



August 12, 2020

The Honorable David J. Kautter
Assistant Secretary for Tax Policy
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, DC 20224

Re: Presidential Memorandum for the Secretary of the Treasury: Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster

Dear Messrs. Kautter and Rettig:

The American Institute of CPAs (AICPA) appreciates the efforts by the Department of the Treasury (“Treasury”) and the Internal Revenue Service (IRS) to provide guidance to taxpayers affected by the Coronavirus Disease 2019 pandemic (commonly known as “Coronavirus” or “COVID-19”) through various notices, news releases, and accompanying frequently asked questions (FAQs).

On August 8, 2020, the President of the United States signed four Executive Actions including a Presidential Memorandum (“the memorandum”) to allow employees to defer certain payroll tax obligations. This letter is in response to the memorandum.

Specifically, the AICPA requests that Treasury and the IRS provide the following:

1. Guidance stating that the deferral is voluntary and that an “eligible employee” (as defined in item 3) is responsible for making an affirmative election to defer the payroll taxes. By requiring employees to make an affirmative election, the employer is prevented from withholding and then failing to deposit and pay the tax (to the extent that an employee elects to defer). In addition, it protects the employer by placing the decision to elect to defer with the party primarily liable for payment of the tax.
2. Guidance stating that an “eligible employee” can make an affirmative election at any time from September 1, 2020 to December 31, 2020 (the “4-month period”) if no prior election has been made. If an employee does not elect to defer social security taxes, taxes will continue to be withheld, deposited, and paid. An employee should only be allowed to make one election and one revocation of such election during the 4-month period.

Guidance stating that the affirmative election and revocation is effective after a specified number of days. We recommend that the affirmative election or revocation take effect as soon

as administratively practicable but in no event later than the first paycheck date that is 14 days after receipt by the employer.

Guidance stating that the election should continue to apply until December 31, 2020, unless revoked by the employee. In addition, the election should apply to each bi-weekly paycheck that is less than \$4,000 (or equivalent amount depending on the employer's pay period).

3. Guidance stating that an "eligible employee" is an employee whose wages are less than \$4,000 (or equivalent amount depending on the employer's pay period) per bi-weekly period.
4. Guidance providing a model notice for employers to furnish to eligible employees to inform them that the election to defer social security taxes is available for the September 1, 2020 to December 31, 2020 period. The guidance should state that the model notice can be delivered to employees electronically. In addition, the model notice should specify that the employee is required to pay the deferred amount to the IRS, alleviating the employer of any liability.
5. Guidance stating that the payroll amount used to determine eligibility is a cliff; if the wage amount for specified pay period is above \$4,000 or the equivalent amount based on the employer's regular payroll periods, no deferral is permitted.
6. Guidance stating that the \$4,000 limit should apply separately to each employer of an employee. Consider whether a related employer rule is needed.
7. Guidance stating that it is the responsibility of the employee and not the employer to pay the deferred payroll taxes. The guidance should also explicitly state that an employer is not liable if an employee does not remit the deferred payroll taxes on the required payment date(s) (when determined).
8. Guidance stating which penalties are waived as a result of this deferral, including the penalty applicable to responsible parties.
9. Guidance addressing whether the increase in take-home pay attributable to the deferred taxes can be used to satisfy other employee obligations such as Internal Revenue Code section 401(k)¹ loan repayments, garnishments, child support payments, etc.
10. Guidance stating a payment due date(s) for the deferred taxes and a mechanism for employees to pay the deferred taxes. We recommend requiring employers to report the deferred amount of taxes in Box 12 of Form W-2 (with a new code) and in Box 3 of the Form W-2, the compensation amount on which taxes are deferred. We recommend that guidance state that employees are required to pay the deferred amounts as an additional tax payment on their applicable federal income tax return.

¹ Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

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The AICPA is the world's largest member association representing the CPA profession, with more than 431,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America's largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Deborah Walker, Chair, AICPA Employee Benefits Taxation Technical Resource Panel at (202) 257-5609, or dwalker@cbh.com; Kristin Esposito, AICPA Senior Manager – Tax Policy & Advocacy, at (202) 434-9241 or kristin.esposito@aicpa-cima.com; or me at (612) 397-3071 or chris.hesse@CLAconnect.com.

Sincerely,



Christopher W. Hesse, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable Michael J. Desmond, Chief Counsel, Internal Revenue Service
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