

September 8, 2020

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

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Washington, D.C. 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 Texas Society of Certified Public Accountants (TXCPA) is a nonprofit, voluntary professional organization representing more than 28,000 members. One of the expressed goals of the TXCPA is to speak on behalf of its members when such action is in the best interest of its constituency and serves the cause of the CPAs of Texas, as well as the public interest. The TXCPA has established a Federal Tax Policy Committee to represent those interests on tax-related matters. The committee has been authorized by the TXCPA Board of Directors to submit comments on such matters of interest to the committee membership. The views expressed herein have not been approved by the Board of Directors or Executive Board and, therefore, should not be construed as representing the view or policies of the TXCPA.

A Presidential Memorandum issued Aug. 8, 2020, permits the deferral of certain payroll tax obligations on wages or compensation paid during the period of Sept. 1, 2020 through Dec. 31, 2020.¹ We understand the concern for providing temporary relief for working Americans. Subject to the additional comments below, we endorse recommendations of the American Institute of CPAs (AICPA) submitted by letter to you dated Aug. 12, 2020.² We encourage the U.S. Treasury and the IRS to address and adopt each of the concerns and recommendations set forth in the AICPA letter. We have appended the AICPA list of guidance requests with additional concerns.

On Aug. 28, 2020, the IRS issued Notice 2020-65, which provides limited guidance relating to the deferral of payroll taxes under the Presidential Memorandum. While this notice provides some helpful guidance, it fails to adopt most of the AICPA's recommendations. In addition, rather than placing the repayment obligation on employees, as the AICPA recommended, it places an obligation on employers to collect and remit it to the IRS during the first quarter of 2021. Adding to this anomaly is an ambiguous statement in the notice that an employer "may make arrangements to otherwise collect the [deferred employment taxes] from the employee."

¹ See Presidential Memoranda: Memorandum on Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster (Aug. 8, 2020), <https://www.whitehouse.gov/presidential-actions/memorandum-deferring-payroll-tax-obligations-light-ongoing-covid-19-disaster/>.

² See AICPA letter to Assistant Secretary for Tax Policy David Kautter and IRS Commissioner Charles Rettig on Presidential Memorandum for the Secretary of the Treasury: Deferring Payroll Tax Obligations in Light of the Ongoing COVID-19 Disaster (Aug. 12, 2020), <https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20200812-aicpa-comment-letter-pres-memo-payroll-tax-deferral.pdf>.

You will note that many of our comments herein are inconsistent with the approach taken in Notice 2020-65, which seeks to place responsibility to collect the deferred taxes on an employer. We believe the approach in Notice 2020-65 is incorrect and should be reversed. Employers should not be placed in the position of collecting taxes that are deferred entirely by virtue of an employee's election, whether by withholding or by taking other affirmative collection action against their employees. The approach in Notice 2020-65 seeks to convert employers into collection agents of the government adding to their already cumbersome administrative responsibilities in the midst of a pandemic. The election to defer payroll taxes provided for in the Presidential Memorandum is not expressly provided for by statute and therefore it seems at least questionable that the IRS has statutory authority to impose collection responsibility for these deferred amounts on employers.

We believe the better approach would be to require reporting of deferred amounts on W-2 and W-3 forms, which amounts can then be paid directly to the IRS by the employees with the filing of their federal income tax returns. Among other benefits to this approach, it would permit the employees to reduce the amount due to the IRS by other amounts withheld or credits available to the employees.

Another issue is that the IRS' approach in Notice 2020-65 fails to account for employees who may not work for the employer during the first quarter of 2021, including seasonal or temporary employees and even employees who are laid off as a result of the pandemic before the end of the year. Because Notice 2020-65 imposes an obligation on an employer to recover the deferred taxes the first quarter of 2021, does this mean that an employer must continue withholding if it does not expect the employee to work for that employer during the recovery period? We do not think this would be consistent with the Presidential Memorandum but may leave employers wondering how to deal with these employees.

In addition, even if employees who elect deferral continue working for an employer during the first quarter of 2021, it is possible their wages for that period will be less than the deferred amount. At a minimum, we believe the IRS should clarify that an employer has no obligation to withhold anything more than what is paid to an employee during the first quarter of 2021. We also believe the IRS should clarify that an employer has no obligation to undertake any other collection action against an employee who elects to defer.

We also request explicit guidance on whether employers have an option in adopting the deferral program. The choice in Notice 2020-65 to define the "affected taxpayer" as the employer may be a subtle way of allowing the employer to opt in or out of the program. Since the timeline on implementation is immediate, taxpayers need certainty on options and responsibilities to comply with the law. Clear guidance is welcome during these uncertain times caused by the pandemic.

Specifically, we recommend the IRS provide the following additional guidance:

1. Guidance clarifying that deferral is voluntary and an employee eligible to elect deferral under the Presidential Memorandum ("eligible employee") is responsible for making an affirmative election to defer the payroll taxes. By requiring employees to make an affirmative election, the employer can then be fully relieved of any obligation to withhold, deposit and pay the tax (to the extent an employee elects to defer). In addition, it protects the employer by placing the decision 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 Sept. 1, 2020 to Dec. 31, 2020 (the "four-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 four-month period. The election should not be retroactive.

3. 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.
4. Guidance stating that the election should continue to apply until Dec. 31, 2020, unless revoked by the employee.
5. 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).

We understand this approach is different than what Notice 2020-65 states as it seeks to place responsibility to collect the deferred taxes on an employer. However, we believe the approach in Notice 2020-65 is incorrect for the reasons discussed above.

6. 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 Sept. 1, 2020, to Dec. 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.

We understand this approach is different than what Notice 2020-65 states as it seeks to place responsibility to collect the deferred taxes on an employer. However, we believe the approach in Notice 2020-65 is incorrect for the reasons discussed above.

In addition, Notice 2020-65 provides no guidance for clearly notifying employees who make this election that the deferral is temporary. Individuals who qualify for the election are not highly compensated and many will be adversely affected in a very significant manner in 2021 when payments become due. Moreover, many eligible employees hold service-sector jobs and may not appreciate that the election will significantly add to their liability in 2021. We believe that both the IRS and affected taxpayers will be well-served if everyone fully and unequivocally understands the implications of making this election.

7. Guidance stating that the \$4,000 limit should apply separately to each employer of an employee. Consider whether a related employer rule is needed.
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 IRC Section 401(k) loan repayments, garnishments, child support payments, etc.
10. Guidance stating the 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 amount as an additional tax payment on their applicable federal income tax return.

We understand this approach is different than what Notice 2020-65 states as it seeks to place responsibility to collect the deferred taxes on an employer. However, we believe the approach in Notice 2020-65 is incorrect for the reasons discussed above.

11. Explicit guidance on whether employers have an option in participating in this program, as discussed in more detail above. Notice 2020-65 does not directly address whether it is mandatory or optional for employers. We recommend that employers be provided an option on this program because the cost of compliance may be substantial. Businesses are generally seeking ways to reduce costs at this time of economic uncertainty and may be harmed by additional compliance burden.
12. Guidance on whether the employee will receive Social Security credit for the amount in 2020 although the amount is not paid in 2020. Such guidance should also include how the Social Security credit will be impacted if the tax is ultimately never paid.
13. Guidance providing that the deferred amount payable to the IRS by an employee in 2021 may be reduced by excess withholding amounts for the prior year.
14. Guidance on whether the deferred tax will create a filing requirement for taxpayers who might not otherwise meet the filing requirements.
15. Guidance on whether the deferred tax will be reported on Form 8919, *Uncollected Social Security and Medicare Tax on Wages*, or a new form.
16. Guidance permitting employees who are laid off to elect deferral if their total compensation for the year from that employer falls below the overall threshold provided for in the Presidential Memorandum. This may be particularly relevant for employees who receive severance packages that will cause them to exceed the biweekly threshold of \$4,000 set forth in Notice 2020-65.
17. Guidance on whether an employee can request payment in cash of deferred tax on noncash compensation.
18. If election to participate in deferral is not voluntary for all employers, the administrative aspect of accounting for employee deferrals will likely pose a disproportionate reporting burden on small employers that might not be using a payroll service company. There should be an exception provided for small employers.
19. The memorandum states, "Amounts deferred pursuant to the implementation of this memorandum shall be deferred without any penalties, interest, additional amount or addition to the tax." Guidance should be provided on the time frame for which this statement applies, whether indefinite, only until the payment is legally due or an alternative time frame.
20. Guidance on the ordering rule as to how a taxpayer's payments will be applied to any deferred amounts. If payments are first applied to other taxes, then this will indirectly subject the deferred payroll taxes to penalties, interest, etc.
21. We recommend that Treasury allow a two-, three- or four-year interest and penalty free period to repay the deferred taxes in annual installments on the employee's federal income tax return. By making the payments in smaller amounts, there is a better chance that it would get repaid.

22. If collection responsibility for the deferred amounts remains with an employer as provided for in Notice 2020-65, guidance should be issued clarifying that an employer has no obligation to withhold anything more than what is actually paid to an employee during the first quarter of 2021. We also believe the IRS should clarify that an employer has no obligation to undertake any other collection action against an employee, including in later periods. We feel it will help all taxpayers (employers and employees) if it is made clear that the IRS will pursue collection of any unremitted portion directly from the employee. It would be very unfortunate if this program indirectly caused major employee turnover due to the expectation by employees that they will not have to pay the deferred taxes if they leave the employer at year end. We are in great need of stability.
23. If collection responsibility for the deferred amounts remains with an employer as provided for in Notice 2020-65, guidance clarifying that employees may elect deferral under the Presidential Memorandum even if the employer does not expect those employees to continue working for the employer during the first quarter of 2021 (e.g., seasonal or temporary employees). Seasonal employees are quite common in the fourth quarter due to the holiday season.

If you have any questions, or if we can assist further, please feel free to contact me at 832-333-7431 or ddonnelly@cricpa.com; or TXCPA Staff Liaison Patty Wyatt at 817-656-5100 or pwyatt@tscpa.net.

Sincerely,



David P. Donnelly, CPA
Chair, Federal Tax Policy Committee
Texas Society of Certified Public Accountants

cc: The Honorable Michael J. Desmond, Chief Counsel, Internal Revenue Service
Ms. Rachel Leiser Levy, Associate Chief Counsel, Office of Chief Counsel, Employee Benefits, Exempt Organizations and Employment Taxes, Internal Revenue Service