



February 25, 2021

Mr. Mark Mazur  
Acting Assistant Secretary (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: Employee Retention Credit – Sections 206 of the Taxpayer Certainty and Disaster Relief Act of 2020 (Division EE of the Consolidated Appropriations Act, 2021)**

Dear Acting Assistant Secretary Mazur and Commissioner 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”).

In response to the pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act.<sup>1</sup> On April 17, 2020,<sup>2</sup> and October 8, 2020,<sup>3</sup> the AICPA submitted letters identifying areas in need of guidance related to the employee retention credit (ERC) provisions of the CARES Act. In addition, on December 27, 2020, the Consolidated Appropriations Act, 2021<sup>4</sup> (CAA 2021), which included the Taxpayer Certainty and Disaster Relief Act of 2020 (TCDRA) (Division EE of the CAA 2021), was signed into law. Section 206 of the TCDRA extended and modified the provisions of the ERC. On January 15, 2021, the AICPA submitted a letter<sup>5</sup> requesting specific guidance related to Section 206 of the TCDRA. This letter is a follow-up letter to urge Treasury and the IRS to issue immediate authoritative guidance related to Section 206 of the TCDRA to ensure that taxpayers are able to promptly take advantage of the ERC.

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<sup>1</sup> P.L. 116-136.

<sup>2</sup> <https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20200417-aicpa-comments-coronavirus-employee-retention-credit-provision.pdf>.

<sup>3</sup> <https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/20201008-aicpa-comments-employee-retention-credit.pdf>.

<sup>4</sup> P.L. 116-260.

<sup>5</sup> <https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/56175896-aicpa-comments-erc-ppp-loans.pdf>.

### Recommendations

- 1) Provide authoritative guidance on both the 2020 ERC<sup>6</sup> and 2021 ERC.<sup>7</sup> The IRS has posted an extensive list of frequently asked questions (FAQs)<sup>8</sup> on its website to assist taxpayers with the implementation of the 2020 ERC. FAQs cannot be relied on as legal authority since they are not published in the Internal Revenue Bulletin. Due to the complexity of the credit, taxpayers require authoritative guidance to promote a uniform application of the rules. In addition, taxpayers need immediate guidance on the 2021 credit.
- 2) Clarify whether wages paid to S corporation owners (regardless of the ownership percentage), and their actively employed spouses qualify for the ERC if all other requirements of the credit are met. Per FAQ 6, qualified wages are defined as those that are paid to an employee. FAQ 59 states that wages paid by an employer to employees who are related individuals, as defined in section 51(i)(1)<sup>9</sup> of the Internal Revenue Code (IRC) are not considered qualified wages. Section 51(i)(1) references section 267(c). While section 51(i)(1)(A) does not include spouses, the interplay between section 51(i)(1)(A) and section 267(c) is unclear. Specific guidance stating whether wages paid to S corporation owners and their actively employed spouses will remove the substantial amount of confusion our members have on this issue.
- 3) Permit PPP loan recipients to file a Q4 2020 Form 941-X, *Adjusted Employer's Quarterly Federal Tax Return or Claim for Refund* to claim wages for the ERC related to any eligible quarter in 2020 if it is determined after the filing date of the original Q4 2020 Form 941, *Employer's Quarterly Federal Tax Return*, that the employer qualified for the credit. Per an IRS Post Release Change to Forms,<sup>10</sup> if an employer received a PPP loan and included wages paid in Q2 2020 and/or Q3 2020 as payroll costs on its loan forgiveness application and the request for loan forgiveness was denied, the employer could claim an ERC for those wages on its originally filed Q4 2020 Form 941. In all other cases, an employer is required to claim ERC wages on a Form 941 or Form 941-X for the quarter to which the credit relates. Per section 206(d)(2) of the TCDRA, "For purposes of section 2301 of the CARES Act, an employer who has filed a return of tax with respect to applicable employment taxes (as defined in section 2301(c)(1) of division A of such Act) before the date of the enactment of this Act may elect (in such manner as the Secretary of the Treasury (or the Secretary's delegate) shall prescribe) to treat any applicable amount as an amount paid in the calendar quarter which includes the date of the enactment of this Act."

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<sup>6</sup> For purposes of this letter, all references to "2020 ERC" relate to the ERC provisions of the CARES Act.

<sup>7</sup> For purposes of this letter, all references to "2021 ERC" relate to the ERC as retroactively changed by the TCDRA.

<sup>8</sup> <https://www.irs.gov/newsroom/covid-19-related-employee-retention-credits-general-information-faqs>.

<sup>9</sup> Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to the Treasury Regulations promulgated thereunder.

<sup>10</sup> <https://www.irs.gov/forms-pubs/didnt-get-requested-ppp-loan-forgiveness-you-can-claim-the-employee-retention-credit-for-2020-on-the-4th-quarter-form-941>.

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The administrative burden on both taxpayers and the IRS would be reduced if employers were permitted to claim any previous credit on a Form 941-X in the current quarter in which the credit is claimed versus for each quarter to which the credit relates.

- 4) Clarify that an employer using the cash method for federal income tax purposes under section 448(c) may use the cash method to calculate gross receipts for purposes of the gross receipts test.

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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](mailto:dwalker@cbh.com); Kristin Esposito, AICPA Director – Tax Policy & Advocacy, at (202) 434-9241, or [kristin.esposito@aicpa-cima.com](mailto:kristin.esposito@aicpa-cima.com); or me at (612) 397-3071, or [chris.hesse@CLAconnect.com](mailto:chris.hesse@CLAconnect.com).

Sincerely,



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

cc: Mr. Thomas West, Deputy Assistant Secretary, Office of Tax Policy, Department of the Treasury  
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