

Current Federal Tax Developments

Week of May 4, 2020

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ACCOUNTING
CONTINUING EDUCATION

CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF MAY 4, 2020
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SECTION: PPP LOAN CORPORATE GROUPS LIMITED TO MAXIMUM \$20 MILLION IN PPP BORROWING

Citation: RIN 3245-AH39, “Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Corporate Groups and Non-Bank and Non- Insured Depository Institution,” Small Business Administration, 4/30/20

The Small Business Administration has published yet another Interim Final Regulation for the PPP loan program.¹ While much of the document relates to issues of interest to non-bank lenders, one key piece of guidance was issued that limits the amount of loans for corporate groups.

The guidance provides the following specific limit:

1. Can a single corporate group receive unlimited PPP loans?

No. To preserve the limited resources available to the PPP program, and in light of the previous lapse of PPP appropriations and the high demand for PPP loans, businesses that are part of a single corporate group shall in no event receive more than \$20,000,000 of PPP loans in the aggregate. For purposes of this limit, businesses are part of a single corporate group if they are majority owned, directly or indirectly, by a common parent. This limitation shall be immediately effective with respect to any loan that has not yet been fully disbursed as of April 30, 2020.

It is the responsibility of an applicant for a PPP loan to notify the lender if the applicant has applied for or received PPP loans in excess of the amount permitted by this interim final rule and withdraw or request cancellation of any pending PPP loan application or approved PPP loan not in compliance with the limitation set forth in this rule. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes, and the loan will not be eligible for

¹ RIN 3245-AH39, “Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Corporate Groups and Non-Bank and Non-Insured Depository Institution,” Small Business Administration, April 30, 2020, <https://home.treasury.gov/system/files/136/IFR--Corporate-Groups-and-Non-Bank-and-Non-Insured-Depository-Institution-Lenders.pdf> (retrieved April 30, 2020)

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forgiveness. A lender may rely on an applicant's representation concerning the applicant's compliance with this limitation.

The Administrator, in consultation with the Secretary, determined that limiting the amount of PPP loans that a single corporate group may receive will promote the availability of PPP loans to the largest possible number of borrowers, consistent with the CARES Act. The Administrator has concluded that a limitation of \$20,000,000 strikes an appropriate balance between broad availability of PPP loans and program resource constraints.

SBA's affiliation rules, which relate to an applicant's eligibility for PPP loans, and any waiver of those rules under the CARES Act, continue to apply independent of this limitation. Businesses are subject to this limitation even if the businesses are eligible for the waiver-of affiliation provision under the CARES Act or are otherwise not considered to be affiliates under SBA's affiliation rules.

This rule has no effect on lender obligations required to obtain an SBA guarantee for PPP loans.

This guidance has a significant footnote that justifies the SBA's authority, at least in the agency's view, to write such a rule into the program:

The Administrator has authority to issue "such rules and regulations as [the Administrator] deems necessary to carry out the authority vested in him by or pursuant to" 15 U.S.C. Chapter 14A, including authorities established under section 1102 of the CARES Act. Section 1102 provides that the Administrator "may" guarantee loans under the terms and conditions set forth in section 7(a) of the Small Business Act, and those conditions specify a "maximum" – but not a minimum – loan amount. See 15 U.S.C. § 636(a)(36)(B), (E); see also CARES Act section 1106(k) (authorizing SBA to issue regulations to govern loan forgiveness). To preserve finite appropriations for PPP loans and ensure broad access for eligible borrowers, the Administrator, in consultation with the Secretary, has determined that an aggregate limitation on loans to a single corporate group is necessary and appropriate.

SECTION: PPP LOAN SALE OF BUSINESS AFTER FEBRUARY 15, 2020 DOES NOT BAR BUSINESS FROM OBTAINING PPP LOAN

Citation: “Payroll Protection Program Loans Frequently Asked Questions (FAQ),” April 29, 2020 version, 4/29/20

The SBA continues to slowly add questions to the frequently asked questions on the Payroll Protection Program (PPP) loans,² in this case giving guidance on what happens if a business had a change of ownership after February 15, 2020.

Question 38 clarifies that a transfer of ownership of the business after February 15, 2020 will not cause the business to be ineligible for a PPP loan.

Question: Section 1102 of the CARES Act provides that PPP loans are available only to applicants that were “in operation on February 15, 2020.” Is a business that was in operation on February 15, 2020 but had a change in ownership after February 15, 2020 eligible for a PPP loan?

Answer: Yes. As long as the business was in operation on February 15, 2020, if it meets the other eligibility criteria, the business is eligible to apply for a PPP loan regardless of the change in ownership. In addition, where there is a change in ownership effectuated through a purchase of substantially all assets of a business that was in operation on February 15, the business acquiring the assets will be eligible to apply for a PPP loan even if the change in ownership results in the assignment of a new tax ID number and even if the acquiring business was not in operation until after February 15, 2020. If the acquiring business has maintained the operations of the pre-sale business, the acquiring business may rely on the historic payroll costs and headcount of the pre-sale business for the purposes of its PPP application, except where the pre-sale business had applied for and received a PPP loan. The Administrator, in consultation with the Secretary, has determined that the requirement that a business “was in operation on February 15, 2020” should be applied based on the economic realities of the business’s operations.

² “Payroll Protection Program Loans Frequently Asked Questions (FAQ),” April 29, 2020 version, <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (retrieved April 29, 2020)

SECTION: PPP LOAN

PPP LOAN REVIEW PROCEDURES DESCRIBED IN JOINT STATEMENT ISSUED BY SBA ADMINISTRATOR AND U.S. TREASURY SECRETARY

Citation: “Joint Statement by Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Review Procedure for Paycheck Protection Program Loans,” U.S. Department of the Treasury website, 4/28/20

After Treasury Secretary Mnuchin initially mentioned the issue in an interview with CNBC³ on April 28, the Treasury Department posted a statement by the Treasury Secretary and Small Business Administration (SBA) Administrator Jovita Carranza on a process for the review of Payroll Protection Program (PPP) loans.⁴

The CNBC article quoted the Treasury Secretary as stating that all PPP loans in excess of \$2 million would be subjected to a full review of the loan by the SBA. Later in the day, the *Wall Street Journal* published a story on its website citing their interview with the Treasury Secretary where he added that smaller loans will be spot checked by the agency as well.⁵

The short statement formally confirms what the stories reported, as well as giving some minor additional details.

The statement indicates that many companies are taking advantage of the May 7 date to repay the loan without having to justify that the loan met the “necessary” test required

³ Lauren Hirsch, “Small business loans above \$2 million will get full audit to make sure they’re valid, Mnuchin says,” CNBC website, April 28, 2020, <https://www.cnbc.com/2020/04/28/small-business-loans-above-2-million-will-get-full-audit-to-make-sure-theyre-valid-mnuchin-says.html>, retrieved April 29, 2020

⁴ “Joint Statement by Secretary Steven T. Mnuchin and Administrator Jovita Carranza on the Review Procedure for Paycheck Protection Program Loans,” U.S. Department of the Treasury website, April 28, 2020, <https://home.treasury.gov/news/press-releases/sm991>, retrieved April 29, 2020

⁵ Bob Davis and Kate Davidson, “U.S. Audits of Small-Business Loans Face Daunting Challenges,” *Wall Street Journal* website, April 28, 2020, https://www.wsj.com/articles/sba-to-face-big-challenges-ensuring-coronavirus-loans-arent-misspent-11588094140?mod=hp_lead_pos6, retrieved April 29, 2020

as part of the certification, though the statement does not give any specific numbers, only a claiming there are a “large number” of such companies:

We have noted the large number of companies that have appropriately reevaluated their need for PPP loans and promptly repaid loan funds in response to SBA guidance reminding all borrowers of an important certification required to obtain a PPP loan.

Presumably, this is a not terribly subtle suggestion that those who are troubled by the remainder of the statement should consider paying back the loan by May 7, as the statement then goes on to confirm the review process outlined in the articles.

To further ensure PPP loans are limited to eligible borrowers, the SBA has decided, in consultation with the Department of the Treasury, that it will review all loans in excess of \$2 million, in addition to other loans as appropriate, following the lender’s submission of the borrower’s loan forgiveness application. Regulatory guidance implementing this procedure will be forthcoming.

It's not clear if borrowers will have a chance to see that regulatory guidance before the May 7 repayment deadline to avoid scrutiny.

Also, it’s important to note this merely says the loans will be reviewed when an application for forgiveness is submitted. The guidance may clarify whether a borrower who chooses to not apply for forgiveness but just accepts a 1% loan with a two year payment term will not be subjected to the scrutiny.

SECTION: PPP LOAN BUSINESSES OWNED BY PRIVATE COMPANIES WARNED THAT SBA GUIDANCE ON LOANS BEING NECESSARY ALSO APPLIES TO THEM

Citation: “Paycheck Protection Program Loans Frequently Asked Questions (FAQs),” April 28, 2020 version, 4/28/20

The latest addition to the frequently asked questions for the Payroll Protection Program loans⁶ is short, but it clarifies that the warning found in question 31 is not just limited to public companies. Given that the agency is reportedly working on guidance for loan

⁶ “Paycheck Protection Program Loans Frequently Asked Questions (FAQs),” April 28, 2020 version, https://www.sba.gov/sites/default/files/2020-04/Paycheck-Protection-Program-Frequently-Asked-Questions_04%2028%2020.pdf retrieved April 28, 2020

forgiveness, this may mean that information on liquidity and access to credit may become part of the information requested of all applying for forgiveness.

The question, number 37 added on April 28, 2020, is very short and to the point:

37. Question: Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Answer: See response to FAQ #31.

For those who need reminding, here is the text of question 31:

31. Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Answer: In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

Again, the SBA does not provide any commentary on why the agency felt question 37 was a necessary addition to its guidance. But it certainly suggests that the agency wishes to dispel the belief that only publicly traded companies needed to worry about the need

to demonstrate a lack of liquidity to show their certification the loan was necessary was made in good faith.

SECTION: PPP LOAN SEASONAL EMPLOYERS ALLOWED TO PICK VARIOUS 12 WEEK PERIODS FOR COMPUTING MAXIMUM PPP LOAN AMOUNT

Citation: RIN 1505-AC67, “Small Business Administration Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Criterion for Seasonal Employer,” 4/27/20

Seasonal businesses received additional guidance from the Small Business Administration on applying their special rules for payroll protection program loans in a new set of interim final rules on the program, the fifth such set of rules.⁷ A key addition is a new provision that allows the use of any 12-week period between May 1, 2019 and September 15, 2019 to calculate the maximum loan amount for a seasonal business.

As the rule description notes:

In this rulemaking, Treasury is addressing the needs of certain potential borrowers that are seasonal employers by allowing seasonal employers to use an alternative base period for purposes of calculating the loan amount for which they are eligible under the PPP. Section 1102 of the Act permits seasonal employers to calculate their maximum loan amount by using their monthly average payments for payroll during “the 12-week period beginning February 15, 2019, or at the election of the eligible [borrower], March 1, 2019, and ending June 30, 2019.” Some seasonal employers, however, have seasons that occur later in the year. Without the ability to use an alternative base period, many summer seasonal businesses would be unable to obtain funding on terms commensurate with those available to winter and spring seasonal businesses. This interim final rule addresses that disparity and ensures consistency in program administration by providing a seasonal employer the option of using any consecutive 12-

⁷ RIN 1505-AC67, “Small Business Administration Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Criterion for Seasonal Employer,” April 27, 2020, <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Additional-Criterion-for-Seasonal-Employers.pdf> (retrieved April 27, 2020)

week period between May 1, 2019 and September 15, 2019 for determining its maximum loan amount.

Question 3 provides the specific rule:

3. How does this rule affect the calculation of the maximum loan amount for seasonal employers?

Under section 1102 of the CARES Act, a seasonal employer may determine its maximum loan amount for purposes of the PPP by reference to the employer's average total monthly payments for payroll "the 12-week period beginning February 15, 2019, or at the election of the eligible [borrower], March 1, 2019, and ending June 30, 2019." Under this interim final rule issued pursuant to section 1109 of the Act, a seasonal employer may alternatively elect to determine its maximum loan amount as the average total monthly payments for payroll during any consecutive 12-week period between May 1, 2019 and September 15, 2019.

The rule also recognizes that a seasonal business may very well have been dormant on February 15, 2020, providing in question 4:

4. If a seasonal business was dormant or not fully operating as of February 15, 2020, is it still eligible?

Yes, in evaluating eligibility, a seasonal business will be considered to have been in operation as of February 15, 2020, if the business was in operation for any 8-week period between May 1, 2019 and September 15, 2019. This approach aligns with guidance previously provided by the Small Business Administration concerning other seasonal businesses under section 1102. See Treasury, Paycheck Protection Program Loans: Frequently Asked Questions (FAQs), FAQ 9 (posted April 6, 2020).

Question 6⁸ reminds all parties that all other PPP rules apply to these loans.

6. Are any other SBA rules or guidance for the PPP affected by Treasury's interim final rule?

No. This interim final rule only provides certain employers with an alternative means of calculating the maximum loan amount. All other terms and conditions in the PPP remain unchanged. All PPP

⁸ It is likely a drafting accident, but the guidance skips from question 4 to question 6. A corrected version of the IFR may very well renumber questions after 4 to get rid of the skipped number 5.

applicants, borrowers, and lenders should continue to use existing SBA forms and follow all requirements set forth in the CARES Act and SBA regulations, except for the alternative approach described above for calculating the maximum loan amount.

The IFR concludes by noting that all lenders authorized to participate in the PPP program are authorized to issue loans under this guidance in Question 7.

SECTION: PPP LOAN 500-EMPLOYEE COUNT FOR PPP LOAN QUALIFICATION COUNTS ALL EMPLOYEES NOT JUST FULL TIME EQUIVALENTS

Citation: “Paycheck Protection Program Loans Frequently Asked Questions (FAQs),” April 26, 2020 version, 4/26/20

The SBA continues to add to the frequently asked questions for payroll protection program loans, adding a new question 36 regarding the 500-employee threshold for PPP loans under the CARES Act.⁹

The newly added question provides:

Question: To determine borrower eligibility under the 500-employee or other applicable threshold established by the CARES Act, must a borrower count all employees or only full-time equivalent employees?

Answer: For purposes of loan eligibility, the CARES Act defines the term employee to include “individuals employed on a full-time, part-time, or other basis.” A borrower must therefore calculate the total number of employees, including part-time employees, when determining their employee headcount for purposes of the eligibility threshold. For example, if a borrower has 200 full-time employees and 50 part-time employees each working 10 hours per week, the borrower has a total of 250 employees.

By contrast, for purposes of loan forgiveness, the CARES Act uses the standard of “fulltime equivalent employees” to determine the extent to which the loan forgiveness amount will be reduced in the event of workforce reductions.

⁹ “Paycheck Protection Program Loans Frequently Asked Questions (FAQs),” April 26, 2020 version, <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>, retrieved April 26, 2020

SECTION: PPP LOAN

SBA RELEASES DOCUMENT OUTLINING CALCULATION OF MAXIMUM PPP LOAN BY ENTITY TYPE

Citation: “Paycheck Protection Program How to Calculate Maximum Loan Amounts-By Business Type,” April 24, 2020 Verison, 4/24/20

The Small Business Administration (SBA) has released a seven-page PDF giving details on exactly how to compute the maximum Payroll Protection Program (PPP) loan amounts for various entity types.¹⁰ The details are being released days before the SBA again opens up to accepting new PPP loan applications from banks for approval.

The document does come with a footnote that states:

This document does not carry the force and effect of law independent of the statute and regulations on which it is based.

But the document does provide the following assurance:

Borrowers and lenders may rely on the guidance provided in this document as SBA’s interpretation of the CARES Act and of the Paycheck Protection Program Interim Final Rules. The U.S. government will not challenge lender PPP actions that conform to this guidance and to the PPP Interim Final Rules and any subsequent rulemaking in effect at the time.

So the document is best viewed as a “safe harbor” that can be used to escape potential scrutiny, but not as proof that a loan already approved was computed incorrectly. Presumably Treasury has taken this position in recognition of the fact that this guidance came out 21 days after the loan program had started and after the program had already used up the entirety of its first funding level.

¹⁰ “Paycheck Protection Program How to Calculate Maximum Loan Amounts-By Business Type,” Small Business Administration, April 24, 2020, <https://home.treasury.gov/system/files/136/How-to-Calculate-Loan-Amounts.pdf>, (document retrieved April 25, 2020)

Self-Employed Person with No Employees

The PDF starts with the case of a self-employed person with no employees and provides:

1. Question: I am self-employed and have no employees, how do I calculate my maximum PPP loan amount? (Note that PPP loan forgiveness amounts will depend, in part, on the total amount spent during the eight-week period following the first disbursement of the PPP loan.)

Answer: The following methodology should be used to calculate the maximum amount that can be borrowed if you are self-employed and have no employees, and your principal place of residence is in the United States, including if you are an independent contractor or operate a sole proprietorship (but not if you are a partner in a partnership):

- Step 1: Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over \$100,000, reduce it to \$100,000. If this amount is zero or less, you are not eligible for a PPP loan.
- Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).
- Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5.
- Step 4: Add the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

Your 2019 IRS Form 1040 Schedule C must be provided to substantiate the applied-for PPP loan amount. You must also provide a 2019 IRS Form 1099-MISC detailing nonemployee compensation received (box 7), invoice, bank statement, or book of record establishing you were self-employed in 2019 and a 2020 invoice, bank statement, or book of record establishing you were in operation on February 15, 2020.

Self-Employed Person With Employees

The PDF's next question describes the calculation for a self-employed person that has employees.

2. Question: I am self-employed and have employees, how do I calculate my maximum PPP loan amount (up to \$10 million)? (Note that PPP loan forgiveness amounts will depend, in part, on the total amount spent during the eight-week period following the first disbursement of the PPP loan.)

Answer: The following methodology should be used to calculate the maximum amount that can be borrowed if you are self-employed with employees, including if you are an independent contractor or operate a sole proprietorship (but not if you are a partner in a partnership):

- Step 1: Compute your 2019 payroll costs by adding the following:
 - 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value); if this amount is over \$100,000, reduce it to \$100,000; and if this amount is less than zero, set this amount at zero;
 - 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amount paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S;
 - 2019 employer contributions for employee health insurance (portion of IRS Form 1040 Schedule C line 14 attributable to health insurance);
 - 2019 employer contributions to employee retirement plans (IRS Form 1040 Schedule C line 19); and
 - 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).
- Step 2: Calculate the average monthly payroll costs amount (divide the amount from Step 1 by 12).

- Step 3: Multiply the average monthly payroll costs amount from Step 2 by 2.5.
- Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

Your 2019 IRS Form 1040 Schedule C, IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with documentation of any retirement or health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.

Farmer Filing Schedule F

The original interim final rule for self-employed individuals never mentioned filings on Schedule F, despite the fact that this is where self-employed farmers report their income. The PDF corrects that oversight in Question 3.

3. Question: I am a self-employed individual who reports my income on IRS Form 1040 Schedule F. What documentation must I provide in place of Schedule C and how should my maximum loan amount be determined (up to \$10 million)?

Answer: Self-employed farmers (i.e., those who report their net farm profit on IRS Form 1040 Schedule 1 and Schedule F) should use IRS Form 1040 Schedule F in lieu of Schedule C, and Schedule F line 34 net farm profit should be used to determine their loan amount in place of Schedule C line 31 net profit. The calculation is otherwise the same as for Schedule C filers above. The 2019 IRS Form 1040 Schedule 1 and Schedule F must be included with the loan application.

Partnerships

The PDF also provides the first complete details of how a partnership's maximum loan is computed.

Question: How do partnerships apply for PPP loans and how is the maximum PPP loan amount calculated for partnerships (up to \$10 million)? Should partners' self-employment income be included on the business entity level PPP loan application or on separate PPP loan applications for each partner? (Note that PPP loan forgiveness

amounts will depend, in part, on the total amount spent during the eight-week period following the first disbursement of the PPP loan.)

Answer: The following methodology should be used to calculate the maximum amount that can be borrowed for partnerships (partners' self-employment income should be included on the partnership's PPP loan application, individual partners may not apply for separate PPP loans):

- Step 1: Compute 2019 payroll costs by adding the following:
 - 2019 Schedule K-1 (IRS Form 1065) Net earnings from self-employment of individual U.S. based general partners that are subject to self-employment tax, computed from box 14a (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235, up to \$100,000 per partner (if 2019 schedules have not been filed, fill them out);
 - 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, if any, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S.;
 - 2019 employer contributions for employee health insurance, if any (portion of IRS Form 1065 line 19 attributable to health insurance);
 - 2019 employer contributions to employee retirement plans, if any (IRS Form 1065 line 18); and
 - 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms), if any.
- Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).
- Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.

- Step 4: Add any outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

The partnership's 2019 IRS Form 1065 (including K-1s) and other relevant supporting documentation if the partnership has employees, including the 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements) along with records of any retirement or health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. If the partnership has employees, a payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish the partnership was in operation and had employees on that date. If the partnership has no employees, an invoice, bank statement, or book of record establishing the partnership was in operation on February 15, 2020 must instead be provided.

One difference that you will likely note between partners and sole proprietors is the reduction of the partners' income to take into account the "employer" share of self-employment taxes. The PDF has a footnote explaining this treatment as follows:

This treatment follows the computation of self-employment tax from IRS Form 1040 Schedule SE Section A line 4 and removes the "employer" share of self-employment tax, consistent with how payroll costs for employees in the partnership are determined.

No explanation is given as to why this is only a concern for partners, but not sole proprietors.

Corporations

Corporations, both C and S, are covered by the next question.

Question: How is the maximum PPP loan amount calculated for S corporations and C corporations (up to \$10 million)? (Note that PPP loan forgiveness amounts will depend, in part, on the total amount

spent during the eight-week period following the first disbursement of the PPP loan.)

Answer: The following methodology should be used to calculate the maximum amount that can be borrowed for corporations, including S and C corporations:

- Step 1: Compute 2019 payroll costs by adding the following:
 - 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S;
 - 2019 employer health insurance contributions (portion of IRS Form 1120 line 24 or IRS Form 1120-S line 18 attributable to health insurance); o 2019 employer retirement contributions (IRS Form 1120 line 23 or IRS Form 1120-S line 17); and
 - 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).
- Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).
- Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.
- Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

The corporation's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with the filed business tax return (IRS Form 1120 or IRS 1120-S) or other documentation of any retirement and health insurance contributions, must be provided to substantiate the applied-for PPP

loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.

Eligible Nonprofit Organizations that File a Form 990

The maximum loan amount for eligible nonprofit organizations is covered by question 6. Such eligible nonprofit organizations are those described in IRC §501(c)(3), per a footnote to question 6.

Question: How is the maximum PPP loan amount calculated for eligible nonprofit organizations³ (up to \$10 million)? (Note that PPP loan forgiveness amounts will depend, in part, on the total amount spent during the eight-week period following the first disbursement of the PPP loan.)

Answer: The following methodology should be used to calculate the maximum amount that can be borrowed for eligible nonprofit organizations (eligible nonprofit religious institutions, see the next question):

- Step 1: Compute 2019 payroll costs by adding the following:
 - 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any amounts paid to any employee whose principal place of residence is outside the U.S;
 - 2019 employer health insurance contributions (portion of IRS Form 990 Part IX line 9 attributable to health insurance);
 - 2019 employer retirement contributions (IRS Form 990 Part IX line 8); and
 - 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).
- Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).

- Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.
- Step 4: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

The nonprofit organization's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with the filed IRS Form 990 Part IX or other documentation of any retirement and health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date. Eligible nonprofits that do not file an IRS Form 990, typically those with gross receipts less than \$50,000, should see the next question.

Other Organizations (Eligible Religious Institutions, Veterans Organizations and Tribal Businesses)

The final entity calculation question covers eligible religious institutions, veterans organizations and tribal businesses.

Question: How is the maximum PPP loan amount calculated for eligible nonprofit religious institutions, veterans organizations, and tribal businesses (up to \$10 million)? (Note that PPP loan forgiveness amounts will depend, in part, on the total amount spent during the eight-week period following the first disbursement of the PPP loan.)

Answer: The following methodology should be used to calculate the maximum amount that can be borrowed for eligible nonprofit religious institutions, veterans organizations and tribal businesses:

- Step 1: Compute 2019 payroll costs by adding the following:
 - 2019 gross wages and tips paid to your employees whose principal place of residence is in the United States, which can be computed using 2019 IRS Form 941 Taxable Medicare wages & tips (line 5c-column 1) from each quarter plus any pre-tax employee contributions for health insurance or other fringe benefits excluded from Taxable Medicare wages & tips, subtracting any amounts paid to any individual employee in excess of \$100,000 and any

amounts paid to any employee whose principal place of residence is outside the U.S;

- 2019 employer health insurance contributions;
 - 2019 employer retirement contributions and
 - 2019 employer state and local taxes assessed on employee compensation, primarily state unemployment insurance tax (from state quarterly wage reporting forms).
- Step 2: Calculate the average monthly payroll costs (divide the amount from Step 1 by 12).
 - Step 3: Multiply the average monthly payroll costs from Step 2 by 2.5.
 - Step 4: Add any outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020 that you seek to refinance, less the amount of any advance under an EIDL COVID-19 loan (because it does not have to be repaid).

The entity's 2019 IRS Form 941 and state quarterly wage unemployment insurance tax reporting form from each quarter (or equivalent payroll processor records or IRS Wage and Tax Statements), along with documentation of any retirement and health insurance contributions, must be provided to substantiate the applied-for PPP loan amount. A payroll statement or similar documentation from the pay period that covered February 15, 2020 must be provided to establish you were in operation and had employees on that date.

What Category Does an LLC Fall Into?

LLCs may have a “deemed” entity type for tax purposes, but they legally remain a distinct type of entity—that is, they are not actually a “disregarded entity,” partnership or corporation, but a distinct entity type. Nevertheless, the SBA has decided that the tax category will serve to determine the calculation of the maximum amount of a loan for an LLC and the information it must provide:

8. Question: I am an LLC owner. Which set of instructions apply to me?

Answer: LLCs should follow the instructions that apply to their tax filing situation, for example, whether they file as a sole proprietor, a partnership, or a corporation.

Other Documentation Acceptable for a PPP Loan

The PDF concludes with this discussion of documents that are acceptable for substantiating an applied-for PPP loan:

9. Question: What other documentation can be provided for the purpose of substantiating the applied-for PPP loan amount?

Answer: IRS Form W-2s and IRS Form W-3 or payroll processor reports, including quarterly and annual tax reports, can be used in place of IRS Form 941. Additionally, very small businesses that file an annual IRS Form 944 instead of quarterly IRS Form 941 should rely on and provide IRS Form 944. Similarly, records from a retirement administrator can be used to document employer retirement contributions while records from a health insurance company or third-party administrator for a self-insured plan can document employer health insurance contributions.

SECTION: 172

PROCEDURES FOR FAXING FORMS 1045 AND 1139

UPDATED BY THE IRS

Citation: “Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19,” May 1, 2020 version, 5/1/20

The IRS has updated the FAQ on the procedures to fax Forms 1045 and 1139 under temporary procedures.¹¹

The IRS has updated the initial question describing how the process has changed:

1. How does the process change from the normal hard copy mailing requirement?

Previously, these forms could be filed only via hard copy delivered through the USPS or by a private delivery service. There are well-established procedures for processing the hard copy forms in order to provide quick tentative refunds to taxpayers. A temporary procedure to accept these forms via fax permits us to make the relief in the CARES

¹¹ “Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19,” May 1, 2020 version, IRS Website, May 1, 2020, <https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19>, (retrieved May 1, 2020)

Act available to taxpayers before IRS processing centers are able to reopen. The procedures to process claims generally remain the same, except as noted in these FAQs. **(updated April 30, 2020)**

The IRS added guidance to explain what will happen if a taxpayer needs to both file a Form 1040X or 1120X in order to modify or create an NOL after CARES Act changes and also wishes to file a Form 1045 or 1139:

9. What will happen if I filed a Form 1120-X/1040-X that has not been processed and I used those numbers in my Form 1139/1045 filing?

Your Form 1139/1045 must reflect your originally filed or previously processed amended information. If your Form 1139/1045 does not match your IRS account, the Form 1139/1045 cannot be processed because the Form 1120-X/1040-X needs to be processed first. For example, if you gave a Form 1120X/1040X to your examination team, it has not been processed.

Do not attempt to fax an amended return at the time of faxing Form 1139/1045. Amended returns will not be acted upon when faxed with Form 1139/1045 through the temporary procedures. **(updated April 30, 2020)**

The IRS expands on additional issues related to the combination of filing a regular amended return and a Form 1045 or 1139:

15. If I need to amend my return by filing a hard copy Form 1120-X/1040-X through the mail (since fax is not available for these forms), can I still file a timely Form 1139/1045 for 2018 for which the time for filing is extended under Notice 2020-26?

Yes. If you need to amend a previously filed return prior to filing Form 1139 or Form 1045, follow normal filing procedures by timely filing hard copy Forms 1120-X/1139 and hard copy Forms 1040-X/1045 as applicable, in order to adhere to any filing deadlines particular to your situation. **(added April 30, 2020)**

16. If I amend my return by filing Form 1120-X electronically, can I use these temporary procedures to file my Form 1139 using those amended amounts?

Yes. Please notate on the fax cover page that you e-filed Form 1120X and the date that it was accepted. Please note that we will be unable to process your Form 1139 until the amended figures from the Form 1120X have been processed and reflected on your account. The timeframe for processing the Form 1120-X and adjusting the account depends on the particular taxpayer's circumstances. Once our normal

mailing operations resume, if your account has still not been adjusted and we are unable to process the Form 1139, we will mail you notification of this status. **(added April 30, 2020)**

The IRS also updated the warning about not giving a Form 1139 to an examining agent, adding Form 1045 to this guidance as well.

14. I am currently under examination. Can I give the Form 1139/1045 to the examiner?

No, you should not give the Form 1139/1045 to the examiner. You should file it via the normal process or via the temporary procedures outlined within. **(updated April 30, 2020)**

The revised FAQ adds guidance on how quickly taxpayers may expect to receive refunds when they file a Form 1045 or 1139 under the temporary procedures:

17. When can I expect to get a refund from a Form 1139 or 1045 that was faxed under these temporary procedures?

The statutory timeframe for processing these forms is 90 days. The IRS is mindful of taxpayers' need to get these refunds. As a result, the IRS set up these temporary procedures to process these forms while our normal operations are closed due to the pandemic. In order to do this, the IRS had to create new processes and procedures as well as get our skilled employees available and trained to work these cases remotely. We are working to process these refunds as quickly as possible, with limited staffing, managing the volumes and adjusting to processing these refunds in a remote work environment. **(added April 30, 2020)**

Finally, the FAQ notes that no such fax procedures exist for carrying back a loss from a Form 990-T:

18. May I use these temporary procedures to fax Form 1139 or 1045 to submit a tentative refund claim for either an NOL carryback or AMT credit associated with a previously filed Form 990-T?

No. The organization must mail an amended Form 990-T to the address shown in the Instructions for Form 990-T; and may attach a Form 1139 or 1045 to the amended Form 990-T to show the computation of the refund claim. **(added April 30, 2020)**

SECTION: 265

IRS RULES THAT NO DEDUCTION WILL BE ALLOWED FOR EXPENSES PAID THAT RESULT IN PPP LOAN FORGIVENESS

Citation: Notice 2020-32, 4/30/20

The IRS has answered one of the key unanswered tax questions involving the PPP loan program, and the answer is one that taxpayers will not like. In Notice 2020-32¹² the IRS has provided that any otherwise deductible expenses that result in forgiveness of a PPP loan pursuant to Section 1106 of the CARES Act will not be deductible in computing the taxpayer's income.

The Notice begins by pointing out that while Congress told us PPP loan forgiveness is not taxable income, they said nothing about deducting the expenses paid with such loan proceeds:

Neither section 1106(i) of the CARES Act nor any other provision of the CARES Act addresses whether deductions otherwise allowable under the Code for payments of eligible section 1106 expenses by a recipient of a covered loan are allowed if the covered loan is subsequently forgiven under section 1106(b) of the CARES Act as a result of the payment of those expenses. This Notice addresses the effect of covered loan forgiveness on the deductibility of payments of eligible section 1106 expenses.¹³

IRC §265(a)(1), the provision the IRS will look at to see if the deduction is barred, states the following:

(a) General rule No deduction shall be allowed for—

(1) Expenses

Any amount otherwise allowable as a deduction which is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by this subtitle, or any amount otherwise allowable under section 212 (relating to expenses for production of income) which is allocable to interest (whether or not

¹² Notice 2020-32, April 30, 2020, <https://www.irs.gov/pub/irs-drop/n-20-32.pdf> (retrieved April 30, 2020)

¹³ Notice 2020-32, Section II

any amount of such interest is received or accrued) wholly exempt from the taxes imposed by this subtitle.

The Notice explains the meaning of a class of income wholly exempt from tax in general terms:

The term “class of exempt income” means any class of income (whether or not any amount of income of such class is received or accrued) that is either wholly excluded from gross income under any provision of subtitle A of the Code or wholly exempt from the taxes imposed by subtitle A of the Code under the provisions of any other law. See §1.265-1(b)(1). The purpose of section 265 of the Code is to prevent a double tax benefit.

The key part of the Notice comes next, as the IRS analyzes §265(a)(1) and related case law that has interpreted that section in the past:

Section 265(a)(1) of the Code applies to otherwise deductible expenses incurred for the purpose of earning or otherwise producing tax-exempt income. It also applies where tax exempt income is earmarked for a specific purpose and deductions are incurred in carrying out that purpose. In such event, it is proper to conclude that some or all of the deductions are allocable to the tax-exempt income. See *Christian v. United States*, 201 F. Supp. 155 (E.D. La. 1962) (school teacher was denied deductions for expenses incurred for a literary research trip to England because the expenses were allocable to a tax-exempt gift and fellowship grant); *Banks v. Commissioner*, 17 T.C. 1386 (1952) (certain educational expenses paid by the Veterans’ Administration that were exempt from income tax, were not deductible); *Heffelfinger v. Commissioner*, 5 T.C. 985 (1945), (Canadian income taxes on income exempt from U.S. tax are not deductible in computing U.S. taxable income); and Rev. Rul. 74-140, 1974-1 C.B. 50, (the portion of a state income tax paid by a taxpayer that is allocable to the cost-of-living allowance, a class of income wholly exempt under section 912, is nondeductible under section 265).

In *Manocchio v. Commissioner*, 78 T.C. 989 (1982), a taxpayer attended a flight-training course that maintained and improved skills required in the taxpayer’s trade or business. As a veteran, the taxpayer was entitled to an educational assistance allowance from the Veterans’ Administration pursuant to 38 U.S.C. section 1677 (1976) equal to 90 percent of the costs incurred. Because the payments received were exempt from taxation under 38 U.S.C. section 310(a) (1976), the taxpayer did not report them as income. The taxpayer did, however, deduct the entire cost of the flight training course, including the portion that had been reimbursed by the Veterans’ Administration. In

a reviewed opinion, the court held that the reimbursed flight-training expenses were nondeductible under section 265(a)(1) of the Code.¹⁴

After reading that analysis the IRS puts forth, it seems clear that this will not be a good Notice for taxpayers—and the final portion of the Notice explicitly states the bad news, beginning with an all uppercase header that reads “NON-DEDUCTIBILITY OF PAYMENTS TO THE EXTENT INCOME RESULTING FROM LOAN FORGIVENESS IS EXCLUDED UNDER SECTION 1106(i) OF THE CARES ACT.”

That section begins with the agency’s conclusion:

To the extent that section 1106(i) of the CARES Act operates to exclude from gross income the amount of a covered loan forgiven under section 1106(b) of the CARES Act, the application of section 1106(i) results in a “class of exempt income” under §1.265-1(b)(1) of the Regulations. Accordingly, section 265(a)(1) of the Code disallows any otherwise allowable deduction under any provision of the Code, including sections 162 and 163, for the amount of any payment of an eligible section 1106 expense to the extent of the resulting covered loan forgiveness (up to the aggregate amount forgiven) because such payment is allocable to tax-exempt income. Consistent with the purpose of section 265, this treatment prevents a double tax benefit.¹⁵

The agency follows this with a defense of the ruling:

This conclusion is consistent with prior guidance of the IRS that addresses the application of section 265(a) to otherwise deductible payments. In particular, Rev. Rul. 83-3, 1983-1 C.B. 72, provides that, where tax exempt income is earmarked for a specific purpose, and deductions are incurred in carrying out that purpose, section 265(a) applies because such deductions are allocable to the tax-exempt income. In accordance with the analysis set forth in Rev. Rul. 83-3, the direct link between (1) the amount of tax exempt covered loan forgiveness that a recipient receives pursuant to section 1106 of the CARES Act, and (2) an equivalent amount of the otherwise deductible payments made by a recipient for eligible section 1106 expenses, constitutes a sufficient connection for section 265(a) to apply to disallow deductions for such payments under any provision of the

¹⁴ Notice 2020-32, Section III

¹⁵ Notice 2020-32, Section III (It appears the IRS may have intended to label the header as IV, but the initial version posted did not do so. It is possible the agency will post a corrected Notice that will label this as Section IV.)

Code, including sections 162 and 163, to the extent of the income excluded under section 1106(i) of the CARES Act.

The deductibility of payments of eligible section 1106 expenses that result in loan forgiveness under section 1106(b) of the CARES Act is also subject to disallowance under case law and published rulings that deny deductions for otherwise deductible payments for which the taxpayer receives reimbursement. See, e.g., *Burnett v. Commissioner*, 356 F.2d 755, 759-60 (5th Cir. 1966); *Wolfers v. Commissioner*, 69 T.C. 975 (1978); *Charles Baloian Co. v. Commissioner*, 68 T.C. 620 (1977); Rev. Rul. 80-348, 1980-2 C.B. 31; Rev. Rul. 80-173, 1980-2 C.B. 60.¹⁶

Is this Notice the final word on this issue? Very possibly not. First, it is possible a taxpayer may decide to challenge this position in court. Whether they would or would not prevail is open to question, and the other big problem is being able to afford the litigation to begin with.

The more likely road to relief would be if Congress were to act in the next Coronavirus bill (assuming there will be such a bill, as many do assume) to simply enact an amendment to make clear that expenses used to justify PPP loan forgiveness are deductible, regardless of any provision in the IRC contrary to that conclusion. But that assumes Congress can agree that this is a step they want to take.

SECTION: 3121

DRAFT OF REVISED FORM 941 RELEASED BY IRS - INCLUDES FFCRA AND CARES PROVISIONS

Citation: 941 for 2020: Employer's Quarterly Federal Tax Return (Rev 4-2020), Draft, Internal Revenue Service, 4/30/20

The IRS has now published the draft of the Form 941¹⁷ to be used for the rest of 2020. The new form takes into account the changes made by the Families First Coronavirus

¹⁶ Notice 2020-32, Section III

¹⁷ *941 for 2020: Employer's Quarterly Federal Tax Return (Rev 4-2020)*, Draft, Internal Revenue Service, April 29, 2020, <https://www.irs.gov/pub/irs-dft/f941--dft.pdf>, (retrieved May 1, 2020)

Response Act and the Coronavirus Aid, Relief, and Economic Security Act that added various types of payroll tax relief.

Specifically, the form adds lines to account for:

- Credit for Qualified Sick and Family Leave Wages;
- Employee Retention Credit; and
- Deferred Amount of the Employer Share of Social Security Tax.

950220

Name (not your trade name)

Employer identification number (EIN)

Part 1: Answer these questions for this quarter. (continued)

11d	Total nonrefundable credits. Add lines 11a, 11b, and 11c	11d	<input type="text"/>
12	Total taxes after adjustments and nonrefundable credits. Subtract line 11d from line 10	12	<input type="text"/>
13a	Total deposits for this quarter, including overpayment applied from a prior quarter and overpayments applied from Form 941-X, 941-X (PR), 944-X, or 944-X (SP) filed in the current quarter	13a	<input type="text"/>
13b	Deferred amount of the employer share of social security tax	13b	<input type="text"/>
13c	Refundable portion of credit for qualified sick and family leave wages from Worksheet 1	13c	<input type="text"/>
13d	Refundable portion of employee retention credit from Worksheet 1	13d	<input type="text"/>
13e	Total deposits, deferrals, and refundable credits. Add lines 13a, 13b, 13c, and 13d	13e	<input type="text"/>
13f	Total advances received from filing Form(s) 7200 for the quarter	13f	<input type="text"/>
13g	Total deposits, deferrals, and refundable credits less advances. Subtract line 13f from line 13e	13g	<input type="text"/>
14	Balance due. If line 12 is more than line 13g, enter the difference and see instructions	14	<input type="text"/>
15	Overpayment. If line 13g is more than line 12, enter the difference <input type="text"/> Check one: <input type="checkbox"/> Apply to next return. <input type="checkbox"/> Send a refund.		

Part 2: Tell us about your deposit schedule and tax liability for this quarter.

If you're unsure about whether you're a monthly schedule depositor or a semiweekly schedule depositor, see section 11 of Pub. 15.

16 Check one: ☐ Line 12 on this return is less than \$2,500 or line 12 on the return for the prior quarter was less than \$2,500, and you didn't incur a \$100,000 next-day deposit obligation during the current quarter. If line 12 for the prior quarter was less than \$2,500 but line 12 on this return is \$100,000 or more, you must provide a record of your federal tax liability. If you're a monthly schedule depositor, complete the deposit schedule below; if you're a semiweekly schedule depositor, attach Schedule B (Form 941). Go to Part 3.

☐ You were a monthly schedule depositor for the entire quarter. Enter your tax liability for each month and total liability for the quarter, then go to Part 3.

Tax liability: Month 1	<input type="text"/>
Month 2	<input type="text"/>
Month 3	<input type="text"/>
Total liability for quarter	<input type="text"/> Total must equal line 12.

☐ You were a semiweekly schedule depositor for any part of this quarter. Complete Schedule B (Form 941), Report of Tax Liability for Semiweekly Schedule Depositors, and attach it to Form 941. Go to Part 3.

▶ You MUST complete all three pages of Form 941 and SIGN it.

Next ▶

950920

Name (not your trade name) _____ Employer identification number (EIN) _____

Part 3: Tell us about your business. If a question does NOT apply to your business, leave it blank.

17 If your business has closed or you stopped paying wages ☐ Check here, and enter the final date you paid wages ____ / ____ / ____; also attach a statement to your return. See instructions.

18 If you're a seasonal employer and you don't have to file a return for every quarter of the year ☐ Check here.

19 Qualified health plan expenses allocable to qualified sick leave wages 19 _____

20 Qualified health plan expenses allocable to qualified family leave wages 20 _____

21 Qualified wages for the employee retention credit 21 _____

22 Qualified health plan expenses allocable to wages reported on line 21 22 _____

23 Credit from Form 5884-C, line 11, for this quarter 23 _____

24 Qualified wages paid March 13 through March 31, 2020, for the employee retention credit (use this line only for the second quarter filing of Form 941) 24 _____

25 Qualified health plan expenses allocable to wages reported on line 24 (use this line only for the second quarter filing of Form 941) 25 _____

Part 4: May we speak with your third-party designee?

Do you want to allow an employee, a paid tax preparer, or another person to discuss this return with the IRS? See the instructions for details.

☐ Yes. Designee's name and phone number _____

Select a 5-digit personal identification number (PIN) to use when talking to the IRS. ☐ ☐ ☐ ☐ ☐

☐ No.

Part 5: Sign here. You MUST complete all three pages of Form 941 and SIGN it.

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

X Sign your name here _____

Date ____ / ____ / ____

Print your name here _____

Print your title here _____

Best daytime phone _____

Paid Preparer Use Only

Preparer's name _____ PTIN _____

Preparer's signature _____ Date ____ / ____ / ____

Firm's name (or yours if self-employed) _____ EIN _____

Address _____ Phone _____

City _____ State _____ ZIP code _____

Check if you're self-employed ☐

Page **3** Form **941** (Rev. 4-2020)

The IRS also has published 17 pages of instructions related to this form.¹⁸

One interesting note in the instructions is found on page 13, with the instruction for line 13b, Deferred Amount of the Employer Share of Social Security Tax. The instructions imply that the deferral is voluntary and not required.

The IRS has provided a “Tip” that notes:

The deferred amount of the employer share of social security tax is a deferral of deposits and payments, not a deferral of liability. You won’t receive a refund or credit of any amount of the employer share of social security tax already deposited for the quarter.¹⁹

SECTION: 6213

TAXPAYER COVID-19 RELIEF FOR DUE DATE FOR FILINGS WITH THE TAX COURT CLARIFIED BY THE IRS

Citation: “Filing and Payment Deadlines Questions and Answers,” IRS website, 4/27/2020

The IRS has added a new question to the agency’s set of frequently asked questions on the extension of filing and other deadlines to address the issue of the deadline to file with the United States Tax Court.²⁰

In Notice 2020-23 the IRS extended most due dates for items falling due between April 1, 2020 and July 14, 2020 to July 15, 2020. That extension of time included filings with the United States Tax Court. However, the United States Tax Court also has its own relief rule, outlined in the case of *Guralnik v. Commissioner*, 146 TC 230 (2016), that applies when the clerk’s office is closed (in that case due to a snow emergency).

¹⁸ *Instructions for Form 941 (Rev. April 2020)*, Internal Revenue Service, April 30, 2020, <https://www.irs.gov/pub/irs-dft/i941--dft.pdf>, (retrieved May 1, 2020)

¹⁹ *Instructions for Form 941 (Rev. April 2020)*, Internal Revenue Service, April 30, 2020, p. 13

²⁰ “Filing and Payment Deadlines Questions and Answers,” IRS website, April 27, 2020, <https://www.irs.gov/newsroom/filing-and-payment-deadlines-questions-and-answers>, retrieved April 29, 2020

The new question clarifies that the taxpayer will be able to file based on the later of the relief offered under Notice 2020-23 or when the clerk's office reopens following the COVID-19 emergency:

Q. How does this notice operate with the Tax Court case of *Guralnik v. Commissioner*, 146 T.C. 230 (2016), which applied Federal Rule of Civil Procedure 6(a)(3)(A) to provide additional time for the filing of a petition when the clerk's office was closed due to a snow emergency? Does the taxpayer get the benefit of both periods? (added April 27, 2020)

A. Yes, a taxpayer will get the benefit of both periods. For example, if the last day for filing a petition fell on March 19, 2020, the date that the Tax Court closed, the taxpayer will get the benefit of *Guralnik* from March 19, 2020 and the benefit of this notice from April 1, 2020 until July 15, 2020. If the court were to reopen before the expiration of the notice postponement period, the taxpayer will get the benefit of the postponement until July 15, 2020. If the court reopens after the notice postponement period (that is, after July 15, 2020), the due date for the taxpayer's petition is extended to the Tax Court's reopening date under *Guralnik* and the relief under Notice 2020-23 does not apply.

SECTION: 9801

IRS AND DEPARTMENT OF LABOR ISSUE RELIEF RELATED TO EMPLOYEE BENEFIT PLANS FOR TIMEFRAMES DUE TO COVID-19 EMERGENCY

Citation: “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” Internal Revenue Service and Department of Labor, 4/30/20

The IRS and U.S. Department of Labor have issued a notice on relief for certain timeframes for employee benefit plans, participants and beneficiaries related to the COVID-19 emergency.²¹

²¹ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” Internal Revenue Service and Department of Labor, April 30, 2020, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2020->

The agencies describe the need for such relief as follows:

As a result of the National Emergency, participants and beneficiaries covered by group health plans, disability or other employee welfare benefit plans, and employee pension benefit plans may encounter problems in exercising their health coverage portability and continuation coverage rights, or in filing or perfecting their benefit claims. Recognizing the numerous challenges participants and beneficiaries already face as a result of the National Emergency, it is important that the Employee Benefits Security Administration, Department of Labor, Internal Revenue Service, and Department of the Treasury (the Agencies) take steps to minimize the possibility of individuals losing benefits because of a failure to comply with certain preestablished timeframes. Similarly, the Agencies recognize that affected group health plans may have difficulty in complying with certain notice obligations.²²

Special Enrollment Periods

The guidance describes special enrollment periods affected by the guidance as follows:

In general, HIPAA requires a special enrollment period in certain circumstances, including when an employee or dependent loses eligibility for any group health plan or other health insurance coverage in which the employee or the employee's dependents were previously enrolled (including coverage under Medicaid and the Children's Health Insurance Program), and when a person becomes a dependent of an eligible employee by birth, marriage, adoption, or placement for adoption. ERISA section 701(f), Code section 9801(f), 29 CFR 2590.701-6, and 26 CFR 54.9801-6. Generally, group health plans must allow such individuals to enroll in the group health plan if they are otherwise eligible and if enrollment is requested within 30 days of the occurrence of the event (or within 60 days, in the case of the special enrollment rights added by the Children's Health Insurance Program Reauthorization Act of 2009). ERISA section 701(f), Code section 9801(f), 29 CFR 2590.701-6, and 26 CFR 54.9801-6.²³

[9399.pdf?utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov&utm_medium=email](https://www.federalregister.gov/documents/2020/04/30/2020-08-9399.pdf?utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov&utm_medium=email) (retrieved April 30, 2020)

²² "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 5

²³ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 6

COBRA Timeframes

COBRA timeframes impacted by this guidance are described as follows:

The COBRA continuation coverage provisions generally provide a qualified beneficiary a period of at least 60 days to elect COBRA continuation coverage under a group health plan. ERISA section 605 and Code section 4980B(f)(5). Plans are required to allow payment of premiums in monthly installments, and plans cannot require payment of premiums before 45 days after the day of the initial COBRA election. ERISA section 602(3) and Code section 4980B(f)(2)(C). COBRA continuation coverage may be terminated for failure to pay premiums timely. ERISA section 602(2)(C) and Code section 4980B(f)(2)(B)(iii). Under the COBRA rules, a premium is considered paid timely if it is made not later than 30 days after the first day of the period for which payment is being made. ERISA section 602(2)(C), Code section 4980B(f)(2)(B)(iii), and 26 CFR 54.4980B-8 Q&A-5(a). Notice requirements prescribe time periods for employers to notify the plan of certain qualifying events and for individuals to notify the plan of certain qualifying events or a determination of disability. Notice requirements also prescribe a time period for plans to notify qualified beneficiaries of their rights to elect COBRA continuation coverage. ERISA section 606, Code section 4980B(f)(6), and 29 CFR 2590.606-3.²⁴

Claims Procedure Timeframes

Claims procedure timeframes impacted by the guidance are described as follows:

Section 503 of ERISA and 29 CFR 2560.503-1, as well as section 2719 of the PHS Act, incorporated into ERISA by ERISA section 715 and 29 CFR 2590.715-2719, and into the Code by Code section 9815 and 26 CFR 54.9815-2719, require ERISA-covered employee benefit plans and non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage to establish and maintain a procedure governing the filing and initial disposition of benefit claims, and to provide claimants with a reasonable opportunity to appeal an adverse benefit determination to an appropriate named fiduciary. Plans may not have provisions that unduly inhibit or hamper the initiation or processing of claims for benefits. Further, group health plans and disability plans must provide claimants at least 180 days following

²⁴ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” pp. 6-7

receipt of an adverse benefit determination to appeal (60 days in the case of pension plans and other welfare benefit plans). 29 CFR 2560.503–1(h)(2)(i) and (h)(3)(i), 29 CFR 2590.715–2719(b)(2)(ii)(C), and 26 CFR 54.9815–2719(b)(2)(ii)(C).²⁵

External Process Review Timeframes

The external process review timeframes impacted by this guidance are described as follows:

PHS Act section 2719, incorporated into ERISA by ERISA section 715 and into the Code by Code section 9815, sets out standards for external review that apply to non-grandfathered group health plans and health insurance issuers offering non-grandfathered group or individual health insurance coverage and provides for either a state external review process or a Federal external review process. Standards for external review processes and timeframes for submitting claims to the independent reviewer for group health plans or health insurance issuers may vary depending on whether a plan uses a State or Federal external review process. For plans or issuers that use the Federal external review process, the process must allow at least four months after the receipt of a notice of an adverse benefit determination or final internal adverse benefit determination for a request for an external review to be filed. 29 CFR 2590.715–2719(d)(2)(i) and 26 CFR 54.9815–2719(d)(2)(i). The Federal external review process also provides for a preliminary review of a request for external review. The regulation provides that if such request is not complete, the Federal external review process must provide for a notification that describes the information or materials needed to make the request complete, and the plan or issuer must allow a claimant to perfect the request for external review within the four-month filing period or within the 48-hour period following the receipt of the notification, whichever is later. 29 CFR 2590.715–2719(d)(2)(ii)(B) and 26 CFR 54.9815–2719(d)(2)(ii)(B).²⁶

²⁵ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” p. 7

²⁶ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” pp. 10-11

Relief Described for Plan Participants, Beneficiaries, Qualified Beneficiaries and Claimants

The IRS and DOL provide specific relief in this section of the document. The agencies also offer a number of examples that will be referenced in this section. For purposes of those examples, the guidance contains the following overall description:

The following examples illustrate the time frame for extensions required by this document. An assumed end date for the National Emergency was needed to make the examples clear and understandable. Accordingly, the Examples assume that the National Emergency ends on April 30, 2020, with the Outbreak Period ending on June 29, 2020 (the 60th day after the end of the National Emergency). To the extent there are different Outbreak Period end dates for different parts of the country, the Agencies will issue additional guidance regarding the application of the relief in this document.²⁷

The IRS and DOL provide the following details of the relief offered:

Subject to the statutory duration limitation in ERISA section 518 and Code section 7508A, all group health plans, disability and other employee welfare benefit plans, and employee pension benefit plans subject to ERISA or the Code must disregard the period from March 1, 2020 until sixty (60) days after the announced end of the National Emergency or such other date announced by the Agencies in a future notification (the “Outbreak Period”) for all plan participants, beneficiaries, qualified beneficiaries, or claimants wherever located in determining the following periods and dates—²⁸

The notice provides the following special footnote disclosure related to the “Outbreak Period” that applies to all relief:

To the extent there are different Outbreak Period end dates for different parts of the country, the Agencies will issue additional guidance regarding the application of the relief in this document.²⁹

²⁷ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” pp. 8-9

²⁸ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” pp. 8-9

²⁹ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” p. 9

The guidance continues as the list of relief items begins:

(1) The 30-day period (or 60-day period, if applicable) to request special enrollment under ERISA section 701(f) and Code section 9801(f),

The guidance provides the following example of the use of the special enrollment period relief:

Example 2 (Special enrollment period). (i) Facts. Individual B is eligible for, but previously declined participation in, her employer-sponsored group health plan. On March 31, 2020, Individual B gave birth and would like to enroll herself and the child into her employer's plan; however, open enrollment does not begin until November 15. When may Individual B exercise her special enrollment rights?

(ii) Conclusion. In Example 2, the Outbreak Period is disregarded for purposes of determining Individual B's special enrollment period. Individual B and her child qualify for special enrollment into her employer's plan as early as the date of the child's birth. Individual B may exercise her special enrollment rights for herself and her child into her employer's plan until 30 days after June 29, 2020, which is July 29, 2020, provided that she pays the premiums for any period of coverage.

The guidance next goes on to describe the relief for the period for an employee to elect COBRA continuing coverage following a qualifying event:

(2) The 60-day election period for COBRA continuation coverage under ERISA section 605 and Code section 4980B(f)(5),³⁰

This COBRA relief item has the following footnote attached.

The term "election period" is defined as "the period which—(A) begins not later than the date on which coverage terminates under the plan by reason of a qualifying event, (B) is of at least 60 days' duration, and (C) ends not earlier than 60 days after the later of—(i) the date described in subparagraph (A), or (ii) in the case of any qualified beneficiary who receives notice under section 1166(a)(4) of this title, the date of such notice." 29 USC 1165(a)(1), ERISA section 605(a)(1). See also Code section 4980B(f)(5).³¹

The guidance also provides an example of the relief related to electing COBRA:

Example 1 (Electing COBRA). (i) Facts. Individual A works for Employer X and participates in X's group health plan. Due to the National Emergency, Individual A experiences a qualifying

³⁰ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 9

³¹ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 9

event for COBRA purposes as a result of a reduction of hours below the hours necessary to meet the group health plan's eligibility requirements and has no other coverage. Individual A is provided a COBRA election notice on April 1, 2020. What is the deadline for A to elect COBRA?

(ii) Conclusion. In Example 1, Individual A is eligible to elect COBRA coverage under Employer X's plan. The Outbreak Period is disregarded for purposes of determining Individual A's COBRA election period. The last day of Individual A's COBRA election period is 60 days after June 29, 2020, which is August 28, 2020.³²

The guidance has a second item of COBRA relief for premium payments, providing:

(3) The date for making COBRA premium payments pursuant to ERISA section 602(2)(C) and (3) and Code section 4980B(f)(2)(B)(iii) and (C)³³

The following footnote is attached to the COBRA premium payment provision:

Under this provision, the group health plan must treat the COBRA premium payments as timely paid if paid in accordance with the periods and dates set forth in this document. Regarding coverage during the election period and before an election is made, see 26 CFR 54.4980B-6, Q&A 3; during the period between the election and payment of the premium, see 26 CFR 54.4980B-8, Q&A 5(c).³⁴

The guidance provides two examples of applying this provision:

Example 3 (COBRA premium payments). (i) Facts. On March 1, 2020, Individual C was receiving COBRA continuation coverage under a group health plan. More than 45 days had passed since Individual C had elected COBRA. Monthly premium payments are due by the first of the month. The plan does not permit qualified beneficiaries longer than the statutory 30-day grace period for making premium payments. Individual C made a timely February payment, but did not make the March payment or any subsequent payments during the Outbreak Period. As of July 1, Individual C has made no premium payments for March, April, May, or June. Does Individual C lose COBRA coverage, and if so for which month(s)?

(ii) Conclusion. In this Example 3, the Outbreak Period is disregarded for purposes of determining whether monthly COBRA premium installment payments are timely. Premium payments made by 30 days after June 29, 2020, which is July 29, 2020, for March, April, May, and June 2020, are timely, and Individual C is entitled to COBRA continuation coverage for

³² "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 10

³³ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 9

³⁴ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 9

these months if she timely makes payment. Under the terms of the COBRA statute, premium payments are timely if made within 30 days from the date they are first due. In calculating the 30-day period, however, the Outbreak Period is disregarded, and payments for March, April, May, and June are all deemed to be timely if they are made within 30 days after the end of the Outbreak Period. Accordingly, premium payments for four months (i.e., March, April, May, and June) are all due by July 29, 2020. Individual C is eligible to receive coverage under the terms of the plan during this interim period even though some or all of Individual C's premium payments may not be received until July 29, 2020. Since the due dates for Individual C's premiums would be postponed and Individual C's payment for premiums would be retroactive during the initial COBRA election period, Individual C's insurer or plan may not deny coverage, and may make retroactive payments for benefits and services received by the participant during this time.³⁵

Example 4 (COBRA premium payments). (i) Facts. Same facts as Example 3. By July 29, 2020, Individual C made a payment equal to two months' premiums. For how long does Individual C have COBRA continuation coverage?

(ii) Conclusion. Individual C is entitled to COBRA continuation coverage for March and April of 2020, the two months for which timely premium payments were made, and Individual C is not entitled to COBRA continuation coverage for any month after April 2020. Benefits and services provided by the group health plan (e.g., doctors' visits or filled prescriptions) that occurred on or before April 30, 2020 would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services that occurred after April 2020.³⁶

The relief provisions continue with the following items:

(4) The date for individuals to notify the plan of a qualifying event or determination of disability under ERISA section 606(a)(3) and Code section 4980B(f)(6)(C),

(5) The date within which individuals may file a benefit claim under the plan's claims procedure pursuant to 29 CFR 2560.503-1,

An example of the pause in the claims period is outlined in the following example found in the document:

Example 5 (Claims for medical treatment under a group health plan). (i) Facts. Individual D is a participant in a group health plan. On March 1, 2020, Individual D received medical treatment for a condition covered under the plan, but a claim relating to the medical treatment was not submitted until April 1, 2021. Under the plan, claims must be submitted

³⁵ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 12-13

³⁶ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 13

within 365 days of the participant's receipt of the medical treatment. Was Individual D's claim timely?

(ii) Conclusion. Yes. For purposes of determining the 365-day period applicable to Individual D's claim, the Outbreak Period is disregarded. Therefore, Individual D's last day to submit a claim is 365 days after June 29, 2020, which is June 29, 2021, so Individual D's claim was timely.³⁷

The document next discusses an appeal of an adverse determination:

(6) The date within which claimants may file an appeal of an adverse benefit determination under the plan's claims procedure pursuant to 29 CFR 2560.503-1(h),

Examples are provided of the application of this relief in the document:

Example 6 (Internal appeal-disability plan). (i) Facts. Individual E received a notification of an adverse benefit determination from Individual E's disability plan on January 28, 2020. The notification advised Individual E that there are 180 days within which to file an appeal. What is Individual E's appeal deadline?

(ii) Conclusion. When determining the 180-day period within which Individual E's appeal must be filed, the Outbreak Period is disregarded. Therefore, Individual E's last day to submit an appeal is 148 days (180 - 32 days following January 28 to March 1) after June 29, 2020, which is November 24, 2020.³⁸

Example 7 (Internal appeal -employee pension benefit plan). (i) Facts. Individual F received a notice of adverse benefit determination from Individual F's 401(k) plan on April 15, 2020. The notification advised Individual F that there are 60 days within which to file an appeal. What is Individual F's appeal deadline?

(ii) Conclusion. When determining the 60-day period within which Individual F's appeal must be filed, the Outbreak Period is disregarded. Therefore, Individual F's last day to submit an appeal is 60 days after June 29, 2020, which is August 28, 2020.³⁹

The general date relief concludes with.

(7) The date within which claimants may file a request for an external review after receipt of an adverse benefit determination or final internal

³⁷ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," pp. 13-14

³⁸ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 14

³⁹ "Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak," p. 14

adverse benefit determination pursuant to 29 CFR 2590.715–2719(d)(2)(i) and 26 CFR 54.9815–2719(d)(2)(i), and

(8) The date within which a claimant may file information to perfect a request for external review upon a finding that the request was not complete pursuant to 29 CFR 2590.715–2719(d)(2)(ii) and 26 CFR 54.9815–2719(d)(2)(ii).⁴⁰

COBRA Election Notice for Group Health Plans

The guidance provides the following relief related to the COBRA notice rules:

With respect to group health plans, and their sponsors and administrators, the Outbreak Period shall be disregarded when determining the date for providing a COBRA election notice under ERISA section 606(c) and Code section 4980B(f)(6)(D).⁴¹

Later Extensions

The guidance notes that the agencies will continue to monitor the situation and may provide additional relief.⁴²

⁴⁰ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” pp. 9-10

⁴¹ “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” p. 10

⁴² “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak,” p. 10