# Current Federal Tax Developments

Week of April 13, 2020

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ACCOUNTING
CONTINUING EDUCATION

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CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF APRIL 13, 2020

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# Current Federal Tax Developments

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# SECTION: PPP LOAN
# TWO NEW QUESTIONS AND ANSWERS ADDED TO SBA PPP FAQ, HOLDS THAT BORROWERS CANNOT ASK LENDER TO DELAY DISBURSING FUNDS FOR AN EXTENDED TIME

## Citation: Paycheck Protection Program Loans Frequently Asked Questions (FAQ), April 8, 2020 Version, 4/8/2020

The Small Business Administration has added two additional questions to the Paycheck Protection Program (PPP) Loans Frequently Asked Questions[1] page originally posted on April 6. The new version, dated April 8, discusses the use of a lender's own promissory note and issues related to the beginning of the 8-week forgiveness period and the timing of funding the loan.

## Eight Week Period

I had seen a number of posts on various online forums frequented by CPAs and posts by CPAs on Twitter asking about whether a borrower who received approval for a PPP loan could delay disbursement of the funds for the loan, thus delaying the start of the 8-week period. For instance, say a borrower's business was currently under an order by the state to close his/her business, and that order is scheduled to stay in place until mid-May at the moment. Could the borrower have the disbursement of funds delayed until the date the business was allowed to reopen, using the funds to reopen the business?

Also, the question arose about when exactly the 8-week period begins, since it begins on origination of the loan. Was that the date the loan is approved, or was it the date the funds were disbursed?

The SBA has answered both questions. Not surprisingly, given the purpose of the program, the SBA squashed the idea of sitting on the funds for an extended period of time, but did provide that the 8-week period did not begin until the funds were actually disbursed to the borrower.

> **20. Question**: The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; when does that eight-week period begin?
>
> **Answer:** The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender

[1] Paycheck Protection Program (PPP) Loans Frequently Asked Questions, April 8, 2020, https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequenty-Asked-Questions.pdf , retrieved April 8, 2020

> must make the first disbursement of the loan no later than ten calendar days from the date of loan approval.[2]

Since the purpose of the program is to provide immediate economic aid to the economy, the SBA appears to have decided that if a borrower doesn't want to use the funds relatively quickly, the money should go to a business that will use the funds more quickly and inject them back into the economy. A borrower who wants to use the funds to restart his/her business would have to wait and apply for the loan at the time the borrower was nearly ready to make use of the funds.

Of course, a borrower who waits will take the risk that there may not be funds remaining in the program when he/she decides to apply for the loan, or they run out while awaiting approval.

### Promissory Notes

The other issue covered in the new questions involves whether a lender can use its own promissory note, or must it use the SBA form of the note:

> **19. Question**: Do lenders have to use a promissory note provided by SBA or may they use their own?
>
> **Answer:** Lenders may use their own promissory note or an SBA form of promissory note.[3]

## SECTION: PPP LOAN
## SBA ISSUES REVISED VERSION OF PPP LOAN FAQ, CLARIFYING A NUMBER OF ISSUES

### Citation: Paycheck Protection Program Loans Frequently Asked Questions (FAQ), April 6, 2020 Version, 4/6/2020

Some key additional information related to the Payroll Protection Program loans has been provided by the Small Business Administration in the evening of April 6, 2020. The agency posted an updated "Paycheck Protection Program Loans Frequently Asked

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[2] Paycheck Protection Program (PPP) Loans Frequently Asked Questions, April 8, 2020, Q&A 20

[3] Paycheck Protection Program (PPP) Loans Frequently Asked Questions, April 8, 2020, Q&A 19

Questions (FAQ)"[4] that addressed some questions that had been left unanswered by the original guidance.

This article looks at most of the items, but not all, contained in the FAQ. Most notably, the article doesn't look at the special rules that may apply to some businesses that may expand this program to cover an employer that otherwise would seem excluded either under the 500 employee test or more general qualifications for participation in SBA programs. Those are found in the FAQ in questions 2 and 3.

## *Gross or Net Payroll?*

One of the biggest areas of confusion arose due to language in CARES Act §1102 that seemed to indicate that payments of federal withholding taxes on behalf of an employee would not be deemed part of payroll costs for the period from February 15, 2020 to June 30, 2020. That would reduce expenditures that count for forgiveness of debt and would also have impacted the maximum loan amount if the maximum loan measuring period being used included the period after February 15, 2020.

The SBA has now clarified that there will be no such reduction in gross payroll by taxes withheld, effectively ignoring this provision of the law that it appears Congress now believes was added in error:

> **Question**: How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan, and the amount of a loan that may be forgiven?
>
> **Answer:** Under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned $4,000 per month in gross wages, from which $500 in federal taxes was withheld, would count as $4,000 in payroll costs. The employee would receive $3,500, and $500 would be paid to the federal government. However, the employer-side federal payroll taxes

[4] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), As of April 6, 2020, https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequenty-Asked-Questions.pdf , retrieved April 7, 2020

> imposed on the $4,000 in wages are excluded from payroll costs under the statute.[5]

Since federal agencies aren't really allowed to ignore the text of the law, the SBA did come up with a formal justification for reading the law to come to this result which it put into a footnote in the FAQ. The SBA is arguing that, effectively, this was just a poorly worded way of saying you don't reduce the gross—which would then beg the question about why that February 15, 2020 to June 30, 2020 period is in there? Well, that one they did just literally decide to ignore.

Here is the SBA's justification for the position they took—which itself is unusual, since a detailed analysis of law provisions isn't included for any other items. That is, the SBA seems to be tacitly admitting they know this is a bit of a strained reading:

> The definition of "payroll costs" in the CARES Act, 15 U.S.C. 636(a)(36)(A)(viii), excludes "taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period," defined as February 15, 2020, to June 30, 2020. As described above, the SBA interprets this statutory exclusion to mean that payroll costs are calculated on a gross basis, without subtracting federal taxes that are imposed on the employee or withheld from employee wages. Unlike employer-side payroll taxes, such employee-side taxes are ordinarily expressed as a reduction in employee take-home pay; their exclusion from the definition of payroll costs means payroll costs should not be reduced based on taxes imposed on the employee or withheld from employee wages. This interpretation is consistent with the text of the statute and advances the legislative purpose of ensuring workers remain paid and employed. Further, because the reference period for determining a borrower's maximum loan amount will largely or entirely precede the period from February 15, 2020, to June 30, 2020, and the period during which borrowers will be subject to the restrictions on allowable uses of the loans may extend beyond that period, for purposes of the determination of allowable uses of loans and the amount of loan forgiveness, this

[5] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 16

> statutory exclusion will apply with respect to such taxes imposed or withheld at any time, not only during such period.[6]

## *Time Period to Determine Maximum Loan Amounts*

One area that had led to much confusion in the previous guidance was what the appropriate time period was to determine the maximum borrowing amount, as some SBA guidance indicated it was calendar year 2019 while other guidance indicated April 1, 2019 to March 31, 2020. The SBA, likely recognizing that borrowers had already picked one or the other to assemble information for decided to allow either option:

> **Question:** What time period should borrowers use to determine their number of employees and payroll costs to calculate their maximum loan amounts?
>
> Answer: In general, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019. For seasonal businesses, the applicant may use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019. An applicant that was not in business from February 15, 2019 to June 30, 2019 may use the average monthly payroll costs for the period January 1, 2020 through February 29, 2020.
>
> Borrowers may use their average employment over the same time periods to determine their number of employees, for the purposes of applying an employee-based size standard. Alternatively, borrowers may elect to use SBA's usual calculation: the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).[7]

## *Applying the $100,000 Compensation Limit*

The FAQ has a borrower friendly interpretation of the $100,000 compensation limit under the PPP. Question and Answer 7 provide:

> **Question**: The CARES Act excludes from the definition of payroll costs any employee compensation in excess of an annual salary of

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[6] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 16, Footnote 2

[7] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 14

> $100,000. Does that exclusion apply to all employee benefits of monetary value?
>
> **Answer:** No. The exclusion of compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits, including:
>
> - employer contributions to defined-benefit or defined-contribution retirement plans;
> - payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
> - payment of state and local taxes assessed on compensation of employees.[8]

The law was somewhat unclear on this point, but this should increase both the maximum borrowing amount and the funds that can be used to meet the requirements to obtain forgiveness.

### *Payments By a Borrower to an Independent Contractor or Sole Proprietor*

The FAQ clarifies that a business does *not* include payments to an independent contractor as part of its payroll costs in computing the maximum loan amount:

> **Question:** Should payments that an eligible borrower made to an independent contractor or sole proprietor be included in calculations of the eligible borrower's payroll costs?
>
> **Answer:** No. Any amounts that an eligible borrower has paid to an independent contractor or sole proprietor should be excluded from the eligible business's payroll costs. However, an independent contractor or sole proprietor will itself be eligible for a loan under the PPP, if it satisfies the applicable requirements.[9]

As of 5:00 am Mountain Standard Time on April 7, 2020, when this is being written, we did not yet have those standards. The application process for those borrowers will open on Friday, April 10.

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[8] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 7

[9] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 15

## *Use of a Professional Employer Organization (PEO)*

The FAQ also clarifies that a business that is using a Professional Employer Organization (PEO) can qualify for the program, and provides the information that should be supplied to the lender to support the loan request.

> **Question:** What if an eligible borrower contracts with a third-party payer such as a payroll provider or a Professional Employer Organization (PEO) to process payroll and report payroll taxes?
>
> **Answer:** SBA recognizes that eligible borrowers that use PEOs or similar payroll providers are required under some state registration laws to report wage and other data on the Employer Identification Number (EIN) of the PEO or other payroll provider. In these cases, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be considered acceptable PPP loan payroll documentation. Relevant information from a Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, attached to the PEO's or other payroll provider's Form 941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes. In addition, employees of the eligible borrower will not be considered employees of the eligible borrower's payroll provider or PEO.[10]

## *Seasonal Business*

The FAQ also has information for seasonal business that was not fully running on February 15, 2020, as that was outside of its season.

> **Question:** My small business is a seasonal business whose activity increases from April to June. Considering activity from that period would be a more accurate reflection of my business's operations. However, my small business was not fully ramped up on February 15, 2020. Am I still eligible?
>
> **Answer:** In evaluating a borrower's eligibility, a lender may consider whether a seasonal borrower was in operation on February 15, 2020 or for an 8-week period between February 15, 2019 and June 30, 2019.[11]

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[10] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 10

[11] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 9

## *Lender Documentation Review*

The document provides lenders with guidance about the level of documentation review they are expected to undertake. The guidance *initially* provided:

> Providing an accurate calculation of payroll costs is the responsibility of the borrower, and the borrower must attest to the accuracy of those calculations. Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost. The level of diligence by a lender should be informed by the quality of supporting documents supplied by the borrower. Minimal review of calculations based on a payroll report by a recognized third-party payroll processor, for example, would be reasonable.
>
> If lenders identify errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the error. [12]

But was modified somewhat in a revised April 7 version, with the key changed portion underlined:

> Providing an accurate calculation of payroll costs is the responsibility of the borrower, and the borrower attests to the accuracy of those calculations on the Borrower Application Form. Lenders are expected to perform a good faith review, in a reasonable time, of the borrower's calculations and supporting documents concerning average monthly payroll cost. <u>For example, minimal review of calculations based on a payroll report by a recognized third-party payroll processor would be reasonable. In addition, as the PPP Interim Final Rule indicates, lenders may rely on borrower representations, including with respect to amounts required to be excluded from payroll costs.</u>
>
> If the lender identifies errors in the borrower's calculation or material lack of substantiation in the borrower's supporting documents, the lender should work with the borrower to remedy the issue.[13]

Based on this guidance, if a borrower does use a payroll service, especially a large national one that the lender will be sure to recognize, submitting the reports those organizations generate to support claimed payroll will likely speed up processing.

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[12] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 1

[13] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 1 as revised April 7, 2020

### *New Customer FinCEN Issues*

The FAQ also address the issues lenders had with accepting applications from new vs. existing customers regarding the application of FinCEN Rule CDD.

> **Question:** Are PPP loans for existing customers considered new accounts for FinCEN Rule CDD purposes? Are lenders required to collect, certify, or verify beneficial ownership information in accordance with the rule requirements for existing customers?
>
> **Answer:** If the PPP loan is being made to an existing customer and the necessary information was previously verified, you do not need to re-verify the information. Furthermore, if federally insured depository institutions and federally insured credit unions eligible to participate in the PPP program have not yet collected beneficial ownership information on existing customers, such institutions do not need to collect and verify beneficial ownership information for those customers applying for new PPP loans, unless otherwise indicated by the lender's risk-based approach to BSA compliance.[14]

### *Affiliation Rules*

A number of questions (from Q&A 4 to 6) deal with the affiliation rule and the 500 employee limit. The guidance makes it clear the *borrower* is responsible for applying the SBA's affiliation rule, found at 13 C.F.R. 121.301(f), and must base its certification of having 500 or fewer employees after applying that rule.

The Cornell Legal Information Institute website maintains a relatively current copy of the Code of Federal regulations. The cited regulation can be found at https://www.law.cornell.edu/cfr/text/13/121.301 .

### *Who Can Sign Documents for the Borrower?*

The guidance provides information on who must sign documents, allowing a single authorized signer—every owner will not be required to sign the form. But the authorized person signing will have full responsibility for all items on the application, including the certifications:

> **Question:** May lenders accept signatures from a single individual who is authorized to sign on behalf of the borrower?
>
> **Answer:** Yes. However, the borrower should bear in mind that, as the Borrower Application Form indicates, only an authorized

[14] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 18

representative of the business seeking a loan may sign on behalf of the business. An individual's signature as an "Authorized Representative of Applicant" is a representation to the lender and to the U.S. government that the signer is authorized to make the certifications, including with respect to the applicant and each owner of 20% or more of the applicant's equity, contained in the Borrower Application Form. Lenders may rely on that representation and accept a single individual's signature on that basis.[15]

## *Long-Ago Felony Convictions*

There are restrictions under the Small Business Act for borrowings by those who have been convicted or indicted on criminal charges. But the FAQ notes that this bar does not last forever:

> **Question:** I need to request a loan to support my small business operations in light of current economic uncertainty. However, I pleaded guilty to a felony crime a very long time ago. Am I still eligible for the PPP?
>
> **Answer:** Yes. Businesses are only ineligible if an owner of 20 percent or more of the equity of the applicant is presently incarcerated, on probation, on parole; subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or, within the last five years, for any felony, has been convicted; pleaded guilty; pleaded nolo contendere; been placed on pretrial diversion; or been placed on any form of parole or probation (including probation before judgment).[16]

## *Lenders Online Portals and Forms*

Lenders are allowed to use their own online portals and forms to collect the data for PPP loans.

> **Question:** Are lenders permitted to use their own online portals and an electronic form that they create to collect the same information and certifications as in the Borrower Application Form, in order to complete implementation of their online portals?
>
> **Answer:** Yes. Lenders may use their own online systems and a form they establish that asks for the same information (using the same

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[15] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 11

[16] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 12

language) as the Borrower Application Form. Lenders are still required to send the data to SBA using SBA's interface.[17]

### *What About Applications Made Before This FAQ Was Published?*

Clearly a lot of applications were submitted before this FAQ was published, and only by a miracle would a lender or borrower have managed to come to the exact conclusions found in this FAQ for every uncertain item. Does everyone have to start over and submit a new application based on this FAQ? And if this FAQ is more favorable to the borrower, can they submit a revised application?

Here is the SBA's answer:

> **Question:** I filed or approved a loan application based on the version of the PPP Interim Final Rule published on April 2, 2020. Do I need to take any action based on the updated guidance in these FAQs?
>
> **Answer:** No. Borrowers and lenders may rely on the laws, rules, and guidance available at the time of the relevant application. However, borrowers whose previously submitted loan applications have not yet been processed may revise their applications based on clarifications reflected in these FAQs.[18]

## SECTION: 163
## OPTION TO CHANGE §163(J) ELECTIONS FOR REAL ESTATE AND FARMING BUSINESSES FOR CARES ACT CHANGES ISSUED BY IRS

### Citation: Revenue Procedure 2020-22, 4/10/20

Some taxpayers who elected to be "electing real property trades or businesses" based on the provisions of §163(j) prior to amendment by the CARES Act likely regretted their decisions once the Act retroactively changed the limit from 30% of adjusted taxable income to 50% of adjusted taxable income temporarily. The IRS is now giving those taxpayers a chance to undo that election based on guidance in Revenue Procedure 2020-22.[19]

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[17] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 13

[18] Paycheck Protection Program Loans Frequently Asked Questions (FAQ), Q&A 17

[19] Revenue Procedure 2020-22, April 10, 2020, https://www.irs.gov/pub/irs-drop/rp-20-22.pdf, retrieved April 10, 2020

As well, the Procedure covers other new elections that are part of the CARES Act to deal with the changes made by that Act to §163(j).

## *Modifying §163(j)(7) Elections*

The Procedure outlines its scope in Section 3. It begins by stating:

> Sections 4 and 5 of this revenue procedure apply to a taxpayer described in section 3.01(1) or (2) of this revenue procedure with respect to an election under section 163(j)(7)(B) to be an electing real property trade or business or under section 163(j)(7)(C) to be an electing farming business (collectively, section 163(j)(7) election). The fact that a taxpayer satisfies the scope requirement of this section 3.01 is not a determination that the taxpayer is a real property trade or business under section 162, 212, or 469 of the Code, or a farming business under section 162, 199A, or 263A of the Code.[20]

### *Making a Late §163(j)(7) Election*

First the IRS deals with the (seemingly less likely) decision that a qualified farming or real estate business would want to make a late election under §163(j)(7) to become an electing farming or real estate business, exempt from the §163(j) limits on business interest, but required to depreciate certain assets using ADS methods and lives.

Taxpayers who can make this late election are:

> A taxpayer is described in this section 3.01(1) if the taxpayer did not file a section 163(j)(7) election with its timely filed original Federal income tax return or Form 1065, including extensions, or withdrew an election under section 5 of this revenue procedure, for a taxable year beginning in 2018 (2018 taxable year), 2019 (2019 taxable year), or 2020 (2020 taxable year), was otherwise qualified to make an election when the return was filed, and now wants to make an election for one of those taxable years.[21]

The time for making the late §163(j) election is outlined in the procedure:

> A taxpayer within the scope of section 3.01(1) of this revenue procedure may make the section 163(j)(7) election for a 2018, 2019, or 2020 taxable year by filing an amended Federal income tax return, amended Form 1065, or AAR, as applicable. Except as provided in Revenue Procedure 2020-23, 2020-18 I.R.B. 1 (April 27, 2020),

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[20] Revenue Procedure 2020-22, Section 3.01

[21] Revenue Procedure 2020-22, Section 3.01(1)

> released on www.irs.gov on April 8, 2020, regarding the time to file an amended return by a partnership subject to the centralized partnership audit regime enacted as part of the Bipartisan Budget Act of 2015 (BBA partnership) for 2018 and 2019 taxable years, the amended Federal income tax return or amended Form 1065 must be filed on or before October 15, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. In the case of a BBA partnership that chooses not to file an amended Form 1065 as permitted under Rev. Proc. 2020-23, the BBA partnership may make a late section 163(j)(7) election by filing an AAR on or before October 15, 2021, but in no event later than the applicable period of limitations on making adjustments under section 6235 for the reviewed year, as defined in § 301.6241-1(a)(8) of the Procedure and Administration Regulations (26 CFR Part 301).[22]

The taxpayer makes the late §163(j) election as follows:

> A taxpayer described in section 4.02 of this revenue procedure must make the election on a timely filed amended Federal income tax return, amended Form 1065, or an AAR, as applicable, with the election statement in accordance with the rules and procedures contained in proposed § 1.163(j)-9 of the 2018 proposed regulations and this section 4. The amended Federal income tax return, amended Form 1065, or AAR, as applicable, must include the adjustment to taxable income for the late section 163(j)(7) election and any collateral adjustments to taxable income or to tax liability. Such collateral adjustments also must be made on amended Federal income tax returns, amended Forms 1065, or AARs, as applicable, for any affected succeeding taxable year. An example of such collateral adjustments is the amount of depreciation allowed or allowable in the applicable taxable year for the property to which the late election applies. The taxpayer is subject to all of the other rules and requirements in section 163(j), except as otherwise provided in this revenue procedure. The Treasury Department and the IRS have provided guidance under section 163(j) in the 2018 proposed regulations and will provide additional guidance in forthcoming final regulations and additional proposed regulations under section 163(j). The additional proposed regulations will address issues arising under the CARES Act as well as certain other issues.[23]

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[22] Revenue Procedure 2020-22, Section 6.02

[23] Revenue Procedure 2020-22, Section 6.03

The late election statement's contents are outlined as follows:

> The election statement must be titled, "Revenue Procedure 2020-22 Late Section 163(j)(7) Election." The election statement must contain:
>
> (1) The taxpayer's name;
>
> (2) The taxpayer's address;
>
> (3) The taxpayer's social security number (SSN) or employer identification number (EIN);
>
> (4) A description of the taxpayer's electing trade or business, including the principal business activity code; and
>
> (5) A statement that the taxpayer is making an election under section 163(j)(7)(B) or 163(j)(7)(C), as applicable. [24]

This portion of the procedure concludes on issues related to depreciation when a late election is made:

> A taxpayer within the scope of section 3.01(1) of this revenue procedure that is making a section 163(j)(7) election must determine its depreciation on the amended Federal income tax returns, amended Forms 1065, or AARs, as applicable, for the property that is affected by the late election using the alternative depreciation system of section 168(g), pursuant to section 168(g)(1)(F) or (G). See also section 163(j)(11). Section 4.02 of Rev. Proc. 2019-8, 2019-3 I.R.B. 347, explains how to change to the alternative depreciation system for existing property that is affected by the late election.[25]

## *Withdrawing an Election Under §163(j)(7)*

The more likely scenario is that a taxpayer will want to withdraw a prior election under §163(j). Under the provisions added by TCJA, an election under §163(j)(7) was an election that bound the taxpayer forever, with no opportunity to undo the election. But the IRS reasoned that taxpayers may have made a very different decision had the interest limit been set at 50% of adjusted taxable income rather than 30%.

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[24] Revenue Procedure 2020-22, Section 6.04

[25] Revenue Procedure 2020-22, Section 6.05

Section 5 allows for just such a withdraw of the prior election. Those taxpayers eligible for it are:

> A taxpayer is described in this section 3.01(2) if the taxpayer filed a section 163(j)(7) election with its timely filed original Federal income tax return or Form 1065, including extensions, or made a late election under section 4 of this revenue procedure, for a 2018, 2019, or 2020 taxable year and now wants to withdraw the election.[26]

The time and manner for withdrawing an election under IRC §163(j)(7) are provided in the procedure:

> A taxpayer that wishes to withdraw an election as described in section 5.01 of this revenue procedure for a 2018, 2019, or 2020 taxable year must timely file an amended Federal income tax return, amended Form 1065, or AAR, as applicable, for the taxable year in which the election was made, with an election withdrawal statement. Except as provided in Revenue Procedure 2020-23, regarding the time to file amended returns by BBA partnerships for 2018 and 2019 taxable years, the amended Federal income tax return or amended Form 1065 must be filed on or before October 15, 2021, but in no event later than the applicable period of limitations on assessment for the taxable year for which the amended return is being filed. In the case of a BBA partnership that chooses not to file an amended Form 1065 as permitted under Rev. Proc. 2020-23, the BBA partnership may withdraw the section 163(j)(7) election by filing an AAR on or before October 15, 2021, but in no event later than the applicable period of limitations on making adjustments under section 6235 for the reviewed year, as defined in § 301.6241-1(a)(8). The amended Federal income tax return, amended Form 1065, or AAR, as applicable, must include the adjustment to taxable income for the withdrawn section 163(j)(7) election and any collateral adjustments to taxable income or to tax liability, including any adjustments under section 481. A taxpayer also must file amended Federal income tax returns, amended Forms 1065, or AARs, as applicable, including such collateral adjustments, for any affected succeeding taxable years. An example of such collateral adjustments is the amount of depreciation allowed or allowable in the applicable taxable year for the property to which the withdrawn election applies.[27]

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[26] Revenue Procedure 2020-22, Section 3.01(2)

[27] Revenue Procedure 2020-22, Section 5.02

The election withdrawal statement contents are described as follows:

> The election withdrawal statement should be titled, "Revenue Procedure 2020-22 Section 163(j)(7) Election Withdrawal." The election withdrawal statement must contain the taxpayer's name, address, and SSN or EIN, and must state that, pursuant to Revenue Procedure 2020-22, the taxpayer is withdrawing its election under section 163(j)(7)(B) or 163(j)(7)(C), as applicable.[28]

As well, the procedure again discusses the issues that will arise with regard to depreciation when the original election is withdrawn:

> A taxpayer that is withdrawing a prior section 163(j)(7) election must determine its depreciation for the property that is affected by the withdrawn election in accordance with section 168 on the amended Federal income tax returns, amended Forms 1065, or AARs, as applicable.[29]

## *Making an Election Under New §163(j)(10)*

The CARES Act added IRC §163(j)(10) that created some new elections to deal with the CARES Act changes to §163(j). This ruling also provides rules for these elections, and the scope is defined in the following paragraph:

> Section 6 of this revenue procedure provides the time and manner of making or revoking elections under new section 163(j)(10) applicable to a taxpayer that has timely filed, or will timely file, an original Federal income tax return or Form 1065 for a taxpayer's 2019 or 2020 taxable year. [30]

The CARES Act added a number of special purpose elections which are described below.

### *Election Out of the 50 Percent ATI Limitation*

Taxpayers have the option to not apply the 50% limitation for the 2019 and/or 2020 tax year, going back to the 30% limit.

> Except as otherwise provided in this section 6.01(1), a taxpayer may elect under section 163(j)(10)(A)(iii) not to apply the 50 percent ATI

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[28] Revenue Procedure 2020-22, Section 5.03

[29] Revenue Procedure 2020-22, Section 5.04

[30] Revenue Procedure 2020-22, Section 3.02

> limitation for a 2019 or 2020 taxable year. A partnership can make this election only for a 2020 taxable year because partnerships cannot use the 50 percent ATI limitation for a 2019 taxable year.[31]

The time and manner of making the election is outlined as follows:

> A taxpayer permitted to make the election, as described in section 6.01 of this revenue procedure, makes the election not to apply the 50 percent ATI limitation for a 2019 or 2020 taxable year by timely filing a Federal income tax return or Form 1065, including extensions, an amended Federal income tax return, amended Form 1065, or AAR, as applicable, using the 30 percent ATI limitation. No formal statement is required to make the election.[32]

Effectively, this is a "Nike" election—the taxpayer just "does it" and applies the 30% limitation.

The procedure also provides an option for a taxpayer (who may have not been aware of the option to use the 50% limitation or just changes his/her mind) to revoke the election to continue to use the 30% limit:

> If a taxpayer made the election, as described in section 6.01(2) of this revenue procedure, not to apply the 50 percent ATI limitation, for a 2019 or 2020 taxable year, and the taxpayer wishes to revoke that election for such taxable year, the Commissioner grants the taxpayer consent to revoke that election, provided the taxpayer timely files an amended Federal income tax return, amended Form 1065, or AAR, as applicable, for the applicable tax year, using the 50 percent ATI limitation.[33]

This section of the procedure concludes:

> The election in section 6.01 of this revenue procedure must be made for each taxable year. For a consolidated group, the election is made by the agent for a consolidated group, within the meaning of § 1.1502-77, on behalf of members of the consolidated group. For partnerships, the election is made by the partnership, but only for a 2020 taxable year. For an applicable CFC, as defined in proposed § 1.163(j)-7(f)(2), the election is not effective unless made for the

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[31] Revenue Procedure 2020-22, Section 6.01(1)

[32] Revenue Procedure 2020-22, Section 6.01(2)

[33] Revenue Procedure 2020-22, Section 6.01(3)

> applicable CFC by each controlling domestic shareholder, as defined in § 1.964-1(c)(5).[34]

### *Election to Use 2019 ATI in 2020 Taxable Year*

Given that many taxpayers will have much lower income in 2020 than in 2019, the law allows the taxpayer to elect to use the taxpayer's 2019 ATI in lieu of using the ATI for 2020.

> Under section 163(j)(10)(B), a taxpayer may elect to use the taxpayer's ATI for the last taxable year beginning in 2019 (that is, the taxpayer's 2019 ATI) as the ATI for any taxable year beginning in 2020, subject to modifications for short taxable years.[35]

The time and manner of making the election is described in the Procedure:

> A taxpayer makes an election under this section 6.02 for a 2020 taxable year by timely filing a Federal income tax return or Form 1065, including extensions, an amended Federal income tax return,amended Form 1065, or AAR, as applicable, using the taxpayer's 2019 ATI. A taxpayer revokes an election under this section 6.02 for a 2020 taxable year by timely filing an amended Federal income tax return, amended Form 1065, or AAR by a BBA partnership, as applicable, not using the taxpayer's 2019 ATI. No formal statement is required to make or revoke the election.[36]

The procedure provides the following information for who makes the election:

> For a consolidated group, the election under section 6.02 of this revenue procedure is made by the agent for a consolidated group, within the meaning of § 1.1502-77, on behalf of itself and members of the group. For partnerships, the election is made by the partnership. For an applicable CFC, the election is not effective unless made for the applicable CFC by each controlling domestic shareholder. In the case of a CFC group, as defined in proposed § 1.163(j)-7(f)(6), the election is not effective for any CFC group member, as defined in proposed § 1.163(j)-7(f)(8), unless made for every taxable year of a CFC group member for which the election is available and for which the CFC

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[34] Revenue Procedure 2020-22, Section 6.01(4)

[35] Revenue Procedure 2020-22, Section 6.02(1)

[36] Revenue Procedure 2020-22, Section 6.02(2)

> group member is a CFC group member on the last day of the CFC group member's taxable year.[37]

The IRS also discusses issues that will arise with a short taxable year:

> If an election is made under section 6.02 of this revenue procedure for a 2020 taxable year that is a short taxable year, the ATI for the taxpayer's applicable taxable year beginning in 2020 is equal to the amount that bears the same ratio to such ATI as the number of months in the short taxable years bears to 12.[38]

### *Election Out of the 50 Percent EBIE (Excess Business Interest Expense) Rule*

A taxpayer wishing to elect out of the 50 percent EBIE rule makes the election at the following time and in the following manner:

> A partner makes the election under section 6.03 of this revenue procedure by timely filing a Federal income tax return or Form 1065, including extensions, an amended Federal income tax return, an amended Form 1065, or an AAR, as applicable, for the partner's first taxable year beginning in 2020, by not applying the 50 percent EBIE rule in determining the section 163(j) limitation. A partner revokes the election under this section 6.03 by timely filing an amended Federal income tax return, amended Form 1065, or AAR, as applicable, for the partner's first taxable year beginning in 2020, by applying the 50 percent EBIE rule in determining the section 163(j) limitation.[39]

## SECTION: 172
## PROCEDURES FOR ELECTING OPTIONS FOR NET OPERATING LOSS TREATMENTS ADDED BY CARES ACT RELEASED

### Citation: Notice 2020-24, 4/9/2020

The CARES Act restored the ability to carryback net operating losses temporarily. The loss carrybacks were restored for 2018, 2019 and 2020, with special provisions provided for electing to carry losses from 2018 and/or 2019 forward to take care of the problem

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[37] Revenue Procedure 2020-22, Section 6.02(3)

[38] Revenue Procedure 2020-22, Section 6.02(4)

[39] Revenue Procedure 2020-22, Section 6.03(2)

that it was too late in many cases to timely elect to forego the carryback period. In Notice 2020-24[40] the IRS has provided procedures for actions related to these net operating losses.

### *Waiving the Entire Five-Year Carryback*

A taxpayer that wishes to waive the five-year carryback period for 2018 and/or 2019 will take the following steps.

> (1) Elections to waive carryback under § 172(b)(3) for NOLs arising in taxable years beginning in 2018 or 2019. A taxpayer within the scope of this revenue procedure may elect under § 172(b)(3) to waive the carryback period for an NOL arising in a taxable year beginning in 2018 or 2019. Such an election must be made no later than the due date, including extensions, for filing the taxpayer's Federal income tax return for the first taxable year ending after March 27, 2020. A taxpayer must make an election described in this section 4.01(1) by attaching to its Federal income tax return filed for the first taxable year ending after March 27, 2020, a separate statement for each of taxable years 2018 or 2019 for which the taxpayer intends to make the election. The election statement must state that the taxpayer is electing to apply § 172(b)(3) under Rev. Proc. 2020-24 and the taxable year for which the statement applies. Once made, the election is irrevocable.[41]

### *Bypass §965 Years in the Carryback Period*

Taxpayers are allowed to elect to exclude only §965 years from the carryback period, avoiding the complications of dealing with that area. Such an election will have the following effect:

> An election under § 172(b)(1)(D)(v)(I) to exclude all section 965 years from the carryback period for an NOL allows a taxpayer to disregard those taxable years when applying an NOL to the carryback period and determining whether the taxpayer has an overpayment and can receive a refund or credit for any of the remaining years in the carryback period to which the NOL is applied.[42]

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[40] Notice 2020-24, April 9, 2020, https://www.irs.gov/pub/irs-drop/rp-18-58.pdf, retrieved April 9, 2020

[41] Notice 2020-24, Section 4.01(1)

[42] Notice 2020-24, Section 4.01(2)(d)

What this election does *not* do is allow the taxpayer to go back to even earlier years to replace the excluded years—rather, while no loss goes into the §965 years, they still count as one of the five years:

> A taxpayer who makes an election under § 172(b)(2)(D)(v)(I) for an NOL must include all section 965 years for purposes of counting the five taxable years in the carryback period for the NOL. [43]

The election is filed by taking the following steps:

> A taxpayer must make the election described in this section 74.01(2) by attaching an election statement to the earliest filed, after this revenue procedure is effective, of:
>
> > (1) The Federal income tax return for the taxable year in which the NOL arises;
> >
> > (2) The taxpayer's claim for tentative carryback adjustment (Form 1045, Application for Tentative Refund; or Form 1139, Corporation Application for Tentative Refund) applying the NOL to a taxable year in the carryback period; or
> >
> > (3) The amended Federal income tax return applying the NOL to the earliest taxable year in the carryback period that is not a section 965 year.[44]

As well, information must be attached to each amended return when this election is made:

> A taxpayer making the election who claims a refund or credit as a result of the carryback of the NOL by filing amended Federal income tax returns for taxable years in the carryback period must also attach an election statement to each amended return. The election statement must state that the taxpayer is electing to apply §172(b)(1)(D)(v)(I) under Rev. Proc. 2020-24, the taxable year in which the NOL arose, and the taxpayer's section 965 years. Once made, the election is irrevocable.[45]

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[43] Notice 2020-24, Section 4.01(2)(d)

[44] Notice 2020-24, Section 4.01(2)(b)

[45] Notice 2020-24, Section 4.01(2)(c)

The Notice also provides for when this election must be filed:

> An election under this section 4.01(2) for an NOL arising in a taxable year beginning in 2018 or 2019 must be made no later than the due date, including extensions, for filing the taxpayer's Federal income tax return for the first taxable year ending after March 27, 2020. For an NOL arising in a taxable year beginning after December 31, 2019, and before January 1, 2021, an election under this section 4.01(2) must be made by no later than the due date, including extensions, for filing the taxpayer's Federal income tax return for the taxable year in which the NOL arises.[46]

### *Effect When a Loss is Carried to a §965 Year*

If a taxpayer does not make the election to bypass the §965 years, the Notice explains what happens in those years.

> To the extent an NOL is carried back pursuant to § 172(b)(1)(D)(i) to a section 965 year, the deemed election under §965(n) pursuant to § 172(b)(1)(D)(iv) may not be waived for that section 965 year (including if a taxpayer previously revoked an election under § 965(n) for that section 965 year pursuant to §1.965-7(e)(2)(ii)(B)). If the deemed election under § 965(n) applies to a section 965 year for which a taxpayer previously revoked or did not previously make an election under § 965(n), the deemed election shall only apply for purposes of the carryback of an NOL to such section 965 year.[47]

### *Consolidated Groups*

Details of the application of these provisions to consolidated groups of corporations are found in Section 4.03 of the Notice.

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[46] Notice 2020-24, Section 4.01(2)(a)

[47] Notice 2020-24, Section 4.02

# SECTION: 3221
# IRS EXPLAINS EMPLOYER PAYROLL TAX DEFERRAL PROVISION OF THE CARES ACT

## Citation: Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, 4/10/20

The IRS has released a set of frequently asked questions on the deferral of the employer's share of the FICA Old Age Survivor's and Disability insurance tax, a provision added by the CARES Act.[48] While summarizing the relief provided in the Act, the FAQ also provides answers to some questions that had been raised under the provision.

The IRS describes the program generally as follows in the FAQ:

> Section 2302 of the CARES Act provides that employers may defer the deposit and payment of the employer's portion of social security taxes and certain railroad retirement taxes. These are the taxes imposed under section 3111(a) of the Internal Revenue Code (the "Code") and, for Railroad employers, so much of the taxes imposed under section 3221(a) of the Code as are attributable to the rate in effect under section 3111(a) of the Code (collectively referred to as the "employer's share of social security tax"). Employers that received a Paycheck Protection Program loan may not defer the deposit and payment of the employer's share of social security tax that is otherwise due after the employer receives a decision from the lender that the loan was forgiven. (See FAQ 4).[49]

The time period covered by the program is outlined by the IRS, as well as the fact that a revised Form 941 is coming for the second quarter and instructions are to come on how to report for the first quarter:

> The deferral applies to deposits and payments of the employer's share of social security tax that would otherwise be required to be made

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[48] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, April 10, 2020 version, https://www.irs.gov/newsroom/deferral-of-employment-tax-deposits-and-payments-through-december-31-2020 , retrieved April 10, 2020

[49] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 1

> during the period beginning on March 27, 2020, and ending December 31, 2020. (Section 2302 of the CARES Act calls this period the "payroll tax deferral period.")
>
> The Form 941, Employer's QUARTERLY Federal Tax Return, will be revised for the second calendar quarter of 2020 (April - June, 2020). Information will be provided in the near future to instruct employers how to reflect the deferred deposits and payments otherwise due on or after March 27, 2020 for the first quarter of 2020 (January – March 2020). In no case will Employers be required to make a special election to be able to defer deposits and payments of these employment taxes.[50]

While all employers can initially defer taxes under this program, an employer who has debt forgiven on a PPP loan will lose that ability at the time the debt forgiveness is approved.[51]

How an employer who gets PPP debt forgiveness will deal with this issue is explained. Some observers had expressed a concern that an employer might retroactively lose the ability to defer, resulting in a sudden payroll tax liability, but the IRS held that is not the case. Rather the IRS provides:

> **4. Can an employer that has applied for and received a PPP loan that is not yet forgiven defer deposit and payment of the employer's share of social security tax without incurring failure to deposit and failure to pay penalties?**
>
> Yes. Employers who have received a PPP loan, but whose loan has not yet been forgiven, may defer deposit and payment of the employer's share of social security tax that otherwise would be required to be made beginning on March 27, 2020, through the date the lender issues a decision to forgive the loan in accordance with paragraph (g) of section 1106 of the CARES Act, without incurring failure to deposit and failure to pay penalties. Once an employer receives a decision from its lender that its PPP loan is forgiven, the employer is no longer eligible to defer deposit and payment of the employer's share of social security tax due after that date. However, the amount of the deposit and payment of the employer's share of social security tax that was deferred through the date that the PPP loan is forgiven continues to be

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[50] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 2

[51] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 3

> deferred and will be due on the "applicable dates," as described in FAQs 7 and 8.[52]

This will serve to relieve employers of most of the burden of paying payroll taxes during the 8-week period given to spend the funds received from a PPP loan, as the debt forgiveness won't take place until after that period has concluded. As well, recall that state payroll taxes are generally considered part of payroll costs for PPP loan forgiveness purposes, so the employer may not initially end up with having to dive into the employer's other funds to pay most taxes during the 8-week period.

The FAQ provides that this deferral is available to an employer who is receiving the payroll related tax credits from the Families First Coronavirus Relief Act (FFCRA) and the CARES Act employee retention credit:

> Notice 2020-22 provides relief from the failure to deposit penalty under section 6656 of the Code for not making deposits of employment taxes, including taxes withheld from employees, in anticipation of the FFCRA paid leave credits and the CARES Act employee retention credit. The ability to defer deposit and payment of the employer's share of social security tax under section 2302 of the CARES Act applies to all employers, not just employers entitled to paid leave credits and employee retention credits. (But see the limit described in FAQ 4 for employers that have a PPP loan forgiven.)[53]

The FAQ also discusses the interaction of the deferral and the refundable payroll tax credits.

> **6. Can an employer that is eligible to claim refundable paid leave tax credits or the employee retention credit defer its deposit and payment of the employer's share of social security tax prior to determining the amount of employment tax deposits that it may retain in anticipation of these credits, the amount of any advance payments of these credits, or the amount of any refunds with respect to these credits?**
>
> Yes. An employer is entitled to defer deposit and payment of the employer's share of social security tax prior to determining whether the employer is entitled to the paid leave credits under sections 7001 or 7003 of FFCRA or the employee retention credit under section 2301 of the CARES Act, and prior to determining the amount of employment tax deposits that it may retain in anticipation of these

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[52] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 4

[53] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 5

> credits, the amount of any advance payments of these credits, or the amount of any refunds with respect to these credits.[54]

The FAQ notes that the deferred deposit dates are:

- December 31, 2021 for deposit of 50% of the amount deferred; and
- December 31, 2022 for the deposit of the remaining taxes.

So long as the deposits are made by those dates, they will be treated as timely paid and the taxpayer will avoid a failure to deposit penalty and a failure to pay penalty.[55]

Questions 9-11 describe the similar rules for self-employed taxpayers:

> **9. Are self-employed individuals eligible to defer payment of self-employment tax on net earnings from self-employment income?**
>
> Yes. Self-employed individuals may defer the payment of 50 percent of the social security tax on net earnings from self-employment income imposed under section 1401(a) of the Code for the period beginning on March 27, 2020, and ending December 31, 2020. (Section 2302 of the CARES Act calls this period the "payroll tax deferral period.")
>
> **10. Is there a penalty for failure to make estimated tax payments for 50 percent of social security tax on net earnings from self-employment income during the payroll tax deferral period?**
>
> No. For any taxable year that includes any part of the payroll tax deferral period, 50 percent of the social security tax imposed on net earnings from self-employment income during that payroll tax deferral period is not used to calculate the installments of estimated tax due under section 6654 of the Code.

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[54] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 6

[55] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 7, 8

**11. What are the applicable dates when deferred payment amounts of 50 percent of the social security tax imposed on self-employment income must be paid?**

The deferred payment amounts are due on the "applicable dates" as described in FAQ 7.[56]

# SECTION: 6221
# PARTNERSHIPS COVERED BY BBA CPAR AUDIT REGIME TEMPORARILY ALLOWED TO FILE AMENDED RETURNS AND K-1S

## Citation: Revenue Procedure 2020-23, 4/8/20

The Centralized Partnership Audit Regime (CPAR) added by the Bipartisan Budget Act of 2015 effectively barred partnerships that did not opt out of the regime from filing an amended return and sending out amended K-1s for prior years. Since many partnerships do not qualify to opt-out of the CPAR regime, a large number of partnerships had no ability to change a previously filed return once the period for filing a superseding return had passed.

This feature of the CPAR regime has now proved a major impediment to partners receiving the sort of retroactive benefits Congress added in the CARES Act, such as the use of bonus depreciation or a 15-year life on qualified improvement property. Recognizing the problem, the IRS has issued a Revenue Procedure allowing CPAR partnerships to temporarily file an amended Form 1065 and issue amended K-1s to partners (Revenue Procedure 2020-23).[57]

The IRS explains the need for relief as follows:

> 04 The Coronavirus Aid, Relief, and Economic Security Act (CARES Act), P.L. 116- 136, 134 Stat. 281 (March 27, 2020), provides retroactive tax relief that affects partnerships, including relief for the taxable years ending in 2018, 2019, and, in some cases, 2020. Without the option to file amended returns, as granted in section 3 of this revenue procedure, BBA partnerships that already filed their Forms 1065 for the affected years generally are unable to take advantage of the CARES Act relief for partnerships except by filing Administrative

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[56] Deferral of employment tax deposits and payments through December 31, 2020, IRS Website, FAQ 9-11

[57] Revenue Procedure 2020-23, April 8, 2020, https://www.irs.gov/pub/irs-drop/rp-20-23.pdf , retrieved April 8, 2020

> Adjustment Requests (AARs) pursuant to section 6227. Filing an AAR would result in the partners' only being able to receive any benefits from that relief on the current taxable year's federal income tax return. Thus, if an AAR were filed, the partners generally would not be able to take advantage of CARES Act benefits from an AAR until they file their current year returns, which could be in 2021. This process would significantly delay the relief provided in the CARES Act intended to apply to the affected taxable years and provide an immediate benefit to taxpayers.[58]

Partnerships covered by this rule are found in Section 3.03 of the Procedure:

> .03 Eligible BBA partnerships. The filing and furnishing option provided in section 3.02 of this revenue procedure is available only to BBA partnerships that filed Forms 1065 and furnished Schedules K-1 for the partnership taxable years beginning in 2018 or 2019 prior to the issuance of this revenue procedure. For purposes of section 6222, the amended return replaces any prior return (including any AAR filed by the partnership) for the taxable year for purposes of determining the partnership's treatment of partnership-related items. See section 4.03 of this revenue procedure for a special rule regarding partnerships who have previously filed AARs for an affected taxable year.[59]

Interestingly, Section 3.02 indicates the relief applies not only to CARES Act issues, but other items the partnership may need to change and that the use of an amended return in lieu of an Administrative Adjustment Request (AAR) is optional:

> 02 Option to file amended return. BBA partnerships that filed a Form 1065 and furnished all required Schedules K-1 for the taxable years beginning in 2018 or 2019 prior to the issuance of this revenue procedure may file amended partnership returns and furnish corresponding Schedules K-1 before September 30, 2020. The amended returns may take into account tax changes brought about by the CARES Act as well as any other tax attributes to which the partnership is entitled by law.[60]

The procedure applies only to taxable years beginning in 2018 or 2019.[61]

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[58] Revenue Procedure 2020-23, Section 2.04

[59] Revenue Procedure 2020-23, Section 3.03

[60] Revenue Procedure 2020-23, Section 3.02

[61] Revenue Procedure 2020-23, Section 3.04

The IRS provides the following requirements to take advantage of this option:

> .01 Filing requirements. To take advantage of the option to file an amended return provided by section 3 of this revenue procedure, a BBA partnership must file a Form 1065 (with the "Amended Return" box checked) and furnish corresponding amended Schedules K-1. The BBA partnership must clearly indicate the application of this revenue procedure on the amended return and write "FILED PURSUANT TO REV PROC 2020-23" at the top of the amended return and attach a statement with each Schedule K-1 sent to its partners with the same notation. The BBA partnership may file electronically or by mail, but filing electronically may allow for faster processing of the amended return.[62]

For partnerships that had previously filed an AAR under CPAR for the year the partnership wishes to now amend, the IRS provides:

> .03 Special rule for BBA partnerships who have previously filed an AAR. If a BBA partnership has previously filed an AAR and wishes to file an amended return pursuant to this revenue procedure for the same taxable year, the partnership should use the items as adjusted in the AAR, where applicable, in lieu of any reporting from the originally filed partnership return.[63]

If a partnership is currently under examination, the procedure provides for the following:

> .02 Special rule for BBA partnerships whose returns are under examination. If a BBA partnership is currently under examination for a taxable year beginning in 2018 or 2019 and wishes to take advantage of the option to file an amended return provided by section 3 of this revenue procedure, the partnership may only do so if the partnership sends notice to the revenue agent coordinating the partnership's examination in writing that the partnership seeks to use the amended return option described in this revenue procedure prior to or contemporaneously with filing the amended return as described in section 4.01 of this revenue procedure. The partnership must also provide the revenue agent with a copy of the amended return upon filing.[64]

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[62] Revenue Procedure 2020-23, Section 4.01

[63] Revenue Procedure 2020-23, Section 4.03

[64] Revenue Procedure 2020-23, Section 4.02

Similarly, the ruling provides the following for partnerships that had previously reported under Notice 2019-45 (related to GILTI):

> .04 Coordination with Notice 2019-46. If, under Notice 2019-46, 2019-37 I.R.B. 695, a partnership has applied the rules of the proposed GILTI regulations under proposed §1.951A-5 for its taxable years ending before June 22, 2019 (Form 1065, Form 8992, U.S Shareholder Calculation of Global Intangible Low-Taxed Income (GILTI), and Schedules K-1), the partnership may continue to apply the rules of proposed §1.951A-5 for purposes of filing an amended Form 1065 for such taxable years under this revenue procedure if the partnership furnishes amended Schedules K-1 consistent with those proposed regulations and provides appropriate notifications to its partners under the principles of section 5.01 of Notice 2019-46 within the period described in section 3.02 of this revenue procedure. Nothing in this revenue procedure changes a partnership's obligation to provide information described in section 5.02 of Notice 2019-46. If a partnership applies the final GILTI regulations under §1.951A-1(e), any amended Schedules K-1 issued under this revenue procedure must be consistent with those final regulations.[65]

# SECTION: 6411
# IRS GRANTS SIX MONTH EXTENSION OF TIME TO FILE CERTAIN CLAIMS FOR TENTATIVE REFUNDS RELATED TO CARES ACT NOL CHANGES

## Citation: Notice 2020-26, 4/9/20

The IRS is moving to simplify the filing of net operating loss carryback claims to take advantage of the CARES Act revisions to NOL provisions, by extending for six months the time period a tentative carryback form (Forms 1045 and 1139) may be filed, per Notice 2020-26.[66]

The Notice briefly describes the key CARES Act changes to net operating losses:

> Section 2303(b) of the CARES Act amends § 172(b)(1) to carry back any NOL arising in a taxable year beginning after December 31, 2017, and before January 1, 2021, to each of the five taxable years preceding the taxable year in which the NOL arises (carryback period). As a

[65] Revenue Procedure 2020-23, Section 4.04

[66] Notice 2020-26, April 9, 2020, https://www.irs.gov/pub/irs-drop/n-20-26.pdf, retrieved April 10, 2020

> result of that amendment, taxpayers take into account such NOLs in the earliest taxable year in the carryback period, carrying forward unused amounts to each succeeding taxable year. Section 2303(a) of the CARES Act amends § 172(a) to allow a deduction for a taxable year beginning before January 1, 2021, in an amount equal to the aggregate of the NOL carryovers and carrybacks to such year.[67]

While such carrybacks can be claimed by filing a formal claim for refund (normally using Form 1040-X or 1120-X), most taxpayers have instead filed such requests for refunds under the tentative refund provisions of IRC §6411:

> Section 6411 allows a taxpayer to file an application for a tentative carryback adjustment of the tax liability for a prior taxable year that is affected by a NOL carryback provided in § 172(b) or by carrybacks provided for in other Code sections. Under §1.6411-1(b)(1) of the Income Tax Regulations, taxpayers that are corporations must make the application on Form 1139, Corporation Application for Tentative Refund, and taxpayers other than corporations must make the application on Form 1045, Application for Tentative Refund. The Code and regulations require that an application must be filed within 12 months of the close of the taxable year in which the NOL arose. Section 6411(a); § 1.6411-1(c). The tentative carryback adjustment procedure allows a taxpayer to obtain a quick tentative tax refund based on an NOL carryback. Under § 6411(b), the Internal Revenue Service (IRS) conducts a limited examination of the application and makes the resulting credit or refund within 90 days of the filing of the application.[68]

Thus, the deadline for a taxpayer to have filed a claim for tentative refund for a loss that arose in 2018 would have been December 31, 2019—a date that had already passed when the CARES Act was signed into law on March 27, 2020.

The IRS, citing the authority granted to the agency under IRC §6081 to grant a reasonable extension of time, generally not to exceed six months, to file documents with the agency has decided to make use of that authority to extend the time to file the Forms 1045 and 1139.

Specifically, the Notice provides:

> The Department of the Treasury and the IRS grant a six-month extension of time to file Form 1045 or Form 1139, as applicable, to taxpayers that have an NOL that arose in a taxable year that began

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[67] Notice 2020-26, Section 2

[68] Notice 2020-26, Section 2

> during calendar year 2018 and that ended on or before June 30, 2019. This extension of time is limited to requesting a tentative refund to carry back an NOL and does not extend the time to carry back any other item.[69]

The Notice gives the following example of its application:

> For example, in the case of an NOL that arose in a taxable year ending on December 31, 2018, a taxpayer normally would have until December 31, 2019, to file the Form 1045 or Form 1139, as applicable, but due to this relief, will now have until June 30, 2020, to file the Form 1045 or Form 1139, as applicable.[70]

The steps a taxpayer must take to take advantage of this procedure are as follows:

> To take advantage of the extension of time for requesting a tentative refund based on an NOL carryback, the taxpayer must perform the following actions:
>
> > (a) File the applicable form no later than 18 months after the close of the taxable year in which the NOL arose (that is, no later than June 30, 2020, for a taxable year ending December 31, 2018); and
> >
> > (b) Include on the top of the applicable form "Notice 2020-26, Extension of Time to File Application for Tentative Carryback Adjustment."[71]

The CARES Act also accelerated the refund of any unused corporate minimum tax credits in 2018 and 2019 under IRC §53(e)(5) and specifically provided this refund could be claimed using the tentative refund procedures so long as the request for tentative refund is filed by December 30, 2020. The notice points out that while this relief is for a longer period, if a calendar year C corporation wishes to file only a single Form 1139 for both the net operating loss carryback and the refund of minimum tax credit, that would be due by June 30, 2020. Continuing with the example above, the IRS provides:

> For this same taxpayer, if the taxpayer is a corporation, the deadline to claim a minimum tax credit described in § 53(e)(5) is December 30, 2020, but in order to file one application for a tentative refund and

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[69] Notice 2020-26, Section 3

[70] Notice 2020-26, Section 3

[71] Notice 2020-26, Section 3

claim both the NOL carryback and the minimum tax credit at the same time, the taxpayer must do so by the earlier of the two deadlines.[72]

# SECTION: 7508A
# IRS GREATLY EXPANDS LIST OF RETURNS, PAYMENTS AND ACTIONS THAT CAN BE DELAYED UNTIL JULY 15

## Citation: Notice 2020-23, 4/9/2020

The IRS has again expanded due date relief in Notice 2020-23,[73] explicitly providing relief for forms that are filed with the Form 1040 (such as Schedule H) and more general relief for certain time sensitive acts that occur between April 1, 2020 and July 15, 2020.

The Notice provides the following relief:

> The Secretary of the Treasury has determined that any person (as defined in section 7701(a)(1) of the Code) with a Federal taxpayment obligation specified in this section III.A (Specified Payment), or a Federal tax return or other form filing obligation specified in this section III.A (Specified Form), which is due to be performed(originally or pursuant to a valid extension) on or after April1, 2020,and before July 15, 2020,is affected by the COVID-19 emergency for purposes of the relief described in this section III (Affected Taxpayer).

The list of forms and payments covered are:

- Individual income tax payments and return filings on Form 1040,U.S. Individual Income Tax Return,1040-SR,U.S. Tax Return for Seniors,1040-NR,U.S. Nonresident Alien Income Tax Return, 1040-NR-EZ, U.S. Income Tax Return for Certain Nonresident Aliens With No Dependents, 1040-PR, Self-Employment Tax Return -Puerto Rico, and 1040-SS,U.S. Self-Employment Tax Return (Including the Additional Child Tax Credit for Bona Fide Residents of Puerto Rico);

- Calendar year or fiscal year corporate income tax payments and return filings on Form 1120, U.S. Corporation Income Tax

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[72] Notice 2020-26, Section 3

[73] Notice 2020-23, April 9, 2020, https://www.irs.gov/pub/irs-drop/n-20-23.pdf, retrieved April 9, 2020

Return, 1120-C, U.S. Income Tax Return for Cooperative Associations, 1120-F, U.S. Income Tax Return of a Foreign Corporation, 1120-FSC, U.S. Income Tax Return of a Foreign Sales Corporation, 1120-H, U.S. Income Tax Return for Homeowners Associations, 1120-L, U.S. Life Insurance Company Income Tax Return, 1120-ND, Return for Nuclear Decommissioning Funds and Certain Related Persons, 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return, 1120-POL, U.S. Income Tax Return for Certain Political Organizations, 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts, 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies, 1120-S, U.S. Income Tax Return for an S Corporation, and 1120-SF,U.S. Income Tax Return for Settlement Funds (Under Section 468B);

- Calendar year or fiscal year partnership return filings on Form 1065, U.S. Return of Partnership Income, and Form 1066, U.S. Real Estate Mortgage Investment Conduit (REMIC) Income Tax Return;

- Estate and trust income tax payments and return filings on Form 1041, U.S. Income Tax Return for Estates and Trusts, 1041-N, U.S. Income Tax Return for Electing Alaska Native Settlement Trusts, and 1041-QFT, U.S. Income Tax Return for Qualified Funeral Trusts;

- Estate and generation-skipping transfer tax payments and return filings on Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, 706-NA, United States Estate (and Generation-Skipping Transfer) Tax Return, 706-A, United States Additional Estate Tax Return, 706-QDT, U.S. Estate Tax Return for Qualified Domestic Trusts, 706-GS(T), Generation-Skipping Transfer Tax Return for Terminations, 706-GS(D), Generation-Skipping Transfer Tax Return for Distributions, and 706-GS(D-1), Notification of Distribution from a Generation-Skipping Trust (including the due date for providing such form to a beneficiary);

- Form 706, United States Estate (and Generation-Skipping Transfer) Tax Return, filed pursuant to Revenue Procedure 2017-34;

- Form 8971, Information Regarding Beneficiaries Acquiring Property from a Decedent and any supplemental Form 8971, including all requirements contained in section 6035(a)of the Code;

- Gift and generation-skipping transfer tax payments and return filings on Form 709, United States Gift (and Generation-Skipping Transfer) Tax Return that are due on the date an estate is required to file Form 706 or Form 706-NA;

- Estate tax payments of principal or interest due as a result of an election made under sections 6166, 6161, or 6163 and annual recertification requirements under section 6166of the Code;

- Exempt organization business income tax and other payments and return filings on Form 990-T, Exempt Organization Business Income Tax Return (and proxy tax under section 6033(e)of the Code);

- Excise tax payments on investment income and return filings on Form 990-PF, Return of Private Foundation or Section 4947(a)(1) Trust Treated as Private Foundation, and excise tax payments and return filings on Form 4720, Return of Certain Excise Taxes under Chapters 41 and 42 of the Internal Revenue Code; and

- Quarterly estimated income tax payments calculated on or submitted with Form 990-W, Estimated Tax on Unrelated Business Taxable Income for Tax-Exempt Organizations, 1040-ES,Estimated Tax for Individuals,1040-ES (NR), U.S. Estimated Tax for Nonresident Alien Individuals, 1040-ES (PR), Estimated Federal Tax on Self Employment Income and on Household Employees (Residents of Puerto Rico), 1041-ES, Estimated Income Tax for Estates and Trusts, and 1120-W, Estimated Tax for Corporations.

The ruling also adds a number of time sensitive acts to the list of items that will be timely if performed by July 15, 2020. As the Notice states:

> The Secretary of the Treasury has also determined that any person performing a time-sensitive action listed in either §301.7508A-1(c)(1)(iv) –(vi) of the Procedure and Administration Regulations or Revenue Procedure 2018-58, 2018-50 IRB 990; (December 10, 2018), which is due to be performed on or after April1, 2020,and before July 15, 2020(Specified Time-Sensitive Action),is an Affected Taxpayer.

Such acts include:

- Filing a petition with the Tax Court, or for review of a decision rendered by the Tax Court;

- Filing a claim for credit or refund of any tax;
- Bringing suit upon a claim for credit or refund of any tax; and
- The long list of items found in Revenue Procedure 2018-58 (the document is 139 pages long),[74]

The Notice also deals with those in the middle of attempting to reinvest funds in a Qualified Opportunity Zone Fund:

> For purposes of this notice, the term Specified Time-Sensitive Action also includes an investment at the election of a taxpayer due to be made during the 180-day period described in section 1400Z-2(a)(1)(A) of the Code.

As well, the Notice provides the relief extends to items filed as attachments to the forms noted above:

> This relief includes not just the filing of Specified Forms, but also all schedules, returns, and other forms that are filed as attachments to Specified Forms or are required to be filed by the due date of Specified Forms, including, for example, Schedule H and Schedule SE, as well as Forms 3520, 5471, 5472, 8621, 8858, 8865, and 8938. This relief also includes any installment payments under section 965(h) due on or after April1, 2020,and before July 15, 2020.Finally, elections that are made or required to be made on a timely filed Specified Form (or attachment to a Specified Form) shall be timely made if filed on such Specified Form or attachment, as appropriate, on or before July 15, 2020

[74] Revenue Procedure 2018-58, https://www.irs.gov/pub/irs-drop/rp-18-58.pdf, retrieved April 9, 2020