



April 14, 2022

The Honorable Shalanda D. Young
Director
U.S. Office of Management and Budget
725 17th St, NW
Washington, DC 20503

RE: Section 41 Research Credit Refund Claims

Dear Ms. Young:

The American Institute of CPAs (AICPA) has concerns related to the significant changes the Department of the Treasury (“Treasury”) announced in IR-2021-2023¹ (IRS News Release) and the accompanying Field Attorney Advice memorandum² that were issued on October 15, 2021. The news release and memorandum outline new requirements for collection of information to obtain a valid refund claim for research credits (collectively referred to as the “FAA”). Specifically, the AICPA is concerned that because the collection of information is imposed by an FAA and not by a form or regulation, it has not been submitted to Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) for approval as required under the Paperwork Reduction Act (PRA) of 1995.³

Given that this new collection of information is burdensome and presents a deviation from the existing procedures, we urge pausing the implementation of the new requirements until the IRS obtains approval from OMB for the collection of information.

Overview

The research credits refund claim is filed by attaching a Form 6765, *Credit for Increasing Research Activities*, to an amended return such as the Form 1120-X, *Amended U.S. Corporation Income Tax Return*, Form 1040-X, *Amended U.S. Individual Income Tax Return*, Form 1065, *US Return of Partnership Income*, or Form 1065-X, *Amended Return or Administrative Adjustment Request (AAR)*, as appropriate, and by following the existing amended return form and instructions. The OMB approved these forms, e.g., Forms 1040-X and 1120-X, along with the Form 6765 that taxpayers use to disclose the calculation of research tax credits.

The FAA provides a new rule, which is a deviation from the existing amended return form and instructions, stating that a refund claim for research credits that does not comply with the new collection of information requirements will not satisfy the requirements for a valid claim for refund under Reg. § 301.6402-2(b)(1).⁴

¹ The IRS issued a news release and field attorney advice on October 15, 2021: [IRS sets forth required information for a valid research credit claim for refund | Internal Revenue Service.](#)

² [FAA 20214101F](#) (October 15th release of September 17th field attorney advice).

³ Pub. L. No. 104–13, 44 USC § 3501 et seq. (1995).

⁴ All references to “section” are to the Internal Revenue Code of 1986, as amended, and all references to “Reg. §”, 1455 Pennsylvania Ave. NW, Washington, DC 20004-1081
T: +1 202.737.6600 F: +1 202.638.4512
aicpaglobal.com | cimaglobal.com | aicpa.org | cgma.org

The FAA states that to be a valid claim for refund, a claim for a section 41 research credit must, at a minimum, include the following information in an attached document signed by the taxpayer under the penalties of perjury:⁵

- Identify all the business components to which the section 41 research credit claim related to that year.
- For each business component:
 - Identify all research activities performed;
 - Identify all individuals who performed each research activity; and
 - Identify all the information each individual sought to discover.
- List the total qualified employee wage expenses, total qualified supply expenses and total qualified contract research expenses for the claim year (this may be done using Form 6765).

The FAA further explains that unless a valid refund claim is filed with the IRS before expiration of the period of limitations, no refund can be issued. Further, a timely, valid refund claim with the IRS is a prerequisite to filing a suit for refund.

The PRA was enacted to minimize the paperwork burden for individuals and entities resulting from the collection of information by or for the federal government. The PRA generally provides that every federal agency must obtain approval from OMB before using identical questions to collect information from 10 or more persons.⁶ If a government agency decides to gather information, the agency must prepare an Information Collection Request (ICR), which describes the information to be collected, gives the reason the information is needed, and estimates the time and cost for the public to answer the request. After reviewing the request, the OMB may approve or disapprove the ICR, or define conditions that must be met for approval.⁷

Executive Order (EO) 12866 generally requires that agencies submit significant regulatory actions for review to OIRA. The Memorandum of Agreement (MOA) between Treasury and OMB, dated April 11, 2018, describes how EO 12866 is applied to tax regulatory actions, which are regulatory actions pursuant to Title 26 of the United States Code (USC). Section 3(e) of EO 12866 defines a regulatory action as “any substantive action by an agency (normally published in the Federal Register) that promulgates or is expected to lead to the promulgation of a final rule or regulation, including notices of inquiry, advance notices of proposed rulemaking, and notices of proposed rulemaking.”

Under the MOA, a tax regulatory action is subject to OIRA review as a significant regulatory action under EO 12866 “if it is likely to result in a rule that may:

- (a) Create serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- (b) Raise novel or legal policy issues, such as by prescribing a rule of conduct backed by an assessable penalty; or

“Prop. Reg. §”, and “regulations” are to U.S. Treasury regulations promulgated thereunder, unless otherwise specified.

⁵ The requirement to affirm this information under the penalties of perjury is in addition to the affirmation under penalties of perjury required with the amended return.

⁶ See 44 USC § 3507(a)(1), 44 USC § 3502(3)(A)(i).

⁷ See 44 USC § 3507(c)-(d).

- (c) Have an annual non-revenue effect on the economy of \$100 million or more, measured against a no-action baseline.”

The MOA also requires Treasury to provide notice to OIRA with a quarterly notice of planned tax regulatory actions.

Recommendation

The AICPA recommends that implementation of the new requirements should be paused until the IRS obtains approval from OMB for the collection of information.

Analysis

The collection of information under the FAA requires a significant increase in the volume of information that must be provided with research credit refund claims. Prior to issuance of the FAA, taxpayers typically did not set forth an exhaustive explanation of the legal and factual basis for claiming the research credit in the Explanation of Changes section of an amended tax return (Part II of Form 1120-X, Part III of Form 1040-X) because the grounds for the overpayment are apparent on Form 6765, which is attached to the amended tax return.⁸

To satisfy the requirements set forth in the FAA, it is anticipated that lists of the business components, research activities, and individuals who worked on the research activities, are requirements that would result in hundreds or thousands of pages of additional documentation to support the refund claim. The requirements of the FAA were not contemplated by OMB when the forms were designed, and perhaps new forms may need to be issued to facilitate the reporting of additional information.

Furthermore, identifying all the information each individual sought to discover will require the drafting of a lengthy narrative after review of the research credit study. Thus, the requirements will add compliance costs and will significantly increase the time it takes to prepare a refund claim. This may likely discourage taxpayers that have valid refund claims from filing such claims. Additionally, given the substantial burden that is imposed by the collection of information, an analysis of whether the annual non-revenue effect on the economy is \$100 million or more would be prudent.

The collection of information required by the FAA, and the change in the definition of a valid refund claim, which now depends on the taxpayer’s compliance with the collection of information, raise novel and legal policy issues. Taxpayers who do not comply with these requirements are effectively prohibited from seeking a refund of amounts overpaid from the government.

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⁸ See e.g., *Premier Tech, Inc. v. United States*, No. 2:20-CV-890-TS-CMR, where the court found that the taxpayer had satisfied the refund claim requirements by attaching a Form 6765 to its refund claim and providing the information required on Form 6765.

The AICPA is the world's largest member association representing the accounting 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 our recommendations and welcome the opportunity to further discuss our comments. If you have any questions, please contact Melanie Lauridsen, Senior Manager — AICPA Tax Policy & Advocacy, at (202) 434-9235, or Melanie.Lauridsen@aicpa-cima.com; or me at (601) 326-7119 or JanLewis@HaddoxReid.com.

Sincerely,



Jan Lewis, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable Neil MacBride, General Counsel, Department of the Treasury
The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
Mr. William Paul, Principal Deputy Chief Counsel and Deputy Chief Counsel, Office of Chief Counsel, Internal Revenue Service
Mr. Tom West, Deputy Assistant Secretary for Domestic Tax, Office of Tax Policy, Department of the Treasury
Mr. Krishna P. Vallabhaneni, Tax Legislative Counsel, Department of the Treasury
Ms. Wendy Friese, Tax Policy Advisor, Office of Tax Legislative Counsel, Department of the Treasury
Mr. Timothy Powell, Tax Policy Advisor, Office of Tax Legislative Counsel, Department of the Treasury
Ms. Drita Tonuzi, Deputy Chief Counsel, Office of Chief Counsel, Operations, Internal Revenue Service
Ms. Nikole Flax, Commissioner, Large Business & International Division, Internal Revenue Service
Ms. Holly Paz, Deputy Commissioner, Large Business & International Division, Internal Revenue Service
Mr. Theodore D. Setzer, Assistant Deputy Commissioner, Compliance Integration, Large Business and International Division, Internal Revenue Service
Ms. Julie A. Foerster, Director, Headquarters Examination, Small Business/Self-Employed Division, Internal Revenue Service
Ms. Julie Hanlon-Bolton, Deputy Associate Chief Counsel, Office of Chief Counsel, Income Tax & Accounting, Internal Revenue Service