Current Federal Tax Developments

Week of October 18, 2021

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Contents

SECTION: 41
MEMORANDUM OUTLINES MINIMUM INFORMATION THAT WILL BE REQUIRED FOR A RESEARCH CREDIT REFUND CLAIM TO BE ACCEPTED

Citation: CCA 20214101F, 10/15/21

The IRS released a News Release[1] and 22-page Chief Counsel Memorandum[2] that set forth information a claim for refund related to the research credit under IRC §41 will be required to contain to be considered a valid claim. The News Release states:

> The IRS has set forth the information that taxpayers will be required to include for a research credit claim for refund to be considered valid. Existing Treasury Regulations require that for a refund claim to be valid, it must set forth sufficient facts to apprise IRS of the basis of the claim. The Chief Counsel memorandum will be used to improve tax administration with clearer instructions for eligible taxpayers to claim the credit while reducing the number of disputes over such claims.[3]

The IRS explains the reasons for releasing this memorandum that will be used to determine if credit claims will be allowed to move forward as follows:

> Effective tax administration entails ensuring taxpayers understand what is required to support the claim for the research and experimentation (R&E) credit. Each year, the IRS receives thousands of R&E claims for credits in the hundreds of millions of dollars from corporations, businesses, and individual taxpayers. Claims for research credit under IRC Section 41 are currently examined in a substantial number of cases and consume significant resources for both the IRS and taxpayers.
>
> The Chief Counsel legal advice released today is the result of ongoing efforts to manage research credit issues and resources in the most effective and efficient manner. By requiring taxpayers to provide the information referenced below, the IRS will be better able to determine

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[1] "IRS sets forth required information for a valid research credit claim for refund", IRS News Release IR-2021-203, October 15, 2021, https://www.irs.gov/newsroom/irs-sets-forth-required-information-for-a-valid-research-credit-claim-for-refund (retrieved October 15, 2021)

[2] CCA 20214101F, October 15, 2021, https://www.irs.gov/pub/irs-lafa/20214101f.pdf (retrieved October 15, 2021)

[3] "IRS sets forth required information for a valid research credit claim for refund", IRS News Release IR-2021-203, October 15, 2021

> upfront if an R&E credit claim for refund should be paid immediately or whether further review is needed.[4]

The News Release summarizes the information requirements found in the memorandum as follows:

> Specifically, the opinion provides that for a Section 41 research credit claim for refund to be considered a valid claim, taxpayers are required to provide the following information at the time the refund claim is filed with the IRS:
>
> - Identify all the business components to which the Section 41 research credit claim relates for that year.
> - For each business component, identify all research activities performed and name the individuals who performed each research activity, as well as the information each individual sought to discover.
> - Provide the total qualified employee wage expenses, total qualified supply expenses, and total qualified contract research expenses for the claim year. This may be done using Form 6765, *Credit for Increasing Research Activities*.[5]

The News Release notes the IRS will phase-in the requirements, with the requirements being strictly enforced beginning in January 2023:

> The IRS will provide a grace period [until January 10, 2022] before requiring the inclusion of this information with timely filed Section 41 research credit claims for refund. Upon the expiration of the grace period, there will be a one-year transition period during which taxpayers will have 30 days to perfect a research credit claim for refund prior to the IRS' final determination on the claim. Further details will be forthcoming; however, taxpayers may begin immediately providing this information.[6]

Advisers who prepare claims for refund for the IRC §41 research credit should begin studying the entire memorandum so that claims will not be returned to the taxpayer beginning early next year, or simply immediately rejected beginning in early 2023.

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[4] "IRS sets forth required information for a valid research credit claim for refund", IRS News Release IR-2021-203, October 15, 2021

[5] "IRS sets forth required information for a valid research credit claim for refund", IRS News Release IR-2021-203, October 15, 2021

[6] "IRS sets forth required information for a valid research credit claim for refund", IRS News Release IR-2021-203, October 15, 2021

SECTION: 71
INSURANCE PAID VIA CAFETERIA PLAN TO SATISFY REQUIREMENTS OF SEPARATION AGREEMENT REPRESENTED DEDUCTIBLE ALIMONY

Citation: Leyh v. Commissioner, 157 TC No. 7, 10/4/21

The IRS argued that Charles Leyh should not be allowed a deduction for alimony for amounts he paid for health insurance for his soon to be ex-wife via his employer's cafeteria plan pursuant to a separation agreement, arguing Charles got an impermissible double benefit since the amount paid for her insurance was not included in his income.[7] But in a published opinion, the Tax Court disagreed, finding that no impermissible double benefit existed, as his spouse reported that amount as income on her separate return for the year.

The facts of the case are summarized as follows:

> In 2012 petitioner filed for divorce from his then wife, Cynthia Leyh (Ms. Leyh), in the Pennsylvania Court of Common Pleas of Westmoreland County. Petitioner and Ms. Leyh filed and signed an agreement in 2014 (2014 agreement) incident to their divorce proceeding in which petitioner agreed to pay Ms. Leyh alimony pendente lite until the final divorce decree was granted. As part of the 2014 agreement, petitioner agreed to pay for Ms. Leyh's health and vision insurance. In 2015 petitioner paid $10,683 for Ms. Leyh's health insurance premiums as pretax payroll reductions from his wages through his employer's "cafeteria plan" (alimony payments). On his 2015 Form 1040, U.S. Individual Income Tax Return, petitioner excluded from his gross income the total amount of health care coverage premiums he and Ms. Leyh received through his employer's "cafeteria plan" (health insurance compensation) and also claimed an alimony deduction for the alimony payments.[8]

The opinion notes that for the years in question, the couple were still considered married and the amounts were properly excluded from Charles' income for tax purposes:

> Petitioner received the health insurance compensation while Ms. Leyh was still considered his spouse as Pennsylvania law recognizes only divorce, not legal separation, and a final decree of divorce was not granted until 2016. See *Argyle v. Commissioner,* T.C. Memo. 2009-218, 2009 WL 2972888, at *3, aff'd, 397 F. App'x 823 (3d Cir. 2010). Consequently, there is no dispute that petitioner was entitled under

[7] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/alimony-deduction-allowed-for-health-insurance-premium-payments/79hcn (retrieved October 5, 2021)

[8] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

> sections 106 and 125 and the regulations thereunder to exclude from his gross income the health insurance compensation, including the portion covering Ms. Leyh's health insurance coverage.[9]

The IRS also agreed that, aside from the fact he obtained the insurance as a tax free employee benefit, that the payment of insurance qualified as alimony under the agreement. The IRS argued, though, that allowing Charles to deduct the premium as alimony means he obtains a double deduction for the same payment:

> In seeking to uphold the disallowance of petitioner's alimony deduction, respondent argues that permitting the alimony deduction in this instance creates a "windfall" to petitioner by granting him the practical equivalent of multiple deductions for the same economic outlay.[10]

The Tax Court did not agree with this view, pointing out that his spouse was reporting an identical amount as income:

> There is, however, no such risk of a "windfall" to petitioner in allowing him an alimony deduction; doing so simply maintains the Government's parity and, as provided by the Code, continues to shift the ultimate tax burden of the income item to the recipient. Disallowing the alimony deduction in this circumstance would instead leave petitioner with a greater tax burden (relative to his position if he received the benefit of the deduction or had elected the married filing jointly filing status pending his divorce) that runs counter to the intended purpose and operation of the general alimony regime as previously interpreted by this Court. See, e.g., *Emmons v. Commissioner*, 36 T.C. 728, 735 (1961) (finding that the purpose behind the alimony provisions is to shift the income tax burden to the recipient), aff'd without published opinion, 311 F.2d 223 (6th Cir. 1962).[11]

The IRS points to a statement by the Senate Finance Committee from 1942 that stated the alimony deduction was created by Congress "to relieve a payor-spouse from the tax burden of whatever part of an alimony payment was "includible in * * * [the payor's] gross income." S. Rept. No. 77-1631, at 83 (1942), 1942-2 C.B. 504, 568."[12] But the Tax Court found that the plain text of the statute did not provide such a rule, and that the Committee Report could not create such a requirement that was not in the law:

> We believe, however, that this legislative history cannot be read to override the plain text of sections 62, 215, and 71 by interpreting these comments as imposing a precondition not present in the statutes themselves. These sections are clear that a payor of alimony may deduct such expenses to the extent they constitute alimony and are includible in the recipient's gross income. Respondent recognizes that these elements are present in petitioner's case by conceding that the

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[9] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

[10] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

[11] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

[12] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

> alimony payments meet the section 71(b) definition of alimony and would otherwise be deductible under sections 62 and 215 but for petitioner's exclusion of the health insurance compensation from his gross income. If respondent is concerned that petitioner's situation might create an unanticipated statutory "loophole" (which we do not believe is the case here), it would be up to Congress, not the Commissioner or this Court, to retroactively address. See *Alcoma Ass'n, Inc. v. United States*, 239 F.2d 365, 367 (5th Cir. 1956) (stating that where the Code explicitly provides for a deduction "the Commissioner cannot cut it down without specific statutory authority"); *Hunter v. Commissioner*, 46 T.C. 477, 491 (1966) (stating the Tax Court cannot legislate for Congress); *Evans v. Dudley*, 188 F. Supp. 9, 12 (W.D. Pa. 1960) (noting that courts are not empowered to impose restrictive conditions which are not in the statute), aff'd, 295 F.2d 713 (3d Cir. 1961).[13]

The IRS did have a second argument. The IRS argued that the deduction was barred under IRC §265(a) as a deduction allocable to tax-exempt income. The Tax Court agrees that they have applied this rule before in business or investment situations:

> We have previously noted that a principal purpose of section 265 is to restrict deductions of expenses incurred in connection with an ongoing trade or business or investment activity, the conduct of which generates exempt income. See *Manocchio v. Commissioner*, 78 T.C. 989, 994 (1982) (describing the legislative history and purpose of section 265), aff'd, 710 F.2d 1400 (9th Cir. 1983). We have also applied this rule more broadly to embrace situations where, but for a given expense, the receipt of tax-free income "fundamental[ly]" connected to the expense item would not have been possible. Id. at 994-995.[14]

But the Tax Court did not find the provision applicable in this case:

> The Court, however, has never applied section 265(a)(1) to disallow an alimony deduction, or, to our knowledge, in any instance where the supposed "exempt" item of income at issue was actually included in gross income by a different taxpayer. Our decisions broadly interpreting section 265(a)(1) have instead generally shared the same basic concern: But for the application of section 265, a taxpayer would have recognized a double tax benefit where one was not otherwise available to him. See, e.g., *Induni v. Commissioner*, 98 T.C. 618, 623 (1992), aff'd, 990 F.2d 53 (2d Cir. 1993); Rickard v. Commissioner, 88 T.C. 188, 193 (1987); *Manocchio v. Commissioner*, 78 T.C. at 994-995, 997. Such application is consistent with the text of the statute. As we have explained supra, this threat does not exist here given the special nature of the alimony regime. Furthermore, the alimony payments are not considered allocable to wholly tax-exempt income for section 265 purposes as Ms. Leyh was required to include it in her income. For

[13] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

[14] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

> these reasons, we decline to extend the reach of section 265 to petitioner's alimony deduction.[15]

SECTION: 4980B
NOTICE CLARIFIES PERIOD OF COBRA DATE EXTENSIONS

Citation: Notice 2021-58, 10/6/2021

In Notice 2021-58[16] the IRS returned to the subject of various emergency extensions for certain COBRA actions issued jointly by the IRS and Department of Labor beginning in May of 2020.

The IRS describes that original notice as follows:

> On May 4, 2020, in response to the National Emergency concerning the Novel Coronavirus Disease (COVID-19) Outbreak (National Emergency), the Agencies published the Joint Notice, which extended certain timeframes otherwise applicable to group health plans, disability and other welfare plans, pension plans, and their participants and beneficiaries under the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code of 1986 (Code). The Joint Notice extended these timeframes by requiring that plans subject to ERISA or the Code disregard the period for certain action from March 1, 2020, until 60 days after the announced end of the National Emergency or such other date announced by the Agencies in a future notification (the Outbreak Period), subject to a maximum disregarded period of one year.[17]

The Notice goes on to describe a clarification published in February of 2021:

> On February 26, 2021, DOL, with the concurrence of HHS, the Treasury Department, and the IRS, issued EBSA Disaster Relief Notice 2021-01, which clarified that the disregarded periods apply from the date each individual or plan was first eligible for relief under the Joint Notice. Under EBSA Disaster Relief Notice 2021-01, the applicable periods under the Emergency Relief Notices for individuals and plans are therefore disregarded until the earlier of (1) one year from the date the individuals and plans were first eligible for relief, or (2) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). At the end of an individual's or plan's disregarded period, the applicable timeframes that were disregarded under the Joint Notice resume.[18]

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[15] *Leyh v. Commissioner*, 157 TC No. 7, October 4, 2021

[16] Notice 2021-58, October 6, 2021, https://www.taxnotes.com/research/federal/irs-guidance/notices/guidance-clarifies-emergency-cobra-extensions/7bbdx (retrieved October 15, 2021)

[17] Notice 2021-58, October 6, 2021

[18] Notice 2021-58, October 6, 2021

Finally, the Notice goes on to describe additional changes in the area made by the American Rescue Plan Act of 2021 (ARPA) and later IRS guidance on these ARPA changes:

> On March 11, 2021, the ARP was enacted. Section 9501 of the ARP provides for temporary COBRA premium assistance for certain "Assistance Eligible Individuals" for periods of coverage beginning on or after April 1, 2021, through periods of coverage beginning on or before September 30, 2021. On May 18, 2021, the IRS and the Treasury Department issued Notice 2021-31 providing guidance regarding COBRA continuation coverage and COBRA premium assistance under the ARP.
>
> On July 26, 2021, the Treasury Department and the IRS issued Notice 2021-46, providing further guidance regarding COBRA continuation coverage and COBRA premium assistance under the ARP.[19]

The following timeframes were provided extensions by the original Joint Notice:

- The 60-day election period for COBRA continuation coverage under section 605 of ERISA and section 4980B(f)(5) of the Code,
- The dates for making COBRA premium payments under section 602(2)(C) and (3) of ERISA and section 4980B(f)(2)(B)(iii) and (C) of the Code,
- The date for individuals to notify the plan of a qualifying event or determination of disability under section 606(a)(3) of ERISA and section 4980B(f)(6)(C) of the Code, and
- The date for providing a COBRA election notice under section 606(c) of ERISA and section 4980B(f)(6)(D) of the Code for group health plans and their sponsors and administrators.[20]

The relief provided that these COBRA timelines are to be disregarded until the earlier of:

- One year from the date that individuals and plans were first eligible for relief, or
- The end of the Outbreak Period.[21]

The "Outbreak Period" is 60 days after the announced end of the National Emergency.[22]

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[19] Notice 2021-58, October 6, 2021

[20] Notice 2021-58, October 6, 2021

[21] Notice 2021-58, October 6, 2021

[22] Notice 2021-58, October 6, 2021, Section II.B

In footnotes, the Notice clarifies information regarding starting dates. In footnote 7 the Notice provides:

> The first date upon which an individual or plan could be eligible for relief was March 1, 2020, the first day of the National Emergency. Therefore, the earliest date upon which a disregarded period could begin to run again was March 1, 2021, including for periods beginning before March 1, 2020, during which an action was required or permitted to be completed.[23]

While footnote 14 provides:

> For an individual with a right to COBRA continuation coverage, the date of the applicable event will be the date the individual action would otherwise have been required or permitted. For group health plans, the date of the applicable event will be the date the plan would otherwise be required to provide a COBRA election notice.[24]

Extensions Under the Emergency Relief Notices to COBRA Elections and Payment of COBRA Premiums

The guidance had previously provided relief regarding the dates a participant had to elect COBRA coverage and pay COBRA premiums during the Outbreak Period. The new Notice "clarifies that the disregarded period for an individual to elect COBRA continuation coverage and the disregarded period for the individual to make initial and subsequent COBRA premium payments generally run concurrently."[25]

The Notice provides the following rules for the timeframes that apply to individuals making initial COBRA premium payments under the Emergency Relief Notices:

- If an individual elected COBRA continuation coverage outside of the initial 60-day COBRA election timeframe, that individual generally will have one year and 105 days after the date the COBRA notice was provided to make the initial COBRA premium payment.

- If an individual elected COBRA continuation coverage within the initial 60-day COBRA election timeframe, that individual will have one year and 45 days after the date of the COBRA election to make the initial COBRA premium payment.[26]

Individuals must make the initial COBRA election by the earlier of:

- One year and 60 days after the individual's receipt of the COBRA election notice, or

[23] Notice 2021-58, October 6, 2021, Footnote 7

[24] Notice 2021-58, October 6, 2021, Footnote 14

[25] Notice 2021-58, October 6, 2021, Section III

[26] Notice 2021-58, October 6, 2021, Section III

- The end of the Outbreak Period.[27]

The Notice points out that generally the maximum relief period would be one year for an individual, but notes:

> …these timeframes are subject to the transition relief provided in section IV of this notice, which provides that in no event will an initial COBRA premium payment be due before November 1, 2021, as long as the individual makes the initial COBRA premium payment within one year and 45 days after the election date.[28]

For subsequent COBRA payments, the Notice provides the following:

> For each subsequent COBRA premium payment, the maximum time an individual has to make a payment while the Outbreak Period continues is one year from the date the payment originally would have been due in the absence of the Emergency Relief Notices, including the mandatory 30-day grace period, but subject to the transition relief provided below.[29]

The special transitional relief for certain COBRA payments to November 1 provides:

> Because some individuals may have assumed that the disregarded period for making the initial premium payment begins on the date of the COBRA election, individuals who made elections more than 60 days after receipt of the election notice may have less time than they anticipated to make the initial premium payment. Therefore, to avoid inequitable outcomes, in no event will an individual be required to make the initial premium payment before November 1, 2021, even if November 1, 2021 is more than one year and 105 days after the date the election notice was received, provided that the individual makes the initial premium payment within one year and 45 days after the date of the election. This transition relief does not result in an individual having a disregarded period related to a particular COBRA timeframe that is more than one year. This transition relief is an exception to the general rule that disregarded periods for COBRA elections and initial COBRA payments run concurrently with respect to each individual.[30]

Interaction with the ARPA COBRA Premium Assistance

In March of 2021 the American Recovery Plan Act (ARPA) provided for special rules for COBRA premium assistance in a portion of 2021. The Notice explains how these rules interact with the previously issued Emergency Relief Notice:

> The extensions of the timeframes under the Emergency Relief Notices do not apply to the periods for providing the required notice of the

[27] Notice 2021-58, October 6, 2021, Section III

[28] Notice 2021-58, October 6, 2021, Section III

[29] Notice 2021-58, October 6, 2021, Section III

[30] Notice 2021-58, October 6, 2021, Section IV

> ARP extended election period or for electing COBRA continuation coverage with COBRA premium assistance under the ARP. See Notice 2021-31, Q&A-57. An individual who has a disregarded period under the Emergency Relief Notices may elect retroactive COBRA continuation coverage, subject to the guidance in this notice, and may elect COBRA continuation coverage with COBRA premium assistance for any period for which the individual is eligible for COBRA premium assistance. However, the disregarded periods under the Emergency Relief Notices continue to apply to payments of COBRA premiums after the end of the ARP COBRA premium assistance period, to the extent that the individual is still eligible for COBRA continuation coverage and the Outbreak Period has not ended.[31]

Examples of Application of the Notice's Provisions

The IRS provides a series of examples of the application of the provisions in the notice. The first set deal with applying the extensions under the Emergency Relief Notices to COBRA elections and payment of COBRA premiums:

EXAMPLE 1, NOTICE 2021-58, SECTION VI.A COBRA ELECTION MADE MORE THAN 60 DAYS AFTER RECEIPT OF COBRA ELECTION NOTICE UNDER THE EMERGENCY RELIEF NOTICES.

(i) Facts. Individual A participates in Employer X's group health plan. On August 1, 2020, Individual A has a qualifying event and receives a COBRA election notice. Individual A elects COBRA continuation coverage on February 1, 2021, retroactive to August 1, 2020. When must Individual A make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

(ii) Conclusion. Individual A has until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after August 1, 2020), because Individual A did not elect COBRA continuation coverage under the Emergency Relief Notices within 60 days after receipt of the election notice. The initial COBRA premium payment would include monthly premium payments for August 2020 through October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months that Individual A is eligible for COBRA continuation coverage.

EXAMPLE 2, NOTICE 2021-58, SECTION VI.A COBRA ELECTION MADE WITHIN 60 DAYS OF THE RECEIPT OF COBRA ELECTION NOTICE UNDER THE EMERGENCY RELIEF NOTICES.

(i) Facts. Individual B participates in Employer Y's group health plan. Individual B has a qualifying event and receives a COBRA election notice on October 1, 2020. Individual B elects COBRA continuation coverage on October 15, 2020 retroactive to October 1, 2020. When

[31] Notice 2021-58, October 6, 2021, Section V

must Individual B make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

(ii) Conclusion. Individual B has until November 29, 2021, to make the initial COBRA premium payment (one year and 45 days after October 15, 2020) because Individual A elected COBRA within 60 days of receiving the election notice. The initial COBRA premium payment would include only the monthly premium payment for October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual B is eligible for COBRA continuation coverage.

EXAMPLE 3, NOTICE 2021-58, SECTION VI.A TIMEFRAME FOR ELECTING COBRA UNDER THE EMERGENCY RELIEF NOTICES.

(i) Facts. Individual C participates in Employer Z's group health plan. Individual C has a qualifying event and is provided a COBRA election notice on August 1, 2020. When must Individual C elect COBRA continuation coverage and, if Individual C elects COBRA continuation coverage, when must Individual C make the initial COBRA premium payment?

(ii) Conclusion. Individual C has until September 30, 2021 (one year and 60 days after August 1, 2020) to elect COBRA continuation coverage. If Individual C elects COBRA continuation coverage after September 30, 2020 (but on or before September 30, 2021) Individual C has until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after receipt of the election notice). If Individual C makes the initial COBRA premium payment on November 14, 2021, that premium payment would include the monthly premiums for August 2020 through October 2020. The November 2020 monthly COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual C is eligible for COBRA continuation coverage.

EXAMPLE 4, NOTICE 2021-58, SECTION VI.A FAILURE TO MAKE COBRA PREMIUM PAYMENTS UNDER THE EMERGENCY RELIEF NOTICES.

(i) Facts. The facts are the same as in Example 1. In addition, Individual A timely makes the initial COBRA premium payment covering the months of August 2020 through October 2020, as well as the payment for the November 2020 monthly premium. Individual A does not make a payment for the December 2020 monthly premium as of December 31, 2021. For how many months does Individual A have COBRA continuation coverage?

(ii) Conclusion. Individual A is entitled to COBRA continuation coverage for the months of August 2020 through November 2020, but Individual A is not entitled to COBRA continuation coverage for any month after November 2020 because Individual A did not pay the December 2020 premium by the end of the applicable grace period. Benefits and services provided by the group health plan (for example, doctor's visits or filled prescriptions) that occurred on or before November 30, 2020, would be covered under the terms of the plan. The plan would not be obligated to cover benefits or services for Individual A that were incurred after November 30, 2020.

EXAMPLE 5, NOTICE 2021-58, SECTION VI.A APPLYING THE TRANSITION RELIEF FOR COBRA PREMIUM PAYMENTS DUE BEFORE NOVEMBER 1, 2021.

(i) Facts. The facts are the same as in Example 1, except that Individual A has a qualifying event on April 1, 2020. Individual A receives the COBRA election notice on April 1, 2020 and

elects COBRA continuation coverage on October 1, 2020, retroactive to April 1, 2020. As of July 15, 2021, Individual A has not made the initial premium payment. When must Individual A make the initial premium payment for COBRA continuation coverage retroactive to April 1, 2020 under the Emergency Relief Notices?

(ii) Conclusion. Under the transition relief provided in this notice, Individual A has until November 1, 2021 to make the initial premium payment, even though November 1, 2021 is more than one year and 105 days after April 1, 2020. Although the disregarded periods for the COBRA election and the initial premium payment run concurrently, under the transition relief provided in this notice, an individual will not be required to make the initial premium payment before November 1, 2021, as long as the individual makes the initial premium payment within one year and 45 days after the date of election. November 1, 2021 is less than one year and 45 days after October 1, 2020. Therefore, Individual A remains eligible to make the initial premium payment by November 1, 2021. The initial COBRA premium payment would include the monthly premium payments for April 2020 through October 2020. The November 2020 COBRA premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual A is eligible for COBRA continuation coverage.

EXAMPLE 6, NOTICE 2021-58, SECTION VI.A FAILURE TO MAKE INITIAL PREMIUM PAYMENT WITHIN ONE YEAR AND 45 DAYS OF ELECTION.

(i) Facts. The facts are the same as in Example 5, except that Individual A elects COBRA continuation coverage on May 1, 2020. As of October 1, 2021, Individual A has not made the initial premium payment for COBRA continuation coverage beginning April 1, 2020. On October 1, 2021 is Individual A eligible to make the initial premium payment for COBRA continuation coverage retroactive to April 1, 2020 under the Emergency Relief Notices?

(ii) Conclusion. No. October 1, 2021 is more than one year and 45 days after May 1, 2020. The maximum disregarded period related to a particular COBRA timeframe cannot be more than one year. Therefore, Individual A is no longer eligible to timely make the initial COBRA premium payment for COBRA continuation coverage retroactive to May 1, 2020 under the Emergency Relief Notices, despite the availability of transition relief. However, if Individual A is an Assistance Eligible Individual, Individual A has COBRA continuation coverage with COBRA premium assistance for the periods of coverage beginning April 1, 2021. Individual A may continue to pay for COBRA continuation coverage after September 2021 through the end of the period that Individual A is eligible for COBRA continuation coverage, if Individual A remains eligible for COBRA continuation coverage.

The IRS then concludes with four examples of applying the ARPA modifications:

EXAMPLE 7, NOTICE 2021-58, SECTION VI.B DEADLINE FOR RETROACTIVE COBRA CONTINUATION COVERAGE UNDER THE EMERGENCY RELIEF NOTICES FOR A POTENTIAL ASSISTANCE ELIGIBLE INDIVIDUAL UNDER THE ARP.

(i) Facts. Individual A works for Employer X and participates in Employer X's group health plan. On August 1, 2020, Individual A has a qualifying event that is an involuntary termination of employment, and, therefore, is a potential Assistance Eligible Individual under the ARP. Individual A receives a COBRA election notice on August 1, 2020, but, as of September 1, 2021, has not yet elected COBRA continuation coverage. Individual A also receives the notice of the ARP extended election period on May 31, 2021, but does not elect COBRA continuation coverage with premium assistance under the ARP. When is the last date for Individual A to

elect COBRA continuation coverage retroactive to August 1, 2020 under the Emergency Relief Notices?

(ii) Conclusion. Individual A has until September 30, 2021 (one year and 60 days after August 1, 2020) to elect COBRA continuation coverage retroactive to August 1, 2020 under the Emergency Relief Notices. Provided Individual A elects COBRA continuation coverage by September 30, 2021, Individual A would have until November 14, 2021 to make the initial COBRA premium payment (one year and 105 days after August 1, 2020). The initial COBRA premium payment would include monthly premium payments for August 2020 through October 2020. The November 2020 premium payment would be due by December 1, 2021 (one year and 30 days after November 1, 2020), with premium payments due every month after that for the months Individual A is eligible for COBRA continuation coverage.

EXAMPLE 8, NOTICE 2021-58, SECTION VI.B FAILURE TO ELECT RETROACTIVE COBRA CONTINUATION COVERAGE UNDER THE EMERGENCY RELIEF NOTICES BY A POTENTIAL ASSISTANCE ELIGIBLE INDIVIDUAL UNDER THE ARP.

(i) Facts. Individual B works for Employer Y and participates in Employer Y's group health plan. On March 1, 2021, Individual B has a qualifying event that is an involuntary termination of employment, and, therefore, is a potential Assistance Eligible Individual under the ARP. Individual B receives the COBRA election notice the same day. Individual B receives the COBRA election notice for the ARP extended election period on May 31, 2021, and elects COBRA continuation coverage with COBRA premium assistance beginning April 1, 2021 but does not elect COBRA continuation coverage retroactive to March 1, 2021. Must Individual B be permitted on or after August 1, 2021, to elect retroactive COBRA continuation coverage beginning March 1, 2021?

(ii) Conclusion. No. Because Individual B elected COBRA coverage with premium assistance under the ARP, Individual B remained eligible only until July 30, 2021 (60 days after the receipt of the notice of the ARP extended election period) to elect COBRA continuation coverage retroactive to March 1, 2021. Employer Y's group health plan may require Individual B to elect COBRA continuation coverage retroactive to the loss of coverage within 60 days of receiving the notice of the ARP extended election period or lose eligibility for retroactive coverage under the Emergency Relief Notices. Because Individual B did not elect retroactive COBRA continuation coverage (beginning March 1, 2021) under the Emergency Relief Notices by July 30, 2021, Employer Y's plan is not required to permit Individual B to elect COBRA continuation coverage retroactive to March 1, 2021 under the Emergency Relief Notices. If Individual B had not elected COBRA continuation coverage with premium assistance under the ARP, Individual B would remain eligible to elect COBRA continuation coverage retroactive to March 1, 2021, until April 30, 2022 (one year and 60 days after March 1, 2021). However, COBRA premium assistance under the ARP would not be available for this coverage.

EXAMPLE 9, NOTICE 2021-58, SECTION VI.B PAYMENT FOR RETROACTIVE COBRA CONTINUATION COVERAGE UNDER THE EMERGENCY RELIEF NOTICES BY A POTENTIAL ASSISTANCE ELIGIBLE INDIVIDUAL UNDER THE ARP.

(i) Facts. On November 1, 2020, Individual C has a qualifying event that is an involuntary termination of employment, and, therefore, is a potential Assistance Eligible Individual under the ARP. Individual C receives the COBRA election notice on the same date. On April 30, 2021, Individual C receives the notice of the ARP extended election period. On May 31, 2021,

Individual C elects both retroactive COBRA continuation coverage beginning on November 1, 2020, and COBRA continuation coverage with premium assistance for the first period of coverage beginning on or after April 1, 2021. When are the deadlines for Individual C to make the initial COBRA premium payment and subsequent monthly COBRA premium payments?

(ii) Conclusion. Individual C has until February 14, 2022 to make the initial COBRA premium payment (one year and 105 days after November 1, 2020). The initial COBRA premium payment would include premium payments for November 2020 through January 2021. The February 2021 premium payment would be due by March 3, 2022 (one year and 30 days after February 1, 2021), and the March 2021 premium payment would be due by March 31, 2022 (one year and 30 days after March 1, 2021). Premium payments would be due every month after that for the months Individual C is eligible for COBRA continuation coverage, except that no payments would be due for the periods beginning on or after April 1, 2021, through September 30, 2021.

EXAMPLE 9, NOTICE 2021-58, SECTION VI.B COBRA PREMIUM PAYMENT AFTER THE END OF THE PERIOD OF COBRA PREMIUM ASSISTANCE BY AN ASSISTANCE ELIGIBLE INDIVIDUAL UNDER THE ARP AND APPLICATION OF THE EMERGENCY RELIEF NOTICES.

(i) Facts. The facts are the same as in Example 9, except that Individual C makes the initial COBRA premium payment by February 14, 2022, fails to make the premium payment for the February 2021 period of coverage by March 3, 2022, and fails to make the premium payment for the March 2021 period of coverage by March 31, 2022. Individual C then makes a COBRA premium payment on May 1, 2022. For which months does Individual C have COBRA continuation coverage?

(ii) Conclusion. Individual C has retroactive COBRA continuation coverage for November 2020, December 2020, and January 2021 because Individual C made a timely initial COBRA premium payment under the Emergency Relief Notices. Individual C does not have coverage for the months of February or March 2021 because Individual C did not make timely COBRA premium payments by March 3, 2022 (one year and 30 days after February 1, 2021) or March 31, 2022 (one year and 30 days after March 1, 2021). Individual C has COBRA continuation coverage with COBRA premium assistance for the periods of coverage from April 1, 2021 through September 30, 2021 because Individual C is an Assistance Eligible Individual and made a timely election under the ARP. Individual C also has COBRA continuation coverage for October 2021 (because Individual C made a premium payment on May 1, 2022) unless Individual C indicates that the May 1, 2022 premium payment was intended to pay premiums for a period during which Individual C was eligible for COBRA premium assistance.17 If the premium payment was not erroneously paid for coverage during a premium assistance period, the COBRA premium payment made on May 1, 2022 must be credited to the period following the ARP COBRA period because that COBRA premium payment is timely under the Emergency Relief Notices (the payment on May 1, 2022 is made within one year and 30 days after October 1, 2021). Individual C may continue to pay for COBRA continuation coverage for

the period after October 2021 until Individual C has paid for the last of the months that Individual C is eligible for COBRA continuation coverage.

Effective Date

The Notice was effective upon its release date of October 6, 2021.[32]

SECTION: 6662
IRS ISSUES STATEMENT ON TAXPAYERS' RELIANCE ON IRS FAQS

Citation: "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, 10/15/21

One of the tools the IRS has used with increasing frequency to provide guidance has been the use of Frequently Asked Questions (FAQs) posted on the IRS website. The IRS began using the tool heavily to provide guidance for various Tax Cut and Jobs Act provisions, and that use continued with guidance for various items found in the COVID relief bills.

However, tax professionals have expressed major concerns with the IRS reliance on such guidance. First, it's not clear what happens if the IRS discovers that an FAQ no longer agrees with what the agency and courts find to be the proper interpretation of the law. Can the IRS assert a position contrary to a published FAQ against a taxpayer and if they succeed in doing so, do taxpayers face potential penalties for taking positions on a tax return relying upon the FAQ?

Second, the IRS has in the past often changed FAQs without making any public statement regarding the changes aside from updating the "Page Last Reviewed or Updated:" footer on the various pages. Advisers may not realize an FAQ was changed just before a taxpayer files a return based on the prior version of the FAQ unless the adviser goes to each of the multitude of IRS FAQs each day to see if any have changed.

The IRS has released a reliance web page[33] that addresses these issues along with a News Release[34] issued simultaneously.

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[32] Notice 2021-58, October 6, 2021, Section VIII

[33] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated), https://www.irs.gov/newsroom/general-overview-of-taxpayer-reliance-on-guidance-published-in-the-internal-revenue-bulletin-and-faqs (retrieved October 15, 2021)

[34] "IRS updates process for frequently asked questions on new tax legislation and addresses reliance concerns," IRS News Release IR-2021-202, October 15, 2021, https://www.irs.gov/newsroom/irs-updates-process-for-frequently-asked-questions-on-new-tax-legislation-and-addresses-reliance-concerns (retrieved October 15, 2021)

News Release

The News Release begins by announcing:

> Today, the Internal Revenue Service is updating its process for certain frequently asked questions (FAQs) on newly enacted tax legislation. The IRS is updating this process to address concerns regarding transparency and the potential impact on taxpayers when these FAQs are updated or revised. At the same time, the IRS is also addressing concerns regarding the potential application of penalties to taxpayers who rely on FAQs by providing clarity to taxpayers as to their ability to rely on FAQs for penalty protection.[35]

The IRS release provides that the IRS will now take the following actions for "significant FAQs" on newly enacted legislation:

> Significant FAQs on newly enacted tax legislation, as well as any later updates or revisions to these FAQs, will now be announced in a news release and posted on IRS.gov in a separate Fact Sheet. These Fact Sheet FAQs will be dated to enable taxpayers to confirm the date on which any changes to the FAQs were made. Additionally, prior versions of Fact Sheet FAQs will be maintained on IRS.gov to ensure that, if a Fact Sheet FAQ is later changed, taxpayers can locate the version they relied on if they later need to do so. In addition to significant FAQs on new legislation, the IRS may apply this updated process in other contexts, such as when FAQs address emerging issues.[36]

While this seems to be an improvement, advisers should be concerned that this rule only covers "significant FAQs" without giving any guidance on what makes an FAQ significant. Similarly, FAQs that aren't related to new legislation are not covered by this policy and it's not clear if even the American Recovery Program Act (ARPA) would still be treated as "new legislation" at this point based on the language of the news release.

The news release also describes the statement it is releasing on taxpayer reliance on the Internal Revenue Bulletin and FAQs:

> To address concerns about the potential application of penalties to taxpayers who rely on an FAQ, the IRS is today releasing a statement clarifying that if a taxpayer relies on any FAQ (including FAQs released before today) in good faith and that reliance is reasonable, the taxpayer will have a "reasonable cause" defense against any negligence penalty or other accuracy-related penalty if it turns out the FAQ is not a correct statement of the law as applied to the taxpayer's particular facts. For more information on taxpayer reliance, see the *General*

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[35] "IRS updates process for frequently asked questions on new tax legislation and addresses reliance concerns," IRS News Release IR-2021-202, October 15, 2021

[36] "IRS updates process for frequently asked questions on new tax legislation and addresses reliance concerns," IRS News Release IR-2021-202, October 15, 2021

Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs.

Finally, the News Release provides that the following statement will be added to Fact Sheet FAQs:

> These FAQs are being issued to provide general information to taxpayers and tax professionals as expeditiously as possible. Accordingly, these FAQs may not address any particular taxpayer's specific facts and circumstances, and they may be updated or modified upon further review. Because these FAQs have not been published in the Internal Revenue Bulletin, they will not be relied on or used by the IRS to resolve a case. Similarly, if an FAQ turns out to be an inaccurate statement of the law as applied to a particular taxpayer's case, the law will control the taxpayer's tax liability. Nonetheless, a taxpayer who reasonably and in good faith relies on these FAQs will not be subject to a penalty that provides a reasonable cause standard for relief, including a negligence penalty or other accuracy-related penalty, to the extent that reliance results in an underpayment of tax. Any later updates or modifications to these FAQs will be dated to enable taxpayers to confirm the date on which any changes to the FAQs were made. Additionally, prior versions of these FAQs will be maintained on IRS.gov to ensure that taxpayers, who may have relied on a prior version, can locate that version if they later need to do so.[37]

IRS Statement on Reliance on the Internal Revenue Bulletin and FAQs

Included in the news release, as well as on its own page on irs.gov, is the promised statement, entitled "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs."

The guidance begins with a section outlining the status of items published in the Internal Revenue Bulletin (IRB). The guidance first states that the IRB is where items with various levels of authority will be published

> The Internal Revenue Bulletin (Bulletin) is the authoritative instrument of the Commissioner of Internal Revenue for announcing official rulings and procedures of the Internal Revenue Service and for publishing Treasury Decisions, Executive Orders, Tax Conventions, legislation, court decisions, and other items of general interest.[38]

The statement then outlines the IRS's policy of what items it will publish in the IRB:

> It is the policy of the Service to publish in the Bulletin all substantive rulings necessary to promote a uniform application of the tax laws,

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[37] "IRS updates process for frequently asked questions on new tax legislation and addresses reliance concerns," IRS News Release IR-2021-202, October 15, 2021

[38] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)

> including all rulings that supersede, revoke, modify, or amend any of those previously published in the Bulletin. All published rulings apply retroactively unless otherwise indicated. Procedures relating solely to matters of internal management are not published; however, statements of internal practices and procedures that affect the rights and duties of taxpayers are published.[39]

The statement describes the class of items published in the IRB that are treated as Revenue Rulings:

> Revenue rulings represent the conclusions of the Service on the application of the law to the pivotal facts stated in the revenue ruling. In those based on positions taken in rulings to taxpayers or technical advice to Service field offices, identifying details and information of a confidential nature are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements.[40]

The level of authority represented by items in the IRB is described in the final paragraph of the first section.

> Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Rulings not published in the Bulletin will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases.[41]

The statement points out that those looking to rely on such items published in the IRB do have to consider events occurring after publication of the item in the IRB—that is, the IRS has no obligation to update items published in the IRB for such changes or developments.

> In applying published rulings and procedures, the effect of subsequent legislation, regulations, court decisions, rulings and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.[42]

This portion of the statement is in line with what advisers have generally understood to be the level of reliance that can be placed on items found in the IRB and the due diligence to be performed to assure that the item has not been rendered void by later developments.

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[39] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)

[40] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)

[41] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)

[42] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)

The relatively new material is found in the second portion of this document that informs taxpayers of how much reliance the taxpayer can place on items published not in the Internal Revenue Bulletin, but rather in FAQs.

The section begins by offering a justification for the IRS use of FAQs to provide guidance:

> FAQs are a valuable alternative to guidance published in the Bulletin because they allow the IRS to more quickly communicate information to the public on topics of frequent inquiry and general applicability. FAQs typically provide responses to general inquiries rather than applying the law to taxpayer-specific facts and may not reflect various special rules or exceptions that could apply in any particular case.[43]

But this statement is immediately followed by a description of the severe limitations on any reliance on an FAQ:

> FAQs that have not been published in the Bulletin will not be relied on, used, or cited as precedents by Service personnel in the disposition of cases. Similarly, if an FAQ turns out to be an inaccurate statement of the law as applied to a particular taxpayer's case, the law will control the taxpayer's tax liability. Only guidance that is published in the Bulletin has precedential value.[44]

Interestingly, in this case the guidance talks about FAQs that *have not been published in the Internal Revenue Bulletin.* It's not clear if that is just a reminder that FAQs to date have not been published there, or if the IRS is considering publishing some types of FAQs in the IRB.

But for those FAQs not published in the IRB, the statement makes clear that a taxpayer will not be able to hold the IRS to a position found in the FAQ if it is determined to be at odds with the law, even if the position stated in the FAQ is more favorable to the taxpayer than the one the IRS is now asserting is required by the law.

Despite this statement, taxpayers may find that the IRS faces a practical problem going against such informal, but widely disseminated, guidance if it affects a large number of taxpayers. In 2014, the IRS prevailed in the case of *Bobrow v. Commissioner* (TC Memo 2014-21) with the Tax Court agreeing that a taxpayer could only have one rollover per year for all of his/her IRAs. The taxpayer argued that the limit applied on a per IRA account basis. However, the Tax Court did not accept that view, effectively treating all IRAs of the taxpayer as one for the rollover rule.

But advisers reading the decision quickly pointed out that IRS Publication 590, *Individual Retirement Arrangements (IRAs)* at the time specifically allowed applying the rule on a per account basis, as Mr. Bobrow had done.

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[43] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)

[44] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)

In reaction to this situation, the IRS released Announcement 2014-15 where the agency agreed to allow an account by account test for rollovers through the end of 2014, and that the agency would not challenge any such rollovers taking place before the deadline in 2014 or prior years. But taxpayers should note that if their issue is more obscure, there may not be the hue and cry that led the IRS to back off on applying the law rather than their non-binding guidance to transactions for a number of months.

The statement continues noting that while taxpayers will not be saved from the consequences of law that is contrary to the FAQ for the taxes and interest due on the understatement, the agency will consider reliance on such FAQs in determining if the taxpayers had a reasonable basis for taking the position:

> Taxpayers who show that they relied in good faith on an FAQ and that their reliance was reasonable based on all the facts and circumstances will not be subject to a penalty that provides a reasonable cause standard for relief, including a negligence penalty or other accuracy-related penalty, to the extent that reliance results in an underpayment of tax. See Treas. Reg. § 1.6664-4(b) for more information. In addition, FAQs that are published in a Fact Sheet that is linked to an IRS news release are considered authority for purposes of the exception to accuracy-related penalties that applies when there is substantial authority for the treatment of an item on a return. See Treas. Reg. § 1.6662-4(d) for more information.[45]

Essentially, the IRS is stating that they will not require a taxpayer to demonstrate that the position outlined in the FAQ they relied upon was disclosed on a Form 8275 and had a reasonable basis under the law to avoid an accuracy related penalty under IRC §6662. Rather, the position will be deemed to have substantial authority even though it was not found to be the ultimately correct answer.

As you may realize, as a practical matter the IRS is treating positions based on an FAQ similarly to positions based on an IRS Publication that is later held to be at odds with the law.

[45] "General Overview of Taxpayer Reliance on Guidance Published in the Internal Revenue Bulletin and FAQs," IRS website, October 15, 2021 (last updated)