Current Federal Tax Developments

Week of June 22, 2020

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ACCOUNTING
CONTINUING EDUCATION

KAPLAN

CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF JUNE 22, 2020

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Contents

SECTION: PPP LOAN
SBA ISSUES NEW SHORT FORM FOR FORGIVENESS AND REVISES LONG FORM TO TAKE INTO ACCOUNT PPPFA CHANGES

Citation: SBA Forms 3508 and 3508EZ, Rev. 6/20, 6/16/20

The SBA has both revised the PPP loan forgiveness application form to take into account the changes made in the Paycheck Protection Program Flexibility Act (PPPFA) and added a new "Loan Forgiveness Application Form EZ" for qualified borrowers.[1]

The revised forms take into account changes made in the interim final rules released on June 16, 2020.[2] The forms also clarify that a new limit on income replacement for sole proprietors discussed in the IFR will apply to partners and owner-employees.

Loan Forgiveness Application Form EZ

The PPP Loan Forgiveness Application Form 3508EZ[3] is available to borrowers who meet one of three criteria listed in separate form instructions.[4]

- The Borrower is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the Borrower Application Form (SBA Form 2483).

- The Borrower did not reduce annual salary or hourly wages of any employee by more than 25 percent during the Covered Period or the Alternative Payroll Covered Period (as defined below) compared to the period between January 1, 2020 and March 31, 2020 (for purposes of this statement, "employees" means only those employees that did not receive, during any single period during 2019, wages

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[1] "The CARES Act Provides Assistance to Small Business," U.S. Department of Treasury website, June 17, 2020, https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses (retrieved June 17, 2020)

[2] RIN 3245-AH51, "Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to the Third and Sixth Interim Final Rules," Small Business Administration, June 16, 2020, scheduled for publication on June 19, 2020, https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-13293.pdf

[3] "Paycheck Protection Program PPP Loan Forgiveness Application Form 3508EZ," June 16, 2020, https://home.treasury.gov/system/files/136/PPP-Forgiveness-Application-3508EZ.pdf (retrieved June 17, 2020)

[4] "PPP Loan Forgiveness Application Form 3508EZ Instructions for Borrowers," June 16, 2020 https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-EZ-Instructions.pdf (retrieved June 17, 2020)

or salary at an annualized rate of pay in an amount more than $100,000); **AND** The Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period. (Ignore reductions that arose from an inability to rehire individuals who were employees on February 15, 2020 if the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020. Also ignore reductions in an employee's hours that the Borrower offered to restore and the employee refused. See 85 FR 33004, 33007 (June 1, 2020) for more details.

- The Borrower did not reduce annual salary or hourly wages of any employee by more than 25 percent during the Covered Period or the Alternative Payroll Covered Period (as defined below) compared to the period between January 1, 2020 and March 31, 2020 (for purposes of this statement, "employees" means only those employees that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than $100,000); **AND** The Borrower was unable to operate during the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.[5]

If a borrower does not fall into one of these categories, the borrower must use the longer SBA Form 3508.[6]

In the IFR also issued on June 16, 2020, the SBA provided that owner compensation replacement would be limited to 2.5 months worth (2.5/12) of 2019 net profit, capped at $20,833, for borrowers that used the 24 week covered period.[7] In the original SBA Form 3508 application for forgiveness, proprietors, partners and "owner-employees" were covered by a similar limit that was set at 8/52 of 2019 self-employment income for partners and compensation for owner-employees.

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[5] "PPP Loan Forgiveness Application Form 3508EZ Instructions for Borrowers," June 16, 2020, p. 1

[6] "PPP Loan Forgiveness Application Form 3508EZ Instructions for Borrowers," June 16, 2020, p. 1

[7] RIN 3245-AH51, Section 1.b, Revised Part III.1.f of Third Interim Final Rule (85 FR 21747, 21750)

The SBA Form 3508EZ (as well as the revised Form 3508) confirm that the new 2.5-month limit will also apply to partners and owner-employees. The first certification on page 2 of Form 3508EZ provides:

> The dollar amount for which forgiveness is requested:
>
> …
>
> - if a 24-week Covered Period applies, does not exceed 2.5 months' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at $20,833 per individual…[8]

The instructions for the form confirm this, providing:

> Owner Compensation: Enter any amounts paid to owners (owner-employees, a self-employed individual, or general partners). For a 24-week Covered Period, this amount is capped at $20,833 (the 2.5-month equivalent of $100,000 per year) for each individual or the 2.5-month equivalent of their applicable compensation in 2019, whichever is lower. For an 8-week Covered Period, this amount is capped at 8/52 of 2019 compensation (up to $15,385).[9]

Some advisors had continued to argue that it wasn't clear previously that "owner-employees" covered corporate shareholders, but the employee benefits instructions for payroll costs for both forms indirectly make it clear that at least S corporation shareholders are covered by this limit. The instructions for amounts to include as employee benefit costs now provide:

> Employer contributions for employee health insurance, including employer contributions to a self-insured, employer-sponsored group health plan, but excluding any pre-tax or after-tax contributions by employees. Do not add employer health insurance contributions made on behalf of a self-employed individual, general partners, or owner-employees of an S-corporation, because such payments are already included in their compensation.[10]

The above reference should make it clear the SBA does consider S-corporation shareholders to be owner-employees for purposes of the various limitations.

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[8] "Paycheck Protection Program PPP Loan Forgiveness Application Form 3508EZ," June 16, 2020, p. 2

[9] "PPP Loan Forgiveness Application Form 3508EZ Instructions for Borrowers," June 16, 2020, p. 2

[10] "PPP Loan Forgiveness Application Form 3508EZ Instructions for Borrowers," June 16, 2020, p. 2

The Form 3508EZ is reproduced below:

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

OMB Control No. 3245-0407
Expiration date: 10/31/2020

Business Legal Name ("Borrower")	DBA or Tradename, if applicable	
Business Address	Business TIN (EIN, SSN)	Business Phone
		( ) -
	Primary Contact	E-mail Address

SBA PPP Loan Number: _____ **Lender PPP Loan Number:** _____

PPP Loan Amount: _____ **PPP Loan Disbursement Date:** _____

Employees at Time of Loan Application: _____ **Employees at Time of Forgiveness Application:** _____

EIDL Advance Amount: _____ **EIDL Application Number:** _____

Payroll Schedule: The frequency with which payroll is paid to employees is:

☐ **Weekly** ☐ **Biweekly** (every other week) ☐ **Twice a month** ☐ **Monthly** ☐ **Other** _____

Covered Period: _____ to _____

Alternative Payroll Covered Period, if applicable: _____ to _____

If Borrower (together with affiliates, if applicable) received PPP loans in excess of $2 million, check here: ☐

Forgiveness Amount Calculation:

Payroll and Nonpayroll Costs

Line 1. Payroll Costs: _____

Line 2. Business Mortgage Interest Payments: _____

Line 3. Business Rent or Lease Payments: _____

Line 4. Business Utility Payments: _____

Potential Forgiveness Amounts

Line 5. Add the amounts on lines 1, 2, 3, and 4: _____

Line 6. PPP Loan Amount: _____

Line 7. Payroll Cost 60% Requirement (divide Line 1 by 0.60): _____

Forgiveness Amount

Line 8. Forgiveness Amount (enter the smallest of Lines 5, 6, and 7): _____

SBA Form 3508EZ (06/20)
Page 1

Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:
The Authorized Representative of the Borrower certifies to all of the below by **initialing** next to each one.

_____ The dollar amount for which forgiveness is requested:
- was used to pay costs that are eligible for forgiveness (payroll costs to retain employees; business mortgage interest payments; business rent or lease payments; or business utility payments);
- includes payroll costs equal to at least 60% of the forgiveness amount;
- if a 24-week Covered Period applies, does not exceed 2.5 months' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at $20,833 per individual; and
- if the Borrower has elected an 8-week Covered Period, does not exceed 8 weeks' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at $15,385 per individual.

_____ I understand that if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.

_____ The Borrower did not reduce salaries or hourly wages by more than 25 percent for any employee during the Covered Period or Alternative Payroll Covered Period compared to the period between January 1, 2020 and March 31, 2020. For purposes of this certification, the term "employee" includes only those employees that did not receive, during any single period during 2019, wages or salary at an annualized rate of pay in an amount more than $100,000.

_____ The Borrower has accurately verified the payments for the eligible payroll and nonpayroll costs for which the Borrower is requesting forgiveness.

_____ I have submitted to the Lender the required documentation verifying payroll costs, the existence of obligations and service (as applicable) prior to February 15, 2020, and eligible business mortgage interest payments, business rent or lease payments, and business utility payments.

_____ The information provided in this application and the information provided in all supporting documents and forms is true and correct in all material respects. I understand that knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000.

_____ The tax documents I have submitted to the Lender are consistent with those the Borrower has submitted/will submit to the IRS and/or state tax or workforce agency. I also understand, acknowledge, and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of ensuring compliance with PPP requirements and all SBA reviews.

_____ I understand, acknowledge, and agree that SBA may request additional information for the purposes of evaluating the Borrower's eligibility for the PPP loan and for loan forgiveness, and that the Borrower's failure to provide information requested by SBA may result in a determination that the Borrower was ineligible for the PPP loan or a denial of the Borrower's loan forgiveness application.

In addition, the Authorized Representative of the Borrower must certify by **initialing at least ONE** of the following two items:

_____ The Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period (other than any reductions that arose from an inability to rehire individuals who were employees on February 15, 2020, if the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020, and reductions in an employee's hours that a borrower offered to restore and were refused).

_____ The Borrower was unable to operate between February 15, 2020, and the end of the Covered Period at the same level of business activity as before February 15, 2020 due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020, by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

The Borrower's eligibility for loan forgiveness will be evaluated in accordance with the PPP regulations and guidance issued by SBA through the date of this application. SBA may direct a lender to disapprove the Borrower's loan forgiveness application if SBA determines that the Borrower was ineligible for the PPP loan.

_____ _____
Signature of Authorized Representative of Borrower | Date

_____ _____
Print Name | Title

SBA Form 3508EZ (06/20)
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Paycheck Protection Program
PPP Loan Forgiveness Application Form 3508EZ

PPP Borrower Demographic Information Form (Optional)

Instructions

1. **Purpose**. Veteran/gender/race/ethnicity data is collected for program reporting purposes only.
2. **Description**. This form requests information about each of the Borrower's Principals. Add additional sheets if necessary.
3. **Definition of Principal**. The term "Principal" means:
   - For a self-employed individual, independent contractor, or a sole proprietor, the self-employed individual, independent contractor, or sole proprietor.
   - For a partnership, all general partners and all limited partners owning 20% or more of the equity of the Borrower, or any partner that is involved in the management of the Borrower's business.
   - For a corporation, all owners of 20% or more of the Borrower, and each officer and director.
   - For a limited liability company, all members owning 20% or more of the Borrower, and each officer and director.
   - Any individual hired by the Borrower to manage the day-to-day operations of the Borrower ("key employee").
   - Any trustor (if the Borrower is owned by a trust).
   - For a nonprofit organization, the officers and directors of the Borrower.
4. **Principal Name**. Insert the full name of the Principal.
5. **Position**. Identify the Principal's position; for example, self-employed individual; independent contractor; sole proprietor; general partner; owner; officer; director; member; or key employee.

Principal Name		Position
Veteran	1=Non-Veteran; 2=Veteran; 3=Service-Disabled Veteran; 4=Spouse of Veteran; X=Not Disclosed	
Gender	M=Male; F=Female; X=Not Disclosed	
Race (more than 1 may be selected)	1=American Indian or Alaska Native; 2=Asian; 3=Black or African-American; 4=Native Hawaiian or Pacific Islander; 5=White; X=Not Disclosed	
Ethnicity	H=Hispanic or Latino; N=Not Hispanic or Latino; X=Not Disclosed	

Disclosure is voluntary and will have no bearing on the loan forgiveness decision

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 20 minutes. Comments about this time or the information requested should be sent to Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

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Long Form – Revised June 16, 2020

The revised form[11] and instructions[12] contains changes to take into account the 24-week period, as well as other changes found in the PPPFA. The long form contains the same provisions regarding owner-employees, partners and the self-employed as on the short form, limiting forgivable compensation for these owners for a 24-week covered period to 2.5 months of 2019 earnings,[13] with a cap at $20,833, as well as the same language applying these limits in the instructions.[14]

SECTION: PPP LOAN
NEW 24 WEEK LIMITS ANNOUNCED FOR EMPLOYEE PAYROLL COSTS AND OWNER INCOME REPLACEMENT FOR PPP LOAN FORGIVENESS

Citation: RIN 3245-AH51, "Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to

the Third and Sixth Interim Final Rules," Small Business Administration, 6/16/2020

A new bit of guidance has emerged from the Small Business Administration, with another interim final rule (IFR) appearing on the *Federal Register* website in pre-publication form.[15] This IFR contains a number of changes to the third and sixth interim final rule on PPP loans, mainly conforming language to agree with changes made in the Paycheck Protection Program Flexibility Act (PPPFA).

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[11] "Loan Forgiveness Application Revised June 16, 2020," June 16, 2020, https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf (retrieved June 17, 2020)

[12] "Loan Forgiveness Application Instructions for Borrowers," June 16, 2020, https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Instructions_1.pdf (retrieved June 17, 2020)

[13] "Loan Forgiveness Application Revised June 16, 2020," June 16, 2020, p. 2

[14] "Loan Forgiveness Application Instructions for Borrowers," June 16, 2020, p. 3

[15] RIN 3245-AH51, "Business Loan Program Temporary Changes; Paycheck Protection Program – Revisions to the Third and Sixth Interim Final Rules," Small Business Administration, June 16, 2020, scheduled for publication on June 19, 2020, https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-13293.pdf (retrieved June 16, 2020)

However, the IFR does contain some guidance related to the maximums that can be used for payroll costs for a single employee and income replacement for an owner-employee in obtaining forgiveness for borrowers that opt to take advantage of the 24 week covered period added by the PPPFA.

The option to select an 8- or 24-week period for borrowers who had loans prior to June 5, 2020 is described as follows in the IFR:

> "Covered period," as that term is used in section 1106 of the CARES Act, was originally defined as the eight-week period beginning on the date of the origination of a covered loan. However, section 3(b) of the Flexibility Act extended the length of the covered period as defined in section 1106 of the CARES Act from eight to 24 weeks, while allowing borrowers that received PPP loans before June 5, 2020 to elect to use the original eight-week covered period.[16]

24-Week Per Employee Cash Compensation Cap

The limit on cash compensation on a per-employee basis after the modification to a 24-week period is described in the IFR as follows:

> The actual amount of loan forgiveness will depend, in part, on the total amount spent over the 24-week period beginning on the date your PPP loan is disbursed3 ("covered period") on:
>
> > i. payroll costs including salary, wages, and tips, up to $100,000 of annualized pay per employee (<u>for 24 weeks, a maximum of $46,154 per individual</u>, or for eight weeks, a maximum of $15,385 per individual), as well as covered benefits for employees (but not owners), including health care expenses, retirement contributions, and state taxes imposed on employee payroll paid by the employer (such as unemployment insurance premiums);[17]

The resulting cap of $46,154 on an employee's cash compensation is the expected amount, taking into account the $100,000 limit as applied to 24 weeks ($100,000 times 24/52, or $46,154) as opposed to 8 weeks ($100,000 times 8/52, or $15,385).

The IFR notes the following in a footnote:

> Given the 2.5 multiplier in the calculation of maximum PPP loan amount in SBA Form 2483, this per-individual maximum would only be reached if the borrower had reduced its FTEs but was eligible for

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[16] RIN 3245-AH51, Section 1.b

[17] RIN 3245-AH51, Section 1.b, Revised Part III.1.f of Third Interim Final Rule (85 FR 21747, 21750)

> an exemption (safe harbor) from the resulting reduction in forgiveness.[18]

24 Week Owner Compensation Replacement

However, this tripling of the limit does not carry over to owner compensation replacement. While the number rises, it does not rise to 24/52 of 2019's net profit, which would be a tripling of the 8/52 for the 8-week test. Rather, the owner-compensation is limited as follows:

> The actual amount of loan forgiveness will depend, in part, on the total amount spent over the 24-week period beginning on the date your PPP loan is disbursed3 ("covered period") on:
>
> …
>
> > ii. owner compensation replacement, calculated based on 2019 net profit as described in Paragraph 1.b. above, with forgiveness of such amounts limited to eight weeks' worth (8/52) of 2019 net profit (up to $15,385) for an eight-week covered period or 2.5 months' worth (2.5/12) of 2019 net profit (up to $20,833) for a 24-week covered period, but excluding any qualified sick leave equivalent amount for which a credit is claimed under section 7002 of the Families First Coronavirus Response Act (FFCRA) (Public Law 116-127) or qualified family leave equivalent amount for which a credit is claimed under section 7004 of FFCRA;[19]

The IFR provides the following justification for limiting the owner's compensation to 2.5 months of 2019 net profit:

> Specifically, Congress determined that the maximum loan amount is generally based on 2.5 months of the borrower's average total monthly payroll costs during the one-year period preceding the loan. 15 U.S.C. 636(a)(36)(E). For example, a borrower with one other employee would receive a maximum loan amount equal to five months of payroll (2.5 months of payroll for the owner plus 2.5 months of payroll for the employee). If the owner laid off the employee and availed itself of the safe harbor in the Flexibility Act from reductions in loan forgiveness for a borrower that is unable to return to the same level of business activity the business was operating at before February 15, 2020, the owner could treat the entire amount of the PPP loan as payroll, with the entire loan being forgiven. This would not only result in a windfall for the owner, by providing the owner with five months

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[18] RIN 3245-AH51, Section 1.b, Revised Part III.1.f of Third Interim Final Rule (85 FR 21747, 21750), Footnote 4

[19] RIN 3245-AH51, Section 1.b, Revised Part III.1.f of Third Interim Final Rule (85 FR 21747, 21750)

> of payroll instead of 2.5 months, but also defeat the purpose of the CARES Act of protecting the paycheck of the employee.[20]

The IFR notes that for a sole-proprietor with no employees, this change has no real impact—the income replacement would now be equal to the loan amount, allowing for 100% forgiveness of the loan:

> For borrowers with no employees, this limitation will have no effect, because the maximum loan amount for such borrowers already includes only 2.5 months of their payroll.[21]

What About "Owner-Employees"?

Readers should take care to note that this guidance does not discuss the impact on "owner-employees," a topic covered in the IFR issued on May 23, 2020,[22] well after the two IFRs modified by the above guidance were issued.

While until the SBA issues revisions to that IFR the final answer can't be known for sure, one likely option is that the SBA limits owner-employees to 2.5/12 of their 2019 employee cash compensation and employer retirement and health care contributions made on their behalf, with a likely cap at $20,833 across all businesses.

SECTION: PPP LOAN
SBA REVISES IFR RELATED TO DISQUALIFICATION FOR FELONY CONVICTION AND ISSUES NEW LOAN APPLICATION FORM

Citation: RIN 3245-AH50, 6/12/20

More late Friday guidance on the Paycheck Protection Program loans was issued by the SBA on June 12, with a second set of Paycheck Protection Program Flexibility Act (PPPFA) interim final rules (IFRs).[23] As with the first set, this guidance makes changes to the original April 2, 2020 IFR released shortly after the CARES Act.

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[20] RIN 3245-AH51, Section 1.b, Revised Part III.1.f of Third Interim Final Rule (85 FR 21747, 21750)

[21] RIN 3245-AH51, Section 1.b, Revised Part III.1.f of Third Interim Final Rule (85 FR 21747, 21750)

[22] RIN 3245-AH46, "Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Loan Forgiveness," Small Business Administration, May 22, 2020

[23] RIN 3245-AH50, June 12, 2020, https://home.treasury.gov/system/files/136/PPP-IFR--Additional-Revisions-to-First-Interim-Final-Rule.pdf (retrieved June 12, 2020)

Eligibility Requirements

Originally the IFR had held that a PPP loan could not be approved if any 20% or greater owner of the business had been convicted of a felony within the past five years. Treasury has now decided to limit that prohibition to only a subset of felonies for that period, with a complete bar only for other felony convictions in the past year. The IFR provides:

> After further consideration, the Administrator, in consultation with the Secretary of the Treasury (the Secretary), has determined that a shorter timeframe for felonies that do not involve fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance is more consistent with Congressional intent to provide relief to small businesses and also promotes the important policies underlying the First Step Act of 2018 (Pub. L. 115-391).[24]

Part III.2.b.iii. of the First Interim Final Rule is now modified to provide that a borrower is ineligible for a PPP loan if:

> …
>
> iii. An owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance within the last five years or any other felony within the last year;…[25]

Revised Borrower and Lender Loan Applications

At the same time, the Treasury Department posted updated borrower[26] and lender[27] application forms.

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[24] RIN 3245-AH50, June 12, 2020, Section 1, Eligibility Requirements

[25] RIN 3245-AH50, June 12, 2020, Section 1, Eligibility Requirements

[26] https://home.treasury.gov/system/files/136/PPP-Borrower-Application-Form-Revised-June-12-2020.pdf

[27] https://home.treasury.gov/system/files/136/PPP-Lender-Application-Form-Revised-June-12-2020.pdf

The revised four-page borrower form is reproduced below:

Paycheck Protection Program
Borrower Application Form Revised June 12, 2020

OMB Control No.: 3245-0407
Expiration Date: 10/31/2020

Check One: ❑ Sole proprietor ❑ Partnership ❑ C-Corp ❑ S-Corp ❑ LLC ❑ Independent contractor ❑ Eligible self-employed individual ❑ 501(c)(3) nonprofit ❑ 501(c)(19) veterans organization ❑ Tribal business (sec. 31(b)(2)(C) of Small Business Act) ❑ Other	DBA or Tradename if Applicable	
Business Legal Name		
Business Address	**Business TIN (EIN, SSN)**	**Business Phone**
		( ) -
	Primary Contact	**Email Address**

Average Monthly Payroll:	$	x 2.5 + EIDL, Net of Advance (if Applicable) Equals Loan Request:	$	Number of Employees:	
Purpose of the loan (select more than one):	☐ Payroll ☐ Lease / Mortgage Interest ☐ Utilities ☐ Other (explain): _____				

Applicant Ownership

List all owners of 20% or more of the equity of the Applicant. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN, SSN)	Address

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Applicant or any owner of the Applicant presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	☐	☐
2. Has the Applicant, any owner of the Applicant, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	☐	☐
3. Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.	☐	☐
4. Has the Applicant received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	☐	☐

If questions (5) or (6) are answered "Yes," the loan will not be approved.

Question	Yes	No
5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole? Initial here to confirm your response to question 5 → _____	☐	☐
6. Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, or within the last year, for any other felony, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) been placed on any form of parole or probation (including probation before judgment)? Initial here to confirm your response to question 6 → _____	☐	☐
7. Is the United States the principal place of residence for all employees of the Applicant included in the Applicant's payroll calculation above?	☐	☐
8. Is the Applicant a franchise that is listed in the SBA's Franchise Directory?	☐	☐

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SBA Form 2483 (06/20)

Paycheck Protection Program
Borrower Application Form Revised June 12, 2020

By Signing Below, You Make the Following Representations, Authorizations, and Certifications

CERTIFICATIONS AND AUTHORIZATIONS

I certify that:

- I have read the statements included in this form, including the Statements Required by Law and Executive Orders, and I understand them.
- The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
- The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business-related purposes as specified in the loan application and consistent with the Paycheck Protection Program Rule.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.
- Any loan received by the Applicant under Section 7(b)(2) of the Small Business Act between January 31, 2020 and April 3, 2020 was for a purpose other than paying payroll costs and other allowable uses loans under the Paycheck Protection Program Rule.

For Applicants who are individuals: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The authorized representative of the Applicant must certify in good faith to all of the below by **initialing** next to each one:

_____ The Applicant was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on Form(s) 1099-MISC.

_____ Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

_____ The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.

_____ The Applicant will provide to the Lender documentation verifying the number of full-time equivalent employees on the Applicant's payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the 24-week period following this loan.

_____ I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 40% of the forgiven amount may be for non-payroll costs.

_____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under the Paycheck Protection Program.

_____ I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than $1,000,000.

_____ I acknowledge that the lender will confirm the eligible loan amount using required documents submitted. I understand, acknowledge and agree that the Lender can share any tax information that I have provided with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

_____ _____
Signature of Authorized Representative of Applicant Date

_____ _____
Print Name Title

Paycheck Protection Program
Borrower Application Form Revised June 12, 2020

Purpose of this form:

This form is to be completed by the authorized representative of the Applicant and ***submitted to your SBA Participating Lender***. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

With respect to "purpose of the loan," payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

For purposes of calculating "Average Monthly Payroll," most Applicants will use the average monthly payroll for 2019, excluding costs over $100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019 or any 12-week period between May 1, 2019 and September 15, 2019, excluding costs over $100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over $100,000 on an annualized basis for each employee.

If Applicant is refinancing an Economic Injury Disaster Loan (EIDL): Add the outstanding amount of an EIDL made between January 31, 2020 and April 3, 2020, less the amount of any "advance" under an EIDL COVID-19 loan, to Loan Request as indicated on the form.

All parties listed below are considered owners of the Applicant as defined in 13 CFR § 120.10, as well as "principals":

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to: Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416, and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503. **PLEASE DO NOT SEND FORMS TO THESE ADDRESSES.**

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below.) Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information – Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies' function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) – SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice, or (6) foreclose on collateral or take other action permitted in the loan instruments.

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SBA Form 2483 (06/20)

Paycheck Protection Program
Borrower Application Form Revised June 12, 2020

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, SBA must supply information reflected in agency files and records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights (13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) – Creditors are prohibited from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither the Applicant or any owner of the Applicant have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

SECTION: 402
NOTICE PROVIDES DETAILS ON CARES ACT RETIREMENT PLAN PROVISIONS

Citation: Notice 2020-50, 6/19/20

Guidance has been issued on various employee benefit plan relief provisions found in the CARES Act in Notice 2020-50.[28]

Coronavirus-Related Distributions from Retirement Plans

CARES Act §2202(a) provides specific relief to beneficiaries of retirement plans for a coronavirus-related distribution. Specifically, the Notice describes this relief in Section 1 of the Notice for such distributions as follows:

> The section provides an exception to the 10% additional tax under § 72(t) of the Code (including the 25% additional tax under § 72(t)(6) for certain distributions from SIMPLE IRAs), allows the distribution to be included in income ratably over 3 years, and provides that the distribution will be treated as though it were paid in a direct rollover to an eligible retirement plan if the distribution is eligible for tax-free rollover treatment and is recontributed to an eligible retirement plan within the 3-year period beginning on the day after the date on which the distribution was received.[29]

To be eligible for such relief, a person must be a *qualified individual*. The law specifically describes the following categories of qualified individuals to include an individual:

- Who is diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (referred to collectively in this notice as COVID-19) by a test approved by the Centers for Disease Control and Prevention (including a test authorized under the Federal Food, Drug, and Cosmetic Act);
- Whose spouse or dependent (as defined in section 152 of the Code) is diagnosed with COVID-19 by a test approved by the Centers for Disease Control and Prevention (including a test authorized under the Federal Food, Drug, and Cosmetic Act); or
- Who experiences adverse financial consequences as a result of:
  - the individual being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19;

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[28] Notice 2020-50, June 19 2020, https://www.irs.gov/pub/irs-drop/n-20-50.pdf (retrieved June 19, 2020)

[29] Notice 2020-50, Section 1.A.

- the individual being unable to work due to lack of childcare due to COVID-19; or

- closing or reducing hours of a business owned or operated by the individual due to COVID-19.[30]

As well, the CARES Act at §2202(a)(4)(A)(ii)(III) allows the IRS to provide for other factors that would make the participant a qualified individual eligible for coronavirus-related distributions. In Notice 2020-50 the IRS provides that a qualified individual also includes an individual who experiences adverse financial consequences as a result of:

- The individual having a reduction in pay (or self-employment income) due to COVID-19 or having a job offer rescinded or start date for a job delayed due to COVID-19;

- The individual's spouse or a member of the individual's household being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19, being unable to work due to lack of childcare due to COVID-19, having a reduction in pay (or self-employment income) due to COVID-19, or having a job offer rescinded or start date for a job delayed due to COVID-19; or

- Closing or reducing hours of a business owned or operated by the individual's spouse or a member of the individual's household due to COVID-19.[31]

A member of the taxpayer's household is defined as "someone who shares the individual's principal residence."[32]

The relief relates to a *coronavirus-related distribution*. The Notice describes the law provision as follows:

> Section 2202(a)(4)(A) of the CARES Act defines a coronavirus-related distribution as any distribution from an eligible retirement plan made on or after January 1, 2020, and before December 31, 2020, to a qualified individual. Section 2202(a)(2) of the CARES Act limits the amount of aggregate distributions from all eligible retirement plans that can be treated as coronavirus-related distributions to no more than $100,000.[33]

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[30] Notice 2020-50, Section 1.B.

[31] Notice 2020-50, Section 1.B.

[32] Notice 2020-50, Section 1.B.

[33] Notice 2020-50, Section 1.C.

The Notice provides that it is the individual and not the plan that ultimately designates a distribution as a corona-virus related distribution, so long as it meets the necessary requirements. The Notice continues:

> This designation is permitted to be made with respect to any distribution to a qualified individual that would meet the requirements of a coronavirus-related distribution without regard to whether the plan treated the distribution as a coronavirus-related distribution. Thus, periodic payments and distributions that would have been required minimum distributions but for section 2203 of the CARES Act, received by a qualified individual from an eligible retirement plan on or after January 1, 2020, and before December 31, 2020, are permitted to be treated as coronavirus-related distributions and, therefore, permitted to be included in income ratably over 3 years. Similarly, any distribution received by a qualified individual as a beneficiary can be treated as a coronavirus-related distribution. In addition, a reduction or offset of a qualified individual's account balance in order to repay a plan loan, as described in Q&A-9(b) of § 1.402(c)-2, including a qualified plan loan offset, is permitted to be treated as a coronavirus-related distribution.[34]

However, the employer retirement plan is allowed to (but not required to) treat a distribution as a coronavirus-related distribution. The Notice provides:

> As explained in section 2.C of this notice, an employer retirement plan also is permitted, but not required, to treat a plan distribution meeting the conditions described in this section 1.C as a coronavirus-related distribution. It is possible that a qualified individual's designation of a coronavirus-related distribution may be different from the employer retirement plan's treatment of the distribution. This different treatment could occur, for example, if a qualified individual has more than one plan distribution that meets the requirements of a coronavirus-related distribution, but one of those distributions occurs before the effective date of the plan amendment providing for coronavirus-related distributions. The different treatment could also occur, for example, if a qualified individual has distributions from more than one eligible retirement plan, and the aggregate amount of those distributions exceeds $100,000.[35]

However, the Notice provides that certain distributions, described in Q&A 4 of Reg. §1.402(c)-2, are not permitted to be treated as coronavirus-related distributions. This would include:

- Corrective distributions of elective deferrals and employee contributions that are returned to the employee (together with the income allocable thereto) in order to comply with the § 415 limitations,

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[34] Notice 2020-50, Section 1.C.

[35] Notice 2020-50, Section 1.C

- Excess elective deferrals under § 402(g),
- Excess contributions under § 401(k),
- Excess aggregate contributions under § 401(m);
- Loans that are treated as deemed distributions pursuant to § 72(p);
- Dividends paid on applicable employer securities under § 404(k);
- The costs of current life insurance protection; prohibited allocations that are treated as deemed distributions pursuant to § 409(p);
- Distributions that are permissible withdrawals from an eligible automatic contribution arrangement within the meaning of § 414(w); and
- Distributions of premiums for accident or health insurance under § 1.402(a)-1(e)(1)(i).[36]

Once an individual is found to be a qualified individual to receive a coronavirus-related distribution, there is no limit on what the distribution can be used for. The Notice provides:

> The definition of a coronavirus-related distribution under section 2202(a)(4) of the CARES Act does not limit these distributions to amounts withdrawn solely to meet a need arising from COVID-19. Thus, for example, for an individual who is a qualified individual as a result of experiencing adverse financial consequences as described above, coronavirus-related distributions are permitted without regard to the qualified individual's need for funds, and the amount of the distribution is not required to correspond to the extent of the adverse financial consequences experienced by the qualified individual.[37]

The Notice also explains that some, but not all, coronavirus-related distributions are eligible for a special 3-year rollover treatment. It begins by explaining that, generally, a distribution must be of a type otherwise eligible for rollover treatment, providing:

> …[O]nly a coronavirus-related distribution that is eligible for tax-free rollover treatment under § 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16) is permitted to be recontributed to an eligible retirement plan, and that recontribution will be treated as having been made in a trustee-to-trustee transfer to that eligible retirement plan.[38]

Specifically, while a distribution made to the beneficiary of an inherited IRA or retirement account can qualify for the 3-year inclusion rule for coronavirus-related

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[36] Notice 2020-50, Section 1.C.

[37] Notice 2020-50, Section 1.C.

[38] Notice 2020-50, Section 1.C.

distributions, "[a]ny coronavirus-related distribution (whether from an employer retirement plan or an IRA) paid to a qualified individual as a beneficiary of an employee or IRA owner (other than the surviving spouse of the employee or IRA owner) cannot be recontributed."[39]

Hardship distributions are not normally eligible for rollover treatment, but the Notice provides:

> In general, a distribution from an employer retirement plan made on account of hardship is not an eligible rollover distribution. However, if the distribution satisfies the requirements under section 1.C of this notice, then, except as otherwise provided in section 6 of this notice (relating to nonqualified deferred compensation plans), the distribution is not treated as made on account of hardship for purposes of this notice and, thus, any portion of the distribution is permitted to be recontributed to an eligible retirement plan.[40]

Guidance for Individuals Receiving Coronavirus-Related Distributions

The Notice provides that individuals entitled to tax-favored treatment for coronavirus-related distributions will report the distribution on Form 8915-E, *Qualified 2020 Disaster Retirement Plan Distributions and Repayments*, a form expected to be available by the end of 2020. The same form will be used to report any recontribution made during a tax year and to determine the amount of the coronavirus-related distribution includible in income for the taxable year.

An individual makes an election to treat a distribution that meets the requirements to be a coronavirus-related distribution as such on his/her individual return, subject to the cap of $100,000 for the individual.[41]

EXAMPLE 1-NOTICE 2020-50, SECTION 4.A.

If a qualified individual receives a distribution of $50,000 in August of 2020 and a distribution of $75,000 in September of 2020 and both distributions satisfy the definition of a coronavirus-related distribution, only $100,000 of the $125,000 received by the qualified individual can be treated as a coronavirus-related distribution. Thus, the individual can only treat $100,000 of the August and September distributions as coronavirus-related distributions on the individual's 2020 federal income tax return. Assuming no § 72(t)(2) exception applies, the remaining $25,000 of the distribution is an early distribution that is subject to the 10%

[39] Notice 2020-50, Section 1.C.

[40] Notice 2020-50, Section 1.C.

[41] Notice 2020-50, Section 4.A

additional tax. This amount must be included on the individual's 2020 federal income tax return and will not be eligible for 3-year recontribution to an eligible retirement plan.

EXAMPLE 2 NOTICE 2020-50, SECTION 4.A.

A section 401(k) plan distributes $35,000 to a qualified individual on December 1, 2020. The qualified individual also receives a distribution from the individual's IRA on December 1, 2020, of $15,000. The individual is permitted to treat both the $35,000 from the plan and the $15,000 from the IRA as coronavirus-related distributions on the individual's 2020 federal income tax return.

The notice provides an individual with a choice of two tax treatments for a qualified coronavirus-related distribution:

- A qualified individual who receives a coronavirus-related distribution is permitted to include the taxable portion of the distribution in income ratably over a 3-year period that begins in the year of the distribution.

- Alternatively, a qualified individual is permitted to elect out of the 3-year ratable income inclusion and include the entire amount of the taxable portion of the distribution in income in the year of the distribution.[42]

The election cannot be made or changed after the timely filing of the individual's federal income tax return (including extensions) for the year the distribution is received. All coronavirus-related distributions received during the year are required to be treated in the same fashion—that is, the election is an all or nothing election with regard to the distributions for the year.[43]

EXAMPLE NOTICE 2020-50 SECTION 4.B.

Taxpayer A receives a $30,000 distribution from his or her IRA on October 1, 2020. Taxpayer A is a qualified individual and elects to treat the distribution as a coronavirus-related distribution. Taxpayer A uses the 3-year ratable income inclusion for the $30,000 distribution. Taxpayer A should include $10,000 in income with respect to the coronavirus-related distribution on each of the individual's 2020, 2021, and 2022 federal income tax returns.

Recontributions are more complicated, since the 3-year period to recontribute extends well beyond the due date for the tax return for the year of the distribution. As well, the taxpayer may have opted to either include the entire amount in income in the first year, or spread the taxable amount of the distribution over three years.

Regardless of which election is made for income inclusion, the taxpayer can make a recontribution of an otherwise-qualified rollover distribution:

> If a coronavirus-related distribution is eligible for tax-free rollover treatment (taking into account section 1.D of this notice), a qualified individual is permitted, at any time in the 3-year period beginning the

[42] Notice 2020-50, Section 4.B.

[43] Notice 2020-50, Section 4.B.

> day after the date of a coronavirusrelated distribution, to recontribute any portion of the distribution, but not an amount in excess of the amount of the distribution, to an eligible retirement plan. A recontribution of a coronavirus-related distribution will not be treated as a rollover contribution for purposes of the one-rollover-per-year limitation under § 408(d)(3)(B).[44]

The Notice first discusses the tax treatment for an individual that had *not* chosen to include the original distribution in income over three years. Not unexpectedly, the individual will need to include the amount of the distribution in income for the year of distribution unless the recontribution is made prior to the timely filing of the individual's tax return for the year of the distribution.

The Notice then describes what will happen once the amount is recontributed:

> If a qualified individual includes a coronavirus-related distribution in gross income in the year of the distribution and recontributes the distribution to an eligible retirement plan after the timely filing of the individual's federal income tax return for the year of the distribution (that is, after the due date, including extensions), the individual will need to file an amended federal income tax return for the year of the distribution. The qualified individual will need to file a revised Form 8915-E (with his or her amended federal income tax return) to report the amount of the recontribution and should reduce his or her gross income by the amount of the recontribution, but not in an amount exceeding the amount of the coronavirus-related distribution.[45]

EXAMPLE 1 NOTICE 2020-50 SECTION 4.D.

Taxpayer B receives a $45,000 distribution from a § 403(b) plan on November 1, 2020. Taxpayer B is a qualified individual and treats the distribution as a coronavirus-related distribution. Taxpayer B receives no other coronavirus-related distribution from any eligible retirement plan. Taxpayer B recontributes $45,000 to an IRA on March 31, 2021. Taxpayer B reports the recontribution on Form 8915-E and files the 2020 federal income tax return on April 10, 2021. For Taxpayer B, no portion of the coronavirus-related distribution is includible as income for the 2020 tax year.

EXAMPLE 2 NOTICE 2020-50 SECTION 4.D.

The facts are the same as in Example 1 of this section 4.D, except that Taxpayer B timely requests an extension of time to file the 2020 federal income tax return and makes a recontribution on August 2, 2021, before filing the 2020 federal income tax return. Taxpayer B files the 2020 federal income tax return on August 10, 2021. As in Example 1, no portion of the coronavirus-related distribution is includible in income for the 2020 tax year because

[44] Notice 2020-50, Section 4.C.

[45] Notice 2020-50, Section 4.D.

Taxpayer B made the recontribution before the timely filing of the 2020 federal income tax return.

EXAMPLE 3 NOTICE 2020-50 SECTION 4.D.

Taxpayer C receives a $15,000 distribution from a governmental § 457(b) plan on March 30, 2020. Taxpayer C is a qualified individual and treats the distribution as a coronavirus-related distribution. Taxpayer C elects out of the 3-year ratable income inclusion on Form 8915-E and includes the entire $15,000 in gross income for the 2020 taxable year. On December 31, 2022, Taxpayer C recontributes $15,000 to the § 457(b) plan. Taxpayer C will need to file an amended federal income tax return for the 2020 tax year to report the amount of the recontribution and reduce the gross income by $15,000 with respect to the coronavirus-related distribution included on the 2020 original federal income tax return.

For those electing a 3-year inclusion in income, only a portion of the distribution may have been subject to tax when the recontribution is made. Initially the recontribution reduces the amount included in the next return due to be filed as follows:

> As explained above, a qualified individual is permitted to include a coronavirus-related distribution in income ratably over a 3-year period. If a qualified individual includes a coronavirus-related distribution ratably over a 3- year period and the individual recontributes any portion of the coronavirus-related distribution to an eligible retirement plan at any date before the timely filing of the individual's federal income tax return (that is, by the due date, including extensions) for a tax year in the 3-year period, the amount of the recontribution will reduce the ratable portion of the coronavirus-related distribution that is includible in gross income for that tax year. See section 4.F of this notice for recontributions that affect income inclusion in other tax years.

EXAMPLE 1 NOTICE 2020-50 SECTION 4.E.

Taxpayer D receives $75,000 from a section 401(k) plan on December 1, 2020. Taxpayer D is a qualified individual and treats the $75,000 distribution as a coronavirus-related distribution. Taxpayer D uses the 3-year ratable income inclusion method for the distribution. Taxpayer D makes one recontribution of $25,000 to the section 401(k) plan on April 10, 2022. Taxpayer D files the 2021 federal income tax return on April 15, 2022. Without the recontribution, Taxpayer D should include $25,000 in income with respect to the coronavirus-related distribution on each of D's 2020, 2021, and 2022 federal income tax returns. However, as a result of the recontribution to the section 401(k) plan, Taxpayer D should include $25,000 in income with respect to the coronavirus-related distribution on the 2020 federal income tax return, $0 in income with respect to the coronavirus-related distribution on the 2021 federal income tax return, and $25,000 in income with respect to the coronavirus-related distribution on the 2022 federal income tax return.

EXAMPLE 2 NOTICE 2020-50 SECTION 4.E.

The facts are the same as in Example 1 of this section 4.E, except that Taxpayer D recontributes $25,000 to the section 401(k) plan on August 10, 2022. Taxpayer D files the 2021 federal income tax return on April 15, 2022, and does not request an extension of time to file that federal income tax return. As a result of the recontribution to the section 401(k) plan, Taxpayer D should include $25,000 in income with respect to the coronavirus-related

distribution on the 2020 federal income tax return, $25,000 in income with respect to the coronavirus-related distribution on the 2021 federal income tax return, and $0 in income with respect to the coronavirus-related distribution on the 2022 federal income tax return.

If the amount of the recontribution exceeds the amount to be included in the next return to be filed, the Notice provides for a carryback or carryforward of the excess:

> If a qualified individual using the 3-year ratable income inclusion method recontributes an amount of a coronavirus-related distribution for a tax year in the 3-year period that exceeds the amount that is otherwise includible in gross income for that tax year, as described in section 4.E of this notice, the excess amount of the recontribution is permitted to be carried forward to reduce the amount of the coronavirus-related distribution that is includible in gross income in the next tax year in the 3-year period. Alternatively, the qualified individual is permitted to carry back the excess amount of the recontribution to a prior taxable year or years in which the individual included income attributable to a coronavirus-related distribution. The individual will need to file an amended federal income tax return for the prior taxable year or years to report the amount of the recontribution on Form 8915-E and reduce his or her gross income by the excess amount of the recontribution. [46]

EXAMPLE NOTICE 2020-50 SECTION 4.F.

Taxpayer E receives a distribution of $90,000 from his or her IRA on November 15, 2020. Taxpayer E is a qualified individual and treats the distribution as a coronavirus-related distribution. Taxpayer E ratably includes the $90,000 distribution in income over a 3-year period. Without any recontribution, Taxpayer E will include $30,000 in income with respect to the coronavirus-related distribution on each of the 2020, 2021, and 2022 federal income tax returns. Taxpayer E includes $30,000 in income with respect to the coronavirus-related distribution on the 2020 federal income tax return. Taxpayer E then recontributes $40,000 to an IRA on November 10, 2021 (and makes no other recontribution in the 3-year period). Taxpayer E is permitted to do either of the following:

- Option 1. Taxpayer E includes $0 in income with respect to the coronavirus-related distribution on the 2021 federal income tax return. Taxpayer E carries forward the excess recontribution of $10,000 to 2022 and includes $20,000 in income with respect to the coronavirus-related distribution on E's 2022 federal income tax return.
- Option 2. Taxpayer E includes $0 in income with respect to the coronavirus-related distribution on the 2021 tax return and $30,000 in income on the 2022 federal income tax return. Taxpayer E also files an amended federal income tax return for 2020 to reduce the amount included in income as a result of the coronavirus-related distribution to $20,000 (that is, the $30,000 original amount includible in income for 2020 minus the remaining $10,000 recontribution that is not offset on either the 2021 or 2022 federal tax return).

[46] Notice 2020-50, Section 4.F.

It is possible that the recipient who elected a 3-year inclusion in income may die prior to the end of the three-year period. In that case, the Notice provides:

> If a qualified individual dies before the full taxable amount of the coronavirus-related distribution has been included in gross income, then the remainder must be included in gross income for the taxable year that includes the individual's death.

The IRS also addresses the impact of taking a coronavirus-related distribution for a participant who is currently receiving substantially equal periodic payments to avoid the imposition of the 10% additional tax for distributions received prior to age 59 ½. The Notice provides the following to avoid disruption of the exception:

> In the case of an individual receiving substantially equal periodic payments from an eligible retirement plan, the receipt of a coronavirus-related distribution from that plan will not be treated as a change in substantially equal payments as described in § 72(t)(4) merely because of the coronavirus-related distribution.[47]

Employer Retirement Plans Making Coronavirus-Related Distributions

The Notice points out that under CARES Act §2202(a)(6) "a distribution designated as a coronavirus-related distribution by an employer retirement plan is treated as meeting the distribution restrictions for qualified cash or deferred arrangements under § 401(k)(2)(B)(i), custodial accounts under § 403(b)(7)(A)(i), annuity contracts under § 403(b)(11), governmental deferred compensation plans under § 457(d)(1)(A), and the Thrift Savings Plan under 5 U.S.C. 8433(h)(1)."[48]

The Notice goes on to explain this special exception to the distribution requirements for such plans as follows:

> [F]or example, an employer may expand the distribution options under its plan to allow an amount attributable to an elective, qualified nonelective, qualified matching, or safe harbor contribution under a qualified cash or deferred arrangement to be distributed as a coronavirus-related distribution even though it is distributed before an otherwise permitted distributable event, such as severance from employment, disability, or attainment of age 59½.[49]

However, the CARES Act does not otherwise change such distribution rules for these plans:

> Except as described above, section 2202 of the CARES Act does not change the rules for when plan distributions are permitted to be made

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[47] Notice 2020-50, Section 4.H.

[48] Notice 2020-50, Section 2.A.

[49] Notice 2020-50, Section 2.A.

> from employer retirement plans. Thus, for example, a qualified plan that is a pension plan (such as a money purchase pension plan) is not permitted to make a distribution before an otherwise permitted distributable event merely because the distribution, if made, would qualify as a coronavirus-related distribution. Further, a pension plan is not permitted to make a distribution under a distribution form that is not a qualified joint and survivor annuity without spousal consent merely because the distribution, if made, could be treated as a coronavirus-related distribution.[50]

The requirements to issue a §402(f) notice, offer a direct rollover or the mandatory withholding of 20% of the distribution do not apply to a qualified plan's coronavirus-related distributions:

> …[T]he plan is not required to offer the qualified individual a direct rollover with respect to the distribution. In addition, the plan administrator is not required to provide a § 402(f) notice. Finally, the plan administrator or payor of the coronavirus-related distribution is not required to withhold an amount equal to 20% of the distribution, as is usually required under § 3405(c)(1). However, a coronavirus-related distribution is subject to the voluntary withholding requirements of § 3405(b) and § 35.3405-1T.[51]

The employer is permitted significant latitude with the plan-level designation of coronavirus-related distributions. The Notice provides:

> An employer is permitted to choose whether, and to what extent, to treat distributions under its plans as coronavirus-related distributions (as well as whether, and to what extent, to apply coronavirus-related plan loan rules described in section 5 of this notice). Thus, for example, an employer may choose to provide for coronavirus-related distributions but choose not to change its plan loan provisions or loan repayment schedules. Further, the employer (or plan administrator) is permitted to develop any reasonable procedures for identifying which distributions are treated as coronavirus-related distributions under its retirement plans.[52]

Nevertheless, the plan must be consistent in its treatments. The Notice provides:

> However, if, under an employer retirement plan, any distribution of an amount subject to § 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11) or 457(d)(1)(A) is treated as a coronavirus-related distribution, the plan must be consistent in its treatment of similar distributions. Accordingly, the amount of the distribution must be taken into account in determining the $100,000 limit on coronavirus-related

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[50] Notice 2020-50, Section 2.A.

[51] Notice 2020-50, Section 2.B.

[52] Notice 2020-50, Section 2.C.

> distributions made under all the retirement plans maintained by the employer. [53]

As well, as noted in the section on individuals' treatments of coronavirus-related distributions, the plan's designation does not bind the individual if the distribution otherwise meets the requirement of being a coronavirus-related distribution:

> Even if, under a plan, a distribution is not treated as coronavirus-related, a qualified individual may treat a distribution that meets the requirements of section 1.C of this notice as a coronavirus-related distribution on the individual's federal income tax return.[54]

While the employer cannot determine how much, if any, an employee has taken as coronavirus-related distributions from other plans, the employer is required to cap coronavirus-related distributions from the plans it does sponsor on a per employee basis:

> The total amount of distributions treated by an employer as coronavirusrelated distributions under all its retirement plans with respect to a qualified individual is not permitted to exceed $100,000. For purposes of this rule, the term "employer" means the employer maintaining the plan and those employers required to be aggregated with the employer under § 414(b), (c), (m), or (o). However, a plan will not fail to satisfy any requirement under the Code merely because a qualified individual's total coronavirus-related distributions exceed $100,000 taking into account distributions from IRAs or other eligible retirement plans maintained by unrelated employers.[55]

A plan is allowed to accept an employee's certification that the individual meets the conditions to be a qualified individual unless the administrator has actual knowledge to the contrary. An administrator does not have to make an inquiry into whether the individual satisfies the conditions, but rather is limited to cases where the administrator is already aware the individual does not qualify.[56]

The Notice provides the following sample certification an administrator can have an employee complete stating he/she is a qualified individual:

> Name: _____ (and other identifying information requested by the employer for administrative purposes).
>
> I certify that I meet at least one of the following conditions: (1) I was diagnosed with the virus SARS-CoV-2 or with coronavirus disease 2019 (referred to collectively as COVID-19) by a test approved by the

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[53] Notice 2020-50, Section 2.C

[54] Notice 2020-50, Section 2.C.

[55] Notice 2020-50, Section 2.D.

[56] Notice 2020-50, Section 2.E.

> Centers for Disease Control and Prevention (including a test authorized under the Federal Food, Drug, and Cosmetic Act); (2) my spouse or my dependent was diagnosed with COVID-19 by a test approved by the Centers for Disease Control and Prevention (including a test authorized under the Federal Food, Drug, and Cosmetic Act); or (3) I have experienced adverse financial consequences because: (i) I, my spouse, or a member of my household was quarantined, furloughed or laid off, or had work hours reduced due to COVID-19; (ii) I, my spouse, or a member of my household was unable to work due to lack of childcare due to COVID-19; (iii) a business owned or operated by me, my spouse, or a member of my household closed or reduced hours due to COVID-19; or (iv) I, my spouse, or a member of my household had a reduction in pay (or self-employment income) due to COVID-19 or had a job offer rescinded or start date for a job delayed due to COVID-19.
>
> Signature: _____

The fact that a plan may have treated a distribution as a coronavirus-related distribution does *not* mean the individual may treat the distribution in that manner. Rather, the individual is responsible for determining if he/she meets the requirements for a coronavirus-related distribution.[57]

Finally, the Notice provides information on the ability to operate the plan as if it had been amended to implement CARES Act provisions, so long as an actual amendment is made by specified dates:

> An employer retirement plan will not be treated as failing to operate in accordance with its terms merely because the plan implements the provisions of section 2202 of the CARES Act if the employer amends its plan by the dates described in this paragraph. For employer retirement plans other than governmental plans under § 414(d) of the Code, the date by which any plan amendment to reflect the CARES Act is required to be made is the last day of the first plan year beginning on or after January 1, 2022. For governmental plans under § 414(d) of the Code, the date by which any plan amendment to reflect the CARES Act is required to be made is the last day of the first plan year beginning on or after January 1, 2024. Pursuant to the authority of the Secretary under section 2202(c)(2) of the CARES Act, these dates may be extended in future guidance.[58]

Plans Making or Accepting Recontributions of Coronavirus-Related Distributions

Tax reporting for plans (including IRAs) is covered in Section 3 of the notice.

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[57] Notice 2020-50, Section 2.E.

[58] Notice 2020-50, Section 2.F.

The plans will report distributions on Forms 1099-R as follows:

> An eligible retirement plan must report the payment of a coronavirusrelated distribution to a qualified individual on Form 1099-R, Distributions from Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc. This reporting is required even if the qualified individual recontributes the coronavirus-related distribution to the same eligible retirement plan in the same year. If a payor is treating the payment as a coronavirus-related distribution and no other appropriate code applies, the payor is permitted to use distribution code 2 (early distribution, exception applies) in box 7 of Form 1099-R. However, a payor also is permitted to use distribution code 1 (early distribution, no known exception) in box 7 of Form 1099-R.[59]

For plans that decide to accept recontributions, the Notice provides the following guidance:

> In general, a qualified individual who receives a coronavirus-related distribution that is eligible for tax-free rollover treatment is permitted to recontribute, at any time in a 3-year period, any portion of the distribution to an eligible retirement plan that is permitted to accept eligible rollover contributions. The relief in Q&A-14 of § 1.401(a)(31)-1 applies to an employer retirement plan accepting recontributions of coronavirus-related distributions. In order to obtain the relief described in Q&A-14 of § 1.401(a)(31)-1, a plan administrator accepting the recontribution of a coronavirus-related distribution must reasonably conclude that the recontribution is eligible for direct rollover treatment under section 2202(a)(3) of the CARES Act and that the recontribution is made in accordance with the rules under section 4.C of this notice. In making this determination, the rule in section 2.E of this notice applies. Thus, the administrator of an eligible retirement plan may rely on an individual's certification that the individual satisfies the conditions to be a qualified individual in determining whether a distribution is a coronavirus-related distribution, unless the administrator has actual knowledge to the contrary.[60]

Note that a plan does *not* have to accept recontributions of coronavirus-related distributions. As the Notice provides:

> In general, it is anticipated that eligible retirement plans will accept recontributions of coronavirus-related distributions, which are to be treated as rollover contributions. However, eligible retirement plans generally are not required to accept rollover contributions. For example, if a plan does not accept any rollover contributions, the plan

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[59] Notice 2020-50, Section 3.A.

[60] Notice 2020-50, Section 3.B.

> is not required to change its terms or procedures to accept recontributions of coronavirus-related distributions.[61]

Qualified Plan Loans

While CARES Act §2202(b) provides special short-term revisions to liberalize rules related to loans from qualified retirement plans to participants, the Notice makes clear an employer is not required to allow use of these revisions by plan participants:

> As described in section 2.C of this notice, an employer is permitted to choose whether, and to what extent, to apply coronavirus-related plan loan rules described in this section (regardless of how coronavirus-related distributions are treated).[62]

If a plan sponsor decides to implement the provision, the CARES Act allows for an increase in the maximum amount a participant may borrow from the plan:

> Special rules apply to a loan made from a qualified employer plan (as defined in § 1.72(p)-1, Q&A-2) to a qualified individual on or after March 27, 2020 (the date of enactment of the CARES Act) and before September 23, 2020. For these loans, section 2202(b)(1) of the CARES Act changes the limits under § 72(p)(2)(A) of the Code. In applying § 72(p) to a plan loan, the $50,000 aggregate limit in § 72(p)(2)(A)(i) is increased to $100,000 and the rule in § 72(p)(2)(A)(ii) limiting the aggregate amount of loans to 50 percent of the employee's vested accrued benefit is increased to 100 percent of the employee's vested accrued benefit.[63]

Since qualified retirement plans are regulated by both the IRS and the Department of Labor, in a footnote the Notice provides assurance that the Department of Labor will not take action against an employer implementing these provisions:

> The Department of Labor has advised the Department of the Treasury and the IRS that it will not treat any person as having violated the provisions of Title I of the Employee Retirement Income Security Act (ERISA), including the adequate security and reasonably equivalent basis requirements in ERISA section 408(b)(1) and 29 CFR 2550.408b-1, solely because the person made a plan loan to a qualified individual during the period beginning on March 27, 2020, and ending on September 22, 2020, in compliance with CARES Act section 2202(b)(1) and the provisions of this notice. See EBSA Disaster Relief Notice 2020-01.[64]

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[61] Notice 2020-50, Section 3.B.

[62] Notice 2020-50, Section 5

[63] Notice 2020-50, Section 5.A.

[64] Notice 2020-50, Section 5.A., Footnote 2

The CARES Act also permits, but does not require, a plan to provide for suspension of payment on plan loans and a related extension of loan terms. The Notice describes these permitted modifications as follows:

> A special rule applies if a qualified individual has an outstanding loan from a qualified employer plan on or after March 27, 2020. Section 2202(b)(2) of the CARES Act provides that, for purposes of § 72(p), in the case of a qualified individual with a loan from a qualified employer plan outstanding on or after March 27, 2020, if the due date pursuant to § 72(p)(2)(B) or (C) for any repayment with respect to the loan occurs during the period beginning on March 27, 2020, and ending on December 31, 2020, the due date shall be delayed for 1 year. In addition, any subsequent repayments of the loan shall be adjusted appropriately to reflect the delay and any interest accruing during the delay, and the period of delay must be disregarded in determining the 5-year period and the term of the loan under § 72(p)(2)(B) and (C). The effect of section 2202(b)(2) of the CARES Act is to permit a delay in certain plan loan repayments without causing the loans to violate § 72(p)(2)(B) and (C). It does not, however, require a delay in plan loan repayments in order to satisfy § 72(p)(2)(B) and (C). Thus, an employer is permitted to choose to allow this delay in loan repayments under its plan with respect to qualified individuals, and, if it does, there will not be a deemed distribution to those individuals under § 72(p) due to the delay. For example, each repayment that becomes due during the period from March 27, 2020, through December 31, 2020, may be delayed for up to 1 year and then reamortized (taking into account interest) over a period that is up to 1 year longer than the original term of the loan. Each reamortized repayment may then be added to other reamortized repayments and to non-reamortized repayments to construct an overall loan reamortization schedule.[65]

The Notice provides for a safe harbor where the plan will be treated as satisfying the requirements necessary to avoid having the loan treated as a distribution under IRC §72(p) if the following steps are followed:

- A qualified individual's obligation to repay a plan loan is suspended under the plan for any period beginning not earlier than March 27, 2020, and ending not later than December 31, 2020 (suspension period).

- The loan repayments must resume after the end of the suspension period, and the term of the loan may be extended by up to 1 year from the date the loan was originally due to be repaid.

- If a qualified employer plan suspends loan repayments during the suspension period, the suspension will not cause the loan to be deemed distributed even if, due solely to the suspension, the term of the loan is extended beyond 5 years.

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[65] Notice 2020-50, Section 5.B.

- Interest accruing during the suspension period must be added to the remaining principal of the loan.

- A plan satisfies these rules if the loan is reamortized and repaid in substantially level installments over the remaining period of the loan (that is, 5 years from the date of the loan, assuming that the loan is not a principal residence loan, plus up to 1 year from the date the loan was originally due to be repaid).

- If an employer, under its plan, chooses to permit a suspension period that is less than the maximum suspension period described above, the employer is permitted to extend the suspension period subsequently, but not beyond December 31, 2020.[66]

EXAMPLE APPLYING THE SAFE HARBOR NOTICE 2020-50 SECTION 5.B.

On April 1, 2020, a participant with a nonforfeitable account balance of $40,000 borrowed $20,000 to be repaid in level monthly installments of $368.33 each over 5 years, with the repayments to be made by payroll withholding. The participant makes payments for 3 months through June 30, 2020. The participant is a qualified individual (as described in section 1.B of this notice). The participant's employer takes action to suspend payroll withholding repayments, for the period from July 1, 2020, through December 31, 2020, for loans to qualified individuals that are outstanding on or after March 27, 2020. Because the participant is a qualified individual, no further repayments are made on the participant's loan until January 1, 2021 (when the balance is $19,477). At that time, repayments on the loan resume, with the amount of each monthly installment reamortized to be $343.27 in order for the loan to be repaid by March 31, 2026 (which is the date the loan originally would have been fully repaid, plus 1 year).

The Notice recognizes that the above is meant to be treated as a safe harbor, not as the sole way to satisfy the law. The Notice provides:

> The Department of the Treasury and the IRS recognize that there may be additional reasonable, if more complex, ways to administer section 2202(b) of the CARES Act. For example, in a plan with a suspension period beginning April 1, 2020, each repayment that becomes due during the suspension period may be delayed to April 1, 2021 (the 1-year anniversary of the beginning of the suspension period). After originally scheduled repayments for January through March of 2021 are made, the outstanding balance of the loan on April 1, 2021, including the delayed repayments with interest, may be reamortized over a period that is up to 1 year longer than the original term of the loan.[67]

An employer can rely on an employee's certification that he/she is a qualified individual under the same terms as provided for coronavirus-related distributions. The same

[66] Notice 2020-50, Section 5.B.

[67] Notice 2020-50, Section 5.B.

certification form may be used to satisfy documenting the employee's qualification as was provided in the Notice for the certification for coronavirus-related distributions.[68]

Deferral Elections Under Nonqualified Deferred Compensation Plans

The IRS provided relief in this notice for certain cases involving nonqualified deferred compensation plans for situations where a service provider receives a coronavirus-related distribution from an eligible retirement plan. The Notice provides:

> Under § 1.409A-3(j)(4)(viii), a nonqualified deferred compensation plan subject to § 409A may provide for a cancellation of a service provider's deferral election, or such a cancellation may be made, due to an unforeseeable emergency or a hardship distribution pursuant to § 1.401(k)-1(d)(3). If a service provider receives a distribution from an eligible retirement plan that constitutes a coronavirus-related distribution, that distribution will be considered a hardship distribution pursuant to § 1.401(k)-1(d)(3) for purposes of § 1.409A-3(j)(4)(viii). As a result, a nonqualified deferred compensation plan may provide for a cancellation of the service provider's deferral election, or such a cancellation may be made, due to a coronavirus-related distribution described in section 1.C of this notice. The deferral election must be cancelled, not merely postponed or otherwise delayed.[69]

SECTION: 7502
USE OF UNAPPROVED PRIVATE DELIVERY SERVICE CAUSES TAXPAYER'S PETITION TO BE TREATED AS NOT FILED TIMELY

Citation: Organic Cannabis Foundation, LLC, et al, v. Commissioner, CA9, Nos. 17-72874, 17-72877, affirming 153 TC No. 4 (2019), 6/18/20

Small details can be crucial in certain portions of tax practice, and in the case of *Organic Cannabis Foundation, LLC, et al, v. Commissioner*[70] the problem involved the use of a particular delivery option available from FedEx that was not on the list of IRS approved delivery services. That fact, combined with the inability of FedEx to make

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[68] Notice 2020-50, Section 5.C.

[69] Notice 2020-50, Section 6

[70] *Organic Cannabis Foundation, LLC, et al, v. Commissioner,* CA9, Nos. 17-72874, 17-72877, *affirming* 153 TC No. 4 (2019), June 18, 2020, https://cdn.ca9.uscourts.gov/datastore/opinions/2020/06/18/17-72874.pdf (retrieved June 19, 2020)

delivery on its initial attempt, combined to deny the taxpayers the ability to contest their issue in the United States Tax Court, their petition being found to have been filed a day late.

Timely Mailing Rule

The main issue goes back to IRC §7502. Per IRC §7502(a)(1), if a document is postmarked on or before the final date for filing certain documents (such as tax returns and, as in this case, Tax Court petitions) the date mailed shall be treated as the date of delivery when determining if an item has been filed timely.

In order to prove the date of the postmark, IRC §7502 and the regulations under it provide for a limited set of options which can be used to establish the postmark date. These options are to file the document using:

- Registered mail;[71]
- Certified mail;[72] or
- Specified private delivery services designated by the IRS.[73]

These options represent the only methods allowed under the regulations for a taxpayer to prove a timely postmark was applied to a document.[74]

The IRS provides a list of specific approved private delivery services and taxpayers must select from this list. At the time of the case in question, the approved list was found in Notice 2004-83. As of the date this article was written, the current approved list is found in Notice 2016-30.[75]

Use of an Unapproved FedEx Service

In the case in question, the law firm representing the taxpayer sought to file a Tax Court petition to challenge the IRS's notices of deficiency. The last date to file the petition was April 22, 2015.

The Ninth Circuit panel describes what happened when the law firm sought to send the petition to the Tax Court:

> As the petitions were being finalized on the late afternoon of April 21 — the day before they were due — one of the firm's attorneys asked a

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[71] IRC §7502(c)(1)

[72] IRC §7502(c)(2), Reg. §301.7502-1(c)(2)

[73] IRC §7502(f), Reg. §301.7502-1(c)(3)

[74] Reg. §301.7501-1(a), (e)

[75] Notice 2016-30, April 11, 2016, https://www.irs.gov/pub/irs-drop/n-16-30.pdf (retrieved June 19, 2020)

secretary to prepare a FedEx shipping envelope addressed for overnight delivery to the Tax Court in Washington, D.C. After logging into her account on the FedEx website, the secretary entered the necessary addressing information and then reviewed the delivery options. She selected the "FedEx 'First Overnight'" delivery option because, "given the attorneys' obvious concerns about meeting the filing deadlines, [she] felt [she] should select the delivery method that would guarantee the earliest possible delivery." After preparing the appropriately labeled FedEx package, the secretary gave it to one of the attorneys and went home. A paper receipt from the FedEx office in nearby Rancho Cordova states that the single package (which contained both Appellants' petitions) was dropped off at 8:04 P.M. Pacific time on April 21.

The original FedEx label prepared by the secretary stated that the shipping date was "21APR15" and that the package was to be delivered "WED — 22 APR 8:30A" by "FIRST OVERNIGHT." At some point in processing the package, however, FedEx apparently prepared a new label that bears a notation indicating it was created on "04/22" and that redesignates the package for delivery on "THU — 23 APR 8:30A" by "FIRST OVERNIGHT." This new label was affixed directly over the prior label, and the package arrived in that form at the Tax Court on the morning of April 23. The limited FedEx tracking information that was later available concerning the package no longer listed any of the details of the package's transit while being handled by FedEx; instead, it merely stated that the "Ship date" was "Wed 4/22/2015" and that the package was delivered at "7:35 am" on "4/23/2015 — Thursday."

On the morning of April 22 (the due date for the petitions), one of the attorneys asked the secretary who had prepared the FedEx package to check on its status. The secretary checked her email and saw that she had not received the usual automatic notice from FedEx confirming its delivery. She called the Tax Court Clerk's Office and "was told something to the effect that the package had not been received." She then called FedEx's customer service number and spoke with a representative to whom she provided the package's tracking number. As the secretary later described it, the FedEx representative responded that "the driver's delivery notes stated the driver had tried to deliver but could not because . . . he or she could not get to the door for some plausible reason like construction, or some sort of police action (perhaps the representative said the access was blocked off because of a safety threat)." The record does not indicate that the law firm took any further action that day. When the secretary arrived at the firm the next morning, April 23, she saw that she had an email in her inbox

> confirming that the package had been delivered that morning at 7:35 a.m. Eastern time.[76]

At the time of the mailing, Notice 2004-83 listed the following services provided by FedEx as qualifying for protection under §7502(f):

- FedEx Priority Overnight,
- FedEx Standard Overnight,
- FedEx 2 Day,
- FedEx International Priority, and
- FedEx International First.[77]

Although FedEx First Overnight did offer the earliest overnight delivery of the overnight options FedEx offered, it was not a service that was on the 2004 approved list, presumably being first offered after that list was finalized.[78]

The Ninth Circuit points out that the law enabling the use of private delivery services restricted the protection only to services approved by the IRS:

> Unlike Federal Rule of Appellate Procedure 25(a)(2)(ii), which applies a mailbox rule to the timely delivery of a brief to "a third-party commercial carrier," § 7502 does not allow taxpayers to use the services of any bona fide commercial courier. Instead, the statute specifies that a particular "delivery service provided by a trade or business" will count as a "designated delivery service" only "if such service is designated by the Secretary for purposes of this section." I.R.C. § 7502(f)(2). The term "Secretary" means "the Secretary of the Treasury or his delegate," id. § 7701(a)(11)(B), and here that delegate is the Commissioner (or his further delegate). In addition to requiring a formal designation, the statute states that the IRS may designate a delivery service "only if [it] determines that such service" meets four enumerated statutory criteria designed to ensure that the delivery service is at least as adequate as the U.S. mail. Id. § 7502(f)(2). Specifically, these criteria require that a service be "available to the general public"; that it be "at least as timely and reliable on a regular basis as the United States mail"; that it employ specified methods for showing "the date on which such item was given to such trade or

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[76] *Organic Cannabis Foundation, LLC, et al, v. Commissioner,* CA9, Nos. 17-72874, 17-72877, pp. 7-8

[77] Notice 2004-83

[78] The service is on the current approved list found in Notice 2016-30 and, in fact, was added to the list of approved services in Notice 2015-38, issued shortly after the petition in this case was filed.

> business for delivery"; and that it meet "such other criteria" as the IRS may prescribe. Id. § 7502(f)(2)(A)–(D).[79]

The Court then noted that the IRS had taken steps to designate such approved services:

> The year after § 7502(f) was added, the IRS published Revenue Procedure 97-19, which outlined the additional criteria that a delivery service must meet before it can be designated under that section. See Rev. Proc. 97-19, § 4, 1997-1 C.B. 644, 645. This document also made clear that private couriers seeking designation under § 7502(f) would not receive a blanket designation for every service they offered; rather, the IRS announced that "[d]esignation will be determined with respect to each type of delivery service offered by a [courier] (e.g., next business morning delivery, next business day delivery, etc.)." Id. § 3.03. Beginning with Notice 97-26 in 1997, see 1997-1 C.B. 413, the IRS has published lists in the Internal Revenue Bulletin of those services that it has designated under § 7502(f). At the time of the delivery at issue in this case, the operative list of designated services was set forth in IRS Notice 2004-83, which designated particular delivery services offered by only three companies, FedEx, DHL, and UPS. See 2004-2 C.B. 1030. As to FedEx, the notice designated five particular delivery services under § 7502(f), including "FedEx Priority Overnight" and "FedEx Standard Overnight," but not "FedEx First Overnight." *Id.*[80]

But the taxpayer countered that, given the facts of what the service offered, this should be deemed to be the same as the approved overnight FedEx offerings found in Notice 2004-83. The Ninth Circuit did not agree:

> Appellants contend that "FedEx First Overnight" should be deemed to be essentially the same delivery service as "FedEx Priority Overnight" and "FedEx Standard Overnight," and that therefore the service Appellants used here is actually covered by the then-existing designations in Notice 2004-83. Alternatively, Appellants argue that, because FedEx First Overnight was indisputably eligible for designation on the day they used it, and was formally designated just two weeks later, Appellants should be deemed to have substantially complied with § 7502(f)'s mailbox rule. These arguments cannot be squared with the language of the statute.
>
> Congress did not merely require that a private delivery service meet certain functional criteria concerning the operation of that delivery service; it also pointedly insisted that the service must be "designated by the Secretary for purposes of this section." I.R.C. § 7502(f)(2) (emphasis added). Given the wide range of documents that are eligible for § 7502(f)'s mailbox rule and the need for clear-cut rules on

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[79] *Organic Cannabis Foundation, LLC, et al, v. Commissioner,* CA9, Nos. 17-72874, 17-72877, p. 16

[80] *Organic Cannabis Foundation, LLC, et al, v. Commissioner,* CA9, Nos. 17-72874, 17-72877, pp. 16-17

> questions of timeliness, Congress understandably elected to establish a quality-control regime in which the IRS would vet each such service in advance and then issue bright-line designations as to which services are subject to the mailbox rule and which are not. The statutory language also makes clear that there must be separate designations for each "service" offered by a private courier — and not merely a designation of the courier itself — because § 7502(f) expressly distinguishes between the "trade or business" that engages in delivery of packages (e.g., FedEx) and the various "delivery service[s]" by which it does so (e.g., FedEx Priority Overnight). See id. (Secretary may designate a "delivery service provided by a trade or business" if, inter alia, the service records "the date on which [an] item [to be delivered] was given to such trade or business for delivery" (emphasis added)). This additional requirement of separate formal designations of each "service" offered by a given "trade or business" would be read out of the statute if we were to accept Appellants' invitation to stretch the existing designations to cover other similar services offered by a particular courier. And the same would be true if we accepted Appellants' argument that use of a non-designated service should be deemed to substantially comply with the statute.[81]

Thus, the date of actual delivery by FedEx would apply in this case—and all parties agreed it had actually been delivered on the day *after* the last day for filing the petition. Thus, the panel concluded, the Tax Court had been correct in finding it had no jurisdiction to hear the case.

Delivery Failure Due to Tax Court Being Inaccessible

The taxpayers argued that even if they had used the wrong service, the fact that FedEx had attempted delivery on the last date for filing but that the driver had tried but failed to make the delivery should offer relief from the fact that actual delivery took place a day later.

The Tax Court's rules do provide that if the Court is closed or otherwise inaccessible on the last day for filing, that items delivered the next day will be timely. But the question that the panel looked at was whether the taxpayer had proven the Tax Court was truly inaccessible at the deadline for filing.

The panel found that, even if they accept what the secretary testified FedEx had told her at face value (that there was "some plausible reason" the FedEx driver had for being unable to deliver at the time the driver arrived), that did not show that the Tax Court's inaccessibility continued for the entire day. The panel's opinion notes:

> But that says nothing about whether the Tax Court's Clerk's Office could have been reached later, during the remainder of the business day. As the Tax Court noted, the nature of the obstacle that FedEx claimed to have encountered was not one that, like "inclement

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[81] *Organic Cannabis Foundation, LLC, et al, v. Commissioner,* CA9, Nos. 17-72874, 17-72877, pp. 17-19

> weather, government closings, or other reasons," would be expected to make it impracticable to reach the clerk's office for the "entire day." Nor did Appellants suggest that the clerk's office was officially closed on April 22; indeed, the Tax Court took judicial notice that "the Court's Clerk's Office was open during its normal business hours" that day. A temporary obstacle that is encountered earlier in the day does not, without more, render the clerk's office "inaccessible" on "the last *day* for filing." Fed. R. Civ. P. 6(a)(3) (emphasis added). Rule 6(a)(4) states that, for filing by non-electronic means, "the last day ends . . . when the clerk's office is *scheduled* to close." Fed. R. Civ. P. 6(a)(4) (emphasis added). To render the clerk's office inaccessible for the "last day," therefore, an obstacle to access must exist for at least a significant portion of the final period of time preceding the point at which "the clerk's office is scheduled to close." Id. Appellants' evidence made no such showing that the Tax Court Clerk's Office remained inaccessible for the several hours that followed after FedEx's unsuccessful attempt to deliver the package. *Cf. Justice v. Town of Cicero*, 682 F.3d 662, 664 (7th Cir. 2012) (suggesting, in dicta, that if a court's e-filing system crashed during the last hour of the day, the clerk's office would be "inaccessible" under Rule 6(a)(3)).
>
> …We therefore hold that, for non-electronic filings (such as those at issue here), a clerk's office is "inaccessible" on the "last day" of a filing period only if the office cannot practicably be accessed for delivery of documents during a sufficient period of time up to and including the point at which "the clerk's office is scheduled to close." Fed. R. Civ. P. 6(a)(3), (4)(B). Because, as the Tax Court noted, Appellants presented no evidence to show that the clerk's office could not be accessed during the substantial remaining portion of the day after FedEx's unsuccessful earlier delivery attempt, the extension in Rule 6(a)(3) did not apply.[82]

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[82] *Organic Cannabis Foundation, LLC, et al, v. Commissioner,* CA9, Nos. 17-72874, 17-72877, pp. 13-15