

# Current Federal Tax Developments

Week of October 12, 2020

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ACCOUNTING  
CONTINUING EDUCATION

CURRENT FEDERAL TAX DEVELOPMENTS  
WEEK OF OCTOBER 12, 2020  
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# Current Federal Tax Developments

Kaplan Financial Education

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# SECTION: PPP LOAN A LOOK AT THE SBA'S FORM 3508S FORGIVENESS APPLICATION FOR LOANS UP TO \$50,000

## Citation: Paycheck Protection Program PPP Loan Forgiveness Application Form 3508S, 10/8/20

The SBA has released the Form 3508S<sup>1</sup> to go along with its new simplified PPP loan forgiveness application process for loans of \$50,000 or less, as well as the related instructions.<sup>2</sup>

### Application Form

The form consists of two pages. The top portion of the first page contains basic identification and loan related information:

		Paycheck Protection Program PPP Loan Forgiveness Application Form 3508S		OMB Control No. 3245-0407 Expiration date: 10/31/2020
A BORROWER MAY USE THIS FORM ONLY IF THE BORROWER RECEIVED A PPP LOAN OF \$50,000 OR LESS. A Borrower that, together with its affiliates, received PPP loans totaling \$2 million or greater cannot use this form.				
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: _____		
Forgiveness Amount: _____				

<sup>1</sup> Paycheck Protection Program PPP Loan Forgiveness Application Form 3508S, October 8, 2020, <https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-3508S.pdf> (retrieved October 9, 2020)

<sup>2</sup> PPP Loan Forgiveness Application Form 3508S Instructions for Borrowers, October 8, 2020, <https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-3508S-Instructions.pdf> (retrieved October 9, 2020)

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The rest of the page contains the signature of the authorized representative of the borrower along with the representations:

<b><u>By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:</u></b>	
The Authorized Representative of the Borrower certifies to all of the below by <b>initialing</b> next to each one.	
_____	The dollar amount for which forgiveness is requested does not exceed the principal amount of the PPP loan and: <ul style="list-style-type: none"><li>• 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);</li><li>• includes payroll costs equal to at least 60% of the forgiveness amount;</li><li>• 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</li><li>• 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.</li></ul>
_____	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 has accurately verified the payments for the eligible payroll and nonpayroll costs for which the Borrower is requesting forgiveness, and has accurately calculated the forgiveness amount requested.
_____	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.
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 3508S (10/20)	

The second page consists of the optional borrower demographic information that has been found with each application package.

What is missing from this form when compared even with the Form 3508-EZ is any computation of the forgiveness amount—the borrower just states the amount of forgiveness that is being requested. Only this form and the required documents, which are outlined in the instructions, are to be submitted.

### ***Form 3508S Instructions***

The instructions to Form 3508S contain a section outlining the computation of the forgiveness amount. The instructions note:

Enter the total amount of your payroll and nonpayroll costs eligible for forgiveness. The amount entered cannot exceed the principal amount of the PPP loan. Use the following instructions to determine your forgiveness amount.<sup>3</sup>

<sup>3</sup> PPP Loan Forgiveness Application Form 3508S Instructions for Borrowers, p. 1

While a detailed computation is not being sent with the application for forgiveness, the borrower will need to be able to provide the detailed support if requested, as the instructions note in the section titled “Documents that Each Borrower Must Maintain but is Not Required to Submit”:

All records relating to the Borrower’s PPP loan, including documentation submitted with its PPP loan application, documentation supporting the Borrower’s certifications as to its eligibility for a PPP loan, documentation necessary to support the Borrower’s loan forgiveness application, and documentation demonstrating the Borrower’s material compliance with PPP requirements. The Borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.<sup>4</sup>

The instructions provide the standard information that has been provided on prior forms for the types of expenses eligible to be used in the forgiveness calculation, as well as the caveat that non-payroll costs can amount to no more than 40% of the forgiveness amount.<sup>5</sup>

Even with the simplified application there are documents that must be submitted with the forgiveness application. The instructions provide that a borrower using Form 3508S must submit the following items with the application:

**Payroll:** Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period consisting of each of the following:

- a. Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
- b. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period:
  - i. Payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941); and
  - ii. State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.
- c. Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to

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<sup>4</sup> PPP Loan Forgiveness Application Form 3508S Instructions for Borrowers, p. 3

<sup>5</sup> PPP Loan Forgiveness Application Form 3508S Instructions for Borrowers, pp. 1-2

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employee health insurance and retirement plans that the Borrower included in the forgiveness amount.

**Nonpayroll:** Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.

a. Business mortgage interest payments: Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.

b. Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.

c. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.<sup>6</sup>

While these documents are being submitted, apparently the lender merely will need to confirm that the documents have been submitted and will not be asked to actually verify the forgiveness calculation itself per the interim final rules released at the same time as the new application.<sup>7</sup>

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<sup>6</sup> PPP Loan Forgiveness Application Form 3508S Instructions for Borrowers, p. 3

<sup>7</sup> RIN 3245-AH59, October 8, 2020, Section III.2.b, p. 9, <https://home.treasury.gov/system/files/136/PPP--IFR--Additional-Revisions-Loan-Forgiveness-Loan-Review-Procedures-Interim-Final-Rules.pdf> (retrieved October 9, 2020)



## **SECTION: PPP LOAN SBA PROVIDES RELIEF FROM FORGIVENESS REDUCTION FOR PPP LOANS OF \$50,000 OR LESS, AND LIMITS NEED FOR LENDER TO REVIEW EXPENSES IN EXCESS OF THOSE NECESSARY FOR FORGIVENESS**

### **Citation: RIN 3245-AH59, Business Loan Program Temporary Changes; Paycheck Protection Program – Additional**

### **Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, Small Business Administration, 10/8/20**

The SBA published an additional interim final rule on PPP loan forgiveness on October 8, 2020.<sup>8</sup> The October 8, 2020 IFR which provides:

- Additional guidance concerning the forgiveness and loan review processes for PPP loans of \$50,000 or less and
- For PPP loans of all sizes, lender responsibilities with respect to the review of borrower documentation of eligible costs for forgiveness in excess of a borrower's PPP loan amount.<sup>9</sup>

### ***Loans of \$50,000 or Less – Administrative Relief***

After much speculation about a potential for a close to automatic PPP loan forgiveness provision for certain loans to be added legislatively that has failed to yet materialize, the SBA has acted to give some administrative relief for loans of \$50,000 or less.

The SBA is at the same time releasing a new simplified form (Form 3508S<sup>10</sup>) to be used by borrowers with loans of \$50,000 or less, except for borrowers that together with affiliates received loans totaling \$2 million or greater.<sup>11</sup>

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<sup>8</sup> RIN 3245-AH59, Business Loan Program Temporary Changes; Paycheck Protection Program – Additional Revisions to Loan Forgiveness and Loan Review Procedures Interim Final Rules, Small Business Administration, October 8, 2020, <https://home.treasury.gov/system/files/136/PPP--IFR--Additional-Revisions-Loan-Forgiveness-Loan-Review-Procedures-Interim-Final-Rules.pdf> (retrieved October 8, 2020)

<sup>9</sup> RIN 3245-AH59, pp. 1-2

<sup>10</sup> Form 3508S, <https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-3508S.pdf> and Instructions to Form 3508S <https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-3508S-Instructions.pdf> (retrieved October 8, 2020)

<sup>11</sup> RIN 3245-AH59, p. 5

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The IFR provides:

A borrower of a PPP loan of \$50,000 or less, other than any borrower that together with its affiliates received loans totaling \$2 million or greater, may use SBA Form 3508S (or lender's equivalent form) to apply for loan forgiveness.<sup>12</sup>

A borrower who chooses to use the Form 3508S is exempt from any:

- Reductions in the borrower's loan forgiveness amount based on reductions in full-time equivalent (FTE) employees (section 1106(d)(2) of the CARES Act) or
- Reductions in employee salary or wages (section 1106(d)(3) of the CARES Act).<sup>13</sup>

The IFR explains that the SBA is treating this as a *de minimis* exception, justifying the provision as follows:

There are approximately 3.57 million outstanding PPP loans of \$50,000 or less, totaling approximately \$62 billion of the \$525 billion in PPP loans. Approximately 1.71 million PPP loans of \$50,000 or less were made to businesses that reported having zero employees (presumably not counting the owner as an employee) or one employee. To the extent that these businesses have no employees other than the owner (i.e., all businesses that reported having zero employees and, in SBA's judgment, the majority of businesses that reported having one employee), they are not affected by these exemptions. As a result, based on available data, we estimate that the outstanding PPP loans of the relevant set of potentially affected borrowers (businesses with at least one employee other than the owner) total approximately \$49 billion, or 9 percent of the overall PPP loan amount. Within this population of potentially affected loans, SBA believes that most borrowers would not be affected by the loan forgiveness reduction requirements because (1) the borrowers did not reduce FTE employees or reduce employee salaries or wages, or (2) the borrowers would qualify for one of the existing exemptions from loan forgiveness amount reductions. Excluding such borrowers, the aggregate dollar amount of PPP funds affected by these exemptions relative to the aggregate dollar amount of all PPP funds is *de minimis*.<sup>14</sup>

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<sup>12</sup> RIN 3245-AH59, Section III.1.b, p. 6

<sup>13</sup> RIN 3245-AH59, Section III.1.b, p. 6

<sup>14</sup> RIN 3245-AH59, Section III.1.b, pp. 7-8

To account for the Form 3508S, the SBA added the following provision applicable to a lender's review of such an application for forgiveness:

When a borrower submits SBA Form 3508S or lender's equivalent form, the lender shall:

- i. Confirm receipt of the borrower certifications contained in the SBA Form 3508S or lender's equivalent form.
- ii. Confirm receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the SBA Form 3508S or lender's equivalent form.

Providing an accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower attests to the accuracy of its reported information and calculations on the Loan Forgiveness Application. The borrower shall not receive forgiveness without submitting all required documentation to the lender.

As the First Interim Final Rule indicates, lenders may rely on borrower representations. As stated in paragraph III.3.c of the First Interim Final Rule, the lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs.<sup>15</sup>

### ***Lenders Actions When a Borrower Submits Expenses in Excess of Those Necessary for Loan Forgiveness***

The SBA has also provided relief from the need for lenders to review every submitted expense when a borrower submits expenses in excess of those necessary to qualify for full forgiveness.

The IFR provides:

*d. What should a lender do if a borrower submits documentation of eligible costs that exceed a borrower's PPP Loan Amount?*

The amount of loan forgiveness that a borrower may receive cannot exceed the principal amount of the PPP loan. Whether a borrower submits SBA Form 3508, 3508EZ, 3508S, or lender's equivalent form, a lender should confirm receipt of the documentation the borrower is required to submit to aid in verifying payroll and nonpayroll costs, and, if applicable (for SBA Form 3508, 3508EZ, or lender's equivalent form), confirm the borrower's calculations on the borrower's Loan

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<sup>15</sup> RIN 3245-AH59, Section III.2.b, p. 9

Forgiveness Application, up to the amount required to reach the requested Forgiveness Amount.<sup>16</sup>

## **SECTION: PPP LOAN PRE-PPPFA LOANS DO NOT HAVE TO BE MODIFIED FOR EXTENDED DEFERRAL PERIOD**

### **Citation: Paycheck Protection Program Frequently Asked Questions (FAQs) on PPP Loan Forgiveness, Small Business Administration, August 11, 2020 Revision, 8/11/20**

The SBA has added a question and answer<sup>17</sup> to the Paycheck Protection Program Loans Frequently Asked Questions to clarify how the extension of the deferral period in the Paycheck Protection Program Flexibility Act affected loans that were already in place when the PPPFA was enacted.

The original loans were written for the original six-month period for deferral of payments of all principal, interest and fees on PPP loans. When the PPPFA extended that period through the date that forgiveness is granted on the PPP loan as long as an application for forgiveness is made during the 10 months following end of the covered period, the key question was whether those PPP notes already signed before passage of the PPPFA had to be modified?

The SBA's answer is these loans do not need to be modified.

The SBA guidance provides:

**52. Question:** The Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) extended the deferral period for borrower payments of principal, interest, and fees on all PPP loans to the date that SBA remits the borrower's loan forgiveness amount to the lender (or, if the borrower does not apply for loan forgiveness, 10 months after the end of the borrower's loan forgiveness covered period). Previously, the deferral period could end after 6 months. Are lenders and borrowers required to modify promissory notes used for PPP loans to reflect the extended deferral period?

**Answer:** The extension of the deferral period under the Flexibility Act automatically applies to all PPP loans. Lenders are required to give immediate effect to the statutory extension and should notify borrowers of the change to the deferral period. SBA does not require a formal modification to the promissory note. A modification of a promissory note to reflect the required statutory deferral period under

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<sup>16</sup> RIN 3245-AH59, Section III.2.c, p. 10

<sup>17</sup> Question 52, Paycheck Protection Program Loans Frequently Asked Questions (FAQs), October 7, 2020, <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (retrieved October 7, 2020)

the Flexibility Act will have no effect on the SBA's guarantee of a PPP loan.

## **SECTION: IRS QR CODES TO NAVIGATE TO APPROPRIATE PORTION OF IRS.GOV TO BE ADDED TO CP14 AND CP14 IA NOTICES**

### **Citation: IRS adds QR technology to key balance due notices to help taxpayers, News Release IR-2020-233, 10/9/20**

In News Release IR-2020-233<sup>18</sup> the IRS announced that CP14 and CP14 IA notices of amounts due to the IRS will come with a QR code. These codes will enable taxpayers to navigate the IRS website to deal with the matter at hand.

A QR code is a square bar code used often for individuals with a smartphone to navigate to a website online by pointing the phone's camera at the QR code rather than typing in a website address. The code below, when read with a QR reading program installed on a phone, takes the individual to the English Wikipedia mobile page:



(Source: Wikipedia entry on QR codes, By brdall - Transferred from en.wikipedia to Commons by Liftarn using CommonsHelper., Public Domain, <https://commons.wikimedia.org/w/index.php?curid=12185494> )

The release indicates the IRS will begin sending out these QR codes on notices in October of 2020. The release notes:

Taxpayers can now use their smartphones to scan a QR code in the CP14 or CP14 IA to go directly to IRS.gov and securely access their account, set up a payment plan or contact the Taxpayer Advocate Service.

Scanning the QR code on the CP14 or CP14 IA gives the taxpayer direct access to the information they need on IRS.gov to resolve their

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<sup>18</sup> IRS adds QR technology to key balance due notices to help taxpayers, News Release IR-2020-233, October 9, 2020, <https://www.irs.gov/newsroom/irs-adds-qr-technology-to-key-balance-due-notices-to-help-taxpayers> (October 9, 2020)

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account balance online without the need to call or interact with the IRS directly.<sup>19</sup>

While currently limited to the CP14 and CP14 IA notices, the release indicates “[t]he IRS is assessing the possibility of adding other QR codes to other balance due notices in the future.”<sup>20</sup>

### **SECTION: 61**

#### **SIFL RATES PUBLISHED FOR SECOND HALF OF 2020**

##### **Citation: Revenue Ruling 2020-21, 10/5/20**

In Revenue Ruling 2020-21 the IRS has announced the rates and terminal charges for noncommercial flights for the second half of 2020. These numbers may be used under IRC §1.61-21(g)(5) to determine the value of such flights on employer-provided aircraft for compensation purposes.

The rates, which are changed semi-annually, are the following for the second half of 2020:

Period During Which the Flight Is Taken	Terminal Charge	SIFL Mileage Rates
7/1/20 - 12/31/20	\$42.62	Up to 500 miles \$.2331 per mile 501–1500 miles \$.1778 per mile Over 1500 miles \$.1709 per mile

### **SECTION: 3121**

#### **TAXPAYER HAS NO RECOURSE FOR EXCESS MEDICARE TAX WITHHELD WHEN DEFERRED COMPENSATION NOT PAID IN FULL**

##### **Citation: *Koopman, et al. v. United States*, US Court of Federal Claims, Case No. 1:09-cv-00333, 9/30/20**

Life can be unfair, and the tax law even more so. In the case of *Koopman, et al. v. United States*<sup>21</sup> the taxpayers found the law left them no recourse when they never received

<sup>19</sup> IRS adds QR technology to key balance due notices to help taxpayers, News Release IR-2020-233, October 9, 2020

<sup>20</sup> IRS adds QR technology to key balance due notices to help taxpayers, News Release IR-2020-233, October 9, 2020

<sup>21</sup> *Koopman, et al. v. United States*, US Court of Federal Claims, Case No. 1:09-cv-00333, September 30, 2020, [https://ecf.cofc.uscourts.gov/cgi-bin/show\\_public\\_doc?2009cv0333-363-0](https://ecf.cofc.uscourts.gov/cgi-bin/show_public_doc?2009cv0333-363-0) (retrieved October 6, 2020)

amounts on which they had previously paid Medicare taxes due to the bankruptcy of United Airlines.

The case involves a United Airlines nonqualified deferred compensation arrangement Mr. Koopman was a participant in. As the Court describes the facts of the case:

The underlying facts of this case are undisputed. In 2001, Mr. Koopmann retired from United Airlines, and was covered by United Airlines' non-qualified deferred compensation plan. Def. Mot. Ex. A at 3-4. Pursuant to the special timing rule, Mr. Koopmann paid the present value of his FICA taxes the year in which he retired. Def. Mot. Ex. A at 3-4. Mr. Koopmann received benefits under United Airlines' non-qualified deferred compensation plan from 2001 through 2006. Def. Mot. Ex. A at 3. The hospital insurance tax was 1.45% of an individual's "wages" received with respect to employment. Def. Mot. Ex. A at 4.

On December 9, 2002, two years after Plaintiff's retirement, United Airlines filed a Chapter 11 bankruptcy petition. Def. Ans. ¶ 13. In 2006, the Seventh Circuit Court of Appeals approved United Airlines' reorganization plan. Def. Ans. ¶ 13; see also *In re UAL Corp.*, 468 F.3d 444 (7<sup>th</sup> Cir. 2006). As a result of these proceedings, United Airlines' obligation to pay Plaintiff's deferred compensation was discharged, with a portion of Mr. Koopmann's benefits never having been paid. See Def. Ex. A at 3; Pl. Resp. at 4, 5-6. Specifically, Mr. Koopmann paid tax on \$415,025.91 worth of non-qualified deferred compensation, of which he received only \$248,293. Def. Ex. A at 3. He paid \$6,017.88 of FICA tax on these benefits, which reflects the 1.45% HI tax rate applied to the \$415,025.91 present value of the benefits. Def. Mot. Ex. A at 3.

As partial compensation for the bankruptcy discharge of Mr. Koopman's retirement benefits, United issued common stock to Mr. Koopmann, with the last issuance taking place on April 24, 2007. Pl. Resp. at 4. Sometime thereafter, Mr. Koopmann filed an administrative claim for refund, on IRS Form 843, which he signed on August 5, 2007. See Def. Mot. Ex. A at 2; Pl. Resp. at 4. Mr. Koopmann's refund claim purported to relate to the tax period from "1/1/06 to 12/31/06." Def. Mot. Ex. A at 2. However, attachments to the refund claim indicate that Koopmann was seeking a refund of "withheld Medicare taxes on the entire amount in the [non-qualified deferred compensation] plan in 2001." Def. Mot. Ex. A at 3.<sup>22</sup>

The IRS denied Mr. Koopman's claim for refund. One key problem was that he had filed the claim more than three years after the tax had been withheld, and thus any refund, whether or not otherwise allowable, would be barred by IRC §6511(a)—the standard three year statute of limitations on claims for refund.

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<sup>22</sup> *Koopman, et al. v. United States*, pp. 4-5

### ***Statute of Limitations for Filing a Claim for Refund***

The Court of Federal Claims agreed with the IRS, finding that the time had long ago past for Mr. Koopman to have filed a claim for a refund of Medicare taxes withheld in 2001. The Court found:

- The three-year statute under IRC §6511(a) applies to any tax imposed by the IRC, which includes the Medicare tax Mr. Koopman was looking to recover;
- The statute of limitations is not subject to equitable tolling—so the mere fact this may appear unfair isn’t relevant; and
- The statute has no “discovery” rule that delays the running of the statute until the taxpayer learns a tax has been paid in error.<sup>23</sup>

The opinion notes that this is not the first time this issue has come before the courts:

In fact, at least two other courts have rejected Mr. Koopmann’s statute of limitations arguments. In *Jackson v. Internal Revenue Service*, No. 7:07-CV-168-H(2), 2008 WL 755916 (E.D.N.C. 2008), the district court held that a refund claim was untimely in circumstances virtually identical to those here. There, a retired United pilot sought a refund of FICA taxes withheld on “the present value of his entire non-qualified pension plan” under the special timing rule in § 3121(v)(2). *Id.* at \*1. When that pilot retired, United paid FICA taxes totaling \$8,239.05, based on the present value of his entire non-qualified pension plan of \$568,210.04. When United filed for bankruptcy, that plaintiff’s pension plan was terminated, with plaintiff only receiving payments totaling \$137,611.60. *Id.* at \*1. The pilot in that case filed a refund claim with the IRS on August 3, 2006, seeking a refund for the 2002 tax year of FICA tax paid on August 9, 2002. *Id.* The court held that Mr. Jackson had not filed a timely administrative claim under § 6511 and dismissed his suit as a result. *Id.*

Likewise, in *United States v. Bates*, No. 8:12-cv-833-T, 2015 WL 7444285 (M.D. Fla. 2015), the district court entered a judgment in the Government’s favor in a suit under § 7405 to recover an erroneous refund of tax. Mr. Bates, who was also a plaintiff in both *Koopmann* and *Sofman*, had filed an administrative refund claim on January 8, 2008, seeking a refund of FICA taxes that United had paid in 2004. *Id.* at \*1-2. An IRS Appeals Officer issued an erroneous refund which the United States sued to recover. *Id.* at \*2. The district court held that “the Office of Appeals exceeded its authority when it authorized the refund . . . to the Bates because the request for refund was filed outside the statutory limitations period provided by 26 U.S.C. § 6511.” *Id.* at \*5. In reaching its holding, the district court rejected the argument that “there was no basis to request a refund until the bankruptcy court definitively ruled that Mr. Bates would no longer be receiving any payments from United under the Plan,” because “the

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<sup>23</sup> *Koopman, et al. v. United States*, pp.8-10



limitations period under section 6511 is not subject to equitable tolling.” *Id.* at \*4.<sup>24</sup>

The Court notes that Mr. Koopman could have challenged the special timing rule that triggers the FICA taxation of deferred compensation by default when the right to the funds vest, rather than when the deferred compensation is paid, before the running of the statute:

Mr. Koopmann could have filed a claim for refund protesting the application of the special timing rule. In this respect, § 6511(a) did not entirely deprive Mr. Koopmann of an opportunity to file a refund. Further, there may have been good reason for Mr. Koopmann and other similarly situated plaintiffs not to challenge the legality of the special timing rule. While it is true that taxation of the compensation at its present value can sometimes work to an employee’s disadvantage such as in the case of an employer going bankrupt, the special timing rule can also work to an employee’s advantage. Indeed, Mr. Koopmann may have potentially benefitted from the application of the special timing rule in this case. Mr. Koopmann paid only a 1.45% Medicare tax on the present value of his compensation in the 2001 tax year, for a total tax of \$6,017.88. See Def. Mot. Ex. A at 3. Had Mr. Koopmann paid FICA tax on the deferred compensation as he received it in 2001 through 2006, and had his income fallen under the Social Security wage cap, he would have paid both a 1.45% Medicare tax and a 6.2% Social Security tax on the compensation he later received. See I.R.C. § 3101(a) (imposing “tax equal to 6.2 percent of the wages”).<sup>25</sup>

### ***The Taxpayer’s Claim Would Have Failed Even if Not Time Barred***

The Court notes that while the taxpayer’s claim had been filed too late to be heard by the Court, the taxpayer’s underlying claim was doomed even if he had filed in time. The Court of Federal Claims had already rejected a challenge to the special timing rule:

Finally, even if Mr. Koopmann’s claims are not time-barred, his arguments would nevertheless fail, as the Federal Circuit has already rejected Mr. Koopmann’s arguments related to the Treasury Department’s application of the special timing rule in the identical situation. *Balestra*, 803 F.3d at 1369-1373 (ruling that Treasury regulation concerning special timing rule was not invalid or inapplicable where United Airlines was in bankruptcy proceedings when the present value of the deferred compensation was calculated). In *Balestra*, a retired United Airlines pilot brought a suit seeking a FICA tax refund. Like the present case, Mr. Balestra paid FICA taxes on retirement benefits he never received due to United Airlines’ bankruptcy. Mr. Balestra challenged the Treasury Department’s

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<sup>24</sup> *Koopman, et al. v. United States*, pp. 10-11

<sup>25</sup> *Koopman, et al. v. United States*, p. 12

application of the special timing rule, which taxed plaintiff's deferred compensation at the "present value" as of the date of plaintiff's retirement but also "prohibited consideration of an employer's financial condition (e.g., bankruptcy) in calculating the amount deferred." *Balestra*, 803 F.3d at 1365 (citing 26 C.F.R. § 31.3121(v)(2)-1(c)(2)(ii)).

The Federal Circuit rejected Mr. Balestra's arguments that these regulations were invalid stating, "[i]t may seem unfair in a specific instance such as this, but in balancing the desire for simplicity against the ideal of ultimate comprehensiveness, the agency must be allowed a reasonable degree of discretion." *Balestra*, 803 F.3d at 1374 (holding that Treasury Department's regulation was due deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)). Regardless of this Court's views on *Chevron* deference, it is axiomatic that this Court is bound by the Supreme Court's decision and the Federal Circuit's analysis and holding in *Balestra*, 803 F.3d at 1365, and Mr. Koopmann has not provided a persuasive reason why his case should be treated differently.<sup>26</sup>

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<sup>26</sup> *Koopman, et al. v. United States*, p. 14