)

³¹⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3), IRC §§51(c)(1) and 3306(b)(2)(B)

³¹⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3)

Wages count for this credit even if the employee:

- Performs no services,
- Performs services at a different place of employment than such principal place of employment, or
- Performs services at such principal place of employment before significant operations have resumed.³¹⁷

However, the term does not include any wages taken into account under either the 2020 or 2021 version of the employee retention credit under CARES Act §2301.³¹⁸

Special Rules

To prevent a double benefit, wages taken into account for the following credits will not be taken into account for the QDERC:

- Credit for increasing research activities (§41);
- Indian employment credit (§45A);
- Employer credit for paid family and medical leave (§45S);
- Work opportunity credit (§51); and
- Empowerment zone employment credit (§1396).³¹⁹

As well, rules similar to the following shall apply for this credit:

- Related individual rules of §51(i)(1) which exclude wages to an individual who
 - Bears any of the relationships described in subparagraphs (A) through (G) of section 152(d)(2) to the taxpayer, or, if the taxpayer is a corporation, to an individual who owns, directly or indirectly, more than 50 percent in value of the outstanding stock of the corporation, or, if the taxpayer is an entity other than a corporation, to any individual who owns, directly or indirectly, more than 50 percent of the capital and profits interests in the entity (determined with the application of section 267(c)),
 - If the taxpayer is an estate or trust, is a grantor, beneficiary, or fiduciary of the estate or trust, or is an individual who bears any of the relationships described in subparagraphs (A) through (G) of section 152(d)(2) to a grantor, beneficiary, or fiduciary of the estate or trust, or
 - Is a dependent (described in section 152(d)(2)(H)) of the taxpayer, or, if the taxpayer is a corporation, of an individual described in the first bullet at this level, or, if the taxpayer is an estate or trust, of a grantor, beneficiary, or fiduciary of the estate or trust.

³¹⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3)

³¹⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3)

³¹⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §303(c)(1)

- Various special rules related to the work opportunity credit found at §52; and
- The credits allowed for wages under IRC §§45A(a), 45P(a), 45S(a), 51(a), and 1396(a) as detailed at §280C(a).³²⁰

Election Not to Take Certain Wages into Account

This credit will not apply to qualified wages paid by an eligible employer with respect to which an employer makes an election to that effect at such time and in such a manner as the IRS prescribes.³²¹

Coordination with the Paycheck Protection Program

The law provides:

The Secretary, in consultation with the Administrator of the Small Business Administration, shall issue guidance providing that payroll costs paid or incurred during the covered period shall not fail to be treated as qualified wages under this section by reason of an election under paragraph (1) to the extent that a covered loan of the eligible employer is not forgiven by reason of a decision under section 7A(g) of the Small Business Act. Terms used in the preceding sentence which are also used in section 7A(g) of such Act shall have the same meaning as when used in such section.³²²

Application to Governmental Employees

For the most part, the credit does not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.³²³ But the law makes an exception for the following government employers:

- Any organization described in section 501(c)(1) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, or
- Any other governmental entity if —
 - Such entity is a college or university, or
 - The principal purpose or function of such entity is providing medical or hospital care.³²⁴

These entities shall be treated for purposes of this section in the same manner as an organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code.³²⁵

³²⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §303(c)(2)

³²¹ Taxpayer Certainty and Disaster Relief Act of 2020 §303(e)(1)

³²² Taxpayer Certainty and Disaster Relief Act of 2020 §303(e)(2)

³²³ Taxpayer Certainty and Disaster Relief Act of 2020 §303(f)(1)

³²⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §303(f)(2)

³²⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §303(f)(2)

PAYROLL TAX CREDIT FOR CERTAIN TAX-EXEMPT ORGANIZATIONS

A similar but separate credit is allowed to tax-exempt organizations of 40% of the *qualified wages* paid to *eligible employees* of such organization during a calendar quarter. As it is part of the section of the *Taxpayer Certainty and Disaster Relief Act of 2020* that creates the QDERC, it appears that the QDERC rules should generally apply except as overridden by *Taxpayer Certainty and Disaster Relief Act of 2020* §303(d).

General Credit

The credit against the employer's share of old age, survivor's and disability (FICA) tax is allowed on wages paid "with respect to employment of all employees of the organization during the calendar quarter an amount equal to 40 percent of the *qualified wages* paid to *eligible employees* of such organization during such calendar quarter."³²⁶

Limit on Wages Taken into Account Each Quarter per Employee

The amount of qualified wages taken into account with respect to any employee for any calendar quarter may not exceed \$6,000 (reduced by the amount of qualified wages taken into account in any prior calendar quarter by the employer).³²⁷

Limitation and Carry Forward of Credit

The total credit allowed for a quarter is limited to the tax imposed on the employer under IRC §3111(a) (employer FICA) reduced by any credits against such tax by any credits allowed under IRC §3111(e) (credit for employment of qualified veterans) and §3111(f) (Credit for research expenditures of a small business).³²⁸

If the total credit computed exceeds the limit for any calendar quarter, "such excess shall be carried to the succeeding calendar quarter and allowed as a credit" of the same type for that following quarter.³²⁹

Definitions for Special Tax-Exempt Organization Credit

The following definitions apply for the special tax-exempt organization credit.

Qualified Tax-Exempt Organization

A *qualified tax-exempt organization* means:

...an organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code if such organization

³²⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(1)

³²⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(2)

³²⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(3)(A)

³²⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(3)(B)

would be an eligible employer if the activities of such organization were an active trade or business.³³⁰

Eligible Employee and Qualified Wages

The terms *eligible employee* and *qualified wages* will be applied with respect to any *qualified tax-exempt organization*:

- By treating the activities of such organization as an active trade or business, and
- By substituting “wages (within the meaning of subsection (d)(4)(C))” (the general definition of wages under chapter 21 and 22 of the IRC) for “wages (as defined in section 51(c)(1) of the Internal Revenue Code of 1986, but without regard to section 3306(b)(2)(B) of such Code)” in the QDERC provision defining qualified wages.³³¹

Any other term used for this credit will have the same meaning it does under chapter 21 or 22 of the Internal Revenue Code if it is used in those chapters.³³²

Thus, the same rules regarding the time period over which the credit can be claimed would apply to the tax-exempt version of the credit as applies to the QDERC.

Waiver of Deposit Penalties

The law provides that:

The Secretary shall waive any penalty under section 6656 of such Code for any failure to make a deposit of applicable employment taxes if the Secretary determines that such failure was due to the anticipation of the credit allowed under this subsection.³³³

Third Party Payors

Any credit allowed under this provision shall be treated as a credit described in IRC §3511(d)(2), that is it is treated as a credit of the customer of the certified professional employer organization.³³⁴

No Duplication of Use of Wages for QDERC

Any wages taken into account in computing the tax-exempt organization credit shall not be taken into account in computing the qualified disaster employee retention credit.³³⁵

³³⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(4)(A)

³³¹ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(4)(B)

³³² Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(4)(C)

³³³ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(6)

³³⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(7)

³³⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(8)

Advance Payment

The law provides that the IRS shall issue forms, instructions regulations and guidance as are necessary:

- To allow the advance payment of the tax-exempt credit, subject to the limitations provided in this subsection, based on such information as the IRS shall require,
- Regulations or other guidance to provide for the reconciliation of such advance payment with the amount of the credit under this subsection at the time of filing the return of tax for the applicable quarter or taxable year,
- With respect to the application of this credit to third party payors (including professional employer organizations, certified professional employer organizations, or agents under section 3504 of the Internal Revenue Code of 1986), including regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors, and
- For recapturing the benefit of credits determined under this subsection in cases where there is a subsequent adjustment to the credit.³³⁶

QUALIFIED DISASTER RELIEF CONTRIBUTIONS - CORPORATIONS

In the case of a qualified disaster relief contribution made by a corporation:

- The CARES Act revisions to the charitable contribution limits will be applied first without regard to any qualified disaster relief contribution and then separately to such qualified disaster relief contribution, and
- In applying the CARES Act corporation contribution limitation to qualified disaster relief contributions shall be applied:
 - Apply a 100% of taxable income limitation in place of the 25% of taxable income limitation; and
 - By treating qualified contributions other than qualified disaster relief contributions as contributions allowed under IRC §170(b)(2) (the standard corporation contribution provision).³³⁷

The term *qualified disaster relief contribution* means any qualified contribution, as defined by IRC §170(c), if:

- Such contribution is paid in cash during calendar year 2020 to an organization described in section 170(b)(1)(A) of such Code, and
- The taxpayer has elected the application of this section with respect to such contribution.³³⁸

³³⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(9)

³³⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §304(a)(1)

³³⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §304(a)(2), CARES Act §2205(a)(3)

The law contains a reminder of the pre-existing individual charitable contribution rules under the CARES Act:

For the suspension of the limitation on qualified disaster relief contributions made by an individual during 2020, see section 2205(a)³³⁹

SPECIAL RULES FOR QUALIFIED DISASTER-RELATED PERSONAL CASUALTY LOSSES

If a taxpayer has a net disaster loss for any taxable year:

- The amount determined under section 165(h)(2)(A)(ii) of the Internal Revenue Code of 1986 (personal casualty losses in excess of 10% of adjusted gross income normally) shall be equal to the sum of—
 - Such net disaster loss, and
 - So much of the excess referred to in the matter preceding clause (i) of section 165(h)(2)(A) of such Code (reduced by the net disaster loss) as exceeds 10 percent of the adjusted gross income of the individual,
- In the case of qualified disaster-related personal casualty losses, section 165(h)(1) of such Code shall be applied to by substituting “\$500” for “\$500 (\$100 for taxable years beginning after December 31, 2009)”,
- The standard deduction determined under section 63(c) of such Code shall be increased by the net disaster loss, and
- The alternative minimum tax adjustment for the standard deduction found at IRC §56(b)(1)(E) shall not apply to so much of the standard deduction as is attributable to the increase of the standard deduction referred to in the above bullet point.³⁴⁰

Definitions

For purposes of this provision the following definitions apply.

Net Disaster Loss

The term *net disaster loss* means:

...the excess of qualified disaster-related personal casualty losses over personal casualty gains (as defined in section 165(h)(3)(A) of the Internal Revenue Code of 1986).³⁴¹

³³⁹ Taxpayer Certainty and Disaster Relief Act of 2020 §304(a)(3)

³⁴⁰ Taxpayer Certainty and Disaster Relief Act of 2020 §304(b)(1)

³⁴¹ Taxpayer Certainty and Disaster Relief Act of 2020 §304(b)(2)

Qualified Disaster-Related Personal Casualty Loss

The term *qualified disaster-related personal casualty loss* means:

...losses described in section 165(c)(3) of the Internal Revenue Code of 1986 which arise in a qualified disaster area on or after the first day of the incident period of the qualified disaster to which such area relates, and which are attributable to such qualified disaster.³⁴²

ADDITIONAL LOW-INCOME HOUSING CREDIT ALLOCATIONS

The law provides:

For purposes of section 42 of the Internal Revenue Code of 1986, the State housing credit ceiling for any State for each of calendar years 2021 and 2022 shall be increased by the aggregate housing credit dollar amount allocated by the State housing credit agencies of such State for such calendar year to buildings located in any qualified disaster zone in such State.³⁴³

However, the increase is subject to the following limitation on the aggregate limitation. The net increase for a State will not exceed:

- In the case of any such increase determined for calendar year 2021, the *applicable dollar limitation* for such State, and
- In the case of any such increase determined for calendar year 2022, the *applicable dollar limitation* for such State reduced by the amount of any increase determined under the above bullet with respect to such State for calendar year 2021.³⁴⁴

The *applicable dollar limitation* means, with respect to any State, the lesser of:

- The product of \$3.50 multiplied by the population of such State (as determined for calendar year 2020) which resides in qualified disaster zones in such State, or
- 65 percent of the State housing credit ceiling for such State for calendar year 2020.³⁴⁵

Extension of Placed in Service Deadline for Designated Housing Credit Dollar Amounts

In the case of any housing credit dollar amount which is

- Allocated by a State housing credit agency of for calendar year 2021 or 2022 to a building located in a qualified disaster zone in such State and
- Which is designated (at such time and in such manner as the IRS may provide) by such State housing credit agency as housing credit dollar amount to which this paragraph applies,

³⁴² Taxpayer Certainty and Disaster Relief Act of 2020 §304(b)(3)

³⁴³ Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(1)

³⁴⁴ Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(2)(A)

³⁴⁵ Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(2)(B)

IRC §42(h)(1)(E) of the Internal Revenue Code of 1986 (exception where 10% of cost incurred) shall be applied:

- By substituting “third calendar year” for “second calendar year” both places it appears, and
- By substituting “2 years” for “1 24 year” in clause (ii) thereof.³⁴⁶

The law continues:

APPLICATION OF LIMITATION.—The aggregate amount of housing credit dollar amount designated under subparagraph (A) for any calendar year by all State housing credit agencies of a State shall not exceed the amount determined under paragraph (2)(A) with respect to such State for such calendar year.³⁴⁷

Allocation Treated as Made First from Additional Allocation for Purposes of Determining Carryover

The law provides:

For purposes of determining the unused State housing credit ceiling for any calendar year under section 42(h)(3)(C) of the Internal Revenue Code of 1986, any increase in the State housing credit ceiling under paragraph (1) shall be treated as an amount described in clause (ii) of such section.³⁴⁸

³⁴⁶ Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(3)(A)

³⁴⁷ Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(3)(B)

³⁴⁸ Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(4)

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