

Current Federal Tax Developments

Week of April 27, 2020

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ACCOUNTING
CONTINUING EDUCATION

CURRENT FEDERAL TAX DEVELOPMENTS
WEEK OF APRIL 27, 2020
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SECTION: PPP LOAN QUESTIONS ADDED TO PPP FAQ DEALING WITH HOUSING ALLOWANCES, AGRICULTURE AND WHETHER AN EMPLOYEE'S PRINCIPAL RESIDENCE IS IN THE UNITED STATES

Citation: Paycheck Protection Program Loans Frequently Asked Questions (FAQ), April 24, 2020 Version, 4/24/2020

Just before the weekend, the SBA added four additional questions (numbers 32-35 for those keeping count) to the Paycheck Protection Program Loans Frequently Asked Questions document on the SBA CARES Act website.¹ The four questions and answers deal with housing allowances, how to determine if an employee's principal place of residence is in the United States and how the PPP program applies to agriculture.

This is the first addition to this list on the website since the SBA published an interim final rule allowing for guidance to appear on the SBA's website.

Housing Stipends or Allowances

Some employees are paid a housing stipend or allowance, which may or may not be taxable to the employee (for instance, ministers' housing allowances generally are not taxable). The SBA tells us that such allowances are part of cash compensation—so it counts, but it is part of the compensation subject to the \$100,000 cap.

32. Question: Does the cost of a housing stipend or allowance provided to an employee as part of compensation count toward payroll costs?

Answer: Yes. Payroll costs includes all cash compensation paid to employees, subject to the \$100,000 annual compensation per employee limitation.

Employee's Principal Residence in the United States

Another added question provides a resource for employers to consult in determining if an employee's principal place of residence is in the United States, a requirement to

¹ "Paycheck Protection Program Loans Frequently Asked Questions," April 24, 2020 version, <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf> (retrieved April 24, 2020)

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count that employee's compensation as a payroll cost for the Payroll Protection Program loans:

33. Question: Is there existing guidance to help PPP applicants and lenders determine whether an individual employee's principal place of residence is in the United States?

Answer: PPP applicants and lenders may consider IRS regulations (26 CFR § 1.121- 1(b)(2)) when determining whether an individual employee's principal place of residence is in the United States.

Issues for Agriculture

The final two questions deal with the availability of the PPP loans for various parties involved in agriculture. The first question outlines how agricultural producers, farmers and ranchers fit into the program:

34. Question: Are agricultural producers, farmers, and ranchers eligible for PPP loans?

Answer: Yes. Agricultural producers, farmers, and ranchers are eligible for PPP loans if: (i) the business has 500 or fewer employees, or (ii) the business fits within the revenue-based sized standard, which is average annual receipts of \$1 million.

Additionally, agricultural producers, farmers, and ranchers can qualify for PPP loans as a small business concern if their business meets SBA's "alternative size standard." The "alternative size standard" is currently: (1) maximum net worth of the business is not more than \$15 million, and (2) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million.

For all of these criteria, the applicant must include its affiliates in its calculations.

The question concludes with a link to the Applicable Affiliation Rules for the PPP at <https://www.sba.gov/document/support--affiliation-rules-paycheck-protection-program>.

The final question discusses how the program applies to cooperatives, both agricultural and other:

35. Question: Are agricultural and other forms of cooperatives eligible to receive PPP loans?

Answer: As long as other PPP eligibility requirements are met, small agricultural cooperatives and other cooperatives may receive PPP loans.

SECTION: PPP LOAN ADDITIONAL SBA PPP IFR FORMALIZES SAFE HARBOR, PROVIDES INFORMATION ON INELIGIBLE BUSINESSES AND OTHER ADDITIONS TO GUIDANCE

Citation: RIN 3245-AH37, “Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility,” 4/24/20

Just prior to the President’s signing of the bill adding additional funding to the PPP loan program, the SBA issued yet another set of Interim Final Rules, this set dealing with the eligibility of certain businesses to obtain such a loan, impact of ESOPs on affiliation rules, guidance for a business in bankruptcy, formalizing the May 7 repayment safe harbor first discussed in the April 23 addition of Q&A 31 to the PPP FAQ by the SBA and authorizing additional guidance to be posted directly on the SBA website.²

Eligible Businesses

The SBA clarified types of businesses that are and are not eligible to obtain a PPP loan in Section III.2. of the April 24 interim final rule.

Hedge funds and private equity funds are held by the SBA to be ineligible to receive a PPP loan.

a. Is a hedge fund or private equity firm eligible for a PPP loan?

No. Hedge funds and private equity firms are primarily engaged in investment or speculation, and such businesses are therefore ineligible to receive a PPP loan. The Administrator, in consultation with the Secretary, does not believe that Congress intended for these types of businesses, which are generally ineligible for section 7(a) loans under existing SBA regulations, to obtain PPP financing.

² RIN 3245-AH37, “Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Promissory Notes, Authorizations, Affiliation, and Eligibility,” April 24, 2020, <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Requirements-for-Promissory-Notes-Authorizations-Affiliation-and-Eligibility.pdf> (retrieved April 24, 2020)

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The IFR also provides the following guidance regarding a portfolio company of a private equity fund. While it doesn't say the company cannot receive a PPP loan, it issues a reminder of finding the borrowing is "necessary" in accordance with the FAQ update issued on April 23 and repeated in this IFR:

b. Do the SBA affiliation rules prohibit a portfolio company of a private equity fund from being eligible for a PPP loan?

Borrowers must apply the affiliation rules that appear in 13 CFR 121.301(f), as set forth in the Second PPP Interim Final Rule (85 FR 20817). The affiliation rules apply to private equity-owned businesses in the same manner as any other business subject to outside ownership or control. However, in addition to applying any applicable affiliation rules, all borrowers should carefully review the required certification on the Paycheck Protection Program Borrower Application Form (SBA Form 2483) stating that "[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

This answer has a footnote that those affected should also consider.

However, the Act waives the affiliation rules if the borrower receives financial assistance from an SBA-licensed Small Business Investment Company (SBIC) in any amount. This includes any type of financing listed in 13 CFR 107.50, such as loans, debt with equity features, equity, and guarantees. Affiliation is waived even if the borrower has investment from other non-SBIC investors.

The IFR goes on to discuss whether a hospital owned by a governmental entity is eligible for the loan, making the answer conditional, creating a 50% test:

c. Is a hospital owned by governmental entities eligible for a PPP loan?

A hospital that is otherwise eligible to receive a PPP loan as a business concern or nonprofit organization (described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from taxation under section 501(a) of such Code) shall not be rendered ineligible for a PPP loan due to ownership by a state or local government if the hospital receives less than 50% of its funding from state or local government sources, exclusive of Medicaid.

The Administrator, in consultation with the Secretary, determined that this exception to the general ineligibility of government-owned entities, 13 CFR 120.110(j), is appropriate to effectuate the purposes of the CARES Act.

The April 24 IFR modifies part III.2.b of the Third PPP IFR, related to businesses involved in legal gambling, to read as follows:

Are businesses that receive revenue from legal gaming eligible for a PPP Loan?

A business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues, and 13 CFR 120.110(g) is inapplicable to PPP loans. Businesses that received illegal gaming revenue remain categorically ineligible. On further consideration, the Administrator, in consultation with the Secretary, believes this approach is more consistent with the policy aim of making PPP loans available to a broad segment of U.S. businesses.

Employee Stock Ownership Plans (ESOPs) and Affiliation Rules

The April 24 IFR at Section III.3 provides the following information regarding the impact of ESOPs on the affiliation rules:

Does participation in an employee stock ownership plan (ESOP) trigger application of the affiliation rules?

No. For purposes of the PPP, a business's participation in an ESOP (as defined in 15 U.S.C. § 632(q)(6)) does not result in an affiliation between the business and the ESOP. The Administrator, in consultation with the Secretary, determined that this is appropriate given the nature of such plans. Under an ESOP, a business concern contributes its stock (or money to buy its stock or to pay off a loan that was used to buy stock) to the plan for the benefit of the company's employees. The plan maintains an account for each employee participating in the plan. Shares of stock vest over time before an employee is entitled to them. However, with an ESOP, an employee generally does not buy or hold the stock directly while still employed with the company. Instead, the employee generally receives the shares in his or her personal account only upon the cessation of employment with the company, including retirement, disability, death, or termination.

PPP Loans for Otherwise Eligible Borrowers Currently in a Bankruptcy Proceeding

At III.3 the new IFR provides that a potential borrower currently in a bankruptcy proceeding will not be approved for a PPP loan:

Will I be approved for a PPP loan if my business is in bankruptcy?

<http://www.currentfederaltaxdevelopments.com>

No. If the applicant or the owner of the applicant is the debtor in a bankruptcy proceeding, either at the time it submits the application or at any time before the loan is disbursed, the applicant is ineligible to receive a PPP loan. If the applicant or the owner of the applicant becomes the debtor in a bankruptcy proceeding after submitting a PPP application but before the loan is disbursed, it is the applicant's obligation to notify the lender and request cancellation of the application. Failure by the applicant to do so will be regarded as a use of PPP funds for unauthorized purposes.

The Administrator, in consultation with the Secretary, determined that providing PPP loans to debtors in bankruptcy would present an unacceptably high risk of an unauthorized use of funds or non-repayment of unforgiven loans. In addition, the Bankruptcy Code does not require any person to make a loan or a financial accommodation to a debtor in bankruptcy. The Borrower Application Form for PPP loans (SBA Form 2483), which reflects this restriction in the form of a borrower certification, is a loan program requirement. Lenders may rely on an applicant's representation concerning the applicant's or an owner of the applicant's involvement in a bankruptcy proceeding.

May 7 Repayment Safe Harbor for Need Certification Made Official

In the May 23 addition of a question to the FAQ regarding a borrower must be able to show a need for the loan, the SBA indicated that a borrower who repays the loan by May 7 will be deemed to have made the need certification in good faith. That is, if you repay by May 7 you will not face any consequences from a later finding that you did not make the need certification in good faith. The IFR formalizes this guidance as follows in Section III.5:

Consistent with section 1102 of the CARES Act, the Borrower Application Form requires PPP applicants to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Any borrower that applied for a PPP loan prior to the issuance of this regulation and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

The Administrator, in consultation with the Secretary, determined that this safe harbor is necessary and appropriate to ensure that borrowers promptly repay PPP loan funds that the borrower obtained based on a misunderstanding or misapplication of the required certification standard.

SBA Website as Source for Additional Guidance

Finally, the new IFR concludes in Section III.6 with a provision allowing the agency to issue additional, apparently binding, guidance by publishing the guidance on the SBA website. The section reads:

SBA may provide further guidance, if needed, through SBA notices that will be posted on SBA’s website at www.sba.gov. Questions on the Paycheck Protection Program may be directed to the Lender Relations Specialist in the local SBA Field Office. The local SBA Field Office may be found at <https://www.sba.gov/tools/localassistance/districtoffices>.

SECTION: PPP LOAN SBA ADDS QUESTION AND ANSWER TO PPP FAQ REGARDING CERTIFICATION OF THE LOAN BEING NECESSARY

Citation: Paycheck Protection Program Loans Frequently Asked Questions (FAQ), April 23, 2020 Version, 4/23/2020

Following the furor over PPP loans being given to certain public companies and the tweets of Senator Marco Rubio³ pointing towards the certification that he indicated required a showing of need to receive a PPP loan, the SBA has added a new question to their FAQ on PPP loans.⁴

³ Senator Marco Rubio Twitter account (@marcorubio), <https://twitter.com/marcorubio/status/1252303608370126849?s=20>

⁴ Paycheck Protection Program Loans Frequently Asked Questions, April 23, 2020 version, <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>, retrieved April 23, 2020. Note the Treasury has “broken” these links in the past, so you may need to go to the main SBA CARES page at <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses> and then scroll down to find the FAQ

New Question 31 in the FAQ reads (with significant guidance highlighted):

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

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

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

While the highlighted text is not highlighted in the document, it points out the key additional guidance found in this question. In essence, if a company does not wish to risk having to demonstrate the need for the loan, they should repay the balance by May 7, 2020.

As well, while the question only discusses public companies, it does so purely as an example. It may be risky to assume that nonpublic companies are safe from being asked the same questions—nothing in the document specifically limits the necessity to consider sources of liquidity solely to public companies.

Will this truly result in any actions against borrowers? And, if so, how many borrowers will face these consequences? Only time will tell on this issue.

But clients who have or are applying for a PPP loan should be made aware they may be asked to justify the need for the loan. Remember at this point we are still awaiting

significant guidance of what will be necessary for forgiveness and it's possible that this sort of proof the loan was necessary question could appear there.

SECTION: 62

TAX STATUS OF PAYMENTS RECEIVED FOR PYRRHOTITE DAMAGE CLARIFIED BY IRS ANNOUNCEMENT

Citation: Announcement 2020-5, 4/22/20

The IRS has issued additional guidance related to a problem Connecticut homeowners had with deteriorating concrete foundations due to pyrrhotite in the concrete mixture in Announcement 2020-5.⁵

The Announcement describes the problem as follows:

Pyrrhotite is a mineral that oxidizes in the presence of water and oxygen, leading to the formation of expansive mineral products. Pyrrhotite is naturally found in certain stone aggregates used to produce concrete and can cause concrete to deteriorate prematurely in certain cases.

In August 2015, agencies of the State of Connecticut began investigating numerous complaints by homeowners concerning the premature deterioration of the concrete foundations of their homes. These agencies concluded that the premature deterioration of the concrete foundations was due to the presence of pyrrhotite in the concrete mixture used to pour the foundations (deteriorating concrete foundations).

The issue involves the tax status of payments made by an insurance company formed by the state of Connecticut to homeowners who had foundation damage related to pyrrhotite. The IRS describes the program as follows:

In 2017, the State of Connecticut mandated the establishment and funding of an entity, the Connecticut Foundation Solutions Indemnity Company, Inc. (CFSIC), to assist homeowners with the expeditious repair of the most severe cases of deteriorating concrete foundations. In addition to establishing the CFSIC, the State of Connecticut authorized the CFSIC to raise funds and augment the

⁵ Announcement 2020-5, April 22, 2020, <https://www.irs.gov/pub/irs-drop/a-20-05.pdf>, retrieved April 22, 2020

monies bonded by the state to remedy the issue of deteriorating concrete foundations.

In January 2019, the CFSIC began accepting applications from homeowners seeking financial assistance to repair their deteriorating concrete foundations. All claims require a contract between the homeowner and a contractor for repair or replacement of the foundation. The contract must set forth the total cost of repair. The CFSIC pays the lesser of: (1) the expenses pertaining to the repair of the crumbling foundation to a structurally safe level, or (2) \$175,000, per residential building. There are two types of claims that homeowners can make. The first type of claim requests that the CFSIC pay the contractor directly, on behalf of the homeowner, for eligible expenses before and during the performance of the repair work. The second type of claim requests that the CFSIC reimburse the homeowner directly for eligible expenses previously paid to the contractor. Payments under both types of claims commenced in 2019.

In Revenue Procedures 2017-60 and 2018-14 the IRS released guidance that allowed taxpayers who incurred expenses to repair these foundations to claim a casualty loss under IRC §165.

This newly released guidance looks at what happens to taxpayers who receive payments from the CFSIC. If a taxpayer had previously claimed a deduction for payments that later were reimbursed by the CFSIC, IRC §111 governs the tax treatment as described below:

If a Connecticut homeowner who paid amounts to repair damage to a personal residence with a deteriorating concrete foundation has claimed a deduction under the safe harbor or otherwise on an original or amended Federal income tax return for an earlier taxable year, then payments received by the homeowner from the CFSIC in a subsequent taxable year must be included in the homeowner's gross income in the Federal income tax return for the subsequent taxable year to the extent the deduction claimed for the earlier taxable year resulted in a Federal income tax benefit. See section 111 of the Code. For example, if a homeowner claimed a deduction of \$125,000 for such amounts in an earlier taxable year and the entire deduction resulted in a reduction in Federal income tax from the tax that would apply without the deduction, a \$125,000 recovery must be included as gross income in the homeowner's Federal income tax return for the subsequent taxable year.

However, what was not so clear is what should happen if a taxpayer who had not previously claimed a loss deduction or did not receive a benefit from claiming the

deduction receives a payment (either directly or to a contractor on the taxpayer's behalf) from the CFSIC.

If a Connecticut homeowner has not claimed a Federal income tax deduction for amounts paid to repair damage to a principal residence under the safe harbor or otherwise, or to the extent such a deduction did not result in a Federal income tax benefit, payments from the CFSIC to contractors (on behalf of the homeowner) or reimbursements paid to the homeowner will not be treated as includible in gross income of the homeowner in the year the payment or reimbursement is paid. Reimbursed repair costs cannot be deducted or included in the basis of a home.

The announcement relieves concerns that it was possible this CFSIC payment might have been viewed as an accession to wealth under IRC §61, and therefore includible in gross income. The IRS has made clear that the agency does not see this as part of gross income.

SECTION: 911

RELIEF GRANTED FOR SOME WHOSE ABILITY TO CLAIM §911 EXCLUSIONS ARE IMPACTED BY THE COVID-19 EMERGENCY

Citation: Revenue Procedure 2020-27, 4/21/20

In a procedure issued at the same time as one giving relief for individuals trapped in the United States due to travel restrictions who might inadvertently become U.S. residents for tax purposes (Revenue Procedure 2020-20), the IRS released a similar relief procedure for taxpayers who will be unable to meet the tests to qualify for the foreign earned income exclusion due to the COVID-19 emergency in Revenue Procedure 2020-27.⁶

The procedure outlines the general rules under §911(a) for being a “qualified individual” for purposes of qualifying for the foreign earned income exclusion and housing cost amount:

.01 Section 911(a) allows a “qualified individual,” as defined in section 911(d)(1), to elect to exclude from gross income the individual's foreign earned income and the housing cost amount.

⁶ Revenue Procedure 2020-27, April 21, 2020, <https://www.irs.gov/pub/irs-drop/rp-20-27.pdf>, retrieved April 22, 2020

.02 Section 911(d)(1) defines the term “qualified individual” as an individual whose tax home is in a foreign country and who is (A) a citizen of the United States and establishes to the satisfaction of the Secretary that the individual has been a *bona fide* resident of a foreign country or countries for an uninterrupted period that includes an entire taxable year, or (B) a citizen or resident of the United States who, during any period of 12 consecutive months, is present in a foreign country or countries during at least 330 full days.

.03 In addition, section 911(d)(4) provides that an individual will be treated as a qualified individual with respect to a period in which the individual was a *bona fide* resident of, or was present in, a foreign country if the individual left the country during a period for which the Secretary of the Treasury, after consultation with the Secretary of State, determines that individuals were required to leave because of war, civil unrest, or similar adverse conditions that precluded the normal conduct of business. An individual must establish that but for those conditions the individual could reasonably have been expected to meet the eligibility requirements.⁷

The ruling provides the following relief, finding the adverse conditions noted above, applied as follows for 2019 and 2020:

.01 For 2019 and 2020, the Secretary of the Treasury, after consultation with the Secretary of State, has determined that, for purposes of section 911(d)(4), the COVID-19 Emergency is an adverse condition that precluded the normal conduct of business as follows:

- in the People’s Republic of China, excluding the Special Administrative Regions of Hong Kong and Macau (China), as of December 1, 2019; and
- globally, as of February 1, 2020.

The period covered by this revenue procedure ends on July 15, 2020, unless an extension is announced by the Treasury Department and IRS. Thus, for purposes of section 911, an individual who left China on or after December 1, 2019, or another foreign country on or after February 1, 2020, but on or before July 15, 2020, will be treated as a qualified individual with respect to the period during which that individual was present in, or was a *bona fide* resident of, that foreign country if the individual establishes a reasonable expectation that he or

⁷ Revenue Procedure 2020-27, Section 2.01-.03

she would have met the requirements of section 911(d)(1) but for the COVID-19 Emergency.

.02 To qualify for relief under section 911(d)(4), an individual must have established residency, or have been physically present, in the foreign country on or before the applicable date specified in section 3.01 of this revenue procedure. Therefore, an individual who was first physically present or established residency in China after December 1, 2020, or another foreign country after February 1, 2020, would not be eligible to use this revenue procedure.⁸

The procedure outlines how this relief will apply to a 12-month period:

.03 Individuals seeking to qualify for the section 911 foreign earned income exclusion because they could reasonably have been expected to have been present in a foreign country for 330 days but for the COVID-19 Emergency and have met the other requirements for qualification may use any 12-month period to meet the qualified individual requirement.⁹

The procedure concludes with two examples of applying the 12-month period:

For example, under this revenue procedure, an individual who arrived in China on September 1, 2019, and establishes that he or she reasonably expected to work in China until September 1, 2020, but departed China on January 10, 2020, due to the COVID-19 Emergency would be a qualified individual for the period from September 1 through December 31, 2019, and for the period from January 1 through January 9, 2020, assuming the individual has met the other requirements for qualification under section 911. As another example, under this revenue procedure, an individual who was present in the United Kingdom on January 1 through March 1, 2020, establishes that he or she reasonably expected to work in the United Kingdom for the entire calendar year, but departed the United Kingdom on March 2, 2020, due to the COVID-19 Emergency, and returns to the United Kingdom on August 25, 2020, for the remainder of the calendar year, would be a qualified individual for 2020 with respect to the period between January 1 through March 1, 2020, and

⁸ Revenue Procedure 2020-20, Section 3.01-.02

⁹ Revenue Procedure 2020-20, Section 3.03

August 25 through December 31, 2020, assuming the individual has met the other requirements for qualification under section 911.¹⁰

SECTION: 6428 PROCEDURES PROVIDED FOR TAXPAYERS NOT REQUIRED TO FILE 2019 RETURN TO FILE A RETURN TO OBTAIN CARES ECONOMIC IMPACT PAYMENT

Citation: Revenue Procedure 2020-28, 4/20/20

The IRS is providing procedures for individuals who are not otherwise required to file a return for 2019 to receive economic impact payments under the CARES Act in Revenue Procedure 2020-28.¹¹ Key are new procedures for those who wish to file an electronic return, but have not been able to because they have zero adjusted gross income, resulting in their return being rejected by the IRS electronic filing system.

The Procedure outlines two methods that such individuals can use to file:

- Use the “Non-Filers: Enter Payment Info Here” tool, available at www.irs.gov/coronavirus, to submit information to the Internal Revenue Service (IRS) (the method the IRS had been pointing to previously to solve this problem); or
- File their return for taxable year 2019 using alternative tax return preparation software or paper returns that follow a simplified return filing procedure outlined in the Revenue Procedure.¹²

The IRS describes the need for the new simplified filing procedure by noting:

The Department of the Treasury (Treasury Department) and the IRS are aware that individuals otherwise not required by law to file Federal income tax returns may prepare income tax returns for State or local governments (for purposes such as establishing qualification for State or local government benefits) using tax return preparation software that can concurrently prepare both Federal and State or local tax returns. The IRS is also aware that individuals having an adjusted gross income (AGI) of zero (as opposed to AGI of \$1 or more) are not able

¹⁰ Revenue Procedure 2020-20, Section 3.03

¹¹ Revenue Procedure 2020-28, April 20, 2020, <https://www.irs.gov/pub/irs-drop/rp-20-28.pdf>, retrieved April 20, 2020

¹² Revenue Procedure 2020-28, Section 1.02

to file Federal income tax returns electronically to receive allowed economic impact payments due to tax return preparation software and return processing parameters. Section 4 of this revenue procedure provides a special procedure for eligible individuals with zero AGI who voluntarily wish to file a complete Federal income tax return electronically for taxable year 2019 to receive allowed economic impact payments. The special procedure in section 4 of this revenue procedure does not apply to a return filed on paper, which should be filed in accordance with the applicable instructions.¹³

General Simplified Return Procedure

There are actually two simplified procedures. The first one applies in cases where a taxpayer either is able to electronically file the simplified return or files the simplified return on paper. This procedure applies to taxpayers who are not required to file a federal tax return for 2019.

The IRS describes the simplified process as follows:

A simplified return filer (as defined in section 3.02 of this revenue procedure) will receive an economic impact payment if the simplified return filer files a Federal income tax return on Form 1040, U.S. Individual Income Tax Return, or Form 1040-SR, U.S. Tax Return for Seniors, for taxable year 2019, on paper or electronically, pursuant to the simplified procedure set forth in this section 3.¹⁴

A *simplified return filer* eligible to participate in the program is defined as follows:

For purposes of this section 3, a “simplified return filer” is an eligible individual described in section 2.02 of this revenue procedure who is not required to file a Federal income tax return for taxable year 2019 and has not filed a Federal income tax return for that taxable year. In addition, a simplified return filer must have an SSN that is valid for employment or file a joint return with an individual who has an SSN that is valid for employment if one of the joint return filers is a member of the Armed Forces of the United States at any time during taxable year 2019.¹⁵

¹³ Revenue Procedure 2028-28, Section 1.03

¹⁴ Revenue Procedure 2020-28, Section 3.01

¹⁵ Revenue Procedure 2020-28, Section 3.02

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Since this program is meant to solve the specific problem of getting a CARES Act payment, there is a deadline to make use of the program:

As soon as possible but not later than October 15, 2020, a simplified return filer following the procedure set forth in this section 3 must file a Federal income tax return. This filing deadline ensures that the IRS will have sufficient time to process all Federal income tax returns filed under section 3 of this revenue procedure and make all resulting economic impact payments before December 31, 2020, the last day economic impact payments may be made under § 6428(f)(3)(A). Simplified return filers are encouraged to file their tax returns electronically to speed the issuance of their economic impact payments.¹⁶

The IRS begins with an overview of the simplified filing process:

In the case of a simplified return filer, the IRS will process the simplified return filer's Form 1040 or Form 1040-SR for taxable year 2019 to provide an economic impact payment, if the form is prepared in the manner required in this section 3.04. The Form 1040 or Form 1040-SR should include only the information described in this section 3.04.¹⁷

The Revenue Procedure then goes on to provide the following detailed guidance on what a taxpayer is to do in Section 3.04:

(2) Write "EIP2020" on form. A simplified return filer must designate "EIP2020" on Form 1040 or Form 1040-SR.

(a) If filing the Federal income tax return by mail, this text must be placed above the printed material at the top of page 1 of the Form 1040 or Form 1040-SR.

(b) If electronically filing the Federal income tax return, this text must be placed in the correct spot of the electronic filing record.

(3) Filing status. A simplified return filer must select their filing status as of the end of taxable year 2019 at the top of Form 1040 or Form 1040-SR.

¹⁶ Revenue Procedure 2020-28, Section 3.03

¹⁷ Revenue Procedure 2020-28, Section 3.04(1)

(4) Required general information. A simplified return filer must enter their name, mailing address, and SSN, and the name and SSN of their spouse if filing a joint return, on the appropriate lines of Form 1040 or Form 1040-SR. If a simplified return filer and their spouse file a joint return and either the simplified return filer or the spouse is a member of the Armed Forces of the United States at any time during taxable year 2019, then an SSN for one spouse and either an SSN or an IRS individual taxpayer identification number (that is, an ITIN) for the other spouse must be entered on the appropriate lines of Form 1040 or Form 1040-SR.

(5) Individuals who could be claimed as dependents by other taxpayers. A simplified return filer must check all applicable boxes under the address lines for each individual who could be claimed as a dependent by any other taxpayer for taxable year 2019.

(6) General information regarding dependents. If applicable, a simplified return filer should provide information regarding each dependent who was under the age of 17 at the end of taxable year 2019 on the appropriate lines of Form 1040 or Form 1040-SR. For each dependent, a simplified return filer must provide the name, SSN or ATIN, and relationship to the individual. Column (4) of each line on the form must be left blank.

(7) Limited information to provide in lines 1 through 24. Except as provided in this section 3.04(7), a simplified return filer should leave blank lines 1 through 24 of Form 1040 or Form 1040-SR, even if the values for these lines are in fact not zero.

(a) Lines 2b, 7b, and 8b. A simplified return filer who files their Federal income tax return electronically must enter \$1.00 on lines 2b, 7b, and 8b.

(b) Line 9. A simplified return filer who files their Federal income tax return electronically must enter the applicable standard deduction amount for their filing status on line 9.

(c) Line 11b. A simplified return filer must enter \$0.00 on line 11b.

(d) Line 21a. A simplified return filer must not check the box on line 21a because the economic impact payment may not be divided among multiple accounts.

(e) Lines 21b through 21d. A simplified return filer may request the direct deposit of their economic impact payment into their account at a bank or other financial institution by

entering their direct deposit information on lines 21b through 21d. A simplified return filer must not request their economic impact payment to be deposited into an account that is not in the name of that simplified return filer (for example, a simplified return filer must not request a direct deposit of their economic impact payment into their tax return preparer's account).¹⁸

The IRS then goes on to describe the signature requirements for the simplified filing.

05. Signature. A simplified return filer must provide their identity protection personal identification number (that is, their IP PIN), if applicable, and sign the return under penalties of perjury. In addition, a simplified return filer may enter their identifying information of any third-party designee, if applicable, at the bottom of page 2 of Form 1040 or Form 1040-SR. A simplified return filer who has been assigned an IP PIN, but has misplaced it, may retrieve the IP PIN at <https://www.irs.gov/identity-theft-fraudscams/retrieve-your-ip-pin>.¹⁹

The economic impact payment will be computed as follows:

06 Computation of economic impact payment. Based on the information provided by a simplified return filer on Form 1040 or Form 1040-SR for taxable year 2019, the IRS will compute the amount of the economic impact payment that will be paid to the simplified return filer in calendar year 2020.²⁰

As well, the procedure provides that the IRS will not challenge the accuracy of the items of income reported on a return filed in accordance with these procedures.²¹

Special Electronic Filing Procedure for Taxpayers with Zero Adjusted Gross Income

A separate procedure applies to taxpayers with zero adjusted gross income who wish to electronically file a 2019 income tax return. The rules do not apply to a return filed on paper, only one filed electronically.²²

¹⁸ Revenue Procedure 2020-28, Section 3.04(2)-(7)

¹⁹ Revenue Procedure 2020-28, Section 3.05

²⁰ Revenue Procedure 2020-28, Section 3.06

²¹ Revenue Procedure 2020-28, Section 3.07

²² Revenue Procedure 2020-28, Section 4.01

A zero AGI filer, eligible to use this procedure is defined by the Revenue Procedure as follows:

For purposes of this section 4, a “zero AGI filer” is an eligible individual described in section 2.02 of this revenue procedure who has zero AGI for taxable year 2019 (that is, the eligible individual has zero AGI for taxable year 2019 reportable on line 8b of Form 1040 or Form 1040-SR) and has not yet filed a Federal income tax return for taxable year 2019. In addition, a zero AGI filer must have an SSN that is valid for employment or file a joint return with an individual who has an SSN that is valid for employment if one of the joint return filers is a member of the Armed Forces of the United States at any time during taxable year 2019.²³

The same filing deadline applies for this purpose as applies for the general simplified filing procedure:

As soon as possible but not later than October 15, 2020, a zero AGI filer must electronically file their Federal income tax return under the procedure set forth in this section 4. This filing deadline ensures that the IRS will have sufficient time to process all Federal income tax returns filed under section 4 of this revenue procedure and make all resulting economic impact payments before December 31, 2020, the last day economic impact payments may be made under § 6428(f)(3)(A).²⁴

The IRS provides the following required information instructions for this filing:

In addition to all other information required to be entered on Form 1040 or Form 1040-SR, a zero AGI filer must enter the following:

- (1) \$1.00 as taxable interest on line 2b of the form;
- (2) \$1.00 as total income on line 7b of the form; and
- (3) \$1.00 as AGI on line 8b of the form.²⁵

The IRS provides for the following signature requirements:

A zero AGI filer must provide their identity protection personal identification number (that is, their IP PIN), if applicable, and sign the

²³ Revenue Procedure 2020-28, Section 4.02

²⁴ Revenue Procedure 2020-28, Section 4.03

²⁵ Revenue Procedure 2020-28, Section 4.04

return under penalties of perjury. In addition, a zero AGI filer may enter the identifying information of any third-party designee, if applicable, at the bottom of page 2 of Form 1040 or Form 1040-SR. A zero AGI filer who has been assigned an IP PIN, but has misplaced it, may retrieve the IP PIN at <https://www.irs.gov/identity-theft-fraud-scams/retrieve-your-ip-pin>.²⁶

As with the general simplified return procedure returns, the IRS will use the information on this return to compute the economic impact payment for the taxpayer²⁷ and the IRS will not challenge the accuracy of items of income reported on these returns.²⁸

SECTION: 7701 RELIEF ISSUED FOR INDIVIDUALS WHO WILL INADVERTENTLY MEET SUBSTANTIAL PRESENCE TEST DUE TO INTERNATIONAL COVID-19 TRAVEL RESTRICTIONS

Citation: Revenue Procedure 2020-20, 4/22/20

The IRS has introduced relief for individuals who, due to travel restrictions imposed during the COVID-19 crisis, will now end up meeting the “substantial presence test” and would otherwise be treated as U.S. residents under IRC §7701(b)(3). The relief is found in Revenue Procedure 2020-20.²⁹

As the procedure notes:

Travel and related disruptions resulting from the global outbreak of the COVID-19 virus may cause certain Eligible Individuals, as defined in section 3.04 of this revenue procedure, who did not anticipate meeting the “substantial presence test” under section 7701(b)(3) of the Internal Revenue Code (the Code) to become residents of the United States for federal income tax purposes during 2020 and may impact an individual’s qualifications for certain treaty benefits. This revenue procedure provides procedures for Eligible Individuals to claim the

²⁶ Revenue Procedure 2020-28, Section 4.05

²⁷ Revenue Procedure 2020-28, Section 4.06

²⁸ Revenue Procedure 2020-28, Section 4.07

²⁹ Revenue Procedure 2020-20, April 21, 2020, <https://www.irs.gov/pub/irs-drop/rp-20-20.pdf>, retrieved April 21, 2020

COVID-19 Medical Condition Travel Exception, as described in section 4.01 of this revenue procedure. Similar relief applies in determining whether an individual (whether or not an Eligible Individual) qualifies for benefits under a U.S. income tax treaty with respect to income from dependent personal services performed in the United States.³⁰

The procedure explains the justification for its issuance, explaining something that most everyone who has not been away from civilization since the end of 2019 is likely aware of:

The COVID-19 Emergency, as defined in section 3.01 of this revenue procedure, may have affected the travel plans of foreign travelers who intended to leave the United States. Regardless of whether they were infected with the COVID-19 virus, individuals may have become severely restricted in their movements, including by order of government authorities. Individuals who do not have the COVID-19 virus and attempt to leave the United States may also face canceled flights and disruptions in other forms of transportation, shelter-in-place orders, quarantines, and border closures. Additionally, even those who can travel may feel unsafe doing so during the COVID-19 Emergency due to recommendations to implement social distancing and limit exposure to public spaces.³¹

Certain terms are defined to be used later in the procedure:

01 COVID-19 Emergency. The term COVID-19 Emergency means the global outbreak of the COVID-19 virus.

02 COVID-19 Emergency Period. The term COVID-19 Emergency Period is a single period of up to 60 consecutive calendar days selected by an individual starting on or after February 1, 2020 and on or before April 1, 2020 during which the individual is physically present in the United States on each day.

03 COVID-19 Emergency Travel Disruptions. The term COVID-19 Emergency Travel Disruptions means the travel disruptions described in section 2.01 of this revenue procedure.

.04 Eligible Individual. The term Eligible Individual means any individual (1) who was not a U.S. resident at the close of the 2019 tax year, (2) who is not a lawful permanent resident at any point in 2020,

³⁰ Revenue Procedure 2020-20, Section 1

³¹ Revenue Procedure 2020-20, Section 2.01

(3) who is present in the United States (without regard to this revenue procedure) on each of the days of the individual's COVID-19 Emergency Period, and (4) who does not become a U.S. resident in 2020 due to days of presence in the United States outside of the individual's COVID-19 Emergency Period.

.05 *Medical Condition Exception.* The term Medical Condition Exception means the exception from the substantial presence test provided under section 7701(b)(3)(D)(ii) and section 301.7701(b)-3(c).³²

The procedure applies a special COVID-19 Medical Condition Travel Exception to an individual's days of presence as described below:

.01 *COVID-19 Medical Condition Travel Exception to days of presence.* An Eligible Individual who intended to leave the United States during the individual's COVID-19 Emergency Period, but was unable to do so due to COVID-19 Emergency Travel Disruptions, may exclude the individual's COVID-19 Emergency Period (up to 60 calendar days of presence in the United States, as explained in section 3.02 of this revenue procedure) for purposes of applying the substantial presence test. The COVID-19 Emergency will be considered a medical condition, as described in section 301.7701(b)-3(c), that prevented the Eligible Individual from leaving the United States on each day during the individual's COVID-19 Emergency Period and, as generally required by the Medical Condition Exception, will not be treated as a pre-existing medical condition, as described in section 301.7701(b)-3(c)(3). Also, in determining an individual's eligibility for treaty benefits with respect to income from employment or the performance of other dependent personal services within the United States, any days of presence during the individual's COVID-19 Emergency Period on which the individual was unable to leave the United States due to COVID-19 Emergency Travel Disruptions will not be counted.³³

The procedure also provides a presumption of intent and inability to leave the United States:

.02 *Presumption of intent and inability to leave the United States.* For purposes of this revenue procedure, an Eligible Individual will be presumed to have intended to leave the United States on any day during the individual's COVID-19 Emergency Period, unless that individual has applied, or otherwise taken steps, to become a lawful

³² Revenue Procedure 2020-20, Section 3

³³ Revenue Procedure 2020-20, Section 4.01

permanent resident of the United States. An Eligible Individual will be presumed unable to leave the United States for purposes of the substantial presence test on any day during the individual's COVID-19 Emergency Period. Similarly, an individual claiming benefits under an applicable U.S. income tax treaty with respect to income from employment or other dependent personal services performed in the United States will be presumed unable to leave the United States on any day during the individual's COVID-19 Emergency Period.³⁴

Section 5 provides the detailed procedures for claiming the COVID-19 medical condition travel exception. The procedures begin with the following general comments:

Eligible Individuals who have a requirement to file a Form 1040-NR for 2020 (taking into account the application of this revenue procedure) must claim the COVID-19 Medical Condition Travel Exception by attaching Form 8843, *Statement for Exempt Individuals and Individuals with a Medical Condition*, to their Form 1040-NR, by the form's due date (with extensions), and mailing the forms to the address shown in the Form 1040-NR return instructions. Eligible Individuals who are not required to file a 2020 Form 1040-NR are not required to file Form 8843 to claim the COVID-19 Medical Condition Travel Exception under this revenue procedure, but those individuals should retain all relevant records to support reliance on this revenue procedure and be prepared to produce these records and complete a Form 8843 if requested by the IRS.³⁵

Special instructions are provided for completing a Form 8843:

Subject to section 5.01 of this revenue procedure, to claim the COVID-19 Medical Condition Travel Exception, Eligible Individuals should complete Form 8843 as follows:

- Part I and the general identifying information sections should be completed pursuant to the form instructions;
- Parts II, III, and IV, if applicable, should be completed pursuant to the form instructions;

³⁴ Revenue Procedure 2020-20, Section 4.02

³⁵ Revenue Procedure 2020-20, Section 5.01

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- Part V should be completed by writing the following in each respective space:
 - for line 17a, “COVID-19 MEDICAL CONDITION TRAVEL EXCEPTION.”
 - for line 17b, the start date of the Eligible Individual’s COVID-19 Emergency Period.
 - for line 17c, the end date of the Eligible Individual’s COVID-19 Emergency Period.
 - line 18 should be left blank. There is no need for a physician’s statement when claiming the COVID-19 Medical Condition Travel Exception.
- The individual should sign and date the form consistent with the form instructions.
- The individual should retain a copy of the completed Form 8843 and be prepared to produce the copy if requested by the IRS, as well as documentation demonstrating that the individual was physically present in the United States during all of the individual’s COVID-19 Emergency Period.³⁶

The procedure also provides information for those who fail to file the form:

Eligible Individuals who are required under section 5.01 of this revenue procedure to file Form 8843 with their Form 1040-NR to claim the COVID-19 Medical Condition Travel Exception, but who fail to do so, may be eligible for the procedural relief under section 301.7701(b)-8(d)(2) or the relief under section 301.7701(b)-8(e). Eligible Individuals who are not required to file a Form 8843 under section 5.01 may submit the completed Form 8843 at a later date as needed, including if the individual’s nonresident status for 2020, 2021, or 2022 is later challenged under examination or otherwise.³⁷

The ruling also explains the interaction with other exceptions to the substantial presence test:

An Eligible Individual may claim the COVID-19 Medical Condition Travel Exception in addition to, or instead of, claiming other

³⁶ Revenue Procedure 2020-20, Section 5.02

³⁷ Revenue Procedure 2020-20, Section 5.03

exceptions from the substantial presence test for which the individual is eligible. Specifically, relief provided under this revenue procedure does not change the application of other applicable exceptions to the substantial presence test: (i) exclusion of days of presence for exempt individuals described under section 7701(b)(3)(D)(i) and section 301.7701(b)-3(b), (ii) exclusion of days of presence under the Medical Condition Exception for medical problems or medical conditions other than those related to the COVID-19 Medical Condition Travel Exception, as addressed in section 5.05 of this revenue procedure, (iii) the closer connection exception under section 301.7701(b)-2, and (iv) relief pursuant to treaty provisions applicable to dual residents under section 301.7701(b)-7. Individuals who qualify for other exceptions to the substantial presence test do not need to claim the COVID-19 Medical Condition Travel Exception in order to claim other available exceptions, or they may choose to claim all exceptions for which they are eligible. For example, an alien individual who would be a U.S. resident due to days spent in the United States even after excluding eligible days under the COVID-19 Medical Condition Travel Exception may still be considered a nonresident alien if the individual is eligible to claim the closer connection exception under section 301.7701(b)-2.³⁸

The procedure also provides that the medical condition exception is also available along with this special exception:

An Eligible Individual who claims the COVID-19 Medical Condition Travel Exception may also claim the Medical Condition Exception, including for medical conditions or medical problems related to the COVID19 virus, with respect to any period during 2020 in which the individual satisfies the requirements to do so. Individuals claiming the Medical Condition Exception for any period outside of the individual's COVID-19 Emergency Period should file Form 8843 consistent with the applicable regulations and form instructions.³⁹

Finally, the procedure discusses claiming a treaty benefit for services income:

To claim an exemption from withholding on income from dependent personal services pursuant to a U.S. income tax treaty in accordance with this revenue procedure, an individual should provide the employer or other withholding agent a Form 8233, *Exemption From Withholding on Compensation for Independent (and Certain Dependent)*

³⁸ Revenue Procedure 2020-20, Section 5.04

³⁹ Revenue Procedure 2020-20, Section 5.05

Personal Services of a Nonresident Alien Individual, certifying that the income is exempt. However, if the withholding agent currently treats the income as exempt based on a previously submitted Form 8233, it is not necessary to provide an additional Form 8233. Form 8233 should be completed pursuant to the form instructions. On line 14 of Form 8233, write “COVID-19 MEDICAL CONDITION TRAVEL EXCEPTION” and specify the individual’s COVID-19 Emergency Period. If a new Form 8233 is not provided to a withholding agent, or if the withholding agent already has withheld income tax that would be exempt from withholding in accordance with this revenue procedure, the nonresident individual should file Form 1040-NR and attach a statement including the same information requested on the Form 8233 (including the phrase “COVID-19 MEDICAL CONDITION TRAVEL EXCEPTION,” the individual’s COVID-19 Emergency Period, the applicable tax treaty, and the tax treaty article).⁴⁰

⁴⁰ Revenue Procedure 2020-20, Section 5.06