

# PPP Round Two and Other Year-End Tax Developments

December 28, 2020

Edward K. Zollars, CPA  
(Licensed in Arizona)

ACCOUNTING  
CONTINUING EDUCATION

PPP ROUND TWO AND OTHER YEAR-END TAX DEVELOPMENTS  
DECEMBER 28, 2020  
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Published in 2020 by Kaplan Financial Education.

Printed in the United States of America.

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# PPP ROUND TWO AND OTHER YEAR-END TAX DEVELOPMENTS

## Contents

<b>Status of the Law</b> .....	<b>1</b>
President’s Response and Possible Responses .....	1
So What’s Going to Happen .....	2
<b>Paycheck Program Loan Revisions and Second Draw Loans</b> .....	<b>3</b>
Time Period for Restarted Program .....	3
Tax Treatment of PPP and Second Draw Debt Forgiveness .....	3
Repeal of EIDL Advance Reduction of PPP Forgiveness .....	4
Modifications to the Original PPP Loan Program.....	4
Reopening Original PPP Loan Program.....	4
Definition of a Seasonal Employer.....	5
Increased Date Range for Computation of Maximum Loan for PPP Loan for Seasonal Employer.....	6
Addition of Certain §501(c)(6) Organizations to List of Those Eligible for Loans.....	6
Housing Cooperatives Added to List of Eligible Borrowers.....	8
Public Companies Barred from Obtaining a PPP Loan.....	8
Additional Eligible Expenses .....	8
Employee Retention Credit Available to Employers Who Obtain a Paycheck Protection Program Loan.....	11
Payroll Costs for Loan Forgiveness Will Not Include Amounts on Which an Employee Retention Credit is Claimed .....	11
Clarification of Application of \$100,000 Cash Compensation Limit Over Covered Period .....	11
Bar on Use of PPP Loan Funds for Lobbying .....	11
Special Maximum PPP Loan Amounts for Farmers and Ranchers .....	12
Selection of Covered Period for Forgiveness.....	13
Simplified Application for Forgiveness of Loans Up to \$150,000 .....	13
Requirement to Have Been in Operation on February 15, 2020 .....	15
Entities Receiving Shuttered Venue Operator Grants Not Eligible for PPP Loans .....	15
CARES Act §1106 Moved into Small Business Act at §7A.....	15
Modification to FTE Safe Harbor 2.....	15
Modification for Exemption Based on Employee Availability .....	16
Unable to Return to Same Level of Activity .....	16

PPP Second Draw Loans .....	17
Definitions .....	17
Eligible Entity.....	17
Requirement to Have First Received a PPP Loan to Get a PPP2 Loan .....	21
Maximum Loan Amount.....	21
Remove Two Certifications .....	23
Loan Forgiveness for PPP2 Loans .....	23
<b>Business COVID-Related Relief .....</b>	<b>25</b>
Payroll Tax Credit Revisions .....	25
Clarifications and Technical Improvements to CARES Act Employee Retention Credit Effective Retroactive to Enactment of CARES Act.....	25
Extension and Modifications of Employee Retention and Rehiring Tax Credit First Effective in 2021 .....	27
Extension of Credits for Paid Sick and Family Leave .....	30
Time Period Over Which Deferred Employee FICA is to Be Withheld in 2021 .....	31
Miscellaneous Business-Related Tax issues.....	31
Restaurant Provided Business Meals Fully Deductible in 2021 and 2022.....	31
Election to Waive Application of Certain Modifications to Farm Losses .....	31
Non PPP Loan Forgiveness Taxation .....	32
Nontaxability of Forgiveness of Indebtedness Under United States Treasury Program Management Authority .....	32
Tax Status of Emergency EIDL Grants and Targeted EIDL Advances .....	33
Tax Status of Loan Payments Made by SBA for Borrowers .....	33
Tax Status of Grants for Shuttered Venue Operators.....	34
Employee Benefit Plan Related Relief .....	34
Minimum Age for Distributions During Working Retirement for Some Workers in the Construction Industry .....	34
Temporary Rule Preventing Partial Plan Termination .....	35
Temporary Modification of Rules for Health and Dependent Care Flexible Spending Arrangements .....	35
Energy Related Relief.....	37
Residential Property in an Electing Real Property Trade or Business Depreciated Over 30- Year Period .....	38
Waste Energy Recovery Property Eligible for Energy Credit .....	38
Extension of Energy Credit for Offshore Wind Facilities.....	39
<b>Individual Provisions .....</b>	<b>41</b>
Recovery Credit and Rebates.....	41

Additional Recovery Rebates for Individuals.....	41
Checks Issued to the Taxpayer – Advance Refund of Additional 2020 Recovery Credit ...	43
Revisions to Original CARES Act Recovery Rebates in IRC §6428.....	45
Options to Use Prior Year Numbers .....	46
Temporary Special Rule for Determination of Earned Income for EITC and Child Tax Credit .....	46
Charitable Tax Provisions .....	47
Charitable Deduction for Non-Itemizers Extended to Cover 2021 .....	47
Increased Charitable Contributions Provisions Continued into 2021 .....	48
Other Individual Tax Provisions .....	48
Educator Expense Deduction Includes Payments for Personal Protective Equipment.....	48
Exclusion from Income for Students Receiving Qualified Emergency Financial Aid Grant .....	48
Credit for Sick Leave and Family Leave of Self-Employed Individuals .....	49
<b>Extenders .....</b>	<b>51</b>
Items Made Permanent .....	51
Medical Expense Deduction Floor.....	51
Energy Efficient Commercial Building Deduction under IRC §179D.....	51
Benefits to Volunteer Firefighters and Emergency Medical Responders Excluded from Gross Income.....	52
Transition from a Deduction for Qualified Tuition and Related Expenses to an Increased Income Limitation on the Lifetime Learning Credit .....	52
Railroad Track Maintenance Credit.....	53
Provisions Extended Through 2025 .....	53
Look-Thru Rule for Related Controlled Foreign Corporations.....	53
New Markets Tax Credit .....	53
Work Opportunity Credit.....	53
Exclusion from Gross Income of Discharge of Qualified Principal Residence Indebtedness .....	54
7-Year Recovery Period for Motorsports Entertainment Complexes .....	54
Expensing Rules for Certain Productions .....	54
Empowerment Zone Tax Incentives.....	54
Employer Credit for Paid Family Leave .....	55
Exclusion for Certain Employer Payment of Student Loans.....	55
Extension of Carbon Oxide Sequestration Credit .....	55
Extensions of Other Provisions .....	55

Credit for Electricity Produced from Certain Renewable Resources .....	55
Extension and Phase-Out of Energy Credit.....	56
Treatment of Mortgage Insurance Premiums as Qualified Residence Interest .....	56
Credit for Health Insurance of Qualified Individuals.....	56
Indian Employment Credit .....	57
Mine Rescue Team Training Credit.....	57
Classification of Certain Race Horses as 3-Year Property.....	57
Accelerated Depreciation for Business Property on Indian Reservations.....	57
American Samoa Economic Development Credit.....	57
Nonbusiness Energy Property Credit.....	57
Qualified Fuel Motor Vehicles Credit .....	57
Alternative Fuel Refueling Property Credit.....	58
2-Wheeled Plug-In Electric Vehicle Credit .....	58
Production Credit for Indian Coal Facilities .....	58
Energy Efficient Homes Credit.....	58
Extension of Residential Energy-Efficient Property Credit and Inclusion of Biomass Fuel Property Expenditures .....	58
<b>Disaster Provisions .....</b>	<b>61</b>
Key Definitions.....	61
Qualified Disaster Area.....	61
Qualified Disaster Zone .....	62
Qualified Disaster .....	62
Incident Period.....	62
Qualified Retirement Plan Disaster Relief.....	62
Tax Favored Withdrawals from Retirement Plans .....	62
Recontributions of Withdrawals for Home Purchases.....	65
Loans from Retirement Plans .....	66
Plan Amendments to Implement These Provisions .....	67
Employee Retention Credit (ERC) for Employers Affected by Qualified Disasters.....	68
Basic Computation .....	68
Definitions .....	68
Special Rules .....	69
Election Not to Take Certain Wages into Account.....	70
Coordination with the Paycheck Protection Program.....	70
Application to Governmental Employees .....	71

Payroll Tax Credit for Certain Tax-Exempt Organizations .....	71
General Credit.....	71
Limit on Wages Taken into Account Each Quarter per Employee .....	72
Limitation and Carry Forward of Credit.....	72
Definitions for Special Tax-Exempt Organization Credit .....	72
Third Party Payors .....	73
No Duplication of Use of Wages for QDERC .....	73
Advance Payment .....	73
Qualified Disaster Relief Contributions - Corporations .....	74
Special Rules for Qualified Disaster-Related Personal Casualty Losses .....	74
Definitions .....	75
Additional Low-Income Housing Credit Allocations .....	75
Extension of Placed in Service Deadline for Designated Housing Credit Dollar Amounts	76
Allocation Treated as Made First from Additional Allocation for Purposes of Determining Carryover.....	76

# Unit

# 1

## Status of the Law

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

### **PRESIDENT'S RESPONSE AND POSSIBLE RESPONSES**

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

But, it turns out, the President would not have to veto this bill in order to prevent it from becoming law. The unique set of circumstances that would allow the President to use a pocket veto have occurred with regard to this bill.

A pocket veto can occur when the President is sent the bill less than 10 days before the Congress that passed the bill adjourns for the final time. The Congress that passed this bill will be required to adjourn by noon EST on January 3, when the new Congress just elected is to be sworn into office. The bill was finally delivered to the President on December 24, less than 10 days before that date.

If the President exercises the pocket veto, there will be no option for Congress to override the veto and have the law take effect upon the override. Rather, Congress would have to restart the process to pass the bill again, and then send it to the President who would again have 10 days to act on the bill. Given the time it would likely take for the bill to get through Congress, it's very possible the 10-day period might stretch to the end of President's Trump's term.

Now it becomes a question of how Congress wants to handle the matter, assuming they would want to pass the same bill (which far from assured). If President-Elect Biden were to indicate he would be willing to sign the bill, it's possible the Congress might wait to be able to deliver the bill to the incoming President.

## SO WHAT'S GOING TO HAPPEN

That is far from clear at this point. First, the “old” Congress could, in theory, pass additional bills to send to the President to address the President’s issues, presumably clearing the path to get the bill signed. However, it’s far from clear that there is enough support in Congress to do any of the actions the President demands.

If the President vetoes the bill before the old Congress adjourns, it’s possible that the Congress might vote to override the veto. But it’s not clear there would be enough time to get an override through if Congressmen or, more critically, Senators opposed to the bill decide not to consent to a rapid vote. Thus, members of Congress could “run out the clock” on the ability to pass an override.

As well, even if a veto override vote is taken, it’s not necessarily a sure thing that all members who initially voted for the bill will vote to override a veto.

If the new Congress has to start over, it’s possible they simply pass the same bill as before—but it’s also possible that the coalition that got the bill passed to begin with will fray with the passage of time, and the bill will have to be renegotiated.

That said, in the view of this author *if* an actual bill gets passed before the end of February, it is very likely this bill’s COVID-19 relief provisions will largely make up the similar portion of any new bill. This is based, first, on the difficulty of starting the process over again entirely from scratch and obtaining an agreement quick (this bill took seven months to work out). And, second, aside from the complaint about the size of the COVID-19 relief checks, the President did not otherwise have complaints about the items discussed in this manual.

Far more likely in my view than a radically different bill being passed in early 2021 is having no relief package passed at all by Congress. So this course will look at the proposed bill, remembering that the application of any of this depends on final enactment of the bill into law.

# Unit

# 2

## Paycheck Program Loan Revisions and Second Draw Loans

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

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

### TIME PERIOD FOR RESTARTED PROGRAM

The dates for the new loan program are found in the section of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* that modifies the end date of the PPP program's funding authorization, along with adding the new second draw program, to March 31, 2021.<sup>2</sup>

Thus funding would be available from the day the President signs the *Consolidated Appropriations Act, 2021* until the end of the first quarter.

### TAX TREATMENT OF PPP AND SECOND DRAW DEBT FORGIVENESS

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

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

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

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

- No amount shall be included in the gross income of the eligible recipient by reason of forgiveness of PPP loan indebtedness, and
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income of that amount.<sup>3</sup>

The same rules will apply to PPP second draw loans.<sup>4</sup>

SBA guidance issued to lenders prior to the enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* had indicated that these payments would be reported to borrowers on Form 1099MISC and be taxable to the borrower.<sup>5</sup>

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

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

## REPEAL OF EIDL ADVANCE REDUCTION OF PPP FORGIVENESS

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

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

## MODIFICATIONS TO THE ORIGINAL PPP LOAN PROGRAM

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

### Reopening Original PPP Loan Program

<sup>3</sup> SBA §7A(i)(1) and (2) (previously CARES Act §1106) as amended by Covid-Related Tax Relief Act of 2020 §276(a)

<sup>4</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §276(b)

<sup>5</sup> See Ed Zollars, CPA, "Guidance on Information Reporting Responsibilities for Payments Under CARES Act §1112 Made by SBA," *Current Federal Tax Developments* website, December 12, 2020, <https://www.currentfederaltaxdevelopments.com/blog/2020/12/12/guidance-on-information-reporting-responsibilities-for-payments-under-cares-act-1112-made-by-sba> (retrieved December 17, 2020)

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

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

<sup>8</sup> COVID-related Tax Relief Act of 2020 §279

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

In the Act, the funding authorization for both the PPP loan program and the second draw program applies through March 31, 2021, marking the last day that such loans can be paid out. Previously payments were barred after August 8, 2020, so this provision serves to open up both programs for the first quarter of 2021.<sup>9</sup>

As well, the definition of “covered period” for a PPP loan received after the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* is revised to end on March 31, 2020 as opposed to December 31, 2020 for loans obtained before that date.<sup>10</sup>

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

- The initial covered loan amount has been fully disbursed; or
- The lender of the initial covered loan has submitted to the Administration a Form 1502 report related to the covered loan.<sup>11</sup>

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

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

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

- In the case of an eligible recipient that returned all or part of a covered loan, the eligible recipient may reapply for a covered loan for an amount equal to the difference between the amount retained and the maximum amount applicable; and
- In the case of an eligible recipient that did not accept the full amount of a covered loan, the eligible recipient may request a modification to increase the amount of the covered loan to the maximum amount applicable, subject to the requirements of the PPP loan program.<sup>12</sup>

## **Definition of a Seasonal Employer**

Although the original PPP loan program made reference to a “seasonal employer,” the term as not defined in the CARES Act. The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*

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<sup>9</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §323(a)

<sup>10</sup> SBA §7(a)(36)(A)(iii) after amendment by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §343(a)(a)

<sup>11</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §312(c)

<sup>12</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §312(b)

now provides a definition of what it means to be a seasonal employer. A seasonal employer is one that:

- Does not operate for more than 7 months in any calendar year; or
- During the preceding calendar year, had gross receipts for any 6 months of that year that were not more than 33.33 percent of the gross receipts of the employer for the other 6 months of that year.<sup>13</sup>

This definition applies as if it had originally been in the CARES Act—and thus may trip up some borrowers who may have treated themselves as seasonal employers but do not meet this new definition.<sup>14</sup>

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

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

- The 12-week period beginning February 15, 2019 or
- The time period between March 1, 2019 and ending June 30, 2019.<sup>15</sup>

The Act changes the above to provide that a seasonal employer “shall use the average total monthly payments for payroll for any 12-week period selected by the seasonal employer between February 15, 2019 and February 15, 2020.”<sup>16</sup>

The revision applies as if it had been included in the original CARES Act, except it will not apply to loans on which the borrower had received forgiveness prior to the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.<sup>17</sup>

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

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

- The organization does not receive more than 15 percent of its receipts from lobbying activities;

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<sup>13</sup> SBA Act §7(a)(36)(A)(xiii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §315

<sup>14</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §315(c)

<sup>15</sup> SBA Act §7(a)(36)(E)(i)(I)(aa)(AA) before amendment by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §336(a)

<sup>16</sup> SBA Act §7(a)(36)(E)(i)(I)(aa)(AA) after amendment by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §336(a)

<sup>17</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §336(b)

- The lobbying activities of the organization do not comprise more than 15 percent of the total activities of the organization;
- the cost of the lobbying activities of the organization did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020; and
- The organization employs not more than 150 employees.<sup>18</sup>

A carve out from the lobbying limits are made for certain destination marketing organizations. Despite not qualifying under the above rules, such organizations nevertheless will be eligible if:

- The destination marketing organization does not receive more than 15 percent of its receipts from lobbying activities;
- The lobbying activities of the destination marketing organization do not comprise more than 15 percent of the total activities of the organization;
- The cost of the lobbying activities of the organization did not exceed \$1,000,000 during the most recent tax year of the organization that ended prior to February 15, 2020;
- The destination marketing organization employs not more than 300 employees; and
- The destination marketing organization —
  - is described in section 501(c) of the Internal Revenue Code and is exempt from taxation under section 501(a) of such Code; or
  - is a quasi-governmental entity or is a political subdivision of a State or local government, including any instrumentality of those entities.<sup>19</sup>

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

- an organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; or
- a State, or a political subdivision of a State (including any instrumentality of such entities)—
  - engaged in marketing and promoting communities and facilities to businesses and leisure travelers through a range of activities, including—
    - assisting with the location of meeting and convention sites;
    - providing travel information on area attractions, lodging accommodations, and restaurants;
    - providing maps; and

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<sup>18</sup> SBA Act §7(a)(36)(A)(vii)(I) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

<sup>19</sup> SBA Act §7(a)(36)(A)(vii)(II) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

- organizing group tours of local historical, recreational, and cultural attractions; or
- that is engaged in, and derives the majority of the operating budget of the entity from revenue attributable to, providing live events.<sup>20</sup>

## **Housing Cooperatives Added to List of Eligible Borrowers**

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* expands the list of eligible borrowers to include housing cooperatives.<sup>21</sup>

A qualified housing cooperative is “a cooperative housing corporation (as defined in section 216(b) of the Internal Revenue Code of 1986) that employs not more than 300 employees...”<sup>22</sup>

## **Public Companies Barred from Obtaining a PPP Loan**

Beginning on the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* public companies will no longer be eligible to receive PPP loans.<sup>23</sup>

## **Additional Eligible Expenses**

The Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act adds the following items to the list of non-payroll funds on which PPP loan proceeds can be spent and which will qualify towards non-payroll forgivable costs.<sup>24</sup> These new expenses are detailed in the following paragraphs.

### **Covered Operations Expenditures**

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

a payment for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses...<sup>25</sup>

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<sup>20</sup> SBA §7(a)(36)(A)(xv) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §318

<sup>21</sup> SBA §7(a)(36)(D)(i) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §316

<sup>22</sup> SBA §7(a)(36)(A)(xiv) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §316

<sup>23</sup> SBA §7(a)(36)(D)(viii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

<sup>24</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(a)

<sup>25</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(v)

## **Covered Property Damage Costs**

*Covered property damage costs* are defined as:

a cost related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation...<sup>26</sup>

## **Covered Supplier Costs**

A *covered supplier cost* is:

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

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

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

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

(ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan...<sup>27</sup>

## **Covered Worker Protection Expenditures**

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

...an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act (50 U.S.C. 1601 et seq.) with respect to the Coronavirus Disease 2019 (COVID-19) expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19...<sup>28</sup>

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

- The purchase, maintenance, or renovation of assets that create or expand —
  - A drive-through window facility;

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<sup>26</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(vi)

<sup>27</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(vii)

<sup>28</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(viii)

- An indoor, outdoor, or combined air or air pressure ventilation or filtration system;
  - A physical barrier such as a sneeze guard;
  - An expansion of additional indoor, outdoor, or combined business space;
  - An onsite or offsite health screening capability; or
  - Other assets relating to the compliance with the requirements or guidance, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and
- The purchase of —
- covered materials described in section 328.103(a) of title 44, Code of Federal Regulations, or any successor regulation. Such materials are listed in 44 CFR 328.103(a) as:
    - Surgical N95 Filtering Facepiece Respirators, including devices that are disposable half-face-piece non-powered air-purifying particulate respirators intended for use to cover the nose and mouth of the wearer to help reduce wearer exposure to pathogenic biological airborne particulates;
    - PPE surgical masks, including masks that cover the user's nose and mouth and provide a physical barrier to fluids and particulate materials;
    - PPE nitrile gloves, including those defined at 21 CFR 880.6250 (exam gloves) and 878.4460 (surgical gloves) and such nitrile gloves intended for the same purposes; and
    - Level 3 and 4 Surgical Gowns and Surgical Isolation Gowns that meet all of the requirements in ANSI/AAMI PB70 and ASTM F2407-06 and are classified by Surgical Gown Barrier Performance based on AAMI PB70.
  - Particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency use authorization; or
  - Other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor.<sup>29</sup>

However, covered worker protective equipment does not include residential real property or intangible property.<sup>30</sup>

These changes do not have retroactive effect—they only apply with respect to loans for which forgiveness is granted after the effective date of ECRA.<sup>31</sup>

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<sup>29</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(viii)

<sup>30</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(2)(viii)

<sup>31</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(c)

## **Group Insurance Payments**

The law clarifies that “group life, disability, vision, or dental insurance” expenditures are to be considered an allowed payroll cost.<sup>32</sup> This provision applies as if it were originally in the CARES Act.

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

Congress has removed the provision in the CARES Act that barred an employer who received a Paycheck Protection Program loan from claiming the employee retention credit.<sup>33</sup>

This change is effective as if it was included in the CARES Act.<sup>34</sup>

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

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

- The employee retention credit under CARES Act §2301 or
- The disaster employee retention credit allowed under §303(a) or (d) of the *Taxpayer Certainty and Disaster Relief Act of 2020*.<sup>35</sup>

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

The Act provides a clarification for the application of the \$100,000 annualization limitation for cash compensation for a single employee over a covered period of what may be a variable number of weeks selected by the borrower between 8 and 24 weeks. The Act clarifies the limit is to be calculated by limiting the cash compensation of an employee to “\$100,000 on an annualized basis, as prorated for the period during which the compensation is paid or the obligation to pay the compensation is incurred.”<sup>36</sup>

## **Bar on Use of PPP Loan Funds for Lobbying**

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<sup>32</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §308

<sup>33</sup> Removal of CARES Act §2301(j) by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)

<sup>34</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(1)

<sup>35</sup> SBA §7A(a)(12) as amended by the Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)

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

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

- Lobbying activities, as defined in section 3 of the Lobbying Disclosure Act of 1995 (2 U.S.C. 1602);
- Lobbying expenditures related to a State or local election; or
- Expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or Executive order proposed or pending before Congress or any State government, State legislature, or local legislature or legislative body.<sup>37</sup>

## **Special Maximum PPP Loan Amounts for Farmers and Ranchers**

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* adds a special maximum loan calculation for farmers and ranchers.<sup>38</sup>

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

- Operates as a sole proprietorship or as an independent contractor, or is an eligible self-employed individual;
- Reports farm income or expenses on a Schedule F (or any equivalent successor schedule); and
- Was in business as of February 15, 2020.<sup>39</sup>

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

- the sum of—
  - the product obtained by multiplying—
    - the gross income of the covered recipient in 2019, as reported on a Schedule F (or any equivalent successor schedule), that is not more than \$100,000, divided by 12; and
    - 2.5; and
  - the outstanding amount of a loan under SBA §7(b)(2) that was made during the period beginning on January 31, 2020 and ending on April 3, 2020 that the borrower intends to refinance under the covered loan, not including any amount of any advance under the loan that is not required to be repaid; *or*
- \$2,000,000.<sup>40</sup>

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<sup>37</sup> SBA §7(a)(36)(F)(vi) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §319

<sup>38</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

<sup>39</sup> SBA §7(a)(36)(V) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

<sup>40</sup> SBA §7(a)(36)(V)(ii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

If the qualified farmer or rancher has employees, then the standard maximum loan computation shall be used (2.5 months of payroll costs plus the §7(b)(2) loan to be refinanced in the PPP loan), with 2.5 months of gross income from the 2019 Schedule F being added to that total.<sup>41</sup>

The provision also allows the qualified farmer or rancher who received a PPP loan to request that the lender recalculate the maximum covered loan using this new formula and provide the qualified farmer or rancher with additional loan proceeds based on this calculation. However, the statute is worded that the lender *may* make such an additional advance, not the lender *must* make this additional advance if the borrower requests.<sup>42</sup>

The farmer and rancher maximum loan provision is effective as if it had been included in the original CARES Act<sup>43</sup> except the provision does not apply to loans that have already been forgiven prior to the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.<sup>44</sup>

## **Selection of Covered Period for Forgiveness**

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

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

- Begins on the date the loan proceeds are received by the borrower and
- Ends on a date selected by the borrower that falls between
  - Eight weeks after the date the funds were received by the borrower and
  - Twenty-four weeks after the date the funds were received by the borrower.<sup>45</sup>

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

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

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<sup>41</sup> SBA §7(a)(36)(V)(iii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

<sup>42</sup> SBA §7(a)(36)(V)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313

<sup>43</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313(b)(1)

<sup>44</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §313(b)(2)

<sup>45</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §306

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

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

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

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

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

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

(cc) the total loan value;

(ii) attests that the eligible recipient has—

(I) accurately provided the required certification; and

(II) complied with the requirements under section 7(a)(36); and

(iii) retains records relevant to the form that prove compliance with such requirements—

(I) with respect to employment records, for the 4-year period following submission of the form; and

(II) with respect to other records, for the 3-year period following submission of the form.<sup>46</sup>

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* provides that no other information will be required to be submitted with the application for the covered loan of \$150,000 or less.<sup>47</sup>

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

As well, the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act did not contain the special reduced documentation application process for borrowers with loans of more than \$150,000 but less than \$2,000,000 that was originally found in the proposed *Emergency Coronavirus Relief Act of 2020* that served as the starting point for negotiations for the eventual bill that was enacted.<sup>48</sup> As well, the application for those with loans of up to \$150,000 are required to provide additional information under the final bill as compared to what was in the initial proposal.

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<sup>46</sup> CARES Act 1106(l)(A) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §307

<sup>47</sup> CARES Act 1106(l)(B) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §307

<sup>48</sup> Full text downloaded from <https://www.cassidy.senate.gov/imo/media/doc/BAI20965.pdf>, retrieved December 19, 2020.

## **Requirement to Have Been in Operation on February 15, 2020**

Businesses must have been in operation on February 15, 2020 in order to receive an original PPP loan. The provision applies as if it had originally been in the CARES Act to all loans, including those made before the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*<sup>49</sup>

## **Entities Receiving Shuttered Venue Operator Grants Not Eligible for PPP Loans**

Entities that receive Shuttered Venue Operator Grants under the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* are not eligible for a PPP loan.<sup>50</sup> Note there is a drafting error in the copy of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* released on December 21, referring to such grants as being under Section 24 of the Act, rather than Section 324 where the grant provision is found. That error may be, or have been, corrected before the Act becomes law.

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

The law moves CARES Act §1106, which had existed solely as text in the law, into the United States Code by designating it as Section 7A of the Small Business Act.<sup>51</sup> Noting this change, which is easy to overlook, makes it a lot easier to interpret the language found in the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.

## **Modification to FTE Safe Harbor 2**

ECRA modifies FTE safe harbor 2 as it is called on the forgiveness application form, which was the only FTE safe harbor found in the CARES Act, for loans made on or after the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.<sup>52</sup>

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

- The borrower must have had a reduction in FTE in the period from February 15, 2020 to April 26, 2020 when compared to FTE at February 15, 2020 *and*
- The borrower has eliminated the reduction by December 31, 2020 except for loans made on or after the date of enactment of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* where the borrower will have until the last day of the covered period for the loan. .<sup>53</sup>

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<sup>49</sup> SBA §7(a)(36)(T) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §310

<sup>50</sup> SBA §7(a)(36)(U) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §310

<sup>51</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §304(b)(1)

<sup>52</sup> CARES Act 1106(d)(5)(B) as amended by ECRA

<sup>53</sup> SBA §7A(d)(5)(B) (formerly CARES Act §1106) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

The same change in the ending date for the restoration test is made for a taxpayer who had a reduction in either the hourly wage rate or annualized salary for an employee in the period from February 15, 2020 to April 26, 2020 when compared to February 15, 2020.<sup>54</sup>

## **Modification for Exemption Based on Employee Availability**

As was true for the FTE Safe Harbor 2 ending date, the end date of the exemption based on employee availability formerly found in CARES Act 1106(d)(7) is moved for loans received after the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.

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

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

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

- An inability to rehire individuals who were employees on February 15, 2020 and
- An inability to hire similarly qualified employees for unfilled positions on or before
  - December 31, 2020 for loans obtained prior to the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* and
  - The last day of the covered period for loans obtained on or after the effective date of the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act*.<sup>55</sup>

## **Unable to Return to Same Level of Activity**

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

The provision now reads that the amount of loan forgiveness shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible recipient, in good faith “is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020 (or, with respect to a covered

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<sup>54</sup> SBA §7A(d)(5)(B) (formerly CARES Act §1106) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

<sup>55</sup> SBA §7A(d)(7)(A) (formerly CARES Act §1106) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

loan made on or after the date of enactment of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act, not later than the last day of the covered period with respect to such covered loan), related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.”<sup>56</sup>

## PPP SECOND DRAW LOANS

The *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* creates a new class of SBA §7(a) loans,<sup>57</sup> found at SBA §7(a)(37), just after the original PPP loan provision. The new loan is meant to provide a second loan for those who have exhausted their original PPP loan but have been impacted by a significant decrease in revenue. Thus, this program has very explicit need qualifications, not just a good faith belief that the loan is necessary.

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

### Definitions

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

- *Covered loan* (PPP2 covered loan) means a loan made under this program.<sup>58</sup>
- *Covered mortgage obligation, covered operating expenditure, covered property damage cost, covered rent obligation, covered supplier cost, covered utility payment, and covered worker protection* have the same meaning as they do under the original PPP program.<sup>59</sup>

### Eligible Entity

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

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

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<sup>56</sup> SBA §7A(d)(7)(B) (formerly CARES Act §1106) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311(b)

<sup>57</sup> Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>58</sup> SBA §7(a)(37)(A)(ii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>59</sup> SBA §7(a)(37)(A)(iii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

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

That meets the remaining requirements.<sup>60</sup>

The entity must also attest that it:

- Employs not more than 300 employees (down from 500 for original PPP loan program) and
- Meets one of the following reduction in gross receipts tests:
  - Had gross receipts during the first, second, third, or, only with respect to an application submitted on or after January 1, 2021, fourth quarter in 2020, that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the same quarter in 2019;
  - If the entity was not in business during the first or second quarter of 2019, but was in business during the third and fourth quarter of 2019, had gross receipts during the first, second, or third quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the third or fourth quarter of 2019;
  - If the entity was not in business during the first, second, or third quarter of 2019, but was in business during the fourth quarter of 2019, had gross receipts during the first, second, or third quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the fourth quarter of 2019; or
  - If the entity was not in business during 2019, but was in operation on February 15, 2020, had gross receipts during the second or third quarter of 2020 that demonstrate not less than a 25 percent reduction from the gross receipts of the entity during the first quarter of 2020.<sup>61</sup>

As well, §501(c)(6) organizations that were first made eligible for the original PPP loans under the *Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act* will be eligible to qualify for the second loan (except the 150 employee limitation will still apply).<sup>62</sup>

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<sup>60</sup> SBA §7(a)(37)(A)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>61</sup> SBA §7(a)(37)(A)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>62</sup> SBA §7(a)(37)(A)(iv)(II) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

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

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

- Speculative businesses (such as oil wildcatting)<sup>63</sup>
- Any business concern or entity primarily engaged in political or lobbying activities, which shall include any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public documents;<sup>64</sup>
- Any business concern or entity:
  - for which an entity created in or organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or that has significant operations in the People's Republic of China or the Special Administrative Region of Hong Kong, owns or holds, directly or indirectly, not less than 20 percent of the economic interest of the business concern or entity, including as equity shares or a capital or profit interest in a limited liability company or partnership; or
  - that retains, as a member of the board of directors of the business concern, a person who is a resident of the People's Republic of China;<sup>65</sup> or
  - any person required to submit a registration statement under section 2 of the Foreign Agents Registration Act of 1938 (22 U.S.C. 612).<sup>66</sup>
- Any entity that received a grant under the Shuttered Venue Operator Grants under the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act are not eligible for a PPP loan.<sup>67</sup>

For purposes of computing gross receipts for nonprofit and veterans organizations, gross receipts means gross receipts within the meaning of IRC Section 6033.<sup>68</sup>

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

- May submit a certification attesting that the eligible entity meets the applicable revenue loss requirement; but
- If the eligible entity submits the simplified certification, the entity shall, on or before the date on which the eligible entity submits an application for forgiveness of the PPP2 loan, produce adequate documentation that the eligible entity met such revenue loss standard.<sup>69</sup>

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<sup>63</sup> SBA §7(a)(37)(A)(v)(III)(aa) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>64</sup> SBA §7(a)(37)(A)(v)(III)(bb) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>65</sup> SBA §7(a)(37)(A)(v)(III)(cc) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>66</sup> SBA §7(a)(37)(A)(v)(III)(dd) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>67</sup> SBA §7(a)(37)(A)(v)(III)(ee) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>68</sup> SBA §7(a)(37)(I)(ii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>69</sup> SBA §7(a)(37)(I)(i) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

An entity can only receive a single PPP2 loan.<sup>70</sup>

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

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

- Received a loan under the original PPP loan program and
- On or before the expected date on which the covered loan under this paragraph is disbursed to the eligible entity, has used, or will use, the full amount of the entity's original PPP loan funds.<sup>71</sup>

## **Maximum Loan Amount**

PPP2 loans are subject to similar maximum loan amounts as the original PPP loans except that they are capped at \$2 million rather than \$10 million.<sup>72</sup> The loans are generally going to be offered on the same terms, conditions and processes as the original PPP loan.<sup>73</sup>

### **General Rule**

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

- the average total monthly payment for payroll costs incurred or paid by the eligible entity during—
  - the 1-year period before the date on which the loan is made; or
  - calendar year 2019; by
  - 2.5; or
- \$2,000,000.<sup>74</sup>

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<sup>70</sup> SBA §7(a)(37)(F) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>71</sup> SBA §7(a)(37)(O) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>72</sup> SBA §7(a)(37)(C) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>73</sup> SBA §7(a)(37)(B) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>74</sup> SBA §7(a)(37)(C)(i) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

## **Seasonal Employers**

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

- at the election of the eligible entity, the average total monthly payments for payroll costs incurred or paid by the eligible entity for any 12-week period during the period between February 15, 2019 and February 15, 2020 by 2.5; or
- \$2,000,000.<sup>75</sup>

## **New Entities**

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

- the product obtained by multiplying —
  - the quotient obtained by dividing —
    - the sum of the total monthly payments by the eligible entity for payroll costs paid or incurred by the eligible entity as of the date on which the eligible entity applies for the covered loan; by
    - the number of months in which those payroll costs were paid or incurred; by
  - 2.5; or
- \$2,000,000.<sup>76</sup>

## **NAICS 72 Entities (Accommodation and Food Industries)**

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

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

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<sup>75</sup> SBA §7(a)(37)(C)(ii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

<sup>76</sup> SBA §7(a)(37)(C)(iii) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

- \$2,000,000<sup>77</sup>

## Remove Two Certifications

Borrowers will no longer be required to certify that they do have an application pending for the same purpose and duplicative of amounts for the PPP2 loan.<sup>78</sup> This proved to be a problem during the initial rollout of the PPP loans, as many potential borrowers found their applications “stuck” and not moving forward at a financial institution they had applied at. Such borrowers would then move to another lender who was timely processing applications, which violated this provision.

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

PPP2 borrowers also will not have to certify that they have received amounts under the program for the same purpose and duplicative of the amounts received under another PPP loan—presumably because the new loan may be based on the same prior payroll costs as one obtained under the first program and it would be used for much the same purpose.<sup>79</sup>

## Loan Forgiveness for PPP2 Loans

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

- Beginning on the date of the origination of a covered loan; and
- Ending on a date selected by the eligible recipient of the covered loan that occurs during the period
  - Beginning on the date that is 8 weeks after such date of origination; and
  - Ending on the date that is 24 weeks after such date of origination.<sup>80</sup>

Generally, except as provided for below, PPP2 loan borrowers are eligible for forgiveness of a PPP2 loan in the same manner as was true for the original PPP loans.<sup>81</sup>

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<sup>77</sup> SBA §7(a)(37)(C)(iv) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act

<sup>78</sup> SBA §7(a)(37)(G) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>79</sup> SBA §7(a)(37)(G) as amended by Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>80</sup> SBA §7A(a)(5), §7(a)(37)(J)(i) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>81</sup> SBA §7(a)(37)(J)(i) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

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

- Payroll costs (excluding those taken into account in computing the employee retention credit under §2301 of the CARES Act or the revised employee retention credit for employers affected by natural disasters added by §303 of the Taxpayer Certainty and Disaster Relief Act of 2020).
- Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).
- Any payment on any covered rent obligation.
- Any covered utility payment.
- Any covered operations expenditure.
- Any covered property damage cost.
- Any covered supplier cost.
- Any covered worker protection expenditure.<sup>82</sup>

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

- The total of the above expenses or
- The amount equal to the quotient obtained by dividing —
  - The amount of the covered loan used for payroll costs during the covered period; by
  - 0.60.<sup>83</sup>

The law notes that those who received loans of \$150,000 or less based on simply certifying they had a qualifying revenue reduction may be required to submit documentation to substantiate the drop in revenue when they apply for forgiveness.<sup>84</sup>

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<sup>82</sup> SBA §7(a)(37)(J)(iii) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>83</sup> SBA §7(a)(37)(J)(iv) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

<sup>84</sup> SBA §7(a)(37)(J)(v) as amended by the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act §311

# Unit 3

## Business COVID-Related Relief

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

### **PAYROLL TAX CREDIT REVISIONS**

Congress extended and revised the key payroll tax credits found in the *Families First Coronavirus Relief Act* and the CARES Act.

#### **Clarifications and Technical Improvements to CARES Act Employee Retention Credit Effective Retroactive to Enactment of CARES Act**

The *Taxpayer Certainty and Disaster Relief Act of 2020* contains a number of significant changes to the employee retention credit (ERC) found at §2301 of the CARES Act which have retroactive effect.

#### **Gross Receipts for a Tax Exempt Organization**

The revision clarifies that gross receipts for a tax-exempt organization for the credit will be determined by reference to gross receipts within the meaning of IRC §6033, which is the IRC provision governing returns filed by such exempt organization.<sup>85</sup>

#### **Health Care Costs**

The new law rearranges the definitions, treating health care costs as wages, making it clear that such payments by themselves would represent wages even if an employee was not otherwise currently employed by the employer.<sup>86</sup>

#### **Availability for Employers That Obtained PPP and/or PPP2 Loan**

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

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<sup>85</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(a)

<sup>86</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(b)

payment to the employee and use that same payment as part of the wages used to claim forgiveness of the PPP2 loan, while imposing no such restriction on claiming the credit for PPP loans.

Congress has removed the provision in the CARES Act that barred an employer who received a Paycheck Protection Program loan from claiming the employee retention credit.<sup>87</sup>

The law provides that any amounts used to claim an ERC cannot be used as payroll costs when claiming forgiveness for either the PPP or PPP2 loan.<sup>88</sup>

In order to enable a business to coordinate between the PPP2 loan forgiveness and the ERC, the law provides that an employer will be able to elect not to take into account a portion of the wages paid that otherwise would qualify for ERC credit in computing the credit. The law provides that the IRS can prescribe how and when this election is to be made.<sup>89</sup>

As well, the provision provides:

The Secretary, in consultation with the Administrator of the Small Business Administration, shall issue guidance providing that payroll costs paid during the covered period shall not fail to be treated as qualified wages under this section by reason of an election under paragraph (1) to the extent that a covered loan of the eligible employer is not forgiven by reason of a decision under section 7A(g) of the Small Business Act. Terms used in the preceding sentence which are also used in section 7A of the Small Business Act shall have the same meaning as when used in such section.<sup>90</sup>

The *Taxpayer Certainty and Disaster Relief Act of 2020* authorizes the IRS to write regulations “to prevent the avoidance of the purposes of the limitations under this section, including through the leaseback of employees.”<sup>91</sup>

### **Provisions in This Section Retroactive to Enactment of CARES Act**

These changes are effective as if they had been part of the original CARES Act.<sup>92</sup> This means that many taxpayers who received a PPP loan now will be able to claim an ERC credit for wages paid in 2020.

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

For purposes of section 2301 of the CARES Act, an employer who has filed a return of tax with respect to applicable employment taxes (as defined in section 2301(c)(1) of division A of such Act) before the date of the enactment of this Act may elect (in such manner as the Secretary of the Treasury (or the Secretary’s delegate) shall prescribe) to treat any applicable amount as an amount paid in the calendar quarter which includes the date of the enactment of this Act.<sup>93</sup>

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<sup>87</sup> Removal of CARES Act §2301(j) by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)

<sup>88</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(1) revising SBA §7A(a)(12)

<sup>89</sup> CARES Act §2301(g)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)(A)

<sup>90</sup> CARES Act §2301(g)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §206(c)(2)(A)

<sup>91</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(d)

<sup>92</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(1)

<sup>93</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(2)(A)

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

- Defined as wages for purposes of ERC or
- Permitted to be treated a qualified wages under guidance issued pursuant to the regulations allowing wages to be treated as qualified for ERC when PPP loan forgiveness is not obtained as described earlier.<sup>94</sup>

And those wages were:

- Paid in a calendar quarter beginning after December 31, 2019 and before October 1, 2020 and
- Were not taken into account by the taxpayer in calculating the ERC credit for such calendar quarter.<sup>95</sup>

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

The second set of revisions to the original ERC do not take effect until 2021.

### ***Extension of ERC Program into First Half of 2021***

First, the ending date for the ERC is pushed forward from the fourth quarter of 2020 to the second quarter of 2021.<sup>96</sup>

The amount of the credit is also increased from 50% of qualified wages paid to 70% of qualified wages paid beginning with the first quarter of 2021.<sup>97</sup>

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

In 2021 the per employee also is modified, no longer limiting the qualified wages per employee to \$10,000 over the lifetime of the ERC to \$10,000 per quarter that the ERC is claimed.<sup>98</sup>

### ***80% Test for Substantial Reduction in Gross Receipts***

The revisions effective in 2021 also make it easier for a taxpayer to qualify for the credit based on a reduction in revenue for a quarter. Under the 2020 version of the ERC, a taxpayer had to show a decrease below 50% of revenue for the same quarter in 2019. In the new version, a reduction where revenue is less than 80% of the revenue for the same quarter in 2019 will begin to qualify a taxpayer for the credit.<sup>99</sup>

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<sup>94</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(2)(B)

<sup>95</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §206(e)(2)(B)

<sup>96</sup> CARES Act §2301(m) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(a)(1)

<sup>97</sup> CARES Act §2301(a) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(b)

<sup>98</sup> CARES Act §2301(b)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(c)

<sup>99</sup> CARES Act §2301(c)(2)(A)(ii)(II) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(1)(A)

## ***Employers Not in Existence in 2019***

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

With respect to any employer for any calendar quarter, if such employer was not in existence as of the beginning of the same calendar quarter in calendar year 2019, clause (ii)(II) shall be applied by substituting ‘2020’ for ‘2019’.<sup>100</sup>

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

## ***Election to Use Prior Quarter for Revenue Testing***

The revised ERC also contains the option to allow an employer to elect to test the decrease in revenue based upon the preceding rather than current calendar quarter.<sup>101</sup>

## ***Certain Governmental Entities Qualify for ERC***

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

These governmental entities include:

- Any §501(c)(3) organization exempt from tax under IRC §501(a);
- A college or university; and
- The principal purpose or function of the entity is providing medical or hospital care.<sup>102</sup>

## ***Changes to Computation of Qualified Wages***

The Act revises the definition of large employer by raising the number of employees from 100 to 500.<sup>103</sup> Thus, more employers will be able to claim the ERC for wages paid to employees who are performing services for the employer during the periods the employer qualifies for the credit, rather than, as a large employer, only being able to claim the credit for amounts paid to employees performing no services for the employer.

The Act also removes the original limitation that provided that qualified wages for an employee could not exceed the amount the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period.<sup>104</sup>

## ***Double Benefit Rule Simplified***

The Act removes two provisions that 1) denied any credit for any quarter in which the employer claimed the work opportunity credit under IRC §51 and 2) prohibited taking a credit under §45S

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<sup>100</sup> CARES Act §2301(c)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(1)(B)

<sup>101</sup> CARES Act §2301(c)(2)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(2)(A)

<sup>102</sup> CARES Act §2301(f)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(d)(3)

<sup>103</sup> CARES Act §2301(c)(3)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(e)(1)t

<sup>104</sup> Repeal of CARES Act §2301(c)(3)(B)

(credit for paid family or medical leave) for any wages on which the ERC was claimed. They are replaced with a single, broader bar on claiming a double benefit.

Any wages taken into account in determining the ERC may be taken into account in computing a credit under:

- IRC §41 (Credit for increasing research activities);
- IRC §45A (Indian employment credit);
- IRC §45P (Employer wage credit for employees who are active duty members of the uniformed services);
- IRC §45S (Employer credit for paid family and medical leave);
- IRC §51 (Work opportunity credit); and
- IRC §1396 (Empowerment zone employment credit).<sup>105</sup>

### ***Advance Payment of Employee Retention Credit***

A new provision has been added to the ERC by the Act allowing small employers to elect to obtain an advance payment of the ERC. For these purposes a small employer is one who did not employ more than 500 employees in 2019—larger employer are barred from receiving such payments.<sup>106</sup>

The advance credit is not to exceed 70% of the average wages paid by the employer in 2019.<sup>107</sup>

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

In the case of any employer who employs seasonal workers (as defined in section 45R(d)(5)(B) of the Internal Revenue Code of 1986), the employer may elect to substitute ‘the wages for the calendar quarter in 2019 which corresponds to the calendar quarter to which the election relates’ for ‘the average quarterly wages paid by the employer in calendar year 2019’<sup>108</sup>

For employers not in existence in 2019, the above rules shall be applied by substituting 2020 for 2019 as the base period being evaluated for the advance payment amount.<sup>109</sup>

The ERC for the quarter shall be reduced (but not below zero) by the amount of the advance credit. A failure to reduce the credit by the advance payment shall be treated as a mathematical or clerical error under IRC §6213(b)(1).<sup>110</sup>

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<sup>105</sup> CARES Act §2301(h)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(f)

<sup>106</sup> CARES Act §2301(j)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

<sup>107</sup> CARES Act §2301(j)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

<sup>108</sup> CARES Act §2301(j)(2)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

<sup>109</sup> CARES Act §2301(j)(2)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

<sup>110</sup> CARES Act §2301(j)(3)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

If an excess advance payment exists for a quarter, the FICA or Railroad Retirement Tax Act tax imposed on the employer shall be increased by the amount of the excess.<sup>111</sup>

### **Third Party Payors**

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

Any forms, instructions, regulations, or guidance described in paragraph (2) shall require the customer to be responsible for the accounting of the credit and for any liability for improperly claimed credits and shall require the certified professional employer organization or other third party payor to accurately report such tax credits based on the information provided by the customer.<sup>112</sup>

### **Public Awareness Campaign**

The law requires the IRS to conduct a public awareness campaign in coordination with the Small Business Administration to provide information regarding the availability of the ERC.<sup>113</sup> As part of that campaign the IRS shall

- Provide to all employers which reported not more than 500 employees on the most recently filed return of applicable employment taxes a notice about the credit allowed under this section and the requirements for eligibility to claim the credit,<sup>114</sup> and
- Not later than 30 days after the date of the enactment of this subsection, provide to all employers educational materials relating to the credit allowed under this section, including specific materials for businesses with not more than 500 employees.<sup>115</sup>

### **Effective Date – Quarters Beginning in 2021**

A key issue to remember about all changes described in this second ERC section is they only become effective for calendar quarters beginning in 2021.<sup>116</sup> Thus, unlike the first set of changes, none of these changes apply retroactively to quarters back to the enactment of the CARES Act.

### **Extension of Credits for Paid Sick and Family Leave**

The *COVID-related Tax Relief Act of 2020* provides for an extension of the credit offered for employer paid sick and family leave, but does not extend the mandate to provide such leave beyond December 31, 2020.<sup>117</sup>

The credits are revised so they are now available:

- When such sick leave is required to be paid by reason of the Emergency Paid Sick Leave Act and

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<sup>111</sup> CARES Act §2301(j)(3)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(g)(1)

<sup>112</sup> CARES Act §2301(l) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(h)

<sup>113</sup> CARES Act §2301(n)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(i)

<sup>114</sup> CARES Act §2301(n)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(i)

<sup>115</sup> CARES Act §2301(n)(2)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §207(i)

<sup>116</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §207(k)

<sup>117</sup> COVID-related Tax Relief Act of 2020 §286

- Would be required if the mandate ended on March 31, 2021 when all other requirements for such leave are met.<sup>118</sup>

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

Congress orders in the Act that the IRS shall modify Notice 2020-65 to provide that any amount of employee FICA deferred during the period September 1, 2020 to December 31, 2020 will be recovered from employees' pay checks over the entirety of 2021, not just the first four months of the year and penalties will only apply to amounts not transmitted to the IRS by January 1, 2022.<sup>119</sup>

## **MISCELLANEOUS BUSINESS-RELATED TAX ISSUES**

The Acts have various other business-related issues.

### **Restaurant Provided Business Meals Fully Deductible in 2021 and 2022**

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

- For food or beverages provided by a restaurant, and
- Paid or incurred before January 1, 2023.<sup>120</sup>

The provision applies to amounts paid or incurred after December 31, 2020.<sup>121</sup>

### **Election to Waive Application of Certain Modifications to Farm Losses**

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

Congress has decided that farmers should be allowed to elect to keep the two year carry back, so a taxpayer may elect to ignore the changes made by the CARES Act to net operating losses, keeping the two year carry back period.<sup>122</sup> Such an election shall be made in the manner specified by the IRS and once made will be irrevocable.<sup>123</sup>

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<sup>118</sup> COVID-related Tax Relief Act of 2020 §286(a)(1) and (3)

<sup>119</sup> COVID-related Tax Relief Act of 2020 §274

<sup>120</sup> IRC §274(n)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §210(a)

<sup>121</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §210

<sup>122</sup> IRC §170(e)(1) as amended by the COVID-related Tax Relief Act of 2020 §281(c)(1)

<sup>123</sup> IRC §170(e)(2) as amended by the COVID-related Tax Relief Act of 2020 §281(c)(1)

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

An election under this paragraph shall be made by the due date (including extensions of time) for filing the taxpayer's return for the taxpayer's first taxable year ending after the date of the enactment of the COVID-related Tax Relief Act of 2020.<sup>124</sup>

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

In the case of any taxable year for which the taxpayer has filed a return of Federal income tax before the date of the enactment of the COVID-related Tax Relief Act of 2020 which disregards the amendments made by subsections (a) and (b), such taxpayer shall be treated as having made an election under this paragraph unless the taxpayer amends such return to reflect such amendments by the due date (including extensions of time) for filing the taxpayer's return for the first taxable year ending after the date of the enactment of the COVID-related Tax Relief Act of 2020.<sup>125</sup>

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

- Which was made before the date of the enactment of the COVID-related Tax Relief Act of 2020, and
- Which relates to the carryback period provided under section 172(b)(1)(B) of such Code with respect to any net operating loss arising in taxable years beginning in 2018 or 2019.<sup>126</sup>

## **NON PPP LOAN FORGIVENESS TAXATION**

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

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

For the United States Treasury Program Management Authority assistance:

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

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<sup>124</sup> IRC §170(e)(1)(B)(ii)(I) as amended by the COVID-related Tax Relief Act of 2020 §281(a)

<sup>125</sup> IRC §170(e)(1)(B)(ii)(II) as amended by the COVID-related Tax Relief Act of 2020 §281(a)

<sup>126</sup> IRC §170(e)(2) as amended by the COVID-related Tax Relief Act of 2020 §281(a)

- Except as provided by the Secretary of the Treasury (or the Secretary’s delegate), any increase in the adjusted basis of a partner’s interest in a partnership under section 705 of the Internal Revenue Code of 1986 with respect to any amount described in the prior bullet shall equal the partner’s distributive share of deductions resulting from costs giving rise to forgiveness described in section 1109(d)(2)(D) of the CARES Act.<sup>127</sup>

## **Tax Status of Emergency EIDL Grants and Targeted EIDL Advances**

For purposes of the Internal Revenue Code:

- Any EIDL Emergency Grant or any funding under section 331 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act shall not be included in the gross income of the person that receives such advance or funding,
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by the first bullet, and
- In the case of a partnership or S corporation that receives such advance or funding—
  - Any amount excluded from income by reason of the first bullet shall be treated as tax exempt income for purposes of sections 705 and 1366 of the Internal Revenue Code of 1986, and
  - The Secretary of the Treasury (or the Secretary’s delegate) shall prescribe rules for determining a partner’s distributive share of any amount described in the prior bullet for purposes of section 705 of the Internal Revenue Code of 1986.<sup>128</sup>

## **Tax Status of Loan Payments Made by SBA for Borrowers**

For purposes of the Internal Revenue Code:

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

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<sup>127</sup> COVID-related Tax Relief Act of 2020 §278(a)

<sup>128</sup> COVID-related Tax Relief Act of 2020 §278(b)

fees described in section 1112(c) of the CARES Act and the partner's share, as determined under section 752 of the Internal Revenue Code of 1986, of principal described in section 1112(c) of the CARES Act.<sup>129</sup>

## **Tax Status of Grants for Shuttered Venue Operators**

For purposes of the Internal Revenue Code:

- Any grant made under section 324 of the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act (Grants for Shuttered Venue Operators) shall not be included in the gross income of the person that receives such grant,
- No deduction shall be denied, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by the first bullet, and
- In the case of a partnership or S corporation that receives such grant—
  - Any amount excluded from income by reason of the first bullet shall be treated as tax exempt income for purposes of sections 705 and 1366 of the Internal Revenue Code of 1986, and
  - The Secretary of the Treasury (or the Secretary's delegate) shall prescribe rules for determining a partner's distributive share of any amount described in the prior bullet for purposes of section 705 of the Internal Revenue Code of 1986.<sup>130</sup>

## **EMPLOYEE BENEFIT PLAN RELATED RELIEF**

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

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

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

- The individual was a participant in the plan on or before April 30, 2013;
- The plan was in existence prior to January 1, 1970; and
- Before December 31, 2011, at a time when the plan provided that distributions may be made to an employee who has attained age 55 and who is not separated from employment at the time of such distribution, the plan received at least 1 written determination from the Internal Revenue Service that the plan constituted a qualified retirement plan.<sup>131</sup>

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<sup>129</sup> COVID-related Tax Relief Act of 2020 §278(c)

<sup>130</sup> COVID-related Tax Relief Act of 2020 §278(d)

<sup>131</sup> IRC §401(a)(36) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §208(a)

The provision applies to distributions made before, on, or after the date of enactment.<sup>132</sup>

## **Temporary Rule Preventing Partial Plan Termination**

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

§209 of the *Taxpayer Certainty and Disaster Relief Act of 2020* provides that a plan “shall not be treated as having a partial termination (within the meaning of 411(d)(3) of the Internal Revenue Code of 1986) during any plan year which includes the period beginning on March 13, 2020, and ending on March 31, 2021, if the number of active participants covered by the plan on March 31, 2021 is at least 80 percent of the number of active participants covered by the plan on March 13, 2020.”<sup>133</sup>

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

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

### ***Plan May Adopt Unlimited Carryover of Amounts from 2020 to 2021***

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

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

(b) CARRYOVER FROM 2021 PLAN YEAR.—For plan years ending in 2021, a plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement permits participants to carry over (under rules similar to the rules applicable to health flexible spending arrangements) any unused benefits or contributions remaining in any such flexible spending arrangement from such plan year to the plan year ending in 2022.<sup>134</sup>

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<sup>132</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §208(b)

<sup>133</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §209

<sup>134</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §214(a) and (b)

### **Option to Provide an Extension of Grace Periods for Cafeteria Plans**

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

The provision reads:

A plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement extends the grace period for a plan year ending in 2020 or 2021 to 12 months after the end of such plan year, with respect to unused benefits or contributions remaining in a health flexible spending arrangement or a dependent care flexible spending arrangement.<sup>135</sup>

### **Option to Allow for Post-Termination Reimbursements from Health FSAs**

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

A plan that includes a health flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement allows (under rules similar to the rules applicable to dependent care flexible spending arrangements) an employee who ceases participation in the plan during calendar year 2020 or 2021 to continue to receive reimbursements from unused benefits or contributions through the end of the plan year in which such participation ceased (including any grace period, taking into account any modification of a grace period permitted under paragraph (1)).<sup>136</sup>

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

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

For purposes of benefits carried over for eligible employees only, the maximum age for dependent care benefits will be temporarily increased from age 13 to age 14.<sup>137</sup>

An *eligible employee* means any employee who is:

- is enrolled in a dependent care flexible spending arrangement for the last plan year with respect to which the end of the regular enrollment period for such plan year was on or before January 31, 2020, and

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<sup>135</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §214(c)(1)

<sup>136</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §214(c)(2)

<sup>137</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §214(d)(1) and (2)

- has one or more dependents (as defined in section 152(a)(1) of the Internal Revenue Code of 1986) who attain the age of 13—
  - during such plan year, or
  - in the case of an employee who (after the application of this section) has an unused balance in the employee’s account under such arrangement for such plan year (determined as of the close of the last day on which, under the terms of the plan, claims for reimbursement may be made with respect to such plan year), the subsequent plan year.<sup>138</sup>

### ***Change in Election Amount***

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

For plan years ending in 2021, a plan that includes a health flexible spending arrangement or dependent care flexible spending arrangement shall not fail to be treated as a cafeteria plan under the Internal Revenue Code of 1986 merely because such plan or arrangement allows an employee to make an election to modify prospectively the amount (but not in excess of any applicable dollar limitation) of such employee’s contributions to any such flexible spending arrangement (without regard to any change in status).<sup>139</sup>

### ***Timing of Plan Amendments***

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

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

- (1) such amendment is adopted not later than the last day of the first calendar year beginning after the end of the plan year in which the amendment is effective, and
- (2) the plan or arrangement is operated consistent with the terms of such amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted.<sup>140</sup>

## **ENERGY RELATED RELIEF**

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<sup>138</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §214(d)(3)

<sup>139</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §214(e)

<sup>140</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §214(g)

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

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

Under the *Tax Cuts and Jobs Act* (TCJA), certain real property trades and businesses have the option to avoid the application of the business interest rules of IRC §163(j). In such a case, all real property of the business is required to be depreciated using the alternative depreciation recovery (ADR) system. TCJA reduced the ADR life for residential real property to 30 years from 40, but it only applied to assets placed in service after September 27, 2017.

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

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

- Which was placed in service before January 1, 2018,
- Which is held by an electing real property trade or business (as defined in section 163(j)(7)(B) of the Internal Revenue Code of 1986), and
- For which subparagraph (A), (B), (C), (D), or (E) of section 168(g)(1) (which would have already required the use of ADR depreciation) of the Internal Revenue Code of 1986 did not apply prior to such date.<sup>141</sup>

The revision retroactively applies to all taxable years beginning after December 31, 2017.<sup>142</sup>

## Waste Energy Recovery Property Eligible for Energy Credit

*Waste energy recovery property* is added to the list of energy property eligible for the 30% IRC §48 energy credit.<sup>143</sup> The property is subject to the phase-out found at IRC §48(a)(7).<sup>144</sup>

*Waste energy recovery property* is defined as:

...property that generates electricity solely from heat from buildings or equipment if the primary purpose of such building or equipment is not the generation of electricity.<sup>145</sup>

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<sup>141</sup> TCJA §13204(b)(3) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §202

<sup>142</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §202

<sup>143</sup> IRC §48(a)(3)(A)(viii) and §48(a)(2)(A)(i)(V) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(a)

<sup>144</sup> IRC §48(a)(7) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(c)

<sup>145</sup> IRC §48(c)(5)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

Such property also must meet a capacity limitation:

The term ‘waste energy recovery property’ shall not include any property which has a capacity in excess of 50 megawatts.<sup>146</sup>

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

Any waste energy recovery property (determined without regard to this subparagraph) which is part of a system which is a combined heat and power system property shall not be treated as waste energy recovery property for purposes of this section unless the taxpayer elects to not treat such system as a combined heat and power system property for purposes of this section.<sup>147</sup>

In order to qualify as waste energy recovery property construction must begin before January 1, 2024.<sup>148</sup>

These changes apply to periods after December 31, 2020, “under rules similar to the rules of section 48(m) as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990.”<sup>149</sup>

## **Extension of Energy Credit for Offshore Wind Facilities**

The energy credit for offshore wind facilities is separately extended so that a credit for this type of facility is available for construction which begins before January 1, 2026, the phase-out reduction of the percentage credit for wind facilities will not apply to offshore wind facilities, and for purposes of the qualified facility definition of IRC §45(d)(1), the date that construction must begin by is pushed back to January 1, 2026.<sup>150</sup>

A *qualified offshore wind facility* is defined as:

...a qualified facility (within the meaning of section 45) described in paragraph (1) of section 45(d) (determined without regard to any date by which the construction of the facility is required to begin) which is located in the inland navigable waters of the United States or in the coastal waters of the United States.<sup>151</sup>

These changes apply to periods after December 31, 2016, “under rules similar to the rules of section 48(m) as in effect on the day before the date of the enactment of the Revenue Reconciliation Act of 1990.”<sup>152</sup>

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<sup>146</sup> IRC §48(c)(5)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

<sup>147</sup> IRC §48(c)(5)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

<sup>148</sup> IRC §48(c)(5)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §203(d)

<sup>149</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §203(e)

<sup>150</sup> IRC §48(a)(5)(F) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §204(a)

<sup>151</sup> IRC §48(a)(5)(F)(ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §204(a)

<sup>152</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §204(b)



# Chapter 4

## Individual Provisions

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

### **RECOVERY CREDIT AND REBATES**

One of the headline items of the package (at least in the minds of most Americans) is the inclusion of a second run of recovery rebate checks to taxpayers. At the time this was written the President had expressed displeasure at the size of these checks, indicating he wanted the amount raised to \$2,000 and stating that if this change and changes to appropriation bills part of the overall package Congress passed were not made, he wouldn't sign the bill.

While he did not state he would veto the bill, given the time remaining for the Congress that passed this bill when the enrolled bill finally reached the President, if he simply doesn't sign the bill it, it will not go into law and the new Congress would have to start over and pass the package yet again or negotiate a new package. The late delivery of the bill to the President enable the are opportunity for the President to use a "pocket veto" to kill the legislation.

While the future of the bill remains in doubt, we will consider the bill has passed and then later take into account any changes that might occur.

### **Additional Recovery Rebates for Individuals**

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

#### **Base Credit Amount**

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

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

- \$600 (\$1,200 for a married couple filing a joint return), plus

- \$600 for each qualifying child of the taxpayer.<sup>153</sup>

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

### **Phase-Out Based on Adjusted Gross Income**

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

- \$150,000 for a joint return or surviving spouse;
- \$112,500 in the case of a taxpayer filing as head of household; and
- \$75,000 in the case of any other filing status.<sup>154</sup>

### **Ineligible Individuals**

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

- Any nonresident alien individual;
- Any individual *eligible* to be claimed as a dependent on another taxpayer's return, even if the individual is not actually claimed as a dependent on that person's return; and
- An estate or trust.<sup>155</sup>

### **Coordination with Advance Refunds of Credit**

Again, this credit (like the last one) is to be reduced, *but not below zero*, by the amount of any advance refund of credit received by the taxpayer.<sup>156</sup>

### **Identification Number Requirement for Credit**

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

For a return other than a joint return, the \$600 amount for the taxpayer is reduced to zero unless the taxpayer includes a valid identification number of the taxpayer on the return of tax for the taxable year.<sup>157</sup>

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<sup>153</sup> IRC §6428A(a) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>154</sup> IRC §6428A(c) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>155</sup> IRC §6428A(d) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>156</sup> IRC §6428A(e)(1) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>157</sup> IRC §6428A(g)(1) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

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

- \$600 if the valid identification number of only one spouse is included on the return of tax for the taxable year, and
- Zero if the valid identification number of neither spouse is so included.<sup>158</sup>

However, special rules apply for joint returns where one spouse is a member of the U.S. Armed Services. In that case, a valid identification number only needs to be supplied for one spouse to obtain the full \$1,200 payment for the spouses.<sup>159</sup>

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

- The taxpayer includes the valid identification number of such taxpayer (or, in the case of a joint return, the valid identification number of at least 1 spouse) on the return of tax for the taxable year, and
- The valid identification number of such qualifying child is included on the return of tax for the taxable year.<sup>160</sup>

A valid identification number generally means a social security number.<sup>161</sup> However, for a qualifying child who is adopted or placed for adoption, the adoption identification number of the child will be accepted as a valid identification number.<sup>162</sup>

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

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

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

Each individual who was an eligible individual for such individual's first taxable year beginning in 2019 shall be treated as having made a payment against the tax imposed by chapter 1 for such taxable year in an amount equal to the advance refund amount for such taxable year.<sup>163</sup>

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<sup>158</sup> IRC §6428A(g)(2) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>159</sup> IRC §6428A(g)(5)

<sup>160</sup> IRC §6428A(g)(3) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>161</sup> IRC §6428A(g)(4)(A) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>162</sup> IRC §6428A(g)(4)(B) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>163</sup> IRC §6428A(f)(1) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

## **Deceased Taxpayers**

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

For purposes of paragraph (1), the advance refund amount is the amount that would have been allowed as a credit under this section for such taxable year if this section (other than subsection (e) and this subsection) had applied to such taxable year.<sup>164</sup>

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

- If an individual died before January 1, 2020, he/she will be treated like an individual that did not provide a valid identification number (so, for instance, on a joint return the payment would be reduced by the \$600 allocable to that individual) and
- No advance payment will be issued with respect to a qualifying child of a taxpayer if
  - The taxpayer was deceased before January 1, 2020 if other than a joint return was filed *or*
  - If a joint return was filed, both taxpayers were deceased before January 1, 2020.<sup>165</sup>

## **Date by Which Payment Must Be Made**

The Treasury Department is instructed to issue these checks as rapidly as possible after enactment of the law, but generally no checks will be issued after January 15, 2021.<sup>166</sup> An exception is provided for mirror code territories (Guam, Commonwealth of the Northern Mariana Islands and US Virgin Islands) no refund will be made after the earlier of:

- A date determined appropriate by the U.S. Treasury Secretary or
- September 30, 2021.<sup>167</sup>

No interest is to be paid on the advance payment.<sup>168</sup>

## **Payments by Electronic Means**

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

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

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<sup>164</sup> IRC §6428A(f)(2) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>165</sup> IRC §6428A(f)(2) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>166</sup> IRC §6428A(f)(3)(A)(I) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>167</sup> IRC §6428A(f)(3)(A)(II) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>168</sup> IRC §6428A(f)(4) as amended by the COVID-related Tax Relief Act of 2020t §272(a)

- Any Treasury-sponsored account (Treasury-sponsored account means a Direct Express card account, a U.S. Debit Card account, or another account established pursuant to 31 CFR § 208.5 or 31 CFR § 208.11).<sup>169</sup>

### **Individuals Who Did Not File a 2019 Income Tax Return**

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

- For social security and supplemental security recipients, the Commissioner of Social Security;
- For railroad retirement recipients, the Railroad Retirement Board, and
- For veterans beneficiaries, the Secretary of Veterans Affairs.<sup>170</sup>

### **Payments Made to Representative Payees and Fiduciaries**

If a payment is issued to representative payee or fiduciary, the entire payment with respect to the individual must be used only for the benefit of that individual who is entitled to the payment.<sup>171</sup>

### **Notice to Taxpayer When Payment is Made**

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

Such notice shall indicate the method by which such payment was made, the amount of such payment, and a phone number for the appropriate point of contact at the Internal Revenue Service to report any failure to receive such payment.<sup>172</sup>

### **Revisions to Original CARES Act Recovery Rebates in IRC §6428**

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

The \$150,000 adjusted gross income amount at which the §6428 recovery rebate begins to phase out for joint taxpayers will now also apply to surviving spouse filing status.<sup>173</sup>

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

In the case of any individual for which payment information is provided to the Secretary by the Commissioner of Social Security, the Railroad Retirement Board, or the Secretary of Veterans Affairs, the payment by the Secretary under paragraph (3) with respect to such individual may be made to such individual's representative payee or fiduciary and the entire payment shall be—

- (i) provided to the individual who is entitled to the payment, or

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<sup>169</sup> IRC §6428A(f)(3)(B) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>170</sup> IRC §6428(f)(5)(A) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>171</sup> IRC §6428A(f)(5)(H) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>172</sup> IRC §6428A(h)(6) as amended by the COVID-related Tax Relief Act of 2020 §272(a)

<sup>173</sup> IRC §6428(c)(1) as amended by the COVID-related Tax Relief Act of 2020 §273(a)(1)

(ii) used only for the benefit of the individual who is entitled to the payment.<sup>174</sup>

### **Identification Number Changes**

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

For a return other than a joint return, the \$1,200 amount for the taxpayer is reduced to zero unless the taxpayer includes a valid identification number of the taxpayer on the return of tax for the taxable year.<sup>175</sup>

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

- \$1,200 if the valid identification number of only one spouse is included on the return of tax for the taxable year, and
- Zero if the valid identification number of neither spouse is so included.<sup>176</sup>

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

- Such individual's valid identification number,
- In the case of a joint return, the valid identification number of such individual's spouse, and
- In the case of any qualifying child, the valid identification number of such qualifying child.<sup>177</sup>

The same rules discussed under the additional recovery rebate for individuals apply for purposes of determining what is a valid identification number for the original recovery rebate and credit.<sup>178</sup>

## **OPTIONS TO USE PRIOR YEAR NUMBERS**

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

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

Due to loss of income, some taxpayers might find they qualify for a lesser amount of earned income tax credit under IRC §32 and the refundable portion of the tax credit under IRC §24(d). For this reason, if the earned income (as determined under IRC §32)<sup>179</sup> of a taxpayer for the first taxable year

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<sup>174</sup> IRC §6428(f)(6) as amended by the COVID-related Tax Relief Act of 2020 §273(a)(2)(C)

<sup>175</sup> IRC §6428(g)(1)(A) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

<sup>176</sup> IRC §6428A(g)(1)(B) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

<sup>177</sup> IRC §6428(g)(2)(A) and (B) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

<sup>178</sup> IRC §6428(g)(3) and (4) as amended by the COVID-related Tax Relief Act of 2020 §273(a)

<sup>179</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §211(b)(1)

beginning in 2020 is less than the taxpayer's earned income for the preceding year, the earned income tax credit and the refundable child tax credit may, at the election of the taxpayer, be determined by:

- Using the earned income for the prior year (generally 2019 calendar year) *or*
- Using the earned income for the current taxable year (generally 2020 calendar year).<sup>180</sup>

For taxpayers filing a joint return, the earned income for the prior taxable year will be the sum of earned income for each spouse—that is, you can't make separate elections for each spouse.<sup>181</sup>

The election of the taxpayer has no impact on the computation of gross income or any other item on the return other than the computation of these two credits.<sup>182</sup>

## CHARITABLE TAX PROVISIONS

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

### Charitable Deduction for Non-Itemizers Extended to Cover 2021

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

In this Act, Congress has decided to extend the deduction for one more year and allow joint filers to claim a \$600 deduction. The law provides:

In the case of any taxable year beginning in 2021, if the individual does not elect to itemize deductions for such taxable year, the deduction under this section shall be equal to the deduction, not in excess of \$300 (\$600 in the case of a joint return), which would be determined under this section if the only charitable contributions taken into account in determining such deduction were contributions made in cash during such taxable year...<sup>183</sup>

However, such deductions cannot be made to

- An IRC §509(a)(3) supporting organization or
- For the establishment of a new, or maintenance of an existing, donor advised fund.<sup>184</sup>

Apparently concerned that many taxpayers will use this provision to claim charitable deductions they did not actually make, Congress has raised the understatement penalty to 50% for an overstatement

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<sup>180</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §211(a)

<sup>181</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §211(b)(2)

<sup>182</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §211(c)(2)

<sup>183</sup> IRC §170(p) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(a)

<sup>184</sup> IRC §170(p)(1) and (2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(a)

of this above the line deduction. The 50% penalty will be applied to the portion of the understatement of tax on the return related to the overstatement of this above the line deduction.<sup>185</sup>

The special 50% underpayment penalty under this provision is also exempted from the approval of the assessment of the penalty under IRC §6751(b)(2)(A).<sup>186</sup>

The rule only applies to tax years beginning in 2021.<sup>187</sup>

## **Increased Charitable Contributions Provisions Continued into 2021**

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

The Act continues this provision into 2021 but makes no other changes to these provisions.<sup>188</sup>

## **OTHER INDIVIDUAL TAX PROVISIONS**

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

### **Educator Expense Deduction Includes Payments for Personal Protective Equipment**

The IRS is directed to provide regulations or other guidance clarifying that the payment by a qualified educator for personal protective equipment, disinfectant and other supplies used for the prevention of the spread of COVID-19 qualify for the above the line deduction of an educator's expenses under IRC §62(a)(2)(D)(ii). This rule will apply for expenses paid or incurred after March 12, 2020.<sup>189</sup>

### **Exclusion from Income for Students Receiving Qualified Emergency Financial Aid Grant**

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

- Such grant shall not be included in the gross income of such individual for purposes of the Internal Revenue Code of 1986, and
- Such grant shall not be treated for purposes of the American Opportunity or Lifetime Learning Credit as
  - A qualified scholarship which is excludable from gross income under section 117,

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<sup>185</sup> IRC §6662(b)(8) and (l) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(b)(1) and (2)

<sup>186</sup> IRC §6751(b)(2)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(b)(3)

<sup>187</sup> IRC §170(p) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §212(a)

<sup>188</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §213(a)

<sup>189</sup> COVID-related Tax Relief Act of 2020 §275

- An educational assistance allowance under chapter 30, 31, 32, 34, or 35 of title 38, United States Code, or under chapter 1606 of title 10, United States Code, and
- A payment for such individual’s educational expenses, or attributable to such individual’s enrollment at an eligible educational institution, which is excludable from gross income under any law of the United States.<sup>190</sup>

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

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

- Would be entitled to paid leave during the taxable year pursuant to the Emergency Paid Sick Leave Act if the individual were an employee of an employer (other than him/herself) or
- Would be so entitled if that mandate applied through March 31, 2021.<sup>191</sup>

As well, if a self-employed taxpayer so elects, the taxpayer may elect to use the prior year rather than the current year for purposes of the credits for paid sick and family leave.<sup>192</sup>

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<sup>190</sup> COVID-related Tax Relief Act of 2020 §277

<sup>191</sup> COVID-related Tax Relief Act of 2020 §286(a)(2) and (4)

<sup>192</sup> COVID-related Tax Relief Act of 2020 §287



# Unit

# 5

## Extenders

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

### ITEMS MADE PERMANENT

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

#### Medical Expense Deduction Floor

Congress has now made permanent the 7.5% floor on the deduction of medical expenses on Schedule A.<sup>193</sup> The floor had been scheduled to increase to 10% for all taxpayers, a level that previously had applied to taxpayers under age 65.

#### Energy Efficient Commercial Building Deduction under IRC §179D

Congress both made permanent<sup>194</sup> and revised the energy efficient commercial building deduction under IRC §179D.

For tax years beginning after 2020, the maximum amount of the deduction under IRC §179D(b) and the computation of a partial allowance under IRC §179D(d)(1)(A) will be increased by an amount equal to multiplying the amounts by the general cost of living adjustments found at IRC §1(f)(3) for the calendar year in which the taxable year begins, using calendar year 2019 as the base year.<sup>195</sup>

As well, various standards used in the section are updated.<sup>196</sup>

The amendments apply to property placed in service after December 31, 2020.<sup>197</sup>

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<sup>193</sup> IRC §213(a) and (f) as amended by the Taxpayer Certainty and Disaster Relief Act of 2020 §101.

<sup>194</sup> Deletion of existing IRC §179D(h) by the Taxpayer Certainty and Disaster Relief Act of 2020 §102

<sup>195</sup> IRC §179D(g) after amendment by the Taxpayer Certainty and Disaster Relief Act of 2020 §102

<sup>196</sup> IRC §179D(d)(2) and (e) after amendment by the Taxpayer Certainty and Disaster Relief Act of 2020 §102

<sup>197</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §102 (d)

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

A provision that had been missing from the law for many years before being brought back into the law last year for a single year has now been a permanent part of the law.<sup>198</sup> IRC §139B, which treats certain *qualified State and local tax benefits* and *qualified payments* made to volunteer firefighters and emergency medical responders as not part of gross, was scheduled to expire at the end of 2020.

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

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

provided by a State or political division thereof on account of services performed as a member of a qualified volunteer emergency response organization.<sup>199</sup>

A *qualified payment* is any payment provided by a State or political division thereof on account of the performance of services as a member of a qualified volunteer emergency response organization. The amount of the excludable payment is capped at \$50 times the number of months the taxpayer performs these services.<sup>200</sup>

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

- which is organized and operated to provide firefighting or emergency medical services for persons in the State or political subdivision, as the case may be, and
- which is required (by written agreement) by the State or political subdivision to furnish firefighting or emergency medical services in such State or political subdivision.<sup>201</sup>

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

In the case of the deduction for qualified tuition, Congress did not decide to make the deduction permanent, despite putting this provision in a Subtitle of the bill entitled “Certain Provisions Made Permanent.” Rather, Congress decided to replace the deduction by expanding the income level at which taxpayers will qualify to claim the Lifetime Learning Credit.<sup>202</sup>

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

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<sup>198</sup> IRC §139D(d) removed by Taxpayer Certainty and Disaster Relief Act of 2020 §103(a)

<sup>199</sup> IRC §139D(c)(1)

<sup>200</sup> IRC §139D(c)(2)

<sup>201</sup> IRC §139D(c)(3)

<sup>202</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §104

- \$80,000 to \$90,000 for individuals other than those filing a joint return and
- \$160,000 to \$180,000 for taxpayers filing a joint return.<sup>203</sup>

The Act removes the inflation adjustment to IRC §25A numbers previously found at IRC §25A(h).<sup>204</sup>

The Lifetime Learning Credit found at IRC §222 is removed from the law.<sup>205</sup>

The changes are effective for tax years beginning after December 31, 2020.<sup>206</sup>

## **Railroad Track Maintenance Credit**

The railroad tax maintenance credit found at IRC §45G is made permanent by the Act.<sup>207</sup>

The credit rate is being reduced beginning with taxable years beginning after December 31, 2022 to 40% from 50%.<sup>208</sup>

## **PROVISIONS EXTENDED THROUGH 2025**

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

### **Look-Thru Rule for Related Controlled Foreign Corporations**

The look-thru rule for related controlled foreign corporations under IRC §954(c)(6) is extended through years ending December 31, 2025.<sup>209</sup>

### **New Markets Tax Credit**

The new markets tax credit under IRC §45 is extended at the limitation of \$5,000,000,000 for each of calendar years 2021-2025.<sup>210</sup>

The carryover period found in IRC §45(f)(3) is extended to 2030.<sup>211</sup>

### **Work Opportunity Credit**

The work opportunity credit found at IRC §51 is extended for amounts paid or incurred to an individual who begins work for the employer after December 31, 2025.<sup>212</sup>

<sup>203</sup> IRC §25D(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §104(a)(1)

<sup>204</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §104(a)(2)

<sup>205</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §104(b)

<sup>206</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §104(c)

<sup>207</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §105(a) striking IRC §45G(h)

<sup>208</sup> IRC §45G(b) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §105(b)

<sup>209</sup> IRC §954(c)(6)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §111(a)

<sup>210</sup> IRC §45D(f)(1)(H) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §112(a)

<sup>211</sup> IRC §45D(f)(3) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §112(b)

<sup>212</sup> IRC §51(c)(4) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §113(a)

## **Exclusion from Gross Income of Discharge of Qualified Principal Residence Indebtedness**

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

- Before January 1, 2026, or
- Subject to an arrangement that is entered into and evidenced in writing before January 1, 2026.<sup>213</sup>

However, this extension comes with a major reduction in the amount of such debt that is taken into account for this exclusion, limiting it to \$750,000 (\$375,000 for a married couple filing a separate return).<sup>214</sup> This reduced exclusion will apply to discharges of indebtedness after December 31, 2020.<sup>215</sup>

## **7-Year Recovery Period for Motorsports Entertainment Complexes**

The 7-year recovery period for motorsports entertainment complexes will remain available for property placed in service through December 31, 2025.<sup>216</sup>

## **Expensing Rules for Certain Productions**

The election under §181 to treat the cost of any qualified film or television production, and any qualified live theatrical production as an expense has been extended for any such production commencing on or before December 31, 2025.<sup>217</sup>

## **Empowerment Zone Tax Incentives**

The date through which the designation of an empowerment zone shall remain effective per IRC §1391 has been extended through December 31, 2025.<sup>218</sup>

However, the increase in §179 expensing for an enterprise zone business shall end on December 31, 2020.<sup>219</sup> Similarly, the nonrecognition of gain on rollover of empowerment zone investments under §1397B will terminate for sales in taxable years beginning after December 31, 2020.<sup>220</sup>

In the case of a designation of an empowerment zone the nomination for which included a termination date which is contemporaneous with December 31, 2020 (formerly the required latest termination of empowerment zone status prior these amendments), that termination date will no longer apply if, after the date of the enactment of the *Taxpayer Certainty and Disaster Relief Act of 2020*, the entity which made such nomination amends the nomination to provide for a new termination date in such manner as the IRS may provide.<sup>221</sup>

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<sup>213</sup> IRC §108(e)(1)(E) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §114(a)

<sup>214</sup> IRC §108(h)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §114(b)

<sup>215</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §114(c)

<sup>216</sup> IRC §168(i)(15)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §115(a)

<sup>217</sup> IRC §181(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §116(a)

<sup>218</sup> IRC §1391(d)(1)(A)(i) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §118(a)

<sup>219</sup> IRC §1397A(c) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §118(b)

<sup>220</sup> IRC §1397B(c) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §118(c).

<sup>221</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §118(d)

## **Employer Credit for Paid Family Leave**

The employer credit for paid leave under the Family Medical Leave Act found at IRC §45S of between 12.5% and 25% of qualified wages paid to an employee during such leave has been extended for wages paid for taxable years beginning on or before December 31, 2025.<sup>222</sup>

## **Exclusion for Certain Employer Payment of Student Loans**

The CARES Act had added payment of principal and interest on qualified student loans as an eligible reimbursement under an employer's §127 plan for 2020. The *Taxpayer Certainty and Disaster Relief Act of 2020* continues that category of allowed reimbursable expense under such plans for payments made before January 1, 2026.<sup>223</sup>

## **Extension of Carbon Oxide Sequestration Credit**

The carbon oxide sequestration credit under IRC §45Q has been extended to allow construction of a facility to begin before January 1, 2026, rather than January 1, 2024 as had been the law prior to this change.<sup>224</sup>

## **EXTENSIONS OF OTHER PROVISIONS**

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

### **Credit for Electricity Produced from Certain Renewable Resources**

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

- Wind facilities;
- Closed-loop biomass facilities;
- Open-loop biomass facilities;
- Geothermal or solar energy facilities;
- Landfill gas facilities;
- Trash facilities;
- Qualified hydropower facility; and
- Marine and hydrokinetic renewable energy facilities.<sup>225</sup>

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<sup>222</sup> IRC §45S(i) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §119(a)

<sup>223</sup> IRC §127(c) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §120(a)

<sup>224</sup> IRC §45Q(d)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §121(a)

<sup>225</sup> IRC §45(d)(1), (2)(A), 3(A), 4(B), (6), (7), (9) and (11)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §131(a)

The election to treat qualified facilities as energy property under §48(a)(5)(C)(ii) is extended to cover property where construction begins before January 1, 2022.<sup>226</sup>

The phase-out percentages provisions found at IRC §§45(b)(5)(D) and 48(a)(5)(E)(iv) are amended to conform to the new dates above.<sup>227</sup>

## **Extension and Phase-Out of Energy Credit**

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

The date by which construction must begin on

- Equipment which uses solar energy to illuminate the inside of a structure using fiber-optic distributed sunlight;<sup>228</sup>
- Equipment which uses the ground or ground water as a thermal energy source to heat a structure or as a thermal energy sink to cool a structure;<sup>229</sup>
- Qualified fuel cell property;<sup>230</sup>
- Qualified microturbine property;<sup>231</sup>
- Combined heat and power system property;<sup>232</sup> and
- Qualified small wind energy property.<sup>233</sup>

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

The various related phase-outs in §48 to the above items are also updated to reflect the new end date for the credits.<sup>234</sup>

## **Treatment of Mortgage Insurance Premiums as Qualified Residence Interest**

The treatment of mortgage insurance premiums for contracts issued after January 1, 2007 as qualified residence interest is extended for amounts paid or accrued through December 31, 2021.<sup>235</sup>

## **Credit for Health Insurance of Qualified Individuals**

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<sup>226</sup> IRC §48(a)(5)(C)(ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §131(b)

<sup>227</sup> IRC §§45(b)(5)(D) and 48(a)(5)(E)(iv) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §131(c)

<sup>228</sup> IRC §§48(a)(2)(A)(i)(II) and (3)(A)(ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

<sup>229</sup> IRC §48(a)(3)(A)(vii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

<sup>230</sup> IRC §48(c)(1)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

<sup>231</sup> IRC §48(c)(2)(D) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

<sup>232</sup> IRC §48(c)(3)(A)(iv) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

<sup>233</sup> IRC §48(c)(4)(C) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §132(a)

<sup>234</sup> IRC §48(a)(6)(A), (A)(i), A(ii), (B) and §48(a)(7)(A)(i) and (ii) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §113(b)

<sup>235</sup> IRC §163(h)(3)(iv)(I) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §133(a)

The credit for health insurance of qualified individuals under IRC §35 is extended for one additional year, for months beginning before January 1, 2022.<sup>236</sup>

### **Indian Employment Credit**

The Indian employment credit under §45A(f) is extended for one year, now applying to tax years beginning before or on December 31, 2020.<sup>237</sup>

### **Mine Rescue Team Training Credit**

The mine rescue team training credit under IRC §45N is extended for one year, now applying to tax years beginning before or on December 31, 2020.<sup>238</sup>

### **Classification of Certain Race Horses as 3-Year Property**

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

- Placed in service by January 1, 2022 and
- Placed in service after December 31, 2021 and which is more than 2 years old at the time such horse is placed in service by such purchaser.<sup>239</sup>

### **Accelerated Depreciation for Business Property on Indian Reservations**

The special lives for accelerated depreciation for property placed in service on an Indian reservation will apply to property placed in service through December 31, 2021.<sup>240</sup>

### **American Samoa Economic Development Credit**

The American Samoa economic development credit is extended for one additional year.<sup>241</sup>

### **Nonbusiness Energy Property Credit**

The nonbusiness energy property credit under IRC §25C is extended for a one, applying to property placed in service through December 31, 2020.<sup>242</sup>

### **Qualified Fuel Motor Vehicles Credit**

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<sup>236</sup> IRC §35(b)(1)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §134(a)

<sup>237</sup> IRC §45A(b) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §135(a)

<sup>238</sup> IRC §45N(e) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §136(a)

<sup>239</sup> IRC §168(e)(3)(A)(i) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §137(a)

<sup>240</sup> IRC §168(j)(9) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §138(a)

<sup>241</sup> Section 119(d) of division A of the Tax Relief and Health Care Act of 2006 as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §139(a)

<sup>242</sup> IRC §25C(g)(2) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §141(a)

The alternative motor vehicle credit on a new qualified fuel cell motor vehicle is extended by one year, applying to such a vehicle purchased by December 31, 2021.<sup>243</sup>

## **Alternative Fuel Refueling Property Credit**

The alternative fuel refueling property credit under IRC §30C is extended for one year, for property placed in service by December 31, 2021.<sup>244</sup>

## **2-Wheeled Plug-In Electric Vehicle Credit**

The 2-wheeled plug-in electric vehicle credit under IRC §30D is extended for one year, for property acquired by December 31, 2021.<sup>245</sup>

## **Production Credit for Indian Coal Facilities**

The production credit for Indian coal facilities under IRC §45 is revised to extend the production period to the 16-year period beginning on January 1, 2006.<sup>246</sup>

## **Energy Efficient Homes Credit**

The energy efficient homes credit under IRC §45L is extended for one year, applying to qualified energy efficient homes acquired by December 31, 2021.<sup>247</sup>

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

The residential energy efficient property credit under IRC §25D is extended for two years, for property placed in service by December 31, 2023.<sup>248</sup>

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

- In the case of property placed in service after December 31, 2016, and before January 1, 2020, 30 percent,
- In the case of property placed in service after December 31, 2019, and before January 1, 2023, 26 percent, and
- In the case of property placed in service after December 31, 2022, and before January 1, 2024, 22 percent.<sup>249</sup>

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<sup>243</sup> IRC §30B(k)(1) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §142(a)

<sup>244</sup> IRC §30C(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §143(a)

<sup>245</sup> IRC §30D(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §144(a)

<sup>246</sup> IRC §45(e)(10)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §145(a)

<sup>247</sup> IRC §45L(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §146(a)

<sup>248</sup> IRC §25D(h) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(a)(1)

<sup>249</sup> IRC §25D(g) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(a)(2)

The Act also adds a new category of property qualifying for the credit, *qualified biomass fuel property expenditures*.<sup>250</sup>

*Qualified biomass fuel property expenditures* are expenditures for property:

- Which uses the burning of biomass fuel to heat a dwelling unit located in the United States and used as a residence by the taxpayer, or to heat water for use in such a dwelling unit, and
- Which has a thermal efficiency rating of at least 75 percent (measured by the higher heating value of the fuel).<sup>251</sup>

*Biomass fuel* is defined as “any plant-derived fuel available on a renewable or recurring basis.”<sup>252</sup>

To deny taxpayers a double-benefit via a non-business property credit under IRC §25C, the law removes from the list of energy-efficient building property a stove which uses the burning of biomass fuel to heat a dwelling unit located in the United States and used as a residence by the taxpayer, or to heat water for use in such a dwelling unit, and which has a thermal efficiency rating of at least 75 percent.<sup>253</sup>

The provisions related to an expenditure for qualified biomass fuel property expenditures takes effect for tax years beginning after December 31, 2020.<sup>254</sup>

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<sup>250</sup> IRC §25D(a)(6) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(1)

<sup>251</sup> IRC §25D(d)(6)(A) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(2)

<sup>252</sup> IRC §25D(d)(6)(B) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(2)

<sup>253</sup> IRC §25D(d)(3) as amended by Taxpayer Certainty and Disaster Relief Act of 2020 §148(b)(3)

<sup>254</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §148(c)(2)



# Unit 6

## Disaster Provisions

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

### KEY DEFINITIONS

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

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

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

### Qualified Disaster Area

A *qualified disaster area* is:

...any area with respect to which a major disaster was declared, during the period beginning on January 1, 2020, and ending on the date which is 60 days after the date of the enactment of this Act, by the President under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act if the incident period of the disaster with respect to which such declaration is made begins on or after December 28, 2019, and on or before the date of the enactment of this Act.<sup>255</sup>

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

...shall not include any area with respect to which such a major disaster has been so declared only by reason of COVID-19.<sup>256</sup>

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<sup>255</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §301(1)

<sup>256</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §301(1)

## Qualified Disaster Zone

A *qualified disaster zone* is:

...that portion of any qualified disaster area which was determined by the President, during the period beginning on January 1, 2020, and ending on the date which is 60 days after the date of the enactment of this Act, to warrant individual or individual and public assistance from the Federal Government under the Robert T. Stafford Disaster Relief and Emergency Assistance Act by reason of the qualified disaster with respect to such disaster area.<sup>257</sup>

## Qualified Disaster

A *qualified disaster* means:

...with respect to any qualified disaster area, the disaster by reason of which a major disaster was declared with respect to such area.<sup>258</sup>

## Incident Period

*Incident period* means:

...with respect to any qualified disaster, the period specified by the Federal Emergency Management Agency as the period during which such disaster occurred (except that for purposes of this title such period shall not be treated as ending after the date which is 30 days after the date of the enactment of this Act).<sup>259</sup>

# QUALIFIED RETIREMENT PLAN DISASTER RELIEF

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

## Tax Favored Withdrawals from Retirement Plans

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

- On or after the first day of the incident period of a qualified disaster and before the date which is 180 days after the date of the enactment of this Act, and
- To an individual
  - Whose principal place of abode at any time during the incident period of such qualified disaster is located in the qualified disaster area with respect to such qualified disaster and
  - Who has sustained an economic loss by reason of such qualified disaster.<sup>260</sup>

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<sup>257</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §301(2)

<sup>258</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §301(3)

<sup>259</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §301(4)

<sup>260</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(4)(A)

An *eligible retirement plan* is:

- An individual retirement account described in section 408(a),
- An individual retirement annuity described in section 408(b) (other than an endowment contract),
- A qualified trust (an employees' trust described in section 401(a) which is exempt from tax under section 501(a), more generally referred to as an employer sponsored qualified retirement plan),
- An annuity plan described in section 403(a),
- An eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A), and
- An annuity contract described in section 403(b).<sup>261</sup>

### **Dollar Limit on Qualified Disaster Distributions**

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

- \$100,000, over
- the aggregate amounts treated as qualified disaster distributions received by such individual for all prior taxable years.<sup>262</sup>

If an individual is impacted by more than one disaster, the above limit is to be applied separately for each qualified disaster.<sup>263</sup>

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

If a distribution to an individual would (without regard to subparagraph (A)) be a qualified disaster distribution, a plan shall not be treated as violating any requirement of the Internal Revenue Code of 1986 merely because the plan treats such distribution as a qualified disaster distribution, unless the aggregate amount of such distributions from all plans maintained by the employer (and any member of any controlled group which includes the employer) to such individual exceeds \$100,000.<sup>264</sup>

### **Exemption from Tax on Premature Distributions**

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

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<sup>261</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(4)(B) and IRC §402(c)(8)(A) and (B)

<sup>262</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(2)(A)

<sup>263</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(2)(D)

<sup>264</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(2)(B)

## ***Election to Spread Income Over a 3-Year Period***

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

In the case of any qualified disaster distribution, unless the taxpayer elects not to have this paragraph apply for any taxable year, any amount required to be included in gross income for such taxable year shall be so included ratably over the 3-taxable-year period beginning with such taxable year.<sup>265</sup>

However, the rollover is not available to the extent the distribution represents a required minimum distribution.<sup>266</sup>

## ***Option to Rollover Qualified Disaster Distribution for 3 Years***

Just as with the CARES Act Coronavirus-related distributions, qualified disaster distributions may be rolled over for three years. The law provides:

Any individual who receives a qualified disaster distribution may, at any time during the 3-year period beginning on the day after the date on which such distribution was received, make 1 or more contributions in an aggregate amount not to exceed the amount of such distribution to an eligible retirement plan of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), 408(d)(3), or 457(e)(16), of the Internal Revenue Code of 1986, as the case may be.<sup>267</sup>

Generally, the amount is treated by the receiving plan as it were an eligible rollover distribution. For distributions from qualified retirement plans the law provides:

For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to subparagraph (A) with respect to a qualified disaster distribution from an eligible retirement plan other than an individual retirement plan, then the taxpayer shall, to the extent of the amount of the contribution, be treated as having received the qualified disaster distribution in an eligible rollover distribution (as defined in section 402(c)(4) of such Code) and as having transferred the amount to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.<sup>268</sup>

For distributions from an IRA, the following rules apply:

For purposes of the Internal Revenue Code of 1986, if a contribution is made pursuant to subparagraph (A) with respect to a qualified disaster distribution from an individual retirement plan (as defined by section 7701(a)(37) of such Code), then, to the extent of the amount of the contribution, the qualified disaster distribution shall be treated as a distribution described in section 408(d)(3) of such Code and as

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<sup>265</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(5)(A)

<sup>266</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(5)(B) and IRC §408(d)(3)(E)

<sup>267</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(3)(A)

<sup>268</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(3)(B)

having been transferred to the eligible retirement plan in a direct trustee to trustee transfer within 60 days of the distribution.<sup>269</sup>

The key reason for the differing deemed treatment is that distributions from an IRA would otherwise be subject to the one rollover per year rule of IRC §408(d)(3)(B).

### **Qualified Disaster Distributions Exempted from Trustee to Trustee Transfer and Rollover Rules**

A qualified rollover distribution is exempted from the rules governing trustee to trustee transfers and mandatory withholding that otherwise would apply under IRC §§401(a)(31), 402(f) and 3405 that would otherwise apply to eligible rollover distributions.<sup>270</sup>

### **Qualified Rollover Distributions Treated as Meeting Plan Distribution Requirements**

The law also provides relief that these plans meet plan distribution requirements:

For purposes of the Internal Revenue Code of 1986, a qualified disaster distribution shall be treated as meeting the requirements of sections 401(k)(2)(B)(i), 403(b)(7)(A)(i), 403(b)(11), and 457(d)(1)(A) of such Code and section 8433(h)(1) of title 5, United States Code, and, in the case of a money purchase pension plan, a qualified disaster distribution which is an in-service withdrawal shall be treated as meeting the distribution rules of section 401(a) of such Code.<sup>271</sup>

### **Recontributions of Withdrawals for Home Purchases**

As was found in prior disaster relief bills, the *Taxpayer Certainty and Disaster Relief Act of 2020* provides relief to allow taxpayers to recontribute amounts to plans that were withdrawn in anticipation of a home purchase.

#### **Qualified Distribution**

A *qualified distribution* for purposes of the recontribution of withdrawals for home purchases is defined as any distribution:

- That is:
  - A §401(k) hardship distribution (§401(k)(2)(B)(i)(IV));
  - Where contributions are made to a §403(b) plan pursuant to a salary reduction agreement, where the participant encounters financial hardship (§403(b)(7)(A)(i)(V))
  - § 403(b) hardship distribution (§403(b)(11)(B)); or
  - A first-time homebuyer distribution from an IRA (IRC §72(t)(2)(F))

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<sup>269</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(3)(C)

<sup>270</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(6)(A)

<sup>271</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(a)(6)(B)

- Which was to be used to purchase or construct a principal residence in a qualified disaster area, but which was not so used on account of the qualified disaster with respect to such area, and
- Which was received during the period beginning on the date which is 180 days before the first day of the incident period of such qualified disaster and ending on the date which is 30 days after the last day of such incident period.<sup>272</sup>

### **Applicable Period**

The law defines *applicable period* for this distribution:

For purposes of this subsection, the term “applicable period” means, in the case of a principal residence in a qualified disaster area with respect to any qualified disaster, the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the date of the enactment of this Act.<sup>273</sup>

### **Recontributions Under This Provision**

The law added a rule to allow recontributions during the *applicable period* defined earlier. The law provides:

Any individual who received a qualified distribution may, during the applicable period, make 1 or more contributions in an aggregate amount not to exceed the amount of such qualified distribution to an eligible retirement plan (as defined in section 402(c)(8)(B) of the Internal Revenue Code of 1986) of which such individual is a beneficiary and to which a rollover contribution of such distribution could be made under section 402(c), 403(a)(4), 403(b)(8), or 408(d)(3), of such Code, as the case may be.<sup>274</sup>

The rollovers are treated under rules similar to those used for recontributions of *qualified disaster distributions*.<sup>275</sup>

### **Loans from Retirement Plans**

As with earlier disaster bills, this one provides for a temporary increase in the loans allowed to be taken from a qualified employer retirement plan.

### **Qualified Individuals for the Loan Rules**

A *qualified individual* for the disaster plan loan rules is any individual:

- Whose principal place of abode at any time during the incident period of any qualified disaster is located in the qualified disaster area with respect to such qualified disaster, and

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<sup>272</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(2)

<sup>273</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(3)

<sup>274</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(1)(A)

<sup>275</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(b)(1)(B)

- Who has sustained an economic loss by reason of such qualified disaster.<sup>276</sup>

### **Increase in Limit on Loans Not Treated as a Distribution**

For any loan from a qualified employer (per IRC §72(p)(4)) to a *qualified individual* made during the 180 day period beginning on the date of enactment of the *Taxpayer Certainty and Disaster Relief Act of 2020*:

- The maximum dollar amount for a loan under IRC §72(p)(2)(A)(i) is raised to \$100,000 from \$50,000 and
- The maximum percentage of a participant's account that can be borrowed found at IRC §72(p)(2)(A)(ii) is raised from 50% to 100%.<sup>277</sup>

Thus, if a plan decides to allow these larger loan, an employee could qualify for the *lower* of those two limits on his/her plan loan.

### **Delay of Repayment of Plan Loans**

The law also provides for a delay in the repayment of loans to the qualified plan should the plan decide to adopt these changes. In that case, for any *qualified individual* with an outstanding loan on the first day of the incident period of the qualified disaster from an employer qualified plan:

- If a due date on the plan loan for any repayment with respect to such loan occurs during the period beginning on the first day of the incident period of such qualified disaster and ending on the date which is 180 days after the last day of such incident period, such due date shall be delayed for 1 year (or, if later, until the date which is 180 days after the date of the enactment of this Act),
- Any subsequent repayments with respect to any such loan shall be appropriately adjusted to reflect the delay in the due date the prior bullet and any interest accruing during such delay, and
- In determining the 5-year period and the term of the loan under the standard plan loan rules, the delay period described in the first bullet shall be disregarded.<sup>278</sup>

### **Plan Amendments to Implement These Provisions**

A plan may operate under these provisions prior to formally amending the plan document, so long as the plan is timely amended under these rules.

### **General Deadline for Adopting a Plan Amendment**

The special rules apply to an amendment to a plan or annuity contract for these provisions, or regulations adopted by the IRS or Department of Labor related to these provisions which is made on or before the last day of the first plan year beginning on or after January 1, 2022 (January 1, 2024 for a governmental plan defined at IRC §414(d)), or such later date as the IRS may prescribe.<sup>279</sup>

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<sup>276</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(c)(3)

<sup>277</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(c)(1)

<sup>278</sup> Taxpayer Certainty and Disaster Relief Act of 2020

<sup>279</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(d)(2)(A)

## **Conditions for Delayed Amendment Rules to Apply**

The delayed amendment rules apply for a period if:

- During the period:
  - Beginning on the date that these provisions or regulations to implement them take effect (or in the case of a plan or contract amendment not required by this section or such regulation, the effective date specified by the plan), and
  - Ending on the last date for a plan amendment specified in the prior section

the plan or contract is operated as if the amendment is in effect and

- The plan or contract amendment applies retroactively for such period.<sup>280</sup>

## **EMPLOYEE RETENTION CREDIT (ERC) FOR EMPLOYERS AFFECTED BY QUALIFIED DISASTERS**

The disaster bill this year sees the addition of a variant of a credit first seen in the CARES Act—and employee retention credit. This version is not quite the same as the COVID-19 variant, either the one in effect for 2020 or the one that applies for 2021.

### **Basic Computation**

The basic qualified disaster employee retention credit (QDERC) for a *qualified employer* is an “amount equal to 40 per-cent of the *qualified wages* with respect to each *eligible employee* of such employer for such taxable year.”<sup>281</sup>

The maximum amount of *qualified wages* for any employee is \$6,000 and, unlike the COVID-19 2021 employee retention credit, the QDERC limit does not reset each quarter, nor does it even get reset if a new tax year begins.<sup>282</sup>

### **Definitions**

The following definitions are to be used in applying the QDERC.

#### **Eligible Employer**

An *eligible employer* is any employer:

- Which conducted an active trade or business in a qualified disaster zone at any time during the incident period of the qualified disaster with respect to such qualified disaster zone, and

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<sup>280</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §302(d)(2)(B)

<sup>281</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(a)

<sup>282</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(a)

- With respect to whom the trade or business is inoperable at any time during the period beginning on the first day of the incident period of such qualified disaster and ending on the date of the enactment of this Act, as a result of damage sustained by reason of such qualified disaster.<sup>283</sup>

### **Eligible Employee**

An *eligible employee* is an employee of the eligible employer:

...whose principal place of employment with such eligible employer (determined immediately before the qualified disaster referred to in paragraph (1)) was in the qualified disaster zone referred to in such paragraph.<sup>284</sup>

### **Qualified Wages**

The term *qualified wages* refers to:

- FUTA wages (without regard to any dollar limit) plus payments made for a plan providing medical or hospitalization expenses in connection with sickness or accident disability<sup>285</sup>
- Paid or incurred by an eligible employer with respect to an eligible employee at any time on or after the date on which the trade or business first became inoperable at the principal place of employment of the employee (determined immediately before the qualified disaster referred to in such paragraph) and before the earlier of:
  - The date on which such trade or business has resumed significant operations at such principal place of employment, or
  - The date which is 150 days after the last day of the incident period of the qualified disaster.<sup>286</sup>

Wages count for this credit even if the employee:

- Performs no services,
- Performs services at a different place of employment than such principal place of employment, or
- Performs services at such principal place of employment before significant operations have resumed.<sup>287</sup>

However, the term does not include any wages taken into account under either the 2020 or 2021 version of the employee retention credit under CARES Act §2301.<sup>288</sup>

### **Special Rules**

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<sup>283</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(1)

<sup>284</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(2)

<sup>285</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3), IRC §§51(c)(1) and 3306(b)(2)(B)

<sup>286</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3)

<sup>287</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3)

<sup>288</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(b)(3)

To prevent a double benefit, wages taken into account for the following credits will not be taken into account for the QDERC:

- Credit for increasing research activities (§41);
- Indian employment credit (§45A);
- Employer credit for paid family and medical leave (§45S);
- Work opportunity credit (§51); and
- Empowerment zone employment credit (§1396).<sup>289</sup>

As well, rules similar to the following shall apply for this credit:

- Related individuals rules of §51(i)(1) which exclude wages to an individual who
  - Bears any of the relationships described in subparagraphs (A) through (G) of section 152(d)(2) to the taxpayer, or, if the taxpayer is a corporation, to an individual who owns, directly or indirectly, more than 50 percent in value of the outstanding stock of the corporation, or, if the taxpayer is an entity other than a corporation, to any individual who owns, directly or indirectly, more than 50 percent of the capital and profits interests in the entity (determined with the application of section 267(c)),
  - If the taxpayer is an estate or trust, is a grantor, beneficiary, or fiduciary of the estate or trust, or is an individual who bears any of the relationships described in subparagraphs (A) through (G) of section 152(d)(2) to a grantor, beneficiary, or fiduciary of the estate or trust, or
  - Is a dependent (described in section 152(d)(2)(H)) of the taxpayer, or, if the taxpayer is a corporation, of an individual described in the first bullet at this level, or, if the taxpayer is an estate or trust, of a grantor, beneficiary, or fiduciary of the estate or trust.
- Various special rules related to the work opportunity credit found at §52; and
- The credits allowed for wages under IRC §§45A(a), 45P(a), 45S(a), 51(a), and 1396(a) as detailed at §280C(a).<sup>290</sup>

## **Election Not to Take Certain Wages into Account**

This credit will not apply to qualified wages paid by an eligible employer with respect to which an employer makes an election to that effect at such time and in such a manner as the IRS prescribes.<sup>291</sup>

## **Coordination with the Paycheck Protection Program**

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<sup>289</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(c)(1)

<sup>290</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(c)(2)

<sup>291</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(e)(1)

The law provides:

The Secretary, in consultation with the Administrator of the Small Business Administration, shall issue guidance providing that payroll costs paid or incurred during the covered period shall not fail to be treated as qualified wages under this section by reason of an election under paragraph (1) to the extent that a covered loan of the eligible employer is not forgiven by reason of a decision under section 7A(g) of the Small Business Act. Terms used in the preceding sentence which are also used in section 7A(g) of such Act shall have the same meaning as when used in such section.<sup>292</sup>

## Application to Governmental Employees

For the most part, the credit does not apply to the Government of the United States, the government of any State or political subdivision thereof, or any agency or instrumentality of any of the foregoing.<sup>293</sup> But the law makes an exception for the following government employers:

- Any organization described in section 501(c)(1) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, or
- Any other governmental entity if —
  - Such entity is a college or university, or
  - The principal purpose or function of such entity is providing medical or hospital care.<sup>294</sup>

These entities shall be treated for purposes of this section in the same manner as an organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code.<sup>295</sup>

## PAYROLL TAX CREDIT FOR CERTAIN TAX-EXEMPT ORGANIZATIONS

A similar but separate credit is allowed to tax-exempt organizations of 40% of the *qualified wages* paid to *eligible employees* of such organization during a calendar quarter. As it is part of the section of the *Taxpayer Certainty and Disaster Relief Act of 2020* that creates the QDERC, it appears that the QDERC rules should generally apply except as overridden by *Taxpayer Certainty and Disaster Relief Act of 2020* §303(d).

### General Credit

The credit against the employer’s share of old age, survivor’s and disability (FICA) tax is allowed on wages paid “with respect to employment of all employees of the organization during the calendar

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<sup>292</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(e)(2)

<sup>293</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(f)(1)

<sup>294</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(f)(2)

<sup>295</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(f)(2)

quarter an amount equal to 40 percent of the *qualified wages* paid to *eligible employees* of such organization during such calendar quarter.”<sup>296</sup>

## **Limit on Wages Taken into Account Each Quarter per Employee**

The amount of qualified wages taken into account with respect to any employee for any calendar quarter may not exceed \$6,000 (reduced by the amount of qualified wages taken into account in any prior calendar quarter by the employer).<sup>297</sup>

## **Limitation and Carry Forward of Credit**

The total credit allowed for a quarter is limited to the tax imposed on the employer under IRC §3111(a) (employer FICA) reduced by any credits against such tax by any credits allowed under IRC §3111(e) (credit for employment of qualified veterans) and §3111(f) (Credit for research expenditures of a small business).<sup>298</sup>

If the total credit computed exceed the limit for any calendar quarter, “such excess shall be carried to the succeeding calendar quarter and allowed as a credit” of the same type for that following quarter.<sup>299</sup>

## **Definitions for Special Tax-Exempt Organization Credit**

The following definitions apply for the special tax-exempt organization credit.

### **Qualified Tax-Exempt Organization**

A *qualified tax-exempt organization* means:

...an organization described in section 501(c) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code if such organization would be an eligible employer if the activities of such organization were an active trade or business.<sup>300</sup>

### **Eligible Employee and Qualified Wages**

The terms *eligible employee* and *qualified wages* will be applied with respect to any *qualified tax-exempt organization*:

- By treating the activities of such organization as an active trade or business, and
- By substituting “wages (within the meaning of subsection (d)(4)(C))” (the general definition of wages under chapter 21 and 22 of the IRC) for “wages (as defined in section 51(c)(1) of the Internal Revenue Code of 1986, but without regard to section 3306(b)(2)(B) of such Code)” in the QDERC provision defining qualified wages.<sup>301</sup>

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<sup>296</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(1)

<sup>297</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(2)

<sup>298</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(3)(A)

<sup>299</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(3)(B)

<sup>300</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(4)(A)

<sup>301</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(4)(B)

Any other term used for this credit will have the same meaning it does under chapter 21 or 22 of the Internal Revenue Code if it is used in those chapters.<sup>302</sup>

Thus, the same rules regarding the time period over which the credit can be claimed would apply to the tax-exempt version of the credit as applies to the QDERC.

### **Waiver of Deposit Penalties**

The law provides that:

The Secretary shall waive any penalty under section 6656 of such Code for any failure to make a deposit of applicable employment taxes if the Secretary determines that such failure was due to the anticipation of the credit allowed under this subsection.<sup>303</sup>

### **Third Party Payors**

Any credit allowed under this provision shall be treated as a credit described in IRC §3511(d)(2), that is it is treated as a credit of the customer of the certified professional employer organization.<sup>304</sup>

### **No Duplication of Use of Wages for QDERC**

Any wages taken into account in computing the tax-exempt organization credit shall not be taken into account in computing the qualified disaster employee retention credit.<sup>305</sup>

### **Advance Payment**

The law provides that the IRS shall issue forms, instructions regulations and guidance as are necessary:

- To allow the advance payment of the tax-exempt credit, subject to the limitations provided in this subsection, based on such information as the IRS shall require,
- Regulations or other guidance to provide for the reconciliation of such advance payment with the amount of the credit under this subsection at the time of filing the return of tax for the applicable quarter or taxable year,
- With respect to the application of this credit to third party payors (including professional employer organizations, certified professional employer organizations, or agents under section 3504 of the Internal Revenue Code of 1986), including regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors, and
- For recapturing the benefit of credits determined under this subsection in cases where there is a subsequent adjustment to the credit.<sup>306</sup>

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<sup>302</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(4)(C)

<sup>303</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(6)

<sup>304</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(7)

<sup>305</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(8)

<sup>306</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §303(d)(9)

## QUALIFIED DISASTER RELIEF CONTRIBUTIONS - CORPORATIONS

In the case of a qualified disaster relief contribution made by a corporation:

- The CARES Act revisions to the charitable contribution limits will be applied first without regard to any qualified disaster relief contribution and then separately to such qualified disaster relief contribution, and
- In apply the CARES Act corporation contribution limitation to qualified disaster relief contributions shall be applied:
  - Apply a 100% of taxable income limitation in place of the 25% of taxable income limitation; and
  - By treating qualified contributions other than qualified disaster relief contributions as contributions allowed under IRC §170(b)(2) (the standard corporation contribution provision).<sup>307</sup>

The term *qualified disaster relief contribution* means any qualified contribution, as defined by IRC §170(c), if:

- Such contribution is paid in cash during calendar year 2020 to an organization described in section 170(b)(1)(A) of such Code, and
- The taxpayer has elected the application of this section with respect to such contribution.<sup>308</sup>

The law contains a reminder of the pre-existing individual charitable contribution rules under the CARES Act:

For the suspension of the limitation on qualified disaster relief contributions made by an individual during 2020, see section 2205(a)<sup>309</sup>

## SPECIAL RULES FOR QUALIFIED DISASTER-RELATED PERSONAL CASUALTY LOSSES

If a taxpayer has a net disaster loss for any taxable year:

- The amount determined under section 165(h)(2)(A)(ii) of the Internal Revenue Code of 1986 (personal casualty losses in excess of 10% of adjusted gross income normally) shall be equal to the sum of—
  - Such net disaster loss, and
  - So much of the excess referred to in the matter preceding clause (i) of section 165(h)(2)(A) of such Code (reduced by the net disaster loss) as exceeds 10 percent of the adjusted gross income of the individual,

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<sup>307</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §304(a)(1)

<sup>308</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §304(a)(2), CARES Act §2205(a)(3)

<sup>309</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §304(a)(3)

- In the case of qualified disaster-related personal casualty losses, section 165(h)(1) of such Code shall be applied to by substituting “ \$500” for “ \$500 ( \$100 for taxable years beginning after December 31, 2009)”,
- The standard deduction determined under section 63(c) of such Code shall be increased by the net disaster loss, and
- The alternative minimum tax adjustment for the standard deduction found at IRC §56(b)(1)(E) shall not apply to so much of the standard deduction as is attributable to the increase of the standard deduction referred to in the above bullet point.<sup>310</sup>

## Definitions

For purposes of this provision the following definitions apply.

### **Net Disaster Loss**

The term *net disaster loss* means:

...the excess of qualified disaster-related personal casualty losses over personal casualty gains (as defined in section 165(h)(3)(A) of the Internal Revenue Code of 1986).<sup>311</sup>

### **Qualified Disaster-Related Personal Casualty Loss**

The term *qualified disaster-related personal casualty loss* means:

...losses described in section 165(c)(3) of the Internal Revenue Code of 1986 which arise in a qualified disaster area on or after the first day of the incident period of the qualified disaster to which such area relates, and which are attributable to such qualified disaster.<sup>312</sup>

## ADDITIONAL LOW-INCOME HOUSING CREDIT ALLOCATIONS

The law provides:

For purposes of section 42 of the Internal Revenue Code of 1986, the State housing credit ceiling for any State for each of calendar years 2021 and 2022 shall be increased by the aggregate housing credit dollar amount allocated by the State housing credit agencies of such State for such calendar year to buildings located in any qualified disaster zone in such State.<sup>313</sup>

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<sup>310</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §304(b)(1)

<sup>311</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §304(b)(2)

<sup>312</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §304(b)(3)

<sup>313</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(1)

However, the increase is subject to the following limitation on the aggregate limitation. The net increase for a State will not exceed:

- In the case of any such increase determined for calendar year 2021, the *applicable dollar limitation* for such State, and
- In the case of any such increase determined for calendar year 2022, the *applicable dollar limitation* for such State reduced by the amount of any increase determined under the above bullet with respect to such State for calendar year 2021.<sup>314</sup>

The *applicable dollar limitation* means, with respect to any State, the lesser of:

- The product of \$3.50 multiplied by the population of such State (as determined for calendar year 2020) which resides in qualified disaster zones in such State, or
- 65 percent of the State housing credit ceiling for such State for calendar year 2020.<sup>315</sup>

## **Extension of Placed in Service Deadline for Designated Housing Credit Dollar Amounts**

In the case of any housing credit dollar amount which is

- Allocated by a State housing credit agency of for calendar year 2021 or 2022 to a building located in a qualified disaster zone in such State and
- Which is designated (at such time and in such manner as the IRS may provide) by such State housing credit agency as housing credit dollar amount to which this paragraph applies,

IRC §42(h)(1)(E) of the Internal Revenue Code of 1986 (exception where 10% of cost incurred) shall be applied:

- By substituting “third calendar year” for “second calendar year” both places it appears, and
- By substituting “2 years” for “1 24 year” in clause (ii) thereof.<sup>316</sup>

The law continues:

APPLICATION OF LIMITATION.—The aggregate amount of housing credit dollar amount designated under subparagraph (A) for any calendar year by all State housing credit agencies of a State shall not exceed the amount determined under paragraph (2)(A) with respect to such State for such calendar year.<sup>317</sup>

## **Allocation Treated as Made First from Additional Allocation for Purposes of Determining Carryover**

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<sup>314</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(2)(A)

<sup>315</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(2)(B)

<sup>316</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(3)(A)

<sup>317</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(3)(B)

The law provides:

For purposes of determining the unused State housing credit ceiling for any calendar year under section 42(h)(3)(C) of the Internal Revenue Code of 1986, any increase in the State housing credit ceiling under paragraph (1) shall be treated as an amount described in clause (ii) of such section.<sup>318</sup>

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<sup>318</sup> Taxpayer Certainty and Disaster Relief Act of 2020 §305(a)(4)