

Reducing Burden Resulting From the Implementation of the Coronavirus Aid, Relief, and Economic Security (CARES) Act

TAXPAYER RIGHTS IMPACTED¹

- *The Right to Be Informed*
- *The Right to Quality Service*
- *The Right to Pay No More Than the Correct Amount of Tax*
- *The Right to Finality*
- *The Right to Privacy*
- *The Right to a Fair and Just Tax System*

OVERVIEW

While the IRS did an impressive job implementing the provisions of the Coronavirus Aid, Relief, and Economic Security (CARES) Act — particularly under these unprecedented circumstances — there have been several issues in implementing the CARES Act's most significant provisions. Although the IRS has issued nearly 160 million Economic Impact Payments (EIPs), many individuals as of June 3, 2020, for a variety of reasons, have either not received the full EIP amount to which they are entitled or received an EIP at all. In most cases, these individuals will have to wait until 2021 to receive either their EIP or the full amount. Because these individuals are likely experiencing financial distress *now*, the National Taxpayer Advocate recommends the IRS continue to work on solutions and alternatives to ensure that all individuals receive the EIP in its entirety in 2020 rather than having to wait until 2021 when they file their 2020 income tax returns.

The Employee Retention Credit (ERC) is a complex refundable tax credit that employers can claim. Several of these complexities come from the determination of when a trade or business was fully or partially suspended by government order; an employer's number of full-time employees; what are qualified wages; if a business's post-COVID-19 operations are comparable to its pre-COVID-19 operations; and the application of aggregation rules.

To address these complexities, the IRS has provided considerable guidance on when and how to claim the ERC; however, several areas demand further clarification. If clarity is not provided, taxpayers will be more likely to make errors when claiming the credit, possibly resulting in an audit. Having to untangle these issues in an audit environment would drain the limited resources of both the IRS and businesses affected by COVID-19. Thus, TAS will continue to advocate that the IRS is as transparent and clear as possible regarding when and how employers should claim this credit.

Another area of complexity is the Paycheck Protection Program (PPP). If businesses meet certain requirements, loans administered through the PPP will be forgiven. To ensure this did not create a taxable event, Congress excluded forgiveness of this loan from taxable income. Thus, the question

1 See Taxpayer Bill of Rights (TBOR), www.TaxpayerAdvocate.irs.gov/taxpayer-rights. The rights contained in the TBOR are also codified in the IRC. See IRC § 7803(a)(3).

became whether employers could still deduct expenses paid with this loan when the loan was forgiven and no cancellation of debt income was generated.² Issues such as this will cause taxpayer confusion, increasing the likelihood that taxpayers will make mistakes when they file returns, possibly resulting in an IRS examination, and causing yet another drain on the resources of both taxpayers and the IRS.³

Other provisions of the CARES Act are designed to provide relief by allowing businesses to utilize Net Operating Losses (NOLs) to offset prior taxable income and in some cases provide them access to refunds. For businesses to determine the optimal application of the CARES Act NOL provisions, they may need to develop complex models involving multiple tax years. The guidance the IRS has provided in the form of frequently asked questions (FAQs), while timely, is not authoritative or binding on the IRS.

The following discussion will examine these concerns in more detail and provide recommendations regarding how the IRS should address these issues.

DISCUSSION

On March 27, 2020, the President signed into law the CARES Act.⁴ The primary goal of this act was to provide fast and direct economic assistance for American workers, families, and small businesses. This was to relieve economic distress due to the many restrictions put in place to slow the spread of COVID-19. [For an overall discussion of the tax administrative impact of COVID-19, see Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services.*]

Among other things, this Act:⁵

- Offered an advance recovery rebate credit (hereafter referred to as “economic impact payments” or EIP)⁶ for individuals;⁶
- Created an ERC for employers;⁷

² IRC § 265(a)(1) and Treas. Reg. § 1.265-1 provide that no deduction is allowed to a taxpayer for any amount otherwise allowable as a deduction to such taxpayer that is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by subtitle A of the Code.

³ Colleen Murphy, *Loan Program Raises Fraud Worries for IRS*, BLOOMBERG TAX (June 3, 2020). Adding to this challenge is the IRS’s major concern that the PPP is being exploited by individuals fraudulently applying for PPP loans. “With just the sheer amount of money that’s going out, we know that when this type of situation happens, fraudsters are on high alert and ramp up all of the efforts they possibly can to get money from the government,” said Don Fort, Chief of the IRS Criminal Investigation Division. *Id.*

⁴ The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, 134 Stat. 281 (2020).

⁵ *Id.* Section 2302 of the CARES Act provides that employers may defer the deposit and payment of the employer’s portion of Social Security taxes and certain railroad retirement taxes. Section 2302(a)(3) of the CARES Act provides that section 2302 will not apply if the taxpayer “has had indebtedness forgiven under section 1106 of the CARES Act.”

⁶ CARES Act, Pub. L. No. 116-136, § 6428, 134 Stat. 281 (2020) (2020 Recovery Rebates for Individuals). When discussing the EIP, we will use the term “individual(s)” as not all recipients filed a tax return to receive the EIP. In the remaining sections of the piece, we will use the term “taxpayer(s).”

⁷ CARES Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281 (2020) (Employee Retention Credit for Employers Subject to Closure due to COVID-19).

- Created the PPP;⁸ and
- Allowed taxpayers with NOLs to carry them back to offset income in prior years and obtain refunds.⁹

During the pandemic, the primary concern of the IRS's leadership was the health and safety of its employees, and to that end, the IRS shut down many of its operations that could not be conducted remotely, including the temporary closing of IRS campuses and the shutdown of all IRS taxpayer assistance phone lines.¹⁰ These steps, although necessary and something the IRS could not prepare for due to the crisis's unexpected nature, created an extremely challenging environment for the IRS to implement the provisions set out in the CARES Act.¹¹ This situation was further aggravated by years of crippling budget cuts, cumbersome paper-based systems, and the challenges of teleworking.¹² Despite these challenges, the IRS has performed admirably and has overall successfully worked to swiftly distribute much-needed EIPs to individuals while providing comprehensive guidance on how to obtain all the tax benefits provided by the CARES Act and other legislation passed to address the effects of the pandemic.¹³

Additionally, the IRS implemented an outreach campaign, working with partners in both the public and private sectors, to ensure that all eligible individuals — particularly vulnerable individuals such as the elderly, disabled, veterans, and those with limited English proficiency — were aware of the EIP and what, if anything, they needed to do to receive it. This included providing outreach materials in more than two dozen languages.¹⁴ The IRS is continuing its outreach programs to identify and send payments to these underserved populations.¹⁵

8 CARES Act, Pub. L. No. 116-136, § 1102, 134 Stat. 281 (2020) (7(a) loan program).

9 CARES Act, Pub. L. No. 116-136, §§ 2303 and 2206, 134 Stat. 281 (2020) (Modifications for Net Operating Losses and Modification of Limitation on Business Interest) (codified at IRC §§ 172(b)(1) and 163(j)).

10 See Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*. See also SERP Alert 20A0135, Product Line Closure (Mar. 24, 2020). All IRS phone lines were shut down April 1, 2020.

11 See Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*. To implement these provisions in addition to provisions in the Families First Coronavirus Response Act (FFCRA), and in order to prevent, prepare for and respond to Coronavirus generally, the CARES Act appropriated \$250,000,000 to remain available to the IRS through September 30, 2021. CARES Act, Pub. L. No. 116-136, § 15001, 134 Stat. 246 (2020).

12 National Taxpayer Advocate 2019 Annual Report to Congress 15 (Most Serious Problem: *Information Technology Modernization: The IRS Modernization Plan's Goal to Improve the Taxpayer Experience Is Commendable, But the IRS Needs Additional Multi-Year Funding to Bring It to Fruition*); National Taxpayer Advocate 2019 Annual Report to Congress 23 (Most Serious Problem: *IRS Funding: The IRS Does Not Have Sufficient Resources to Provide Quality Service*).

13 As of June 10, 2020, the IRS issued 273 FAQs which addressed the following topics: Employee Retention Credit (94 FAQs); Filing and Payment Deadlines Questions and Answers (40 FAQs); COVID-19-Related Tax Credits: Special Issues for Employees and Additional Questions FAQs (67 FAQs); Economic Impact Payment Information Center (62 FAQs); and Carrybacks of NOLs for taxpayers who have had Section 965 inclusions (10 FAQs). There is additional guidance in the Internal Revenue Bulletin. See, e.g., <https://www.irs.gov/irb>. Additionally, the IRS created two EIP portals, *Get My Payment* and a portal for nonfilers to file a "simple return."

14 IRS, IR-2020-96, IRS Expands Partner Materials for Economic Impact Payments; Continues Sweeping Effort to Share Details in Multiple Languages (May 15, 2020), <https://www.irs.gov/newsroom/irs-expands-partner-materials-for-economic-impact-payments-continues-sweeping-effort-to-share-details-in-multiple-languages>.

15 Despite these outreach efforts, some in Congress have asked that the IRS take steps to expand its outreach efforts in a way that does not fully rely on the Internet and will get EIP information to those taxpayers who do not have internet access. *Lawmakers Call for IRS Guidance for Those Without Internet*, 2020 TNTF 113-29 (June 8, 2020).

This piece examines the IRS's implementation of the provisions of the CARES Act and issues that arose during that implementation, such as issues that have delayed or prevented individuals from receiving their EIPs, and when or how other benefits set out in the CARES Act should be claimed. Throughout this discussion, TAS considers these issues and proposes recommendations as to how the IRS can address these problems moving forward.

Economic Impact Payments

The EIP generally mirrors the Economic Stimulus Act of 2008, as the CARES Act made the EIP an advance refundable credit against a taxpayer's 2020 tax for eligible individuals with adjusted gross income (AGI) below the phase-out thresholds.¹⁶ As of June 3, 2020, nearly 160 million individuals had received EIPs totaling more than \$267 billion.¹⁷ The CARES Act provides up to \$1,200 per qualifying individual, or up to \$2,400 for married couples filing jointly, and up to an additional \$500 per eligible dependent.¹⁸

Individuals Began Receiving Economic Impact Payments by Mid-April

Pursuant to the CARES Act, the IRS acted quickly to get payments to eligible individuals by assessing which individuals it could immediately distribute EIPs to based on available IRS information, such as a 2019 or 2018 return with direct deposit information.¹⁹ Getting payments to some other individuals posed more challenges.²⁰ The law provided that the IRS could use Form SSA-1099, Social Security Benefit Statement, or Form RRB-1099, Social Security Equivalent Benefit Statement, to determine a taxpayer's AGI if it did not have a 2018 or 2019 return on file.²¹ But these forms did not give the IRS direct information about the qualifying children of these individuals or their deposit information. Additionally, the IRS did not have information on recipients of Supplemental Security Income (SSI) or veterans benefits, since the IRS does not receive data on these

16 The Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 101(e)(3), 122 Stat. 613, 614 (2008); CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020) (explaining the term "eligible individual": "[t]his includes 'any individual other than (1) [a] non-resident alien ... (2) an individual with respect to whom a deduction under section 151 is allowable to another taxpayer ... and (3) an estate or trust.'").

17 IRS, IR-2020-111, 159 Million Economic Impact Payments Processed; Low-Income People and Others Who Aren't Required to File Tax Returns Can Quickly Register for Payment with IRS Non-Filers Tool (June 3, 2020), <https://www.irs.gov/newsroom/159-million-economic-impact-payments-processed-low-income-people-and-others-who-arent-required-to-file-tax-returns-can-quickly-register-for-payment-with-irs-non-filers-tool>.

18 CARES Act Pub. L. No. 116-136, § 2201, 134 Stat. 281 (2020). There is no limitation on the number of dependents when calculating the EIP if the dependent is 16 or younger on December 31, 2020, and possesses a Social Security number (SSN) or an Adoption Taxpayer Identification Number (ATIN). Further, for the purpose of the EIP, the term "qualifying child" has the same meaning as that for the child tax credit (*i.e.*, the meaning provided by IRC § 24(c)). The total EIP for single filers whose adjusted gross incomes (AGIs) exceed \$75,000, married couples filing jointly whose AGIs exceed \$150,000, and heads of household whose AGIs exceed \$112,500, and including the additional \$500 amount for each qualifying child, will be reduced by \$5 for every \$100 above their AGI cap. All taxpayers including qualifying children, must have a valid SSN as defined by IRC § 24(h)(7). There are two exceptions: for joint returns, only one taxpayer has to have a valid SSN if one of the taxpayers is a member of the Armed Forces, and qualifying children can have an ATIN. *Id.* at § 2201(a).

19 CARES Act Pub. L. No. 116-136, § 2201, 134 Stat. 281 (2020); IR-2020-58, Tax Day Now July 15: Treasury, IRS extend filing deadline and federal tax payments regardless of amount owed (Mar. 21, 2020). Since the filing deadline was postponed to July 15, 2020, a number of taxpayers had not yet filed their 2019 return at the time the EIPs were being issued.

20 CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020).

21 *Id.*

types of benefits.²² Further, there are individuals who were eligible for the EIP but do not have a tax filing requirement and do not receive Social Security or veterans benefits.²³

To ensure that all eligible individuals received their EIPs as seamlessly as possible, the IRS took several steps:

1. Created a *Get My Payment* portal that allowed individuals to check on the status of their EIP and provide bank account information for direct deposit;²⁴
2. Established agreements with the Social Security Administration (SSA) and the Veterans Administration (VA) to share data regarding recipients of SSI and veterans benefits and ensure that these recipients would receive, at a minimum, a \$1,200 EIP;²⁵
3. Created the *Non-Filers: Enter Payment Info Here* tool, allowing individuals who did not otherwise have a filing requirement to file what the IRS referred to as a “simple return,”²⁶ essentially providing the IRS with the information it needed to issue an EIP, including information for direct deposit. This portal also allowed SSI and veterans benefits recipients to claim qualifying children (the SSA/VA data does not contain data on dependents) and provide their direct deposit information, so the eligible individuals would not have to wait to receive the EIP funds through the mail; and
4. Modified existing policies and procedures to assist individuals who typically do not have filing requirements and are not familiar with the filing process by authorizing the Low Income Taxpayer Clinic (LITC) Program Office a limited safe harbor for LITCs to assist low-income and English as a second language taxpayers eligible to receive EIPs with preparing 2019 returns.²⁷

22 Forms 1099 are not issued to the IRS for SSI or veterans benefits.

23 See CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020); Chuck Marr, et al., *Aggressive State Outreach Can Help Reach the 12 Million Non-filers Eligible for Stimulus Payments*, CENTER ON BUDGET AND POLICY PRIORITIES, (June 11, 2020). CBPP estimates that 12 million people who are eligible for an EIP must file a simple return using the IRS’s *Non-Filers: Enter Payment Info Here* tool, to claim the funds. These individuals have until October 15, 2020, to submit a simple return.

24 See IRS, *Get My Payment Frequently Asked Questions*, <https://www.irs.gov/coronavirus/get-my-payment-frequently-asked-questions> (last visited May 12, 2020) (“To help protect against potential fraud, the tool ... does not allow people to change direct deposit bank account information already on file with the IRS. If we issue a direct deposit and the bank information is invalid or the bank account has been closed, the bank will reject the deposit. We will then mail your payment as soon as possible to the address we have on file for you, and we will update Get My Payment to reflect the date your payment will be mailed. Typically, once the payment is mailed, it will take up to 14 days to receive the payment, standard mailing time.”).

25 IRS, *IR-2020-75, Veterans Affairs Recipients Will Receive Automatic Economic Impact Payments; Step Follows Work Between Treasury, IRS, VA* (Apr. 17, 2020). Initially the IRS did not intend to automatically send EIPs to SSI and veteran’s benefits recipients, but after mounting public pressure, the IRS entered into data-sharing agreement with SSA and the VA, providing them with information about who receives these benefits, and allowing them to automatically issue them EIPs. See also Lorie Konish, *Social Security Beneficiaries Do Not Have to File Tax Returns to Receive Stimulus Checks*, CNBC (Apr. 1, 2020), <https://www.cnbc.com/amp/2020/04/01/social-security-beneficiaries-do-not-have-to-file-tax-returns-to-receive-coronavirus-stimulus-checks.html>.

26 See Rev. Proc. 2020-28, 2020-19 I.R.B. 792.

27 Memorandum from Commissioner of Internal Revenue to National Taxpayer Advocate, *Safe Harbor for Low-Income Taxpayer Clinics (LITCs) Preparing Returns in Light of COVID-19 Pandemic* (Apr. 13, 2020).

Despite initial problems with the portals, such as long wait times, error messages, and the lack of recognition of foreign addresses for American citizens living abroad,²⁸ subsequently, more than 70 million people successfully verified the status of their payments,²⁹ and as of April 23, 2020, about 23 million people provided bank or financial account information to accelerate receipt of their EIPs — which is no small feat.³⁰ Additionally, for the same time period, about 3.7 million individuals used the *Non-Filers: Enter Payment Info Here* tool to file a “simple return.”³¹

The IRS mailed EIPs to individuals’ addresses on their most recent tax returns, addresses provided to the IRS in the interim, or addresses on file with the United States Postal Service (USPS).³² Because of the pandemic, IRS employees were unable to open and process mail from about the end of March through the end of May, so taxpayers who needed to update their mailing addresses with the IRS were unable to do so.³³ Thus, the EIPs were possibly mailed to outdated addresses and returned to the IRS as undeliverable. In future circumstances, the IRS should consider opening a phone line solely devoted to updating taxpayers’ mailing address changes.³⁴

On May 19, 2020, pursuant to an agreement with the Bureau of the Fiscal Service, which had a preexisting agreement with MetaBank, the IRS began issuing debit cards preloaded with COVID-19 stimulus payments.³⁵ The primary objective of issuing prepaid debit cards is to get EIPs to taxpayers

28 Bernie Becker, *One Big Grab Bag*, POLITICO (May 13, 2020), <https://www.politico.com/newsletters/morning-tax/2020/05/13/one-big-grab-bag-787574>; Rey Mashayekhi, *Couldn’t Track Your Stimulus Check? Errors and Long Waits Plague IRS Portal Rollout*, FORTUNE (Apr. 15, 2020), [https://fortune.com/2020/04/15/irs-stimulus-check-portal-get-my-payment-status-tracker-errors-not-available-wait-number/amp](https://fortune.com/2020/04/15/irs-stimulus-check-portal-get-my-payment-status-tracker-errors-not-available-wait-number/). The IRS worked quickly to resolve these and other issues.

29 IRS Integrated Customer Communications Environment (ICCE) Authentication report (Apr. 23, 2020).

30 IRS Compliance Data Warehouse (CDW), IMF (Apr. 23, 2020).

31 ICCE Authentication report (Apr. 23, 2020).

32 IRM 21.6.3.4.2.13.2, Economic Impact Payments – Refund Inquiries (June 5, 2020).

33 Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, supra; Lisa Rein, *As the Backlogged IRS Struggles to Open Mail and Answer the Phone, Taxpayers Face Long Delays*, WASH. POST (May 20, 2020); Allyson Versprille, *Virus Fears, Unopened Mail Await IRS Employees Returning to Work*, BLOOMBERG LAW: TAX (June 1, 2020) (citing data provided by the IRS to the U.S. House Committee on Ways and Means in a report titled “Internal Revenue Service Operations (Report on May 27, 2020)”). Even though employees had been called back to IRS campuses as of June 1, 2020, only a fraction of the staff was working when compared to pre-pandemic levels, meaning that the opening and processing of correspondence will likely be happening at a much slower rate.

34 Letter from American Bar Association (ABA) Tax Section Office to IRS Commissioner, *Delivery of Economic Impact Payments to Low-Income and Vulnerable Individuals* (Apr. 13, 2020) (“Finally, the Service could consider the feasibility of a dedicated telephone line for taxpayers without internet or email access to call and report a change of address or direct deposit information through oral testimony, as prescribed in the Internal Revenue Manual Section 3.13.5.29.”); IRM 3.13.5.29, Oral Statement/Telephone Contact Address Change Requirements (Sept. 16, 2019). Currently taxpayers can call the IRS and orally provide an address change. This recommendation would create a distinct line for individuals to submit such changes.

35 See U.S. Department of the Treasury Press Release, *Treasury Is Delivering Millions of Economic Impact Payments by Prepaid Debit Card* (May 18, 2020), <https://home.treasury.gov/news/press-releases/sm1012>. The EIP Card is part of Treasury’s U.S. Debit Card program, which provides prepaid debit card services to federal agencies for the electronic delivery of non-benefit payments. MetaBank was selected as Treasury’s financial agent for the U.S. Debit Card program in 2016, following a competitive selection process conducted by the Treasury’s Bureau of the Fiscal Service. See also *Status of Economic Stimulus Payments, Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. 13 (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate). In 2008, during the prior economic stimulus payment distribution, TAS made a similar recommendation that stimulus payments be loaded onto prepaid debit cards.

more quickly.³⁶ Another benefit of using debit cards is they can be used in the future in the event Congress authorizes more stimulus payments. Unfortunately, it seems that the IRS's outreach efforts to inform individuals that some EIPs would be issued in the form of prepaid debit cards did not reach everyone, as some recipients destroyed or disposed of the card, fearing it was a scam. These individuals will have to have their preloaded debit cards reissued. Fortunately, an arrangement was reached with MetaBank, and it is offering the first reissuance of a debit card at no cost to the cardholder.³⁷ To avoid these issues going forward, TAS recommends that the IRS develop a more comprehensive outreach plan to inform and educate vulnerable individuals, such as the elderly, disabled, veterans, or those who have limited English proficiency, that they may receive debit cards and how to activate and use them.³⁸

Most individuals received their EIPs without any problem, but certain small groups of individuals have either not received their EIP or not received the entire amount. Individuals experienced many of the same problems during the issuance of the 2008 Economic Stimulus Payments, specifically:

- Delay of stimulus payments for taxpayers who purchased Refund Anticipation Loans (RALs) or Refund Anticipation Checks (RACs) to receive their tax refunds;
- Stimulus payments being deposited into the wrong bank accounts;
- Individuals not receiving stimulus payments for qualifying children; and
- Issues that resulted in incorrect, delayed, or unexpectedly reduced stimulus payments.³⁹

During this most recent stimulus payment distribution, the major issues that individuals have encountered are variations on these problems.

36 IRS, Economic Impact Payment Frequently Asked Questions, FAQs #46, *Can I Have My EIP Issued on a Debit Card?*, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#receiving> (May 20, 2020). "The determination of which taxpayers receive a debit card will be made by the Bureau of the Fiscal Service (BFS), another part of the Treasury Department that works with the IRS to handle distribution of the payments. BFS is sending nearly four million debit cards to taxpayers starting in mid-May."

37 IRS, IR-2020-105, IRS Economic Impact Payments Being Sent by Prepaid Debit Cards, Arrive in Plain Envelope; IRS.gov Answers Frequently Asked Questions (May 27, 2020); Money Network FAQs, <https://www.eipcard.com/faq> (June 1, 2020) ("Your first reissued Card will be free and then a \$7.50 fee will be applied for each additional reissued Card"). See also IRS, Economic Impact Payment Frequently Asked Questions, FAQs #50, *What Do I Do If My Prepaid Debit Card Was Lost or Destroyed?*, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#receiving> (June 4, 2020) ("Any initial reissuance fee charged to a customer from an earlier date will be reversed").

38 Lee Rood, *What Should You Do If You Threw Out or Destroyed That Stimulus Card? Members of Congress Want to Know, Too*, DES MOINES REGISTER (May 26, 2020), <https://www.desmoinesregister.com/story/news/2020/05/26/stimulus-visa-cards-iowans-seek-answers-after-many-throw-out-federal-payments/5261414002/>.

39 *Status of Economic Stimulus Payments, Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. 13 (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate).

Individuals Who Had Previously Purchased Refund Anticipation Loans or Refund Anticipation Checks Saw Their Payments Sent to Inactive Virtual Accounts

The IRS suppressed issuance of EIPs to virtual accounts established when a taxpayer purchases a RAL or RAC, since these accounts no longer exist after the tax refund is transferred to the taxpayer, and then mailed the EIP to the taxpayer at his or her last known address.⁴⁰ Despite the RAL indicators on taxpayer accounts, the IRS did not suppress EIPs in all situations. Nearly 800,000 individuals who purchased RALs and RACs had their EIPs deposited to closed virtual accounts; following the deposits, banks returned the funds to the IRS, which subsequently mailed those EIPs to the individuals.⁴¹ When these taxpayers checked the status of their EIPs, the *Get My Payment* portal indicated that the IRS had already sent the payments. Taxpayers were confused by the status on the portal, as the original information said the IRS would not send EIPs to virtual accounts set up through the purchase of a RAL or RAC. After the IRS processed the returned payment, it updated the portal to reflect that the bank had returned the EIP and that the IRS would mail it to the taxpayers weeks later.

Individuals Who Receive Social Security Income or Veterans Benefits May Not Receive Credit for Their Qualifying Children Until 2021

The IRS was able to secure SSI and veterans benefits data from both the SSA and VA, allowing it to issue EIPs to SSI and veterans benefits recipients the way they normally receive their benefits (*i.e.*, via direct deposit, Direct Express debit card, or paper check). As mentioned above, the data did not contain information regarding dependents, so these individuals only received their share of the EIP.

Individuals needed to update their information on the IRS's *Non-Filers: Enter Payment Info Here* tool to claim the EIP for their qualifying children. The IRS was concerned that once it issued individuals an EIP, it did not have the authority or a process to issue additional amounts. However, it is TAS's understanding that there are no legal constraints on the IRS's authority to issue additional EIP amounts in 2020; thus, the decision to not do so is purely a business one.⁴² To balance this decision against individuals needing more time to update their information, the IRS held off issuing the EIPs to SSI recipients until the middle of May, giving these individuals until May 5 to go onto the *Non-Filers: Enter Payment Info Here* tool and update their number of dependents.⁴³ After May 5, 2020, SSI and veterans benefits recipients could no longer use the portal to update the number of their dependents and are not able to receive the \$500 per qualifying child until they file a 2020 return on which they will reconcile the EIP.

40 When a taxpayer purchases a RAL or RAC, a virtual account is established to which the refund is deposited. After the refund is transferred to the taxpayer, the virtual account no longer exists. The IRS receives an electronic indicator when a RAL or RAC is associated with a return, and the IRS was able to program its systems to send paper checks to all taxpayers whose 2019 or 2018 returns were accompanied by one of these indicators.

41 IRS response to TAS fact check (June 23, 2020). Paul Kiel, Justin Elliott, and Will Young, *Millions of People Face Stimulus Check Delays for a Strange Reason: They Are Poor*, PROPUBLICA.ORG (Apr. 24, 2020), <https://www.propublica.org/article/millions-of-people-face-stimulus-check-delays-for-a-strange-reason-they-are-poor>. As of April 23, 2020, the IRS had mailed 745,000 of the nearly 800,000 EIPs to individuals.

42 Email from Special Counsel to the National Taxpayer Advocate to Senior Advisor to the National Taxpayer Advocate (June 10, 2020) (available upon request). There is no legal barrier to paying an additional amount [of EIP] under IRC § 6428(f) based on a TY 2019 return that is filed after an advance payment was already made.

43 IRS, IR-2020-76, Special Alert for Benefit Recipients Who Do Not File a Tax Return and Have Dependents (Apr. 20, 2020).

Because these financially-strapped individuals will have to wait at least nine more months to receive this additional amount, TAS recommends the IRS continue to allow these individuals to either file paper returns or use the *Non-Filers: Enter Payment Info Here* tool to enter information about their qualifying children, and then immediately issue supplemental payments to those individuals.⁴⁴

The CARES Act's Valid Social Security Number Requirement Complicated Individuals' Receipts of the Economic Impact Payments in Certain Circumstances

Similar to other refundable credits such as the Earned Income Tax Credit and Additional Child Tax Credit, individuals and their qualifying children must have valid Social Security numbers (SSNs) to receive the EIP.⁴⁵ The exceptions to these requirements are when an individual is a member of the Armed Forces and files a joint return, only one of the individuals on the return must have an SSN, and qualifying children who have adoption taxpayer identification numbers can still qualify for the EIP.⁴⁶ This means that under the law, eligible individuals who do not have valid SSNs but whose qualifying children do would receive no EIP — not even the amounts attributable to their qualifying children. A class action complaint concerning this issue was filed on May 5, 2020, seeking a declaration that the CARES Act's denial of EIPs to undocumented aliens for their qualifying children who are U.S. citizens is unconstitutional. Further, the complaint seeks payments of up to \$500 for each U.S. citizen child, in accordance with the thresholds in the CARES Act.⁴⁷

Another issue is that an individual who has an SSN eligible for employment in the United States, but filed a joint return in 2019 (or 2018, if the 2019 return has not yet been filed) with an individual who does not have a valid SSN, will not receive an EIP in 2020. The IRS's guidance is that the individuals will have to wait until they file an individual 2020 tax return using married filing separate (MFS) status, thereby omitting the individual who does not have a valid SSN. This means these eligible individuals will not receive their EIP for at least another nine months. For example, if an individual with a valid SSN filed a joint return for 2019 (or 2018, if the 2019 return has not yet been filed) with an individual who does *not* have a valid SSN, the individual with the valid SSN can file MFS for tax year (TY) 2020 and will then receive an EIP for their share and for any qualifying children. (Because there are significant tax consequences to MFS, individuals will need to consider

44 ABA Tax Section, *Recommendations Regarding the Implementation of Various Tax-Related Provisions of the CARES Act* (May 12, 2020). The IRS has indicated that it will not be issuing additional EIP amounts at this time, and taxpayers who believe they are entitled to a larger EIP than what they received will have to wait. The IRS stated it will provide additional details on IRS.gov on the actions taxpayers will need to take in the future. See IRS, Economic Impact Payment FAQ #14, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#collapseCollapsible1589477358225> (last visited May 21, 2020).

45 CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020); IRC § 24(h)(7). To receive the EIP, a taxpayer must include on his or her tax return on file with the IRS the taxpayer identification numbers (TINs) of the taxpayer, their spouse (if filing a joint return), and any qualifying child(ren). For this purpose, a valid TIN is an SSN eligible for employment in the United States or, in the case of a qualifying child legally placed for adoption, an ATIN.

46 CARES Act, Pub. L. No. 116-136, § 2201(g)(3), 134 Stat. 281 (2020).

47 *R.V. et al. v. Mnuchin*, No. 8:20-cv-1148 (D. Md. May 5, 2020). The complaint was filed on behalf of seven U.S. citizen children and with the support of CASA, a D.C.-area immigration non-profit organization. The complaint explains that the CARES Act provides a financial lifeline to millions of people by distributing economic impact payments. However, the CARES Act provides payments solely to taxpayers who file their taxes using an SSN — meaning U.S. citizens and immigrants with work authorization — thereby denying payments to U.S. citizen children of undocumented immigrants who pay their taxes using an individual taxpayer identification number (ITIN). The complaint alleges that the CARES Act provisions deny U.S. citizen children of undocumented immigrant taxpayers the equal protection of the laws guaranteed by the U.S. Constitution.

if giving up certain tax benefits claimed when filing married filing jointly is outweighed by receiving the EIP.)⁴⁸

Individuals in this and other situations could file a superseding return in an effort to obtain the EIP in 2020 rather than having to wait until they file their 2020 tax returns.⁴⁹ However, due to programming limitations, the IRS has stated that filing a superseding return will not result in the issuance of an EIP or an additional EIP amount. TAS is concerned that these individuals who likely need their stimulus money now will have to wait several more months to even claim their EIP. Thus, TAS recommends that the IRS develop a process by which taxpayers in these and other similar situations can take steps to receive their EIPs now rather than having to wait until the 2021 filing season.

Despite Filing an Injured Spouse Claim, a Number of Individuals Had Their Economic Impact Payments Offset Against Their Spouse's Past-Due Child Support

In certain circumstances, a taxpayer's refund can be offset against outstanding tax or non-tax liabilities.⁵⁰ Unlike regular tax refunds, the EIP is only supposed to be offset against an individual's past-due child support.⁵¹ Because the EIP is separately allocated to each eligible individual in the amount of \$1,200, the non-liable spouse's portion of the EIP should not have been offset against the liable spouse's past-due child support. However, about 862,000 individuals had their portion of the EIP offset against their spouse's past-due child support,⁵² including about 26,000 of these individuals who previously identified as an injured spouse and had their portion of the EIP offset against their spouse's past due child support. For the 26,000 non-liable spouses, the IRS has been working since about the middle of April to retrieve their portion of the refunds that were improperly offset against their liable spouse's past-due child support payments, but at the time of this writing, this issue had not been corrected. Further, for the 836,000 individuals where circumstances may not demand the filing of an injured spouse claim, there has been no guidance available instructing them how to proceed.⁵³ TAS recommends that the IRS provide guidance stating that it will retrieve the non-liable

48 The IRS only refers to the recovery rebate credit as an EIP when it is issued as an advance payment in 2020. Otherwise, the taxpayer is claiming the recovery rebate on his/her 2020 tax return and it will be included in their refund along with any other refundable credits to which they might be entitled.

49 A superseding return is when a taxpayer files a second return before the filing deadline — in this case, the postponed filing deadline of July 15, 2020. For a more in-depth discussion as to when a superseding return could assist taxpayers who are experiencing financial distress, see Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*. Individuals who are domestic violence survivors may also be in a similar situation (*i.e.*, the abusive spouse filed a joint return without the surviving spouse's knowledge, retaining the surviving spouse's portion of the EIP). Letter from ABA Tax Section Office to IRS Commissioner, *Delivery of Economic Impact Payments to Low-Income and Vulnerable Individuals* (Apr. 13, 2020). The IRS can mitigate the problem of EIPs going to spousal abusers by suppressing the portion of the domestic abuse survivor's EIP from being issued automatically where there is either a domestic violence indicator on the taxpayer's account or where a Form 8857, Request for Innocent Spouse Relief, has been filed.

50 IRC § 6402.

51 CARES Act, Pub. L. No. 116-136, § 2201(d), 134 Stat. 281 (2020); IRS, Economic Impact Payment Information Center, FAQ #31, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center#calculating> (last visited May 13, 2020).

52 IRS CDW, IMF (Apr. 23, 2020). IRS response to TAS fact check (June 23, 2020).

53 Taxpayers would not have needed to file an injured spouse claim when they did not file a return in 2019 or 2018; their 2019 return has not yet been processed; or they did not have a refund and thus had no reason to file an injured spouse claim, but have now learned that their EIP has been offset against their spouse's past-due child support.

spouse's portion of the EIP regardless of whether an injured spouse claim has been filed. If the IRS determines that the non-liable spouse is required to file an injured spouse claim, taxpayers should be allowed to file Form 8379, Injured Spouse Allocation, either electronically or by fax.

Individuals in Limited Circumstances Are Being Asked to Return the Economic Impact Payments

The IRS issued about 965,000 EIPs to deceased taxpayers.⁵⁴ Initially, it seemed these payments would not have to be returned to the IRS, as early guidance said families that received extra stimulus funds for ineligible children did not have to return the funds.⁵⁵ However, on May 6, 2020, the IRS posted an FAQ notifying taxpayers that these payments “should be returned to the IRS...”⁵⁶ Like the 2008 law, there is nothing in the CARES Act that specifically states decedents are ineligible for an EIP.⁵⁷

This issue also came up in 2008, and the IRS posted the following FAQ on this issue:⁵⁸

Stimulus payments will be issued in the name of the individual eligible for payment on a filed 2007 income tax return or to the account designated by the individual on that return. This includes situations where a person dies after filing a return or where the final 2007 income tax return was filed by a personal representative or surviving spouse. Any issues or concerns involving a decedent's filed return or the related stimulus payment should be addressed by the legal representative of the decedent's estate. See Publication 559 for more useful information for survivors and personal representatives.⁵⁹

If stimulus payments were issued to a decedent taxpayer as described in the above FAQ, the IRS in 2008 did not ask that the payment be returned and took no steps to collect the payment from the decedent taxpayer's estate or family.⁶⁰

The 2020 FAQ provides guidance as to when an EIP would need to be returned for a recipient who has passed away. Specifically, the FAQ determination of eligibility is based upon two moving targets: the actual date of death versus the date the EIP is received (*i.e.*, if the date of death is before

54 IRS response to TAS fact check (June 23, 2020). As the EIPS were being issued, the IRS was aware that 837,000 of the 965,000 taxpayers had died but did not program its systems to exclude decedents.

55 IRS, Economic Impact Payment Information Center, FAQ #26, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center> (last visited May 7, 2020).

56 *Id.*

57 CARES Act, Pub. L. No. 116-136, § 2201(a), 134 Stat. 281 (2020) (explaining “[t]his includes ‘any individual other than (1) [a] non-resident alien ... (2) an individual with respect to whom a deduction under section 151 is allowable to another taxpayer ... and (3) an estate or trust.’”). See also The Economic Stimulus Act of 2008, Pub. L. No. 110-185, § 101(e)(3), 122 Stat. 613, 614 (2008).

58 *Status of Economic Stimulus Payments, Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. 13 (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate).

59 Nina E. Olson, *The Uncertainty of Death and Taxes: Economic Stimulus Payments to Deceased Individuals*, PROCEDURALLY TAXING BLOG, <https://procedurallytaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/> (May 11, 2020).

60 See, e.g., *Status of Economic Stimulus Payments: Hearing Before the H. Comm. on Ways and Means, Subcomm. on Oversight and Social Security*, 110th Cong. (June 19, 2008) (written testimony of Nina E. Olson, National Taxpayer Advocate); Nina E. Olson, *The Uncertainty of Death and Taxes: Economic Stimulus Payments to Deceased Individuals*, PROCEDURALLY TAXING BLOG, <https://procedurallytaxing.com/the-uncertainty-of-death-and-taxes-economic-stimulus-payments-to-deceased-individuals/> (May 11, 2020).

the receipt of the EIP, the instruction is the EIP should be returned to the IRS). Based upon the FAQ, an individual who died in May 2020 and whose spouse received an EIP from the IRS in June 2020 would need to send back the portion of the check attributed to the spouse who died (\$1,200).⁶¹ Rather than applying this approach, the statute could be read to deem an individual who dies in 2020 as an “eligible individual,” therefore making them eligible to receive the EIP. Conversely, under the IRS’s interpretation, an EIP that was sent to an individual who died prior to 2020 would be characterized as an improper payment and should be returned to the IRS. However, if the IRS made the payment despite having information in its possession that the individual was in fact deceased, the National Taxpayer Advocate recommends the IRS not spend its resources pursuing enforcement actions against a decedent’s estate or a family member who received an EIP for a decedent.

Similarly, individuals who are incarcerated have been advised by the IRS to return their EIPs.⁶² However, a situation could arise where a taxpayer was incarcerated at the beginning of 2020 but was released in the midst of the pandemic — especially since a number of incarcerated individuals were released to mitigate the spread of COVID-19 in the country’s prison system. Unlike a deceased individual, a released prisoner could return the EIP and then claim it when filing his/her 2020 income tax return. TAS will advocate for the IRS to provide more specific guidance regarding a released prisoner’s eligibility for receipt of an EIP.

Individuals Should Be on Alert for Scams Regarding the Economic Impact Payment

As has become all too common, fraudsters are trying to exploit the current situation for their own personal gain. The Treasury Inspector General for Tax Administration (TIGTA) has warned of the following types of EIP scams:

- Notices sent to individuals through the mail stating they need to send the IRS personal information to receive their EIP, when the IRS does not contact individuals to ask for information to send the payment;
- Requests by third parties to deposit or otherwise exchange EIP Treasury checks for cash, but the checks are subsequently determined to be fraudulent, counterfeit, or stolen;
- Tax preparer theft of EIPs;
- EIPs that have been fraudulently rerouted as a result of an unauthorized USPS address change; and
- EIP payments that were fraudulently rerouted to another bank account.⁶³

61 Frederic Lee and Jad Chamseddine, *IRS Wants Its Money Back From The Dead*, TAX NOTES (May 7, 2020), <https://www.taxnotes.com/featured-news/irs-wants-its-money-back-dead/2020/05/07/2chjz>.

62 IRS response to TAS fact check (June 23, 2020). About 74,000 incarcerated individuals received EIPs. The number of incarcerated taxpayers is based on their 2019 or 2018 tax returns. IRS, Economic Impact Payment Information Center, FAQ #12, <https://www.irs.gov/coronavirus/economic-impact-payment-information-center/#collapseCollapsible1588859690354> (last visited May 13, 2020). See also IRM 21.6.3.4.2.13, Economic Impact Payments (June 5, 2020). It is unclear what the IRS will do if taxpayers do not return the EIP. SERP IRM 21.6.3.4.2.13, Economic Impact Payments (June 5, 2020) specifies, “EXCEPTION: For those taxpayers who received the Economic Impact Payment but were not eligible, advise the taxpayer return or repay the payment.”

63 See TIGTA, *Are You a Victim of an IRS-Related Coronavirus Scam?*, https://www.treasury.gov/tigta/contact_report_treasurycheck.shtml (last visited May 13, 2020). See also TIGTA, *TIGTA-2020-5, TIGTA Urges Taxpayers to Stay Alert and Safeguard Their Economic Impact Payment* (May 14, 2020).

Individuals should be aware of these types of scams, and if they believe they have been victimized or are aware of these scams occurring, TIGTA has asked individuals to notify Treasury via an online form.⁶⁴ The IRS and state Attorneys General have also warned individuals about such scams.⁶⁵ Additionally, if individuals have not received the EIP because they suspect they are victims of identity theft, taxpayers should submit Form 14039, Identity Theft Affidavit, and notate “Stolen EIP” at the top of the form. Unfortunately, the processing of these forms will likely be delayed because IRS campuses have a backlog of correspondence as a result of the temporary closure of the IRS campuses. TAS will continue to work with the IRS to ensure individuals are informed about specific scams related to EIPs and recommend that the IRS prioritize the processing of Forms 14039 bearing an EIP notation.

When Individuals Have Questions and Concerns Regarding Their Economic Impact Payments, They Should Be Able to Easily Access IRS Resources

As the above discussion illustrates, there are several complex situations facing individuals in relation to the EIP. Already, individuals have a number of IRS resources to access online including an expansive list of FAQs that answer many of the simpler questions for individuals who have internet access.⁶⁶ It was not until May 18, 2020, that the IRS announced it had assigned 3,500 telephone representatives to answer common questions about EIPs; however, resources remain limited, and individuals who call these phone lines can expect long wait times.⁶⁷ Once individuals do reach assistors, generally these assistors will be reading the answers to the FAQs, and their responses will likely not go beyond the FAQs posted on IRS.gov. TAS recommends that the IRS ensure that assistors working the IRS phone lines are able to answer more complex questions.⁶⁸ Individuals calling this phone line should also be able to update their mailing addresses.

For its part, TAS is assisting taxpayers by working these issues systemically and is advocating for the IRS to develop procedures that will correct inaccurate EIP amounts and issue missing payments during 2020. TAS has been inundated by taxpayer and congressional requests to assist in these types of cases. However, without an IRS process in place to correct a taxpayer’s payment, TAS is unable

64 See TIGTA, *Are You a Victim of an IRS-Related Coronavirus Scam?*, https://www.treasury.gov/tigta/contact_report_treasurycheck.shtml (last visited May 13, 2020).

65 California Attorney General’s Office, *Attorney General Warns Consumers to Beware of Scams Related to Economic Impact Stimulus Payments*, (May 11, 2020), <http://www.lakeconews.com/index.php/news/community/65293-attorney-general-warns-consumers-to-beware-of-scams-related-to-economic-impact-stimulus-payments>; Kansas Attorney General Warns Public to Watch Out for Stimulus Package Scams, KWCH.com (Mar. 30, 2020), <https://www.kwch.com/content/news/Kansas-attorney-general-warns-public-to-watch-out-for-stimulus-package-scams-569230591.html> (last visited May 13, 2020); IRS, *IRS Issues Warning About Coronavirus-Related Scams; Watch Out for Schemes Tied to Economic Impact Payments*, <https://www.irs.gov/newsroom/irs-issues-warning-about-coronavirus-related-scams-watch-out-for-schemes-tied-to-economic-impact-payments> (last visited May 21, 2020).

66 Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency and Restoring Much-Needed Taxpayer Services*, *supra*.

67 IRS, *IR-2020-97, IRS Adds Phone Operators to Answer Economic Impact Payment Questions* (May 18, 2020); IRS, *Operations During COVID-19: Mission-Critical Functions Continue* (May 19, 2020), <https://www.irs.gov/newsroom/irs-operations-during-covid-19-mission-critical-functions-continue>.

68 National Taxpayer Advocate 2009 Annual Report to Congress 4, at 9 (Most Serious Problem: *IRS Toll-Free Telephone Service Is Declining as Taxpayer Demand for Telephone Service Is Increasing*). As was the case in 2008, taxpayers called the toll-free line for the more complex questions, which inevitably take the telephone representatives longer to resolve. TAS suggests that the IRS continue to analyze its call data and base its toll-free assistor staffing decisions on this analysis.

to resolve an EIP issue. Instead, TAS's work has been limited to instances where a problem with a taxpayer's current year return — such as wage verification or identity theft — is holding up the issuance of the EIP.⁶⁹ If the IRS developed a process to correct EIP amounts now, TAS could begin accepting these cases, working with the IRS to resolve them, and getting the money into the hands of eligible individuals.

Employee Retention Credit

The ERC is a significant tax benefit for employers, but its complexity presents opportunities for error. Employers who qualify for the ERC will receive a refundable credit against an employer's 6.2 percent share of Federal Insurance Contribution Act (FICA) wages or Railroad Retirement Tax Act (RRTA) compensation.⁷⁰ An employer can claim a refundable payroll tax credit of up to 50 percent of qualified wages (including health plan expenses) up to \$10,000 per employee, for a maximum credit amount of \$5,000 per employee, paid after March 12, 2020, and before January 1, 2021. As of June 2, 2020, the IRS had received at least 8,700 Forms 7200, Advance Payment of Employer Credits Due to COVID-19.⁷¹

To qualify, an employer must operate a trade or business and:

- Have operations fully or partially suspended by governmental order limiting commerce, travel, or group meetings due to COVID-19 during a calendar quarter, or
- Have experienced a significant decline in gross receipts in a calendar quarter when compared to 2019.

69 Because the IRS was not answering phone lines but TAS local offices were, TAS began experiencing unprecedented call volumes and voice messages from taxpayers with EIP questions. Through May 7, 2020, TAS employees answered 4,226 EIP-related calls from taxpayers. TAS is not staffed to take over the IRS's phone lines when the IRS has shutdown and stopped answering incoming calls, while continuing to assist taxpayers who qualify for TAS assistance. Memorandum from Deputy National Taxpayer Advocate for TAS Employees: Interim Guidance – Economic Impact Payments and TAS Case Acceptance (May 14, 2020). See also Memorandum from National Taxpayer Advocate to TAS Employees: Interim Guidance on Accepting Cases Under TAS Case Criteria 9, Public Policy (June 1, 2020). TAS assistance will not expedite or improve current EIP processing. TAS will not accept cases related solely to EIP issues — even from a congressional office.

70 CARES Act, Pub. L. No. 116-136, § 2301, 134 Stat. 281 (2020) (Employee Retention Credit for Employers Subject to Closure due to COVID-19). IRC § 3111(a) (employer's share of the Old Age, Survivors, and Disability Insurance (social security) portion of FICA tax) and IRC § 3221(a) (employer's share of the social security and Hospital Insurance (Medicare) portions of RRTA tax), along with IRC § 3402 related to Federal income tax withholding, impose employment tax liability on employers. For most employers, this liability is reported on the quarterly Form 941, Employer's Quarterly Federal Tax Return.

71 This data was obtained in an April 21, 2020, email from Senior Technical Analyst, Small Business/Self-Employed Division (available upon request). The IRS received 8,700 eFaxes, but each eFax could have contained multiple Forms 7200, so the total number of forms has yet to be ascertained.

If either of these requirements is met, the taxpayer may be eligible for the ERC.⁷² This credit may appear straightforward, but there are many layers of complexity, such as:

- Determining when a trade or business was fully or partially suspended by government order;⁷³
- Determining the employer's number of full-time employees;
- Determining gross receipts for an exempt organization;
- Determining qualified wages; and
- Applying aggregation rules.⁷⁴

To answer these questions, the IRS has provided nearly 100 FAQs on the ERC. Although these FAQs are helpful to taxpayers and provide answers to many of the simpler questions surrounding the credits, areas of ambiguity remain. For example, the IRS provides that if a business is closed, but the employer is able to continue operations “comparable” to its operations prior to the closure by requiring its employees to telework, there has been no partial suspension.⁷⁵ Specifically, one of the FAQs on the ERC provides this example:

Employer C, a software development company maintains an office in a city where the mayor has ordered that only essential businesses may operate. Employer C's business is not essential under the mayor's order and must close its office. Prior to the order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the order, the company ordered mandatory telework for all employees and limited client meetings to telephone or video conferences. Employer C's business operations are not considered to be fully or partially suspended by the governmental order because its employees may continue to conduct its business operations by teleworking.⁷⁶

72 CARES Act, Pub. L. No. 116-136, § 2301(3)(j), 70 Stat. 281 (2020) (Employee Retention Credit for Employers Subject to Closure due to COVID-19). If an employer receives a Small Business Interruption Loan under the Paycheck Protection Program, authorized under the CARES Act, then the employer is not eligible for the Employee Retention Credit.

73 Only orders, proclamations, or decrees from the Federal government, or any State or local government authorities apply. See IRS, COVID-19-Related Employee Retention Credits: Determining What Types of Governmental Orders May be Taken into Account for Purposes of the Employee Retention Credit FAQs, FAQ #28, <https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-what-types-of-governmental-orders-may-be-taken-into-account-for-purposes-of-the-employee-retention-credit-faqs> (last visited June 9, 2020). See also Letter from Caroline L. Harris, U.S. Chamber of Commerce, to Office of IRS Chief Counsel and Office of the Tax Policy, *Employee Retention Tax Credit (ERTC) Frequently Asked Questions (FAQs): Additional Modifications* (May 19, 2020). The Chamber recommends that the IRS allow eligible employers to claim credit on U.S. based payroll wages paid to U.S. employees with partially suspended activities due to governmental orders of non-U.S. locations.

74 CARES Act, Pub. L. No. 116-136, § 2301(d), 134 Stat. 281 (2020). The CARES Act requires that the aggregation rules under IRC §§ 52 or 414 be applied to taxpayers claiming the employee retention credit. These and other issues have been raised by a number of businesses regarding how to claim the ERC. See Scott Harty, *et al.*, *Into the Unknown: Employee Retention Credit Remains Murky*, Tax NOTES (June 8, 2020).

75 Tony Nitti, *Miss Out on A Paycheck Protection Program Loan? Don't Forget About the Employee Retention Credit*, FORBES (Apr. 30, 2020), <https://www.forbes.com/sites/anthonyнити/2020/04/30/miss-out-on-a-paycheck-protection-program-loan-dont-forget-about-the-employee-retention-credit/>.

76 IRS, COVID-19-Related Employee Retention Credits: Determining When an Employer's Trade or Business Operations are Considered to be Fully or Partially Suspended Due to a Governmental Order FAQs, FAQ #33, <https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-determining-when-an-employers-trade-or-business-operations-are-considered-to-be-fully-or-partially-suspended-due-to-a-governmental-order-faqs> (last visited May 8, 2020).

The question here is what will be considered “comparable?”⁷⁷ For example, what if the facts in the FAQ above are largely the same, but only 80 percent of the company’s employees are set up to work from home? Would that still be considered “comparable,” or will the taxpayer then have to analyze what operations are performed by employees who are not set up to work from home?

An example of another area of uncertainty is where essential businesses were required to stay open, but the state or local government order required them to implement social distancing practices and imposed restrictions on capacity, or the businesses voluntarily implemented such restrictions in accordance with Center for Disease Control and Prevention (CDC) or Department of Homeland Security (DHS) guidelines to protect their employees.⁷⁸ For example, some grocery stores restricted the number of employees and customers allowed into the store and also reduced their hours of operation. Additionally, meat packing plants, even though deemed essential and required to stay open, often worked with state governments on what steps should be taken to reduce the spread of COVID-19, such as implementing capacity limits or requiring employees who had been exposed to the virus to stay home.⁷⁹ Although there are a number of FAQs that touch on this issue, additional guidance on whether an essential business that remains open would be considered partially suspended because of restrictions due to COVID-19 — whether imposed by a governmental order or voluntarily adopted by an employer to comply with CDC and DHS guidelines — would help taxpayers comply with the credit eligibility rules.⁸⁰

It is TAS’s understanding that the IRS is in the process of addressing these ambiguities in its FAQs. At the time of this writing, TAS had not had an opportunity to review the new or revised FAQs, so it is unclear the extent to which this guidance will provide more clarity to taxpayers so they can confidently move forward with claiming this credit without concern for unintentionally violating a rule resulting in a compliance situation. The IRS will need to determine the amount of resources it wants to devote to auditing and verifying the proper allocation of this credit. It is imperative that taxpayers are prepared to support their position for claiming the credit and the amount they have claimed if contacted for audit.

The IRS has been willing to modify its FAQs in other situations where the FAQs have either been ambiguous or inconsistent with Congress’s intent. For example, in the early release of the FAQs, an issue arose regarding whether an employer may treat health plan expenses as qualified wages

77 See Letter from Caroline L. Harris, U.S. Chamber of Commerce, to Office of IRS Chief Counsel and Office of the Tax Policy, *Employee Retention Tax Credit (ERTC) Frequently Asked Questions (FAQs): Additional Modifications* (May 19, 2020). The Chamber recommends that the IRS either withdraws the FAQs that deals with comparable operations (FAQ #33) or provide specific examples of what is *not* considered “comparable” operations.

78 See Letter from Caroline L. Harris, U.S. Chamber of Commerce, to Office of IRS Chief Counsel and Office of the Tax Policy, *Employee Retention Tax Credit (ERTC) Frequently Asked Questions (FAQs): Additional Modifications* (May 19, 2020). The Chamber recommends that the IRS should clarify that this is a partial suspension for purposes of the ERTC. See also Centers for Disease Control and Prevention, *COVID-19 Ongoing Mitigation Guidance*, <https://www.cdc.gov/coronavirus/2019-ncov/community/organizations/businesses-employers.html> (last visited May 14, 2020); Department of Homeland Security, *DHS Responds: Coronavirus (COVID-19)*, <https://www.dhs.gov/coronavirus> (last visited May 21, 2020).

79 Executive Order 13917, *Delegating Authority Under the Defense Production Act With Respect to Food Supply Chain Resources During the National Emergency Caused by the Outbreak of COVID-19* (Apr. 28, 2020) (“It is important that processors of beef, pork, and poultry ... in the food supply chain continue operating and fulfilling orders to ensure a continued supply of protein for Americans.”).

80 ABA Tax Section Office, *Recommendations regarding the implementation of various tax-related provisions of the CARES Act* (May 12, 2020).

when the employees were not working and were not getting paid. Initially, the IRS determined that continued payment of health plan expenses would not be considered *qualified wages* in that scenario for the purpose of the ERC. However, after members of Congress expressed concern regarding this interpretation, the IRS modified its FAQs, allowing the payment of such benefits to be considered *qualified wages*.⁸¹

In addition to the FAQs, the IRS opened a phone line at the beginning of May 2020 to assist taxpayers with their ERC questions.⁸² By providing these resources and clarifying areas of ambiguity, taxpayers can take the steps they need to avoid entanglement in an unnecessary audit that would result in the draining of both taxpayers' and IRS's limited resources.

Paycheck Protection Program

The CARES Act created another significant benefit to assist employers whose businesses have been affected due to the many restrictions put in place to stem the spread of COVID-19.

The PPP is a loan designed to provide an incentive for small businesses to keep their employees on payroll and to assist in paying other expenses.⁸³ The loan will be fully forgiven if businesses use the funds for certain costs including payroll, interest on mortgages, rent, and utilities.⁸⁴ A number of small businesses are eligible to apply for these loans.⁸⁵

81 See letter from Sen. Chuck Grassley, Sen. Ron Wyden, and Rep. Richard E. Neal to Treasury Secretary Steven T. Mnuchin (May 5, 2020). Senators Grassley and Wyden and Rep. Neal urged Treasury to reconsider that determination, saying it goes against congressional intent and that allowing people to keep their employer-sponsored health plans even while furloughed is important in ensuring that Americans have access to affordable health care during the pandemic. "This decision will encourage employers to help employees keep their health insurance while temporarily furloughed due to the shutdown." *Id.* See also IRS, COVID-19-Related Employee Retention Credits: Amount of Allocable Qualified Health Plan Expenses FAQs, FAQs #64-65, <https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-amount-of-allocable-qualified-health-plan-expenses-faqs> (updated May 7, 2020; last visited June 9, 2020).

82 IRS SERP Alert 20A0198, ACS CRs Responding to BMF Taxpayers Regarding the New Employer Tax Credits (May 8, 2020).

83 CARES Act, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 281 (2020). *Small Business Administration (SBA), Paycheck Protection Program: An SBA Loan That Helps Businesses Keep Their Workforce Employed During the Coronavirus (COVID-19) Crisis*; <https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program> (last visited May 19, 2020).

84 CARES Act, Pub. L. No. 116-136, § 1106, 134 Stat. 281 (2020). Payment on mortgages does not include any prepayment or payment of principal on a covered mortgage obligation. Additionally, the CARES Act also defines covered rent obligations and covered utility payments. See, e.g., CARES Act, § 1106(a)(4) and § 1106(a)(5). See also Paycheck Protection Program Flexibility Act of 2020, H.R. 7010, 116th Cong. (June 5, 2020). The PPP Flexibility Act modifies the CARES Act, widening the time frame in which incurred expenses can be covered under the PPP — to either 24 weeks after the origination of the loan or December 31, 2020, whichever comes earlier. Previously, the covered period under the CARES Act was eight weeks following the origination of the loan. Additionally, the PPP Flexibility Act of 2020 modifies the requirement for how the loan should be used. It now requires that eligible recipients use at least 60 percent of the covered loan amount for payroll costs, and may use the remaining 40 percent for any payment of interest on a covered mortgage or for rent or utility obligations. Some have lamented that determining when these loans will be fully forgiven is overly complex. See Neil Hare, *House Passes PPP Loan Forgiveness Bill, Treasury Issues Harsh Forgiveness Regulations—What You Need To Know*, FORBES (June 1, 2020).

85 The eligible businesses that can apply for this loan are: any small business concern that meets SBA's size standards (either the industry based size standard or the alternative size standard); any business, 501(c)(3) non-profit organization, 501(c)(19) veterans organization, or Tribal business concern with the greater of 500 employees, or that meets the SBA industry size standard if more than 500 employees; any business with an NAICS Code that begins with 72 (Accommodations and Food Services) that has more than one physical location and employs fewer than 500 people per location; and sole proprietors, independent contractors, and self-employed persons. See CARES Act, Pub. L. No. 116-136, § 1102(a), 134 Stat. 281 (2020).

As illustrated above, benefits bestowed upon taxpayers during this unprecedented time often create complex tax issues, and the PPP is no different. If businesses meet certain requirements, loans administered through the PPP will be forgiven. To ensure this did not create a taxable event, Congress excluded forgiveness of this loan from taxable income.⁸⁶ This immediately raised questions as to whether taxpayers who received a loan through the PPP that was either expected to be forgiven or was forgiven could deduct expenses paid with this loan.⁸⁷ In Notice 2020-32, the government took the position that no deduction is allowed for an expense that is otherwise deductible because IRC § 265 denies deductions from income of a class that is exempt from tax.⁸⁸ Although this interpretation seems reasonable from a technical perspective, members of Congress took issue with the interpretation, arguing that it blunted Congress's intent to provide economic relief to taxpayers.⁸⁹ Examples such as this will cause taxpayer confusion, possibly resulting in an IRS examination.⁹⁰ Further, considering the complexity and the newness of this program, it is not entirely clear how it will be audited, and the extent to which the IRS will need to commit resources to conduct those audits.

Net Operating Loss Carrybacks and Elections

The CARES Act allows taxpayers to elect to carry back certain NOLs.⁹¹ It also provides for the accelerated recovery of refundable alternative minimum tax credits for corporations.⁹² These provisions provide businesses flexibility to utilize NOLs to offset prior taxable income and reduce the cost of capital as they cope with the economic and business effects of the pandemic. Loss carrybacks generally allow businesses to get refunds of the taxes they paid for earlier taxable years, in some cases, by releasing another tax attribute (*e.g.*, a foreign tax credit, minimum tax credit, or general business credit) in the carryback year that is carried to another year to create an overpayment.⁹³ Taxpayers can obtain refunds by filing a Form 1045, Application for Tentative Refund, or Form 1139, Corporation Application for Tentative Refund, or an amended return (*e.g.*, on Forms 1040X and 1120X). The amount of the refunds depends on both the magnitude of the NOL and the amount of tax paid for the earlier years to which the NOL is applied. Businesses try to estimate and

86 See CARES Act, Pub. L. No. 116-136, § 1106(i), 134 Stat. 281 (2020).

87 IRC § 265(a)(1) and Treas. Reg. § 1.265-1 provide that no deduction is allowed to a taxpayer for any amount otherwise allowable as a deduction to such taxpayer that is allocable to one or more classes of income other than interest (whether or not any amount of income of that class or classes is received or accrued) wholly exempt from the taxes imposed by subtitle A of the Code.

88 IRS Notice 2020-32, 2020-21 I.R.B. 837.

89 See letter from Sen. Chuck Grassley, Sen. Ron Wyden, and Rep. Richard E. Neal, to Treasury Secretary Steven T. Mnuchin (May 5, 2020). See also S.3612 116th Congress 2d Session, *Small Business Expense Protection Act of 2020* (May 5, 2020). Separately, practitioners observed that it would be helpful for the government to clarify that the taxpayer's attributes remain intact upon forgiveness of a PPP loan (*i.e.*, because IRC § 108 is not applicable, the attribute reduction rules of IRC § 108(b) are inapplicable). ABA Section of Taxation, *Tax Implementation of the CARES Act* (May 12, 2020). They also asked for clarification about how the forgiveness should be reported and proper characterization of the loans for purposes of the public support test applicable to nonprofits.

90 Colleen Murphy, *Loan Program Raises Fraud Worries for IRS*, FORBES (June 3, 2020). Adding to this challenge is the IRS's major concern that the PPP is being exploited by individuals fraudulently applying for PPP loans. "With just the sheer amount of money that's going out, we know that when this type of situation happens, fraudsters are on high alert and ramp up all of the efforts they possibly can to get money from the government," said Don Fort, Chief of the IRS Criminal Investigation Division.

91 CARES Act, Pub. L. No. 116-136, §§ 2303 and 2306, 134 Stat. 281 (2020) (codified at IRC §§ 172(b)(1) and 163(j)(10)).

92 See CARES Act, Pub. L. No. 116-136, § 2305, 134 Stat. 281 (2020).

93 See CCA 2020-23006 (Mar. 6, 2020).

compare the value of using the NOL to offset income in future years at future tax rates with the value of carrying the NOL back to offset income at the rates applicable to prior years. They may also consider their immediate cash flow needs, the timing of the refund, and the risk that carrying the loss back will trigger an audit of an earlier year.

Recent Legislative Changes Make Election Decisions and Computations More Difficult

For tax years beginning on or before December 31, 2017, the top corporate rate was 35 percent, and NOLs could generally be carried back two years.⁹⁴ For taxable years beginning after 2017, the Tax Cuts and Jobs Act (TCJA) generally reduced the top corporate rate to 21 percent and eliminated the option to carry back NOLs for most taxpayers.⁹⁵ The TCJA also imposed a new one-time tax (albeit at lower effective rates by virtue of a deduction under IRC § 965(c) and sometimes offset by foreign tax credits) on certain accumulated foreign earnings by *deeming* them to be repatriated (*i.e.*, taxing them whether they were repatriated or not) under IRC § 965. This tax is widely referred to as the “transition tax.” Although the entire transition tax was assessed in the IRC § 965 inclusion year, taxpayers could elect to pay it in eight annual installments without interest under IRC § 965(h).

Section 2303 of the CARES Act requires a taxpayer with an NOL arising in a taxable year beginning in 2018, 2019, or 2020 to carry that loss back to each of the five preceding years unless they elect to waive the carryback, and also provided a two-year carryback of NOLs arising during a taxable year that began in 2017 and ended during 2018.⁹⁶ An election for an NOL arising in a taxable year beginning in 2018 or 2019 must be made no later than the due date, including extensions, for filing the taxpayer’s federal income tax return for the first taxable year ending after March 27, 2020.⁹⁷ This added flexibility means that taxpayers have difficult choices about when to elect to take the losses and whether to amend prior-year returns – choices that are even more complicated because of special rules that apply to those subject to the “transition tax” under IRC § 965(a).⁹⁸

To assist taxpayers, Congress enacted two special rules that apply to a year in which there was an IRC § 965 inclusion (generally 2017, 2018, or both). First, if one or more years in the carryback period are an IRC § 965 inclusion year, taxpayers may elect to exclude all such inclusion years from

94 IRC § 11 (2017); IRC § 172 (2017).

95 Section 13302 of the TCJA, Pub. L. No. 115-97, 131 Stat. 2054 (2017), amended IRC § 172(a) to limit the deduction of NOLs incurred in taxable years beginning after 2017 to 80 percent of taxable income. This limitation applied to all taxpayers. Section 11012 of the TCJA also added IRC § 461(l), which limited the amount of business deductions allowed for a taxable year in excess of business income for such year, applicable to taxpayers other than corporations. The amount of such excess deductions that could be used to offset non-business income was limited to \$250,000 for single filers and \$500,000 for joint filers. Any excess business deductions beyond these limitations were carried forward to the following year as an NOL. Section 12001 of the TCJA repealed the corporate alternative minimum tax (AMT), effective for tax years beginning after December 31, 2017. These technical rules make the carryback election decision more difficult.

96 CARES Act, Pub. L. No. 116-136, § 2303, 134 Stat. 281 (2020) (codified at IRC § 172(b)(1)). For further guidance, see IRS, Temporary procedures to fax certain Forms 1139 and 1045 due to COVID-19 (May 1, 2020), <https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19>.

97 Rev. Proc. 2020-24, 2020-18 I.R.B. 750.

98 For further analysis of the complexity involved in the NOL election decisions, see, e.g., Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020); Josiah P. Child, et al., *A Silver Linings Guidebook: Corporate Planning for Coronavirus Losses*, 2020 TNTF 96-15 (May 18, 2020); Amy Chapman, et al., *ATNOL Carrybacks Under the CARES Act*, 167 TAX NOTES FED. 1185 (May 18, 2020); Kittle-Camp, et al., *Insight: Who CARES for Taxpayer Cash Flow? The IRS and Its Quick Refund Fix*, BLOOMBERG L. NEWS DAILY TAX REP. (May 15, 2020).

the carryback period.⁹⁹ If they do not, then a second rule provides that the taxpayers will be treated as having made an election under IRC § 965(n) to not apply the carryback to the amount included in income under IRC § 951(a) (by reason of IRC § 965) for any IRC § 965 inclusion year in the carryback period.¹⁰⁰ This means, for example, that if 2017 is an IRC § 965 inclusion year for a taxpayer, the NOL will not reduce 2017 taxable income attributable to the transition tax. This may help ensure the NOL generates a refund rather than simply offsetting transition tax liability that a taxpayer is already authorized to pay in eight annual installments under IRC § 965(h).¹⁰¹ However, calculating the transition tax may involve so many complexities that some taxpayers might be reluctant to revisit it.¹⁰²

The decision to carryback losses is further complicated if the losses might be subject to the separate return limitation year rules (*i.e.*, rules that limit the use of losses when corporations enter and exit a consolidated group),¹⁰³ or if a purchase agreement was drafted under the assumption that no losses could be carried back. The impact of the NOL carryback on global intangible low-taxed income (GILTI) and the foreign derived intangible income (FDII), which were also enacted as part of the TCJA, may also complicate the analysis. Both GILTI and FDII are taxed at reduced rates by operation of IRC § 250. It might not make sense to use current-year losses to offset income that was taxed at a lower rate or that was already offset by foreign tax credits (FTCs) for taxes paid to other jurisdictions.

In addition, a taxpayer is precluded from claiming an NOL on either Form 1045 or Form 1139 when the carryback of the NOL would release FTCs in the carryback period that normally would then be available to carry forward. The instructions advise taxpayers to file amended returns in these situations instead.¹⁰⁴ Thus, a taxpayer might have to wait for the IRS to process an amended return rather than obtaining a quick refund based on the tentative carryback adjustment procedures. Moreover, some have suggested that sourcing an NOL carryback raises complex questions because the FTC regulations that address the transition between the pre-TCJA and the post-TCJA regime did not contemplate that taxpayers might be able to carry back an NOL from a post-TCJA year into the pre-TCJA regime.¹⁰⁵

99 IRC § 172(b)(1)(D)(v)(I).

100 IRC § 172(b)(1)(D)(iv).

101 See PMTA 2018-16 (Aug. 2, 2018). The IRS's conclusion that it cannot issue a refund for an IRC § 965 inclusion year until the entire liability for that year is satisfied is controversial. See, e.g., National Taxpayer Advocate, IRS Administration of the Section 965 Transition Tax Contravenes Congressional Intent and Imposes Unintended Burden on Taxpayers, NTA BLOG, <https://taxpayeradvocate.irs.gov/news/nta-blog-irs-administration-of-the-section-965-transition-tax-contravenes-congressional-intent-and-imposes-unintended-burden-on-taxpayers?category=Tax%20News> (Aug. 16, 2018); Brian Kittle *et al.*, *Rush for NOL Carryback Cash Hits IRS Roadblock*, 167 TAX NOTES FED. 969 (May 11, 2020). However, the IRS has concluded that it may pay refunds attributable to subsequent years even if the transition tax liability is not fully satisfied. See IRS, Questions and Answers about Tax Year 2018 Reporting and Payments Arising under Section 965, FAQ #3 (Apr. 3, 2020), <https://www.irs.gov/newsroom/questions-and-answers-about-tax-year-2018-reporting-and-payments-arising-under-section-965> ("If you made a section 965(h) election on your 2017 income tax year return, the IRS will apply voluntary payments that are designated as 2018 income tax payments solely against the 2018 income tax liability.").

102 See, e.g., Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020).

103 See Treas. Reg. §§ 1.1502-21 and -22.

104 See, e.g., IRS, Instructions for Form 1045, at 2 (2019); IRS, Instructions for Form 1139, at 2 (2018).

105 See Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020) (citing T.D. 9882).

The Base Erosion and Anti-Abuse Tax (BEAT), which was enacted as part of the TCJA also complicates the analysis. The BEAT is determined in part by the extent to which the taxpayer has made deductible payments to foreign related parties.¹⁰⁶ The CARES Act amended IRC § 163(j) for tax years beginning in 2019 and 2020 by increasing the percentage of adjusted taxable income (ATI) that is used to determine a taxpayer's interest deduction limitation for the year.¹⁰⁷ For taxable years beginning in 2019 or 2020, this percentage is increased from 30 percent to 50 percent.¹⁰⁸ For purposes of BEAT, IRC § 163(j) applies to first reduce deductible third-party interest expense, and only after to related-party interest expense (*pro rata* between foreign related party and domestic related party interest expense). Additional interest expense deductible under the expanded limitation could mean more interest expense is added back to the BEAT modified taxable income calculation.¹⁰⁹ Given all of this complexity, a taxpayer may require complex models to determine the optimal application of the CARES Act provisions to exercise the *right to pay no more than the correct amount of tax*.

Timing of Net Operating Loss Carryback Elections and Refunds

The decision to carryback NOLs and claim refunds may also depend on how quickly taxpayers can obtain refunds.¹¹⁰ Helpfully, the IRS issued Notice 2020-26, which provided a six-month extension to file the application (on Form 1139 or Form 1045) requesting a tentative refund to carry back an NOL with respect to a taxable year that began during calendar year 2018 and ended on or before June 30, 2019.¹¹¹ Although there is generally no easy way to expedite tentative allowance processing, the IRS has temporarily allowed taxpayers to file Forms 1139 and 1045 by fax.¹¹²

Once a taxpayer files a timely Form 1139 or 1045, the IRS has 90 days to perform a limited examination of the application.¹¹³ The scope of this review is very narrow and limited to discovering omissions and errors of computation and to determining the amount of the decrease in the tax attributable to such carryback upon the basis of the application and examination. IRC § 6411 does not authorize any examination of the merits of the loss being carried back nor of the merits of the tax year to which the loss is carried back, and nothing in that section authorizes the IRS to examine the application beyond the 90-day period.

Unless there are material omissions or computational errors, the IRS generally pays the tentative refund by the end of the 90-day period. The IRS often attempts to pay out tentative refunds within 45 days to avoid having to pay interest on the amount refunded.¹¹⁴ Receiving a tentative refund from the IRS is not necessarily the end of the process. In fact, it may just be the beginning. The IRS must determine if it will examine the return or survey the return without an examination. If

106 IRC § 59A.

107 CARES Act, Pub. L. No. 116-136, § 2306, 134 Stat. 281 (2020) (codified at IRC § 163(j)(10)).

108 Taxpayers may elect to use the 30 percent rate instead of the 50 percent rate.

109 For an example, see, e.g., Mindy Herzfeld, *So Many Ways to Lose Your Losses*, 167 TAX NOTES FED. 749 (May 4, 2020).

110 For a more detailed discussion of practical problems that might arise, see Systemic Advocacy Objective: *Protecting the Rights of Taxpayers Impacted by the COVID-19 National Emergency, and Restoring Much-Needed Taxpayer Services*, *supra*.

111 IRS Notice 2020-26, 2020-18 I.R.B. 744.

112 IRS, *Temporary Procedures to Fax Certain Forms 1139 and 1045 Due to COVID-19*, FAQ #5 (May 1, 2020), <https://www.irs.gov/newsroom/temporary-procedures-to-fax-certain-forms-1139-and-1045-due-to-covid-19>.

113 IRC § 6411(b).

114 IRC § 6611(e)(2) and (f)(4).

the taxpayer is currently under examination, the exam team may review the carryback as part of the ongoing audit. For taxpayers who are not currently under exam, the IRS can, and often does, conduct intensive examinations (after a tentative refund is paid) of the tax year(s) giving rise to the NOL. The IRS may also examine tax years to which the NOL is carried back.¹¹⁵ Although the examination of the years in the carryback period should not give rise to any increased tax liability for those years, the IRS may determine that unrelated issues in those years reduce or possibly eliminate the amount of the tentative refund paid.

All refunds in excess of \$5 million for corporate taxpayers and \$2 million for all other taxpayers (*e.g.*, individuals, partnerships, trusts, etc.) require additional review by the Joint Committee on Taxation (JCT).¹¹⁶ Unlike a tentative allowance, which can be refunded to the taxpayer prior to reporting the refund to the JCT, amended returns requesting refunds in excess of the JCT threshold are not paid until after JCT review.

Net Operating Loss Concerns

The interplay between the various provisions on complex business returns with tax attributes carrying over and carrying back over a five-year period is ripe for error or differing interpretations of the CARES Act. The IRS has released a set of FAQs that address the interaction of the new CARES Act NOL carryback provisions with taxpayers' IRC § 965(a) "transition tax" liabilities and inclusion years, including how to deal with the carryover of non-NOL attributes into the 965 inclusion year (*e.g.*, foreign tax credits and charitable contributions that are released as a result of carrying back NOLs to years preceding the IRC § 965 inclusion year). FAQ #10 does not explicitly say that taxpayers must file an amended return for their 965 inclusion year but encourages taxpayers to do so for proper accounting of any corresponding reduction to the taxpayers' remaining IRC § 965(h) tax liability.¹¹⁷ A taxpayer might infer, however, that a failure to do so could result in future problems relating to the assessment of a taxpayer's remaining IRC § 965(h) liability – *e.g.*, if the taxpayer believes his or her liability has been reduced by reason of these other attributes but does not adjust the source-year IRC § 965(h) liability through an amended return, the IRS may treat a failure to pay in full a future installment that the IRS systems still reflect as owed at the pre-adjustment amount as an acceleration event.

With the potential issues associated with these large refunds, application of JCT review and the proper application of the new rules, the Large Business and International Division will have tough choices to make as to which returns to examine and how to allocate its resources over the next few years. Taxpayers face uncertainty as the guidance issued via FAQs is non-binding on the IRS. Although we commend the IRS for quickly providing guidance on these issues and getting information out to the public, FAQs can be changed, supplemented, and amended without notice and public comment, unlike regulations. But FAQs, unlike the traditional forms of sub-regulatory guidance, are not "authority" under IRC § 6662, and if the IRS continues issuing and relying on FAQs, the regulations under IRC § 6662 need to be amended to clarify that FAQs can be used

¹¹⁵ IRC § 6501(k).

¹¹⁶ See IRC § 6405(a).

¹¹⁷ IRS, Frequently Asked Questions About Carrybacks of NOLs for Taxpayers Who Have Had Section 965 Inclusions, FAQ #10, <https://www.irs.gov/newsroom/questions-and-answers-about-reporting-related-to-section-965-on-2017-tax-returns> (last visited June 3, 2020).

to establish reasonable cause for relief from the accuracy-related penalty. Due to the complexity, severity, and size of the resulting refunds, we recommend the IRS also consider providing additional guidance in a binding and authoritative manner.¹¹⁸

OBJECTIVES FOR FISCAL YEAR 2021

In fiscal year 2021, TAS will:

- Advocate for the IRS to allow individuals who received their EIPs through federal benefit programs such as SSI or veterans benefits to either file a paper return or use the *Non-Filers: Enter Payment Info Here* tool to enter information about their qualifying children, and for the IRS to issue supplemental payments to those individuals during 2020;
- Advocate for the IRS to create a process to correct EIP amounts in 2020 rather than requiring taxpayers to wait until they file their 2020 returns in 2021;
- Advocate that the IRS provide guidance stating that it will retrieve a non-liable spouse's portion of the EIP regardless of whether an injured spouse claim has been filed;
- Advocate for the IRS to permit the electronic or fax submission of IRS Form 8379, Injured Spouse Allocation;
- Advocate that the IRS not spend its resources pursuing enforcement actions against a decedent's estate or family member who received an EIP for a decedent and did not return it;
- Conduct comprehensive outreach to external stakeholders regarding specific scams related to EIPs, particularly stakeholders that work with the disabled, elderly, veterans, and those with limited English proficiency;
- Advocate that the IRS prioritize the processing of Forms 14039, Identity Theft Affidavit, that bear the notation "Stolen EIP;"
- Advocate for the IRS to allow taxpayers to update their mailing addresses by calling a phone line devoted to EIP questions;
- Advocate for the IRS to provide clear guidance as to what is considered operations "comparable" to pre-pandemic operations for the ERC;
- Identify potential systemic delays in processing refund claims (*e.g.*, those arising from NOL carrybacks) and work with the IRS on solutions; and
- Advocate for the IRS to issue guidance to clarify the NOL carryback rules or to clarify that taxpayers can rely on FAQs to avoid penalties and to bind the IRS.

¹¹⁸ It should be noted, on May 6, 2020, the IRS updated its manual providing specific guidance for processing Form 1139 or Form 1045 with NOLs, section 965 inclusions, and 100 percent refund of FTCs filed under provisions of the CARES Act. See *generally* IRM 21.5.9.5.10.16, CARES Act of 2020 (PL 116-136, Section 2303, Section 2304, and 2305) Overview – Net Operating Losses (May 6, 2020).