University of Miami Business Law Review

Volume 30 | Issue 1 | Article 6

December 2021

# With Coronavirus Ravaging the Economy, Congress Shows Highest Tax Priorities: An Exploration of the Provisions in the CARES Act and Beyond

Paul Nylen
*University of Wisconsin-Whitewater*

Brian Huels
*University of Wisconsin-Whitewater*

Shane Wheeler
*University of Wisconsin-Green Bay*

# With Coronavirus Ravaging the Economy, Congress Shows Highest Tax Priorities: An Exploration of the Provisions in the CARES Act and Beyond

Paul Nylen, Brian Huels, Shane Wheeler

## I. BACKGROUND

The virus known as SARS–CoV–2[1] (Coronavirus) swept over the United States in ways that no other crisis has affected modern society. While the Spanish Flu of 1918 has often been cited for its pandemic similarities to the Coronavirus, from an economic standpoint the attacks of September 11, 2001, and the Great Recession of 2008 are perhaps the Coronavirus's best analogy for the modern economic carnage that has occurred. In those previous events, Congress responded with sweeping legislation like Dodd–Frank and the Patriot Act. With the Coronavirus, Congress responded with the CARES Act. Within the CARES Act are historical changes to the tax code. By exploring the provisions of the CARES Act, taxpayers receive a glimpse into Congress's highest priorities in times of crisis. This article explores those changes in the tax law with the hope of providing taxpayers some insight into which priorities Congress views as most vital to a country in crisis.

---

1 Per the World Health Organization (WHO), SARS–CoV–2 is a virus that stands for Severe Acute Respiratory Syndrome Coronavirus. It causes the disease known as Coronavirus (or previously known as COVID–19, which stood for 2019 Novel Coronavirus). Per the WHO, "viruses, and the diseases they cause, often have different names. For example, HIV is the virus that causes AIDS. People often know the name of a disease, but not the name of the virus that causes it." *Naming the coronavirus disease (COVID–19) and the virus that causes it,* WORLD HEALTH ORGANIZATION (Feb.11, 2020),https://www.who.int/emergencies/diseases/novel–coronavirus–2019/technical–guidance/naming–the–coronavirus–disease–(covid–2019)–and–the–virus–that–causes–it.

## II. SETTING THE PARTISAN STAGE

Almost two years before the Coronavirus shut down large swaths of the economy, Congress was in a virtual deadlock in passing one of President's Trump's most ambitious campaign promises: tax reform.[2] However, by the end of 2017, republicans, much like democrats passing the Affordable Care Act,[3] proceeded to pass the Tax Cuts and Jobs Act (TCJA) through Congress.[4] With no democratic votes in favor of the TCJA,[5] the United States moved forward with lower individual marginal tax rates, a significantly lower corporate income tax rate, as well as an army of new tax provisions that both modified the then–existing tax code and created new provisions for tax preparers to cope with during the 2018 income tax season.[6]

The TCJA is a particularly important starting point in the analysis of Congress's response to the Coronavirus. Known as the CARES Act[7], Congress addressed the Coronavirus from two important tax perspectives.[8] First, a number of new and specific tax policies were put into place to

---

[2] It is worth noting that President Trump's tax reform proposals as a presidential candidate, at least from a business perspective, were directionally similar to the implementation of the Tax Cuts and Jobs Act that became law on December 22, 2017. Notably, as a candidate, President Trump proposed: reducing the corporate income tax rate from 35% to 15%, taxing the deferral of earnings in controlled foreign subsidiaries (this later became codified under Internal Revenue Code section 965 under the TCJA), mirroring the pass–thru income tax rate to the corporate tax rate of 15%, as well as limiting interest expense deductions under Internal Revenue Code section 163(j). Alan Cole, *Details and Analysis of Donald Trump's Tax Plan*, TAX FOUNDATION (Sept. 29, 2015), https://taxfoundation.org/details–and–analysis–donald–trump–s–tax–plan/#_ftn1.

[3] There are some key similarities and differences between how the Affordable Care Act (ACA) and Tax Cuts and Jobs Act (TCJA) passed Congress. Both bills received no votes from the opposing party. Moreover, both bills used the process of budget reconciliation to pass the final version of each bill (the ACA only used budget reconciliation for smaller amendments, while the TCJA used budget reconciliation for the entirety of its passage). *Congress.gov,* US GOVERNMENT PUBLISHING OFFICE, P.L. 115–97, Contrast with US GOVERNMENT PUBLISHING OFFICE, P.L. 111–48.

[4] P.L. 115–97. Tax Cuts and Jobs Act. December 22, 2017.

[5] Jasmine C. Lee and Sara Simon, *How Every Senator Voted on the Tax Bill*, NEW YORK TIMES (Dec. 19, 2017), https://www.nytimes.com/interactive/2017/12/19/us/politics/tax–bill–senate–live–vote.html.

[6] Garrett Watson, *Two Years After Passage, Treasury Regulations for the Tax Cuts and Jobs Act Surpass 1,000 Pages*, TAX FOUNDATION (Dec. 12, 2019), https://taxfoundation.org/treasury–regulations–for–the–tcja/.

[7] P.L. 116–136. March 27, 2020. The Coronavirus Aid, Relief, and Economic Security (CARES) Act.

[8] To suggest at the time of passage that any practitioner can neatly define a core number of congressional priorities is optimistic, at best, given the fact that the entire CARES Act legislation was approximately 880 pages. For comparison purposes, the Sarbanes–Oxley Act of 2002, which passed after the collapse of Enron, and ushered in one the largest accounting changes in the history of the profession, was only 66 pages. See P.L. 107–204.

immediately help individual taxpayers. Second, structural changes, i.e. changes that last beyond the 2020 tax year to the Internal Revenue Code were made to help alleviate some of the economic burden that individuals, and companies, will likely endure due to the carryover effects of the Coronavirus. [9] Many of the structural effects of the CARES Act were recently modified in the TCJA, and thus, it is important to understand how those changes came about, and why the TCJA modified the Internal Revenue Code initially. With the TCJA as a backdrop, this article examines these two broad sets of changes made by the CARES Act.

## III. NEW AND SPECIFIC TAX POLICIES

### *A. Notice 2020–18: Change in Individual Filing Date*

Before diving into the details of the CARES Act, it is helpful to have some framework for how, and by whom, the Internal Revenue Code is drafted. To address this question, the authors of this article find Dave Barry's quote on tax law instructive:[10]

> Congresspersons are too busy raising campaign money to read the laws they pass. The laws are written by staff tax nerds who can put pretty much use any wording they want in there. I bet that if you actually read the entire vastness of the U.S. Tax Code, you'd find at least one sex scene.

From a practical perspective, the most immediate change affecting individual taxpayers was the delaying of the federal individual income tax filing day from April 15, 2020 to July 15, 2020.[11] Interestingly, the Treasury Department changed the deadline through administrative action, while other deadlines administered by the Treasury Department had to be authorized through executive order.[12] Unfortunately for taxpayers, this

---

9 There were a variety of other provisions in the CARES Act that impacted individual income tax, but which did not receive much attention outside of occasional media attention. For example, see the Joint Committee on Taxation's response to US Senator's Whitehouse and Doggett on the request to analyze the distributional effect of the temporary suspension of the limitation on excess business losses for taxpayers other than corporations for tax years 2018, 2019, and 2020. April 9, 2020. Available at: https:// www.whitehouse. senate.gov/imo/media/doc/116–0849.pdf

10 Dan Casey, *Quote of the Day: Dave Barry on the Laws Congress Writes*, THE ROANOKE TIMES (Aug. 19, 2009), *https*://roanoke.com/news/local/quote–of–the–day–dave–barry–on–the–laws–congress–writes/article_a9265272–132d–5d04–8182–3ff2090cc532.html.

11 I.R.S. Notice 2020–15, I.R.B. 591.

12 For example, for payments related to tariffs and customs, the Treasury Department did not have the authority to extend deadlines on payments owed to the Treasury

change had no bearing on state tax returns.[13] As of April 15, 2020, all forty one states (including Washington D.C.) that have individual income taxes chose to extend their individual income tax deadlines.[14] While the federal change came in the form of an IRS Notice, and not the CARES Act, its impact is part and parcel of the larger tax changes that were signed by President Trump.[15]

In unusual fashion, the Treasury Department stated that any taxes owed by taxpayers on April 15, did not need to be paid to the Treasury Department by this date.[16] Instead, income tax liabilities are due on July 15, 2020.[17] This change in deadline is unique in that it actually operates as

---

Department. The President, therefore, issued an executive order. Exec. Order No. 13,916, 85 Fed. Reg. 22,951 (April 18, 2020).

13 Numerous business and tax sites have aggregated the ever–evolving state deadlines that began to change after the IRS changed the federal deadline. For example, in the author's home state of Wisconsin, the state issued proposed guidance on April 14, 2020, specifically addressing how IRS Notice 2020–18 and IRS Notice 2020–23 affect Wisconsin tax returns. WIS. DEP'T OF REVENUE, WISCONSIN TAX RETURN DUE DATES AND PAYMENTS (2020), https://www.revenue.wi.gov/Pages/TaxPro/2020/TaxDeadlinesExtendedCOVID.pdf. For a more comprehensive list of all fifty states and their changes to tax filings due to Coronavirus, see Kelly Erb, *List of State & Federal Tax Office Closings, Filing Delays & Extensions Due to Coronavirus.* FORBES (Apr. 1, 2020), https://www.forbes.com/sites/kellyphillipserb/2020/03/12/heres–what–we–know–about–extensions–other–tax–relief–due–to–coronavirus–concerns/#51f880703412.

14 New Jersey was the last state to extend their April 15 deadline to July 15 (they extended on April 14, 2020). Five of the forty–one states (including Puerto Rico) changed their April 15 individual income tax filing to a date other than July 15. Iowa extended to July 31, Hawaii extended to July 20, Idaho extended to June 15, Mississippi extended to May 15, Virginia and Puerto Rico extended to June 15. Jayme Deerwester, *Did Your State Extend the Deadline for Income Tax Returns like the IRS? Here's When 2020 Taxes are Due*, USA TODAY (May 14, 2021), https:// www.usatoday.com/story/money/taxes/2021/05/14/taxes–2021–state–income–tax–return–filing–deadline–extension/5056500001/.

15 Depending on the historical viewpoint, not all changes in deadlines result in good outcomes. *See* Joseph J. Thorndike, *When Taxpayers Are Confused About Filing, Bad Things Can Happen*, TAX NOTES (Apr. 15, 2020), https://www.taxnotes.com/tax–notes–state/tax–history/when–taxpayers–are–confused–about–filing–bad–things–can–happen/2020/04/06/2ccdt.

16 This was a distinct modification of Notice 2020–2017, which was superseded by notice 2020–18. Notice 2020–17, limited the amount of income taxes that could be deferred until July 15 to $1 million for most taxpayers and $10 million for corporations. I.R.S. Notice 2020–17, 2020–15 I.R.B. 590.

17 Note that the delayed date of the income taxes is not to be confused with the modifications made in the CARES Act in section 2302 that allowed for the deferral of employer matched payroll taxes. Because the payroll taxes were deferred (one half deferral until 12/31/2021, and one half is deferred until 12/31/2022) and not outright waived, the impact on the federal budget, per JCX 11–20, was measured to be $12.312 billion as measured over a ten–year period from tax year 2020 through 2030. For the current IRS position on employment taxes, see I.R.S., DEFERRAL OF EMPLOYMENT TAX DEPOSITS AND PAYMENTS THROUGH DECEMBER 31, 2020 (June 25, 2021), https:// www.irs.gov/

a change of filing date, and not like an extension.[18] With an income tax extension, which usually occurs when taxpayers choose to extend their tax filing date six months, all income taxes are still due on April 15. Therefore, the movement from April 15 to July 15, does not operate like an extension, but a true change of filing date.

It is worth noting that the change to the filing date may have seemed like an obvious reaction to the Coronavirus, given the lobbying efforts that occurred.[19] However, the Treasury Department's refusal to extend other due dates, like partnership tax returns, made it clear that either the Treasury Department did not fully appreciate the large number of flow–thru tax returns that needed to be filed in the midst of the coronavirus panic, or simply the Treasury Department was too overwhelmed itself to issue guidance on this topic.[20] This is evidenced by the fact that Notice 2020–18 raised as many questions as it answered for taxpayers.[21] The result was that the IRS issued a Frequently Asked Questions page.[22] While not eligible to be cited as legal authority, given the high volume of Coronavirus–related responsibilities, many taxpayers presumably will rely on this for questions like: how does the April 15 deadline change affect rules related to Individual Retirement Accounts or Health Savings

newsroom/deferral–of–employment–tax–deposits–and–payments–through–december–31–2020.

18 Businesses typically file six–month extensions of their business tax return, using IRS form 7004, effectively moving their due date to October 15. On a related issue, moving the filing date to July 15 only affects estimated payments that a company made for the first quarter. Quarter two estimated payments, oddly enough, are due *before* quarter 1 estimated payment.

19 *See* Press Release, AM. INST. OF CERTIFIED PUB. ACCTS., *AICPA Calls for Tax Filing Relief Amid Coronavirus Pandemic* (March 11, 2020), https:// www.aicpa.org/press/pressreleases/2020/aicpa–calls–for–indiv–and–business–tax–relief–amid–coronavirus–pandemic.html.

20 A good example of the IRS's inability to keep up with the volume of new regulations that it is responsible for is IRS Form 7200. Discussed elsewhere in this article, IRS Form 7200 is the new form that must be filed by employers in order to claim a qualified family leave credit, qualified paid sick leave credit, or employee retention credit. To illustrate just how overwhelmed the IRS's systems are, the form is not capable of being electronically filed. It must be faxed. In addition, on April 13, 2020, the IRS issued Temporary Procedures to fax certain Forms 1139 and 1045 due to COVID–19. *See generally* I.R.S., TEMPORARY PROCEDURES TO FAX CERTAIN FORMS 1139 AND 1045 DUE TO COVID–19 (May 5, 2021), https://www.irs.gov/newsroom/temporary–procedures–to–fax–certain–forms–1139–and–1045–due–to–covid–19.

21 Paul Bonner, *Practitioners Seek Further Clarity on Tax Filing, Payment Delay*, J. OF ACCOUNTANCY (Mar. 23, 2020), https:// www.journalofaccountancy.com/news/2020/mar/tax–practitioners–seek–clarity–filing–payment–delay–23261.html.

22 *See Filing and Payment Deadlines Questions and Answers*, I.R.S. (May 5, 2021), https://www.irs.gov/newsroom/filing–and–payment–deadlines–questions–and–answers.

Accounts,[23] or what happens if a deceased person receives a stimulus payment?[24]

Lastly, it is worth observing that the Treasury Department specifically chose to pursue a more complicated filing path than was necessary. Per the American Institute of Certified Public Accountants' (AICPA) recommendation, the simpler way to address the change in filing date would be to provide everyone an automatic 6–month extension that is typically allowed by filing an additional tax form,[25] and simply not require anyone to file such a form.[26] Of course, this extension, while in the form of the automatic six month extension practitioners are familiar with, would need to function as a true change of filing date as opposed to a 6–month extension for purposes of calculating the taxpayers' late payment penalties in order to provide the same relief Treasury provided taxpayers via Notice 2020–18. Complicating the matter further, however, is the widely held belief that many taxpayers would actually be wiser to file their tax returns as soon as possible, regardless of Notice 2020–18, because they are due a federal tax income refund.[27]

While the change in individual federal tax filing dates was not part of the CARES Act, it was changed by the Treasury Department due to the Coronavirus.[28] This change is important in three respects. First, it

---

[23] While most of the IRS guidance relating to the change in deadlines is taxpayer friendly, that does not always equate with uncomplicated tax outcomes for taxpayers. See, for example, Jonathan Curry, *CARES Act's Retirement Plan Relief Could Get Mess*, TAX NOTES (Apr. 10, 2020), https://www.taxnotes.com/featured–news/cares–acts–retirement–plan–relief–could–get–messy/2020/04/09/2cdht.

[24] This question has received attention by both the President and Secretary of Treasury. It has been the IRS position that any economic impact payment that was received accidentally should be returned to the Treasury Department. The problem with this position is twofold. First, the receipt of the payment does generate any gross income for the person and/or estate. Second, there is no claw back provision in the CARES Act that gives the Treasury Department the legal authority the ability to reclaim the money. There is only an IRS FAQ, which while instructive, does not carry the legal weight of other administrative guidance.

[25] For corporations, the IRS tax form is 7004 and for individuals that wish to extend their tax returns they must file form 4868.

[26] The downside to this approach, however, is that all taxes would have still been due by April 15, and not the extension date. That said, the Treasury Department could have also issued Notice 2020–18 and said, for purposes of 2020, all April 15 deadlines will now be treated as though the actual filing date was 6–month later. (The Treasury Department is responsible for doling out a variety of payments to taxpayers, including EIDL, PPP Loans, and stimulus payments, which would have been a counterproductive exercise.)

[27] *See* Laura Davison, *IRS Pushes Tax Date to July 15, Same as Payment Deadline*, BLOOMBERG (Mar. 20, 2020, 7:22 PM), https:// www.bloomberg.com/news/articles/ 2020–03–20/tax–filings–payment–due–date–extended–to–july–15–mnuchin–says.

[28] The Treasury Department changed a host of other administrative positions that were also taxpayer friendly. For example, Revenue Procedure 2020–20 provides more leniency under I.R.C. § 7701(b)(3) in determining "substantial presence," which in turn determines

illustrates that when the federal government needs to act as quickly as possible, oftentimes using administrative action, not legislative action, is the timeliest option.[29] Second, the timeliness of administrative action can be limited by the Treasury Department's natural deferral for legislative support as opposed to acting unilaterally, as evidenced by Treasury's failure to push back the filing date for pass–thru entities. Third, the timeliest option is not always the most comprehensive or articulate option. Treasury's failure to push back the filing date for pass–thru entities, along with the number of IRS Notices issued that supersede previous Notices are prime examples of how administrative agencies struggle to make efficient thought–out changes with a complex tax system in the midst of a crisis.

### *B. The Modified Andrew Yang Approach: Economic Impact Payments*

During the 2020 nomination process for the Democrat's nominee for president, Andrew Yang ran on a platform defined by the belief that sending checks, monthly, to US taxpayers in the amount of $1,000, was a solution to the economic problems caused by technological innovation.[30] This same idea had been used in both 2001 as part of the Bush Tax Cuts,[31] as well as 2008, when the economy was in the midst of the Great

---

when people become US residents for federal income tax purposes. I.R.S. Rev. Proc. 2020–20, 2020–20 I.R.B. 801. In essence, the guidance provides people with 60 extra days to stay in the US and not qualify as residents if they meet certain Coronavirus–related facts. In addition, the Treasury Department also issued Revenue Procedure 2020–27, which provides a waiver for certain individuals who failed to meet the eligibility requirements of I.R.C. § 911(d)(1) for the foreign earned income exclusion because adverse conditions in a foreign country precluded the individual from meeting the requirements during 2019 and 2020. I.R.S. Rev. Proc. 2020–20, 2020–27 I.R.B. 803. Under I.R.C. § 911(d)(4), the Coronavirus pandemic is an adverse condition that affected the normal conduct of business in: a) the People's Republic of China (excluding the Special Administrative Regions of Hong Kong and Macau (China)) as of December 1, 2019; and b) globally, as of February 1, 2020. *Id.*

29 Providing leniency to taxpayers is often easiest done through administrative action and can be seen in other actions by the Treasury Department. See, for example, I.R.S. Notice 2020–29, 2020–22 I.R.B. 864, which permits more flexibility for midyear elections under I.R.C § 125, cafeteria plans during calendar year 2020 for employer–sponsored health coverage, health flexible spending arrangements, and dependent care assistance programs. *See also* I.R.S. Notice 2020–33, 2020–22 I.R.B. 868, which modified IRS Notice 2013–71, to increase the carryover limit from $500 to $550 of unused amounts remaining as of the end of a plan year in a health FSA under a I.R.C. § 125 cafeteria plan.

30 There is some precedent in the United States of this concept at the state level, specifically Alaska's Permanent Fund. *See Permanent Fund Division*, ALASKA DEP'T OF REVENUE, https://pfd.alaska.gov/ (last visited Sept. 9, 2021).

31 *See* Kelly Wallace, *$1.35 trillion tax cut becomes law*, CNN (Jun. 7, 2001, 12:19 PM), https://edition.cnn.com/2001/ALLPOLITICS/06/07/bush.taxes//.

Recession.[32] The payments made in 2008 are particularly instructive because they created the legal foundation for Internal Revenue Code section 6428 that was used by the CARES Act to administer payments in 2020.[33] The credit was refundable, and taxpayers could receive advance refunds before filing their 2008 Federal income tax returns.[34] Relative to the 2008 payments, the payments made during 2020 are considerably larger. Per the Joint Committee on Taxation, the 2020 payments are estimated to cost the Treasury Department $269 billion.[35] In 2008, the payments totaled $96 billion.[36]

The economic concept of sending citizens monthly checks is known as Universal Basic Income, and has been supported by a broad spectrum of intellectuals and economists.[37] It has also been proposed by republicans in Congress.[38] Shortly after Yang dropped out of the race for the nomination, the Coronavirus swept into the United States causing

---

32 *See* Tami Luhby, *Flashback to Great Recession: The President wants to send stimulus checks to Americans*, CNN (Mar. 17, 2020, 8:55 PM), https://www.cnn.com/2020/03/17/politics/coronavirus–federal–stimulus–payments/index.html.

33 Economic Stimulus Act of 2008, Pub. L. No. 110–185, § 101, 122 Stat. 613 (2008) (repealed 2014).

34 The credit was the sum of two components, a basic component and a qualifying child component. Eligible individuals were allowed a basic component equal to the greater of net income tax liability, not to exceed $600 ($1,200 in the case of a joint return), or $300 ($600 in the case of a joint return) if the eligible individual had (1) qualifying income of at least $3,000 or (2) a net income tax liability of at least $1 and gross income greater than the sum of the applicable basic standard deduction amount and one personal exemption (two personal exemptions for a joint return).

35 J. COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF PROVISIONS CONTAINED IN AN AMENDMENT TO THE CARES ACT, JCX–11–20 (2020), https://go.usa.gov/xvZ5Z.

36 Treasury Inspector General for Tax Administration, *Evaluation of the Planning, Computation, and Issuance of the Recovery Rebate Credit* (Sept. 9, 2009), https://www.treasury.gov/tigta/auditreports/2009reports/200940129fr.pdf.

37 *See* Noah J. Gordon, *The Conservative Case for a Guaranteed Basic Income*, THE ATLANTIC (Aug. 6, 2014), https://www.theatlantic.com/politics/archive/2014/08/why–arent–reformicons–pushing–a–guaranteed–basic–income/375600/.

38 U.S. Senator Josh Hawley proposed a temporary universal basic income through The Emergency Family Relief Act of 2020. *See* S. 3516 116th Cong. (2020), https://www.congress.gov/bill/116th–congress/senate–bill/3516. In general, the proposal would do the following: provide families experiencing school closures or financial hardship a fully refundable monthly benefit lasting through the coronavirus emergency to make it through this crisis unscathed. The benefit matches the IRS's monthly standards for household expenses: $1,446 for a family of three, or $1,786 for a family of four, or $2,206 for a family of five. In addition, it would guarantee timely benefit delivery every month during this emergency by building on existing federal payment and verification infrastructure run by the Treasury Department and expedited applications utilizing past tax return data for prior filers. Lastly, it would provide its full benefit to all single parents making less than $50,000 and to all married parents making less than $100,000 before phasing down the credit value. Proposed law available at: https:// www.hawley.senate.gov/sites/default/files/2020–03/Emergency–Family–Relief–Act.pdf.

significant economic damage.[39] Piggybacking off Andrew Yang's proposed $1,000 monthly checks,[40] Congress took a different approach with the Coronavirus than it did in previous economic collapses. The term used by the Treasury Department is Economic Impact Payments,[41] other sources, however, have called the payments by a variety of different names.[42] As the Wall St. Journal described it, the Coronavirus approach was simple: Spend Generously, Take Care of Workers.[43]

While Andrew Yang's perpetual $1,000 checks were not adopted, his economic framework did help shape the White House's perspective on the impact of distributing money directly to taxpayers.[44] In effect, the CARES Act set out to pay $1,200 to each eligible individual ($2,400 if married filing joint), and $500 in addition for children age 17 and under.[45] An eligible individual is any individual other than: (1) a nonresident alien; (2) an estate or trust; or (3) a dependent.[46] The amount of the payment is phased out at a rate of five percent of AGI above certain income levels.[47] The starting point of this phase out is $150,000 of Adjusted Gross Income (AGI) for joint filers, $112,500 of AGI for head of household filers, and $75,000 of AGI for all other filers. At the time of this writing, the Treasury

---

39 Andrew Yang dropped out of the Democratic race on February 11, 2020, approximately one month before states started issuing stay at home orders to their residents. He would later run unsuccessfully for mayor of New York City.

40 These became known as Freedom Dividends. *See* Andrew Yang, *Policy: The Freedom Dividend*, YANG2020, (2020), https://2020.yang2020.com/policies/the–freedom–dividend/.

41 I.R.S. News Release IR–2020–61 (Mar. 30, 2020).

42 As discussed by the Tax Policy Center, the names of the payments have varied depending on the medium. According to the language of the CARES Act, the payments are "recovery rebates." The media call them "stimulus checks," or "stimulus payments," or "coronavirus stimulus." The IRS calls them "economic impact payments." When the checks arrive in individual checking accounts they are called "IRS Treas. 310." Janet Holtzblatt, *What Should We Call Those COVID–19 Recovery Rebates?*, TAX POLICY CTR. (Apr. 22, 2020), https://www.taxpolicycenter.org/taxvox/what–should–we–call–those–covid–19–recovery–rebates.

43 Greg Ip & Jacob M. Schlesinger, *Spend Generously, Take Care of Workers: Coronavirus Stimulus Takes Lessons From TARP*. WALL ST. J. (Mar. 26, 2020), https://www.wsj.com/articles/spend-generously-take-care-of-workers-coronavirus-stimulus-takes-lessons-from-tarp-11585246787.

44 *See* Veronica Stracqualursi, '*Freedom Dividend' Champion Yang Says His Team Is in Touch with White House Over Stimulus Plans*, CNN (Mar 17, 2020), https://www.cnn.com/2020/03/17/politics/andrew–yang–trump–stimulus–coronavirus–cnntv/index.html.

45 CARES Act, Pub.L. 116–36, § 6428(a), 134 Stat. 281, 335 (codified at 26 U.S.C. § 6428).

46 *Id.* at 6428(d).

47 *Id.* at 6428(c).

Department had just recently posted guidance regarding phase outs, effect of having children, etc.[48]

It is currently difficult to know what impact the $1,200 checks will have on the economy, in light of staggering uncertainty and unemployment.[49] It is also difficult to know which future proposals Congress will adopt in the myriad of private sector recommendations.[50] That said, checks to individual taxpayers will be one of the hallmark pieces of tax legislation associated with the Coronavirus.[51] Unique in both approach and amount, the first conclusion we can draw from the Coronavirus is that when a pandemic strikes, Congress agrees, on a bipartisan basis, that individual lower and middle income taxpayers are one of main priorities. This is in contrast to many of the criticisms of the

---

[48] Treasury Department's guidance on the Economic Impact payments changed frequently in the early months, in particular as it related to taxpayers that do not have tax return filing requirements, for example, citizens that only receive social security and some military veterans. Much of this guidance culminated in Revenue Procedure 2020–28, which addressed the addition of section 6428 to the Internal Revenue Code. The precedent for this I.R.S. Procedure was set forth in I.R.S. Notice 2008–28, which created a mechanism for individuals that traditionally did not have tax filing obligations, to file an income tax return to receive an advance refund amount. These taxpayers were required to file a Form 1040A.

[49] *See* Eric Morath, Jon Hilsenrath & Sarah Chaney, *Record Rise in Unemployment Claims Halts Historic Run of Job Growth*. WALL ST. J. (Mar. 26, 2020), https://www.wsj.com/articles/the–long–run–of–american–job–growth–has–ended–11585215000.

[50] See, for example, a letter written to Congress by the AICPA on proposals to modify the Internal Revenue Code that would help the economy recover after the Coronavirus. The recommendations include: repeal the alternative minimum tax, repeal the limit on business deductions for state and local taxes, repeal syndicate rules, remove strict requirements on home office deductions, expand definition of property that can be depreciated under I.R.C. section 179, increase limit on organizational expense deductions under I.R.C. sections 195, 248, and 709, increase the amount of self–employment contributions threshold, exempt small business from I.R.C. section 461(l), modify small business employee benefit plan rules, expand scope of I.R.C. section 199A, remove uncertainty of continually expiring tax provisions, implement a mobile workforce statute. Letter from Christopher W. Hesse, Chair of AICPA Tax Executive Committee, to Chairman and Ranking Members of the Senate Comm. on Fin. And House Ways and Means Comm. (May 7, 2020), https://www.journalofaccountancy.com/content/dam/jofa/news/aicpa–support–letter–covid–19.pdf.

[51] Over time the program may be known for some of the odd outcomes the CARES Act produced with respect for individual payments, including, for example, payments that were made to U.S. residents who were dead. See, Janet Holtzblatt, *Are Dead People Eligible For Coronavirus Recovery Rebates?* TAX POLICY CTR. (Apr. 27, 2020), https://www.taxpolicycenter.org/taxvox/are–dead–people–eligible–coronavirus–recovery–rebates.

TCJA.[52] A deeper dive into the CARES Act, however, also reveals what other tax priorities Congress focused on. As one might suspect, many of them focused on businesses rather than individuals.

### *C. Payroll Protection Program*

Created under Section 1102 of the CARES Act,[53] the Payroll Protection Program (PPP) was included in the CARES Act as a way for the federal government to encourage employers to maintain current employees, in the face of low revenue, high expenses,[54] and historically high unemployment claims.[55] While the PPP is not an express change in tax policy, its impact on businesses and individual taxpayers is so substantial, and tangential in many ways to tax policy, that it must be considered one of Congress's core priorities during a time of crisis.[56] The general idea of the PPP was that the federal government would subsidize

---

52 Howard Gleckman, *A New Congressional Study Finds Little Economic Benefit from the 2017 Tax Cuts*, TAX POLICY CTR. (May 29, 2019), https:// www.taxpolicycenter.org/ taxvox/new–congressional–study–finds–little–economic–benefit–2017–tax–cuts.

53 CARES Act, Pub. L. 116–36, § 1102, 134 Stat. 281.

54 Expenses are always subject to some interpretation, and in the case of the hospitals, it appears that some of their protective gear is eligible to be classified as inventory, thus reducing the size of financial accounting losses that would have occurred had the gear been considered an expense. *See* Mark Maurer, *Inventory or Expense: Coronavirus Pushes Mayo Clinic to Revisit Its Accounting Practices*, WALL ST. J. (May 11, 2020), https://www.wsj.com/articles/inventory–or–expense–coronavirus–pushes–mayo–clinic–to–revisit–its–accounting–practices–11589241631?mod=djemCFO

55 Sarah Chaney & Eric Morath, *Record 6.6 Million Americans Sought Unemployment Benefits Last Week*, WALL STREET JOURNAL (Apr. 2, 2020), https:// www.wsj.com/articles/another–3–1–million–americans–likely–sought–unemployment–benefits–last–week–11585819800.

56 There was a myriad of other employer–related benefits besides the PPP, including a number of credits that could be claimed by filing I.R.S. Form 7200 Advance Payment of Employer Credits Due to COVID–19. The credits that were eligible to be claimed on I.R.S. Form 7200 included Qualified Family Leave, Qualified Paid Sick Leave, and Employee Retention. These credits did not come without their own controversy and misinterpretations. For example, on May 7, 2020 a letter was sent by U.S. Senator Charles Grassley and House Representative Richard Neal to the Treasury Department addressing two Frequently Asked Questions (FAQs) issued by the Treasury Department that were focused on the Employer Retention Tax Credit (ERTC). *See* Grassley, *supra* note 50. The letter asks the Treasury Department to reconsider their conclusion on whether employers are eligible for the ERTC in the event employers furlough employees but maintain paying benefits like health care insurance. *Id.* at 5. Treasury has concluded that employers were not eligible for the credit, while several Congressman believe that this interpretation is not consistent with congressional intent. Letter from Chuck Grassley, Chairman, Senate Comm. on Fin., Richard E. Neal, Chairman, House Comm. on Ways and Means, and Ron Wyden, Ranking Member, Senate Comm. on Fin. to Steven T. Mnuchin, Sec'y, Dep't of Treasury (May 4, 2020), https://www.finance.senate.gov/imo/media/doc/050420 %20Letter%20to%20Treasury%20on%20ERTC%20health%20benefits.pdf.

"payroll" costs of businesses for 8 weeks while the peaks of the coronavirus would subside.[57] Other countries, like Norway, took some similar and some different approaches.[58] In fact, it was the actions of other countries that spurred proposed changes by the House of Representatives in HR 7010, which would allow the PPP funds to be spent on a broader range of services (i.e. interest expense) and over a period greater than 8 weeks.[59] Nevertheless, the definition of "payroll" costs,[60] remained a topic

---

57 Taylor LaJoie, *Understanding the Paycheck Protection Program in the CARES Act*, TAX FOUND. (Apr. 2, 2020), https://taxfoundation.org/sba–paycheck–protection–program–cares–act/.

58 *See* Peter S. Goodman, *The Nordic Way to Economic Rescue*, N.Y. TIMES (Mar. 28, 2020), https://www.nytimes.com/2020/03/28/business/nordic–way–economic–rescue–virus.html. *See also* Daniel Bunn, *Norway Opens the Fiscal Toolbox*, TAX FOUND., (Mar. 24, 2020), https://taxfoundation.org/norway–coronavirus–relief–wealth–tax–vat/. Note also that Norway's policies come amidst a larger EU effort to reduce targeted tax policy on medical devices. See, Jan Strupczewski. *EU waives customs duties, VAT on imports of medical equipment*, REUTERS (Apr. 3, 2020), https://www.reuters.com/article/us–health–coronavirus–eu–customs/eu–waives–customs–duties–vat–on–imports–of–medical–equipment–idUSKBN21L1TD.

59 Paycheck Protection Program Flexibility Act, Pub. L. No. 116–142, § 3(b)(3), 134 Stat. 641–642 (2020). PPPFA also included provisions that allowed more of the funds to be spent on non–payroll expenses by reducing the administratively created 75% threshold to 60%. Upon passage by Congress, however, technical glitches with the bill were almost immediately identified, including the "cliff effect" of the 60% cutoff. For example, if a business owner were to spend 59% of the funds on payroll costs, instead of receiving a partial loan forgiveness of the PPP, the entire loan would become unforgivable, thus causing full repayment by the taxpayer. Also notable was the omission of any language addressing Notice 2020–32, which contrary to the express opinion of the PPP law writers (Senators Charles Grassley and Ron Wyden), denies ordinary and necessary deductions for salaries paid with PPP funds.

60 CARES Act, Pub. L. No. 116–136, § 1102(a)(1)(A)(viii), 134 Stat. 281, 287 (2020) defines payroll costs to include: ''salary, wage, commission, or similar compensation, payment of cash tip or equivalent; payment for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for the provisions of group health care benefits, including insurance premiums; payment of any retirement benefit; or payment of State or local tax assessed on the compensation of employees; and the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self–employment, or similar compensation and that is in an amount that is not more than $100,000 in 1 year, as prorated for the covered period." Payroll costs do not include: "the compensation of an individual employee in excess of an annual salary of $100,000, as prorated for the covered period; taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period; any compensation of an employee whose principal place of residence is outside of the United States; wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act; or qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act. Families First Coronavirus Response Act, Pub. L. No. 116–127 §§ 7001, 7003, 178, 210–17.

under significant debate during the early phases of the program.[61] The initial funding of the PPP was also an issue of significant concern early in the application process.[62] The concern was large enough that it sparked Congress to almost immediately request additional funding.[63]

Outside of the funding mechanism, there were a number of other attributes that made the PPP unique. First, unlike the stimulus payments made directly to individual US citizens, the PPP is administered by the two different third parties.[64] One of the parties is the Small Business Association (SBA), the other is privately run or publicly–held banks.[65]

---

61 See the Interim Final Rule Treasury issued under the Business Loan Program Temporary Changes; Paycheck Protection Program, SBA No. 2020–0015 (Apr. 15, 2020). After substantial confusion created by the interim final rule, the SBA then promulgated an 18–point FAQ, which further defined a number of definitions including payroll costs and affiliation rules. *See* I.R.S., *Paycheck Protection Program Loans Frequently Asked Questions (FAQs)*, INTERNAL REVENUE SERVICE (July 29, 2021), https://home.treasury.gov/system/files/136/Paycheck–Protection–Program–Frequently–Asked–Questions.pdf.

62 *See generally* Ruth Simon & Peter Rudegeair, *Big Banks Favor Certain Customers in $350 Billion Small–Business Loan Program*. WALL ST. J. (Apr. 6, 2020), https://www.wsj.com/articles/big–banks–favor–certain–customers–in–350–billion–small–business–loan–program–11586174401.

63 *See* Emily Cochrane & Jim Tankersley, *With Demand Soaring, Congress Weighs Adding $250 Billion in Small–Business Aid*, N.Y. TIMES (Apr. 7, 2020), https://www.nytimes.com/2020/04/07/us/politics/coronavirus–congress–small–businesses.html.

64 In some circumstances, employers used agents to help compute payroll costs. These agents were typically either accountants or lawyers.

65 CARES Act, Pub. L. 116–136, § 1114, 134 Stat. 281, 312 (2020) (codified at 15 U.S.C. § 9012) authorized the Small Business Association to issue regulations to implement the PPP without regard to notice requirements, and this is precisely what the SBA did. Within one month of the passage of the CARES Act, the SBA issued nine Interim Final Rules. The first (Initial Rule) Interim Final Rule, addressed fundamental questions about the PPP, including definitions and calculations. *See* Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20811–20817 (April 15, 2020) (to be codified at 13 C.F.R. pt. 120). The second Interim Final Rule. The second Interim Final Rule supplements the Initial Rule with additional guidance regarding the application of certain affiliate rules applicable to SBA's implementation of sections 1102 and 1106 of the Act and requests public comment. *Id.* at 20817–21. The third Interim Final Rule supplements the First Interim Final Rule with guidance for individuals with self–employment income who file a Form 1040, Schedule C. Business Loan Program Temporary Changes; Paycheck Protection Program—Additional Eligibility Criteria and Requirements for Certain Pledges of Loans, 85 Fed. Reg. 21747, 21748 (April 20, 2020) (to be codified at 13 C.F.R. pt. 120). The fourth Interim Final Rule supplements the third Interim Final Rule and provides a series of questions and answers. Business Loan Program Temporary Changes; Paycheck Protection Program–Requirements–Promissory Notes, Authorizations, Affiliation, and Eligibility, 85 Fed. Reg. 23450, 23450–52 (April 28, 2020) (to be codified at 13 C.F.R. pt. 120–121). The fifth Interim Final Rule authorizes all lenders eligible to originate loans under the PPP to use an alternative criterion for calculating the maximum loan amount for PPP loans issued to seasonal employers. Small Business Administration Business Loan Program Temporary Changes; Paycheck Protection

Because of the requirement to use a bank that was affiliated with the SBA, and because the PPP is designed to operate principally as a loan first, with the right of future forgiveness to the extent the funds were used for a pre–selected set of costs, the federal government chose to administer the program in a truly public–private partnership.[66]

Second, the PPP is also unique in that upon loan forgiveness, the individual business who received the loan is not required to recognize any gross income under Internal Revenue Code 61(a)(11).[67] However, to the extent that at least 75% of the payroll costs are not spent on payroll, the PPP will not be forgiven and must be repaid to the SBA.[68] As the PPP has been implemented, the 75% cutoff has drawn criticism from business and congress alike.[69] Criticism aside, loan forgiveness is an extraordinary exception set forth by the CARES Act. Internal Revenue Code section 61(a)(11) is generally construed as a broad provision, and its exceptions located in Internal Revenue Code section 108 have historically been

Program—Additional Criterion for Seasonal Employers, 85 Fed. Reg. 23917, 23918 (April 30, 2020) (to be codified at 13 C.F.R. pt. 120). The seventh Interim Final Rule provides rules that limit the total amount of PPP to related legal entities to $20 million. Treasury issued an Interim Final Rule under Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Corporate Groups and Non–Bank and Non–Insured Depository Institution Lenders, SBA No. 2020–0023 (May 4, 2020). The eighth and ninth Interim Final Rules were promulgated on May 22, 2020 and focused on the how borrowers should apply for loan forgiveness.

66 The general practice is for businesses to apply for the PPP through their own bank. Their bank would then complete applications administered by the SBA and funded by the Treasury Department.

67 CARES Act, Pub. L. No. 116–136, § 1106(i), 134 Stat. 281, 301 (2020) (codified at 15 U.S.C. 9005). Interestingly, unlike other provisions of the CARES Act, for example relating to net operating losses (where the CARES Act directly modified the Internal Revenue Code), the Internal Revenue Code section that relates to exceptions of gross income related to discharge of indebtedness, section 108, was not directly modified. Instead, Section 1106(i) simply creates a new rule that directly affects the Internal Revenue Code.

68 This point brings up two different issues. First, the 75% threshold is not listed anywhere in the CARES Act, instead it is a strictly administrative rule. Second, the 75% rule is not as straight forward as it appears, and in some circumstance, is causing business owners significant problems in spending the PPP funds. See, Stacy Cowley, Emily Flitter *and* David Enrich, *Some Small Businesses That Got Aid Fear the Rules Too Much to Spend It*, NEW YORK TIMES (May 2, 2020), https:// www.nytimes.com/ 2020/05/02/business/economy/loans–coronavirus–small–business.html.

69 See, for example, the letter sent from nineteen U.S. senators demanding that the Treasury Department consider being more lenient on the 75% threshold, as well as overall forgiveness. In particular, businesses with high overhead and operational expenses, like restaurants, which have been hit the hardest by the Coronavirus, have struggles to meet Treasury Department's guidelines. Letter from John Cornyn, Sen., U.S. Senate, ET. AL, to Steven Mnuchin, Sec'y, U.S. Treasury Dep't, and Jovita Carranza, Adm'r, Small Bus. Admin. (May 5, 2020), https:// www.cornyn.senate.gov/sites/default/files/PPP%20 forgiveness%20letter_final_.pdf.

narrowly construed to the black letter of the law.[70] Given the amount of legislation that was likely accidentally left out of the CARES Act, for Congress to include an on–point provision addressing the debt forgiveness shows how important Congress believes the tax policy behind the PPP is.[71] Given the importance of the loan forgiveness aspect, it should come as no surprise that practitioners have compiled extensive questions regarding how to actually achieve the forgiveness from a compliance perspective.[72]

Third, the PPP is unique in that it has no pre–screening mechanism for companies that actually *need* the funds, compared to companies that could theoretically use the funds, but are not actually in a worse financial situation due to the coronavirus.[73] To–date, the only screening mechanism is a question on the PPP application that requires companies to certify that, "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."[74] With almost 29% of the nation's businesses considered idle, it is reasonable to believe that almost any business could certify that its operations are uncertain.[75] The

[70] One cautionary story of how narrow I.R.C. § 108 has been constructed is the story behind President Trump issuing a directive to cancel the student loans of 25,000 wounded veterans. While in theory this should have been a simple modification to I.R.C. § 108, because so many federal agencies were involved, including the Internal Revenue Service and Department of Education, President Trump's last resort was to sign a directive to all 53 states and territories requiring that the cancellation of the veterans' student loans not be considered gross income. See, Neil Vigdor, *Trump Orders Student Loan Forgiveness for Disabled Veterans*, N.Y. TIMES (Aug. 21, 2019), https:// www.nytimes.com/2019/08/21/us/trump–veterans–student–loans.html.

[71] The omissions and mistakes of the CARES Act will continually be spotted for the foreseeable future, for example, it was widely known that many lobbyists were not happy with omissions in the CARES Act that needed to address the New North American Trade Deal. See, *What's in the $2 Trillion Senate Coronavirus Bill*, WALL ST. J. (Mar. 26, 2020), https://www.wsj.com/articles/whats–in–the–2–trillion–senate–coronavirus–bill–11585185450.

[72] Press Release, AICPA, AICPA Recommendations PPP Application and Forgiveness Processes (Apr. 28, 2020), https:// www.aicpa.org/content/dam/aicpa/press/pressreleases/2020/aicpa–ppp–recommendations–letter.pdf.

[73] At the time the initial $350 billion of SBA funds were approaching exhaustion, the SBA reported that construction companies were the largest recipient accounting for about 14% of funds, followed by the professional, scientific and technical services category. The accommodation and food services industries received 9.2% of the funds; while retail received 8.6% of funds. See, Anthony DeBarros & Yuka Hayashi, *Where the Stimulus Loans for Small Businesses Are Going*, WALL ST. J. (Apr. 15, 2020), https:// www.wsj.com/articles/small–business–loans–by–the–numbers–11586975871.

[74] SMALL BUS. ADMIN., PAYCHECK PROTECTION PROGRAM BORROWER APPLICATION FORM (2020), https://www.sba.gov/document/sba–form–2483–ppp–first–draw–borrower–application–form.

[75] Josh Mitchell, *State Shutdowns Have Taken at Least a Quarter of U.S. Economy Offline*, WALL ST. J. (Apr. 5, 2020), https://www.wsj.com/articles/state–coronavirus–shutdowns–have–taken–29–of–u–s–economy–offline–11586079001.

economic damage for some companies has been so devastating that they closed for good.[76] That said, given the public disclosures some companies made about receiving the PPP funds, it turned out that a number of publicly traded companies either did not need the money, or had recently engaged in illegal accounting practices.[77] There are, of course, some exceptions like grocery stores.[78] Banks have also seen an astronomical rise in lending demands between programs like the PPP and the Federal Reserve's ability to drive down interest rates, and as a consequence, create a rush of homeowners to refinance their mortgages.[79] These exceptions aside, it is difficult to envision a large swath of US businesses not needing the money as soon as possible, or at a minimum, attempting to excuse performance in a contract through a force majeure provision,[80] or even perhaps through

[76] Ruth Simon, *For These Companies, Stimulus Was No Solution 'We Decided to Cut Our Losses*', WALL ST. J. (Apr. 15, 2020), https://www.wsj.com/articles/we–decided–to–cut–our–losses–why–some–small–firms–are–shutting–down–11586943002?mod=article_inline.

[77] See, for example, MiMedX, a biopharmaceutical company that, only months before receiving PPP, settled with the SEC for charges on accounting fraud. Press Release, MiMedx, MiMedx Announces Additional Access to Capital and Financing, (Apr. 21, 2020), https://mimedx.gcs–web.com/news–releases/news–release–details/mimedx–announces–additional–access–capital–and–financing. *See also* Press Release, MiMedX, MiMedX Announces Seecurities and Exchange Commission Settlement (Nov. 26, 2019), https://mimedx.gcs–web.com/news–releases/news–release–details/mimedx–announces–securities–and–exchange–commission–settlement.

[78] Tunku Varadarajan, *A Coronavirus Bull Market for Groceries*, WALL ST. J. (Apr. 3, 2020), https://www.wsj.com/articles/a–coronavirus–bull–market–for–groceries–11585937507. The entire food chain supply, however, is a more complicated picture. Analysis shows that prices and demand have dried up in a variety of tangential industries like farming and meat packing. *See* Jesse Newman & Jacob Bunge, *Farmers Dump Milk, Break Eggs as Coronavirus Restaurant Closings Destroy Demand*, WALL ST. J. (Apr. 9, 2020), https://www.wsj.com/articles/farmers–deal–with–glut–of–food–as–coronavirus–closes–restaurants–11586439722?mod=article_inline.

[79] *See* Anna Bahney, *What Will a 0% Interest Rate Mean for Mortgages?* CNN BUSINESS (Mar. 16, 2020, 6:55 PM), https://www.cnn.com/2020/03/16/success/mortgage–rate–fed–cut/index.html. The Federal Reserve is not the only central bank that addressed interest rates. In Europe, where Spain and Italy are experiencing the worst economic depression since World War II, the European Central Bank underwent a historic bond buying program. Tom Fairless, *As Europe's Economy Founders, ECB Signals Readiness to Act*, WALL ST. J. (May 1, 2020), https://www.wsj.com/articles/as–europes–economy–founders–ecb–signals–readiness–to–act–11588345368?mod=djemCFO.

[80] Black's Law Dictionary states that Force Majeure "is meant to protect the parties in the event that a contract cannot be performed due to causes which are outside the control of the parties and could not be avoided by exercise of due care." For a brief explanation of the applicable case history on Force Majeure, see David J. Marmins, *Is the Coronavirus a Force Majeure that Excuses Performance of a Contract?*, A.B.A. (Mar. 19, 2020), https://www.americanbar.org/groups/litigation/committees/real–estate–condemnation–trust/articles/2020/winter2020–coronavirus–force–majeure–clauses–

the use of frustration.[81] By putting in place a burdensome screening requirement, the government would have fundamentally undermined its own main objective: get money into the hands of employees immediately.

Fourth, the payroll deductions that companies would normally receive under Internal Revenue Code section 162 are not deductible to the extent that the funds used for payroll were part of the PPP.[82] This was the administrative rule, under IRS Notice 2020–32, set forth by the IRS On April 30, 2020, almost one month after the PPP was authorized by Congress.[83] For many practitioners this IRS position comes as a surprise, namely because the CARES Act specifically states that PPP, if forgiven, does not generate taxable income.[84] The fact that Congress specifically expressed its view on the tax consequences of the forgiveness, but was silent on the deductibility, made the issue ripe for administrative guidance.

In providing the guidance, the IRS relied heavily on Internal Revenue Code section 265, which disallows taxpayers from taking a double tax benefit, for example, deducting expenses where there is corresponding tax exempt income.[85] From a practitioner perspective, there is some disagreement about if the PPP is considered tax exempt income, particularly because the plain language of the CARES Act does not use the term "tax exempt", but instead uses the term "excluded from gross income."[86] Nevertheless, the case law appears to support the IRS's position. In *Christian*, a school teacher was denied deductions for expenses incurred for a literary research trip to England because the expenses were allocable to a tax–exempt gift and fellowship grant.[87] In *Banks*, certain educational expenses paid by the Veterans' Administration

---

real–estate–contracts/. For an example of how businesses have historically claimed force majeure in contract law in times of pandemics, see Northwest Airlines use of force majeure during the 2003 SARS outbreak. Interestingly enough, Northwest Airlines claimed force majeure three times over an 18–month period, which included the September 11, 2001 terrorists attacks. Micheline Maynard, *Citing SARS, Northwest Invokes Clause to Allow Layoffs*, N.Y. TIMES (May 9, 2003), https://www.nytimes.com/2003/05/09/business/citing–sars–northwest–invokes–clause–to–allow–layoffs.html.

81 Black's Law Dictionary defines contract frustration as "a court–created doctrine under which a party to a contract will be relieved of his or her duty to perform when the objective purpose for performance no longer exists (due to reasons beyond that party's control)." The last time the world saw a virus similar to the coronavirus was in 2003 with SARS. Following that epidemic, the Hong Kong District Court held that a 10–day period, where a property was uninhabited, did not frustrate the two–year term of the tenancy agreement. Li Ching Wing v. Xuan Yi Xiong, [2004], 1 HKLRD 754, (D.C.) (H.K.).

82 I.R.S. Notice 2020–32, 2020–21 I.R.B. 837.

83 *Id.*

84 CARES Act, Pub. L. No. 116–136, § 1106(i), 134 Stat. 281, 301 (2020) (codified at 15 U.S.C. § 9005).

85 *See* Treas. Reg. § 1.265–1 (2001).

86 CARES Act, § 1106(i).

87 Christian v. United States, 201 F. Supp. 155, 156 (E.D. La. 1962).

that were exempt from income tax, were not deductible.[88] In *Heffelfinger*, Canadian income taxes on income exempt from U.S. tax are not deductible in computing U.S. taxable income.[89] This position was further supported by IRS Revenue Ruling. 74–140.[90]

From an employer perspective, IRS Notice 2020–32 was a disappointing outcome. For almost a month after the CARES Act became law, many employers received guidance that they would, in fact, be receiving a much–needed double tax benefit. Of course, even if the PPP was not considered forgiven under Treasury guidance, it is presumed that the payroll expenses incurred by the company that received PPP would be fully deductible, and this would create almost a wash from a taxable income perspective.

Fortunately for taxpayers, members of Congress openly disagreed with Notice 2020–32 and sent Secretary Steven Mnuchin a letter explaining how they believe the Treasury Department misinterpreted the congressional intent of CARES Act.[91] Specifically, the letter states that they "did not intend to deny the deductibility of ordinary and necessary business expenses, nor did these small businesses expect to lose deductions for their business expenses when they applied for a PPP loan." The letter goes on to argue:

> Providing assistance to small businesses, only to disallow their business deductions as provided in Notice 2020–32, reverses the benefit that Congress specifically granted by exempting PPP loan forgiveness from income. This interpretation means that whatever income a small business is able to produce will be taxed on a gross basis to the extent of the loan forgiveness, leaving substantially less after–tax capital for the swift economic recovery we hope is on the horizon. Section 1106(i) was specifically included in the CARES Act to exclude from income loan forgiveness, which would otherwise be taxable, to provide a tax benefit to small businesses that received the

---

88 Banks v. Commissioner, 17 T.C. 1386, 1392–93 (1952).

89 Heffelfinger v. Commissioner, 5 T.C. 985, 991 (1945).

90 Rev. Rul. 74–140, 1974–1 C.B. 50, which stated that the portion of a state income tax paid by a taxpayer that is allocable to the cost–of–living allowance, a class of income wholly exempt under § 912, is nondeductible under § 265.

91 Letter from Chuck Grassley, Chairman, Sen. Comm. on Fin., Richard E. Neal, Chairman, House Comm. on Ways and Means, and Ron Wyden, Ranking Member, Sen. Comm. on Fin., to Steven T. Mnuchin, Sec'y of the Treasury, Dep't of Treasury (May 5, 2020), https://www.finance.senate.gov/imo/media/doc/2020–05–05%20CEG,%20RW,%20RN%20to%20Treasury%20(PPP%20Business%20Deductions).pdf?mod=article_inline.

> PPP loan. Had we intended to provide neutral tax treatment for loan forgiveness, Section 1106(i) would not have been necessary. In that case, loan forgiveness generally would have been added to the borrower's taxable income, and the expenses covered by the PPP loan would be deductible, reducing taxable income by an offsetting amount and resulting in no additional net income. Notice 2020–32 effectively renders Section 1106(i) meaningless. That, clearly, is contrary to the intent of Section 1106(i) and the CARES Act more generally.

The letter sent by the congressmen then goes to make an additional argument targeted at Internal Revenue Code section 265. It is here, where practitioners tend to disagree. In general, Internal Revenue Code section 265 is commonly used to prevent taxpayers from claiming a double benefit, i.e. not allowing deductions based on gross income that was excluded from taxpayers. The letter argues the following:

> In addition to disregarding congressional intent, we believe Notice 2020–32 is flawed in its analysis of the applicability of Section 265(a) of the Internal Revenue Code. Section 265(a)(1) applies to deny a deduction only if the deduction is allocable to a class of income that is "wholly exempt from the taxes imposed by this subtitle [of the Internal Revenue Code]." In this case, the deduction is not allocable to the exempt income resulting from the forgiven loan. The deductions for expenses that make a borrower eligible for loan forgiveness are attributable to the conduct of its business. Accordingly, they are properly allocable to the income produced by the business, not to the PPP loan forgiveness. Moreover, the loan forgiveness is not a class of income that is "wholly exempt from the taxes imposed by this subtitle." The loan may or may not be forgiven, and the amount of the forgiveness is limited by a number of factors. Therefore, even putting aside clear congressional intent, we believe Section 265(a) should not be read to deny ordinary and necessary business deductions in this case.

To make the issue even more complicated, it appears that the logic in the letter sent to Secretary Mnuchin is also consistent with non–partisan scorekeeper of Congress, the Joint Committee on Taxation (JCT). Per JCX–12R–20, the JCT explained the provisions of the CARES Act, and their interpretation of Congressional intent.[92] In this nearly 120–page document, nowhere does it agree with Notice 2020–32. This is evidenced by the fact that had the JCT anticipated disallowing over $600 billion in payroll deductions, their description of the CARES Act would have taken this revenue generating position into account.

Given this complexity in administrative rulings,[93] as well as issues relating to the PPP website crashing,[94] it would come as little surprise if some employers opted out of PPP, and instead directed their employees to collect unemployment insurance, which due to the CARES Act, provided for $600 of weekly extra federal money in addition to any applicable state unemployment amount.[95] Going this route would absolve the employer from going through the messy process of applying for PPP, applying for forgiveness, and correctly applying the deduction, or deduction disallowance, rules.[96]

The confusion did not only exist between employers and government agencies. There was also considerable concern raised among lawyers and accountants who often acted as agents under the PPP. The primary concern of agents was whether they could be paid for helping employers file their PPP application. The SBA Interim Final Rule stated:[97]

---

92 JOINT COMM. ON TAX'N, DESCRIPTION OF THE TAX PROVISIONS OF PUBLIC LAW 116–136, THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ("CARES") ACT, JCX–12R–20, (2020).

93 *See* Ruth Simon & Peter Rudegeair, *PPP Changes Trip Up Small Businesses*, WALL ST. J. (May 12, 2020), https://www.wsj.com/articles/paycheck–protection–program–changes–trip–up–small–businesses–11589288403?mod=hp_lead_pos7.

94 Danielle Kurtzleben, *Small Business Loans Site Crashes on First Day of Reopening*, NPR (Apr. 27, 2020, 2:09 PM), https://www.npr.org/sections/coronavirus–live–updates/2020/04/27/846197794/small–business–loans–site–crashes–on–1st–day–of–reopening.

95 This viewpoint is bolstered by the fact that when employees take into account both the unemployment money in their state, as well as the extra $600 per week in the CARES ACT, almost one–half of workers in the country would earn more money by staying on unemployment than they would if they returned to work. This math is also complicated by the fact that many states were flooded with unemployment claims and receiving the money was delayed. Even taking into account the delay, many employees still find the math favorable to stay on unemployment instead of going back to work and receiving PPP money. Eric Morath, *Coronavirus Relief Often Pays Workers More Than Work*, WALL ST. J. (Apr. 28, 2020), https://www.wsj.com/articles/coronavirus–relief–often–pays–workers–more–than–work11588066200?mod=searchresults&page=1&pos=4&mod=article_inline.

96 The Treasury Department and SBA are not the only two federal organizations that have issued PPP guidance. See for example, Financial Crimes Enforcement Network, which is overseen by the Treasury Department, but provides rules related to money laundering, among other things. FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, PAYCHECK PROTECTION PROGRAM FREQUENTLY ASKED QUESTIONS (FAQS) (2020), https://www.fincen.gov/sites/default/files/2020–04/Paycheck_Protection_Program_FAQs.pdf.

97 Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811, 20816 (Apr. 15, 2020) (to be codified at 13 C.F.R. pt. 120).

> Agent fees will be paid by the lender out of the fees the lender receives from SBA. Agents may not collect fees from the borrower or be paid out of the PPP loan proceeds. The total amount that an agent may collect from the lender for assistance in preparing an application for a PPP loan (including referral to the lender) may not exceed: i. One (1) percent for loans of not more than \$350,000; ii. 0.50 percent for loans of more than \$350,000 and less than \$2 million; and iii. 0.25 percent for loans of at least \$2 million.

Unfortunately, while agents were eligible to be paid, many were not paid, or the employers used banks that expressly prevented agents from being paid.[98] To make matters even more confusing, the AICPA issued multiple sets of guidance about whether accountants could be agents or consultants of PPP and whether or not these services would violate auditor independence rules.[99] As a result of the difficulties in getting agency fees paid and the independence issues, many accountants resorted to defining their services as consulting, as opposed to agency services, in order to invoice employers directly for the services provided. [100]

Lastly, an analysis of the PPP would not be complete without an autopsy of how and where the funds were distributed, as well as some of the early litigation that took place in the program's wake.[101] On April 15,

---

[98] Peter Reilly, *Banks Keeping Paycheck Protection Fees Meant For Others*, FORBES (Apr. 26, 2020), https://www.forbes.com/sites/peterjreilly/. 2020/04/26/banks–keeping–paycheck–protection–fees–meant–for–others/#5407a1ff5725

[99] *See* Kristy Illuzzi & Jim Brackens, *Small Business Loans Under the Paycheck Protection Program Issues Related to CPA Involvement,* AICPA (Apr. 22, 2020), https://www.aicpa.org/content/dam/aicpa/interestareas/centerforplainenglishaccounting/ resources/2020/special–report–sba–ppp–loans.pdf.

[100] News of the failure of banks to pay PPP agency fees spread fast and accountants, who were most often the ones assisting employers with their applications, were quick to seek alternative methods of compensation for their services. Additionally, there was concern over compensation when applications were rejected, as the agency fees were based on a percentage of the PPP loan received. Ultimately, the result of accountants pursuing the consultancy role is that employers are paying for PPP application assistance but cannot use PPP funds to do so. Peter Fontaine, *Agent or Advisor? It Matters for CARES Act–Related Services*, ACCT. TODAY (Apr. 23, 2020, 11:12 AM), https:// www.accountingtoday.com/ opinion/agent–or–advisor–it–matters–for–cares–act–related–services.

[101] Not all businesses were eligible for the PPP as some industries were singled out through other provisions in the CARES Act. For example, in section 4113 of the CARES Act, Congress created the Payroll Support Program (PSP), which provides payroll support for American workers employed by passenger air carriers, cargo air carriers, and related contractors. All funds provided under the program can be used only for the continuation of payment of employee wages, salaries, and benefits. And, unlike the PPP, the PSP is funded

2020, less than two weeks after the program had been created by Congress, the $350 billion of initial funds allocated to the PPP were exhausted.[102] This prompted Congress to pass, and the President to sign into law, a second round of funding for PPP on April 24, 2020.[103] The total bill included $484 billion of provisions, of which $310 billion was allocated to replenishing the PPP.[104]

Due to the speed at which the initial $349 billion was exhausted, along with public companies reporting that they too received the money, Senator Marco Rubio sent a letter to investigate many of the larger banks' lending practices of PPP.[105] The Treasury Department followed the Senator's lead by stating that companies receiving loans larger than $2 million, should expect to be audited, while smaller loans will be spot checked.[106] Per the

---

directly by the Treasury Department on a rolling basis. CARES Act, Pub. L. No. 116–136, § 4113, 134 Stat. 281, 489–99 (2020).

102 Andrew Duehren. *Funding Exhausted for $350 Billion Small–Business Paycheck Protection Program*, WALL ST. J. (Apr. 16, 2020), https://www.wsj.com/articles/funding–exhausted–for–350–billion–small–business–paycheck–protection–program–11587048384.

103 Members of Congress proposed other programs in addition to replenishing the PPP fund. For example, US Senator Doug Jones of Alabama, along with Bernie Sanders, Elizabeth Warren, and three other senators, proposed the Paycheck Security Program. In general, the program would use federal agencies like the IRS and Federal Reserve to directly pay works their salaries (up to $90,000) instead of funding employers, which in turn would pay wages. Letter from Doug Jones, Sen., U.S. Senate, ET. AL., to Mitch McConnell, Majority Leader, U.S. Senate, and Charles Schumer, Minority Leader, U.S. Senate (Apr. 22, 2020), https:// www.warren.senate.gov/imo/media/doc/Jones%20Warner%20Sanders%20Blumenthal%20Klobuchar%20Warren%20letter%20to%20Senate%20Leadership%20on%20Paycheck%20Security%20Act%20–%20Final.pdf.

104 Paycheck Protection Program and Health Care Enhancement Act, Pub. L. No. 116–139, §101(a), 134 Stat. 620, 620–21 (2020) (codified at 15 U.S.C. 9001) amended the CARES Act § 1102(b)(1) of $349,000,000,000 with $659,000,000,000. The net effect being $310 billion of additional funds for PPP. The replenishment of the PPP was not without continued technological difficulty. For example, see Stacy Cowley, *Bankers Rebuke S.B.A. as Loan System Crashes in Flood of Applications*, N.Y. TIMES (Apr. 27, 2020), https://www.nytimes.com/2020/04/27/business/sba–loan–system–crash. html?campaign_id=168&emc=edit_NN_p_20200428&instance_id=17997&nl=morning–briefing&regi_id=73235269&section=topNews&segment_id=26118&te=1&user_id=6d53acc2d56620c1e71e6fe9858bbd91.

105 Amara Omeokwe, *Rubio Asks Bank CEOs if They Favored Certain Customers for SBA Loans*, WALL ST. J. (Apr. 24, 2020), https://www.wsj.com/articles/rubio–asks–bank–ceos–if–they–favored–certain–customers–for–sba–loans–11587667917.

106 Bob Davis & Kate Davidson, *U.S. Audits of Small–Business Loans Face Daunting Challenges*, WALL ST. J. (Apr. 28, 2020), https://www.wsj.com/articles/sba–to–face–big–challenges–ensuring–coronavirus–loans–arent–misspent–11588094140?mod=djemCFO. Weeks later the Small Business Administration further modified its position on the loans under $2 million, by posting a FAQ stating that loans under $2 million would have a presumption of proper use by the loan applicant upon loan forgiveness. *See* SMALL BUS.

Small Business Administration, which was in charge of distributing the money to local banks, by April 13, 2020, approximately $247 billion in funds had been distributed through 4,664 lenders, for a total of 1,035,086 loans.[107] In addition to total funding numbers, SBA also provided data on a state–by–state basis.

What is interesting is that not all states came out even remotely close to even in terms of percentage of the state's payroll that successfully secured PPP loans. On one end of the spectrum, Nebraska saw 74.7% of its total payroll in the state supported by PPP, while on the other end of the spectrum, New York and California saw 23.1% and 24% of its payrolls secure PPP loans, respectively.[108] From an industry perspective, construction led the way with 13.73% of the total PPP money loaned to employers. On the other end of the scale are utility companies, which only received .28% of the total PPP funds allocated.[109] Other areas of business including professional, scientific, and technical services also did well, receiving 12.26% of the total PPP funds. Business areas like agriculture, forestry, fishing, and hunting fared less favorable, receiving only 1.20% of the allocated funds.[110]

The SBA also broke down the data by loan size. The smaller scale loans consisted of loans for $150,000 and less. Those loans accounted for 15.02% of PPP funds allocated. At the higher end were loans that exceeded $5 million, which accounted for 9.20% of the total funds allocated.[111] It is this part of the SBA analysis that generated the largest criticism from other business owners and the media. For example, public companies like Shake Shack, Potbellies, and Ruth Chris steakhouses, received PPP loans from the initial funding of the CARES Act, even though locally owned businesses were unable to secure PPP loans.[112] Upon replenishment of the

ADMIN., OFFICE OF CAPITAL ACCESS PAYCHECK PROTECTION PROGRAM LOANS FREQUENTLY ASKED QUESTIONS (FAQS), at 18 n.47 (2021).

107 SMALL BUS. ADMIN., PAYROLL PROTECTION PROGRAM REPORT (2020), https://www.sba.gov/sites/default/files/2020-06/PPP_Report_200530-508.pdf.

108 Zachary Mider & Cedric Sam, *Chart Shows Which States Received the Most PPP Loans*, BLOOMBERG NEWS (Apr. 16, 2020), https://www.cpapracticeadvisor.com/small–business/news/21134380/chart–shows–which–states–received–the–most–ppp–loans.

109 SMALL BUS. ADMIN., PAYROLL PROTECTION PROGRAM REPORT (2020), https://www.sba.gov/sites/default/files/2020-06/PPP_Report_200530-508.pdf

110 *Id.*

111 *Id.*

112 Peter Rudegeair, Heather Haddon & Ruth Simon, *Ruth's Chris to Repay Loan Amid Outcry Over Rescue Program*, WALL ST. J. (Apr. 23, 2020), https:// www.wsj.com/ articles/public–companies–have–to–repay–small–business–rescue–loans–11587670442.

second round of PPP funding, many of the same problems that occurred in the first round still existed.[113]

To be fair, the public outcry was so severe that in most circumstances almost all of the public companies either opted to return the funds themselves or were asked to return the PPP funding to the Treasury Department.[114] For other companies, the public perception on PPP was so negative that companies refused to accept other CARES Act funding for fear of potential damage to their brand and reputation.[115] That said, some public companies like Ashford, Inc., which applied for over $120 million in PPP, refused to give money back, thus triggering a letter sent from US Senator Charles Schumer to the Small Business Association, inquiring about the legality of the PPP funds disbursed to public companies.[116] It is worth noting that some economists suggested simply capping maximum PPP loans to $1 million to avoid issues like Ashford.[117] Instead, the SBA responded by doing two things. First, it gave small lenders exclusive access to the PPP for an eight hour stretch.[118] Second, the SBA issued an additional final interim rule, stating that companies are not eligible for unlimited PPP and are capped at $20,000,000.[119] In addition, the allocation

---

113 *See* Danielle Kurtzleben, *Not–So–Small Businesses Continue To Benefit From PPP Loans*, NPR (May 4, 2020, 5:51 PM), https://www.npr.org/2020/05/04/850177240/not–so–small–businesses–continue–to–benefit–from–ppp–loans.

114 *See* Michelle Toh, *Shake Shack Returns $10 million Emergency Loan to the US Government*, CNN BUSINESS (Apr. 20, 2020), https:// www.cnn.com/2020/04/20/business/shake–shack–ppp–loan–sba/index.html.

115 The Treasury Department is authorized to loan up to $17 billion in funds to companies that maintain national security. These funds were eschewed by firms like Boeing, who were able to raise capital in other markets. CARES Act, Pub. L. No. 116–136, § 4003(b)(3), 134 Stat. 281, 470–76 (2020) (codified at 26 USC § 6428). *See* Doug Cameron, *Pentagon, Treasury Have $17 Billion Stimulus Money to Lend, But There's Little Interest*, WALL ST. J. (May 3, 2020), https://www.wsj.com/articles/pentagon–treasury–have–17–billion–stimulus–money–to–lend–but–theres–little–interest–11588510800?mod=djem10point.

116 Letter from Charles Schumer, Sen., U.S. Sen., to Jovita Carranza, Adm'r, Small Bus. Admin. (May 1, 2020), https://www.documentcloud.org/documents/6880847–Schumer–Seeks–Review–Of–S–B–A–Loans–To–Major.html.

117 Aaron Klein, *The Small Business Relief Program Is Still Broken*, POLITICO (Apr. 27, 2020, 4:30 AM), https://www.politico.com/news/agenda/2020/04/27/small–business–relief–206960.

118 Danielle Kurtzleben, *Scram Big Banks: Small Lenders Take Over SBA Lending Program (For a Night)*, NPR (Apr. 29, 2020, 3:15 PM), https:// www.npr.org/sections/coronavirus–live–updates/2020/04/29/847940090/scram–big–banks–small–lenders–take–over–sba–lending–program–for–a–night.

119 The Seventh Interim Final Rule is supplemental to the first six Interim Final Rules, which became effective without advance notice and public comment. CARES Act, Pub. L. No. 116–136, § 1114, 134 Stat. 281, 312 (2020) (codified at 15 U.S.C. § 9012). Section 1114 authorizes the Small Business Administration to issue PPP regulations without regard to notice requirements. Business Loan Program Temporary Changes; Paycheck Protection Program—Requirements—Corporate Groups and Non–Bank and Non–Insured Depository

of PPP loans to large companies also spurred a number of lawsuits. One of the lawsuits alleged that banks shuffled the application queue to help larger businesses.[120] Other lawsuits claimed that banks should not have had the ability to limit the PPP loans to existing customers.[121]

In addition to lawsuits that were filed, US Senator Elizabeth Warren and House Representative Nydia Velazquez, sent a letter to Mike Ware, Inspector General Office of the Inspector General U.S. Small Business Administration, and Richard Delmar, Acting Inspector General Office of the Inspector General U.S. Department of the Treasury, demanding investigation into the SBA'S administration of the funds.[122] The letter makes a number of claims that have been discussed in this article, in addition to arguments that a company with ties to President Trump received millions from PPP.[123] In addition to the letter by Senator Warren and Representative Nydia Velazquez, Senators Charles Schumer, Sherrod Brown, and Ben Cardin all sent a letter to Mike Ware as well.[124] This letter asked the SBA to provide a report about whether the PPP program favored employers with existing relationships with large banks, and whether underserved minority or women–owned businesses were served consistent with congressional mandate. Combined, these two letters spurred a Flash Report by the SBA Inspector General.[125]

The Flash Report by the SBA Inspector General concluded that the SBA did not fully align with CARES Act in the following areas. First, the

---

Institution Lenders, 85 Fed. Reg. 26324, 26324 (May 4, 2020) (to be codified at 13 C.F.R. pt. 120).

120 Dalvin Brown, *Lawsuit Alleges Wells Fargo Unfairly Shuffled Paycheck Protection Program Applications*, USA TODAY (Apr. 19, 2020), https:// www.usatoday.com/story/money/2020/04/19/wells–fargo–lawsuit–small–business–ppp–loans/5162801002/.

121 *Lawsuit Accuses Bank of America of Prioritizing Existing Customers When Doling Out Federal Coronavirus Relief Funds*, CBS BALTIMORE (Apr. 10, 2020, 6:15 PM), https://www.msn.com/en–us/money/smallbusiness/lawsuit–accuses–bank–of–america–of–prioritizing–existing–customers–when–doling–out–federal–coronavirus–relief–funds/ar–BB12so6m.

122 Letter from Elizabeth Warren, Sen., U.S. Senate, and Nydia M. Velázquez, Chairwoman, Senate Comm. on Small Bus., to Hannibal "Mike" Ware, Inspector General, Office of Inspector General Bus. Admin., and Richard K. Delmar, Acting Inspector General, Office of the Inspector General Dep't of Treasury (Apr. 23, 2020), https://www.warren.senate.gov/imo/media/doc/2020.04.23%20Letter%20to%20SBA%20and%20Treasury%20IG.pdf.

123 Robert Benincasa, *Company With Ties to Trump Receives Millions from Small Business Loan Program*, NPR (Apr. 20, 2020, 9:01 PM), https:// www.npr.org/2020/04/20/839455480/company–with–ties–to–trump–receives–millions–fromsmall–business–loan–program.

124 SMALL BUS. ADMIN., REP. NO. 20–14, FLASH REPORT SMALL BUS. ADMIN.'S IMPLEMENTATION OF THE PAYCHECK PROTECTION PROGRAM REQUIREMENTS, AT 1 (2020).

125 SMALL BUS. ADMIN., REP. NO. 20–14, FLASH REPORT SMALL BUS. ADMIN.'S IMPLEMENTATION OF THE PAYCHECK PROTECTION PROGRAM REQUIREMENTS (2020).

SBA, consistent with Section 1102 of the CARES Act, should have prioritized rural, minority, and women–owned businesses. Because the SBA did not require demographic data to identify PPP borrowers in these markets, it was unlikely that the SBA would be able to determine the loan volume to these borrowers.[126] Second, the SBA's Interim Final rule stating that 75% of the funds be used for "payroll" costs did not align with the CARES Act.[127] This rule, created by the SBA, in coordination with the Secretary of Treasury, did not take into account that some small businesses may have more operational expenses than employee expenses and that the PPP should be available to those businesses too.[128] Third, the SBA Inspector General found that the SBA did not issue guidance on the deferment process for the PPP loans to lenders within the required 30 days that was specified in the CARES Act.[129] Without timely guidance on the loan deferment process, both borrowers and lenders may not know what is required to repay the outstanding loan balance.[130] Last, the SBA Inspector General found that SBA should have registered the loans using Taxpayer Identification Numbers, however, this information was not collected by the SBA.[131]

At some point the Congressional lending for the Coronavirus will end. The requests of the changes to the PPP will be either accepted or denied.[132]

---

[126] *Id.* at 4.
[127] *Id.* at 5.
[128] *See id.* at 5.
[129] *Id.*
[130] *Id.* at 5–6.
[131] *Id.* at 6.
[132] See, for example, the open letter written by Judy Chu (US House of Representatives, Chairwoman of the Subcommittee on Investigations, Oversight and Regulations) and Nydia Velazquez (Chairwoman on the Committee on Small Business) addressing SBA's Interim Final Rule. Specifically, the letter states how problematic it is that the SBA, " . . . does not prevent lenders from setting unreasonable, exclusionary, and inequitable conditions on applicants. The nation's largest banks, including Bank of America, JPMorgan Chase, and Wells Fargo, all engaged in this behavior, announcing they would be accepting applications only from customers with a pre–existing business lending relationships or business checking accounts . . . . As we have all observed, this practice has overwhelmed smaller banks, participating CDFIs and other lenders with the remaining applications, leaving countless small business owners without options for submitting a PPP application and accessing the assistance Congress sought to provide." Letter from Judy Chu, Chairwoman, U.S. House Subcomm. on Investigations, Oversight and Regulations Comm. on Small Bus., and Nydia M. Velázquez, Chairwoman, U.S. House Comm. on Small Bus., to Jovita Carranza, Adm'r, Small Bus. Admin., and Steven Mnuchin, Sec'y, Dep't of Treasury (Apr. 16, 2020), https://chu.house.gov/sites/chu.house.gov/files/documents/Letter%20to%20SBA–Treasury%20on%20PPP%20Rules%20for%20Banks%20FINAL.pdf.

If the past 2008 crisis is any indication,[133] the investigations of the funds will be settled over the coming decade. Some of these investigations will be performed at the congressional level.[134] Other investigations will be taking place within the Department of Justice (DOJ).[135] At that point, taxpayers will eventually come to find out whether the practice of subsidizing payroll directly was a politically and economically effective plan, or simply another piece of crisis level legislation that becomes universally unpopular.[136]

## IV. CORPORATE TAX POLICIES SPURRED BY THE CORONAVIRUS

### *A. Net Operating Losses*

Internal Revenue Code section 172, the controlling law on net operating losses, has been a target of fierce bipartisan legislation since the passage of the TCJA. Prior to the TCJA, the general rule for net operating losses allowed corporations to carry back a current year loss two prior tax periods, and thus claim an immediate refund, or carry forward up to twenty

---

[133] *See* OFFICE OF THE SPECIAL INSPECTOR GENERAL FOR THE TROUBLED ASSET RELIEF PROGRAM, https://www.sigtarp.gov/about–us (last visited Sept. 26, 2021) (maintaining an on–going database of the crimes and fines that occurred from individuals and businesses after companies accepted money during the 2008 financial crisis).

[134] Jacob Pramuk, *Pelosi Announces New House Committee to Oversee Trump Administration Coronavirus Response*, CNBC (Apr. 2, 2020, 11:13 AM), https://www.cnbc.com/2020/04/02/coronavirus–bailout–nancy–pelosi–unveils–new–committee–to–oversee–white–house.html.

[135] The initial DOJ reports are based on a federal criminal complaint unsealed in Rhode Island where two men are accused of claiming to have dozens of employees in order to receive PPP loans, when in fact they had no workers. *See* Dave Michaels, *Justice Department Eyes Fraud in Lending Program for Small Businesses Hit by Coronavirus Crisis*, WALL ST. J. (May 5, 2020), https://www.wsj.com/articles/justice–department–eyes–fraud–in–lending–program–for–small–businesses–hit–by–coronavirus–crisis–11588716487?mod=business_minor_pos6. In addition, it should come as little surprise that a program with the size, complexity, and speed at which the PPP was disbursed, would generate considerable levels of abuse or error. Contrast the PPP, with a well–established tax program like the Earned Income Tax Credit (EITC), and the evidence suggests that the PPP will have significant errors and abuse. *See, e.g.,* Treasury Inspector General for Tax Admin. Office of Audit, *Highlights of Reference Number: 2020–40–025 to the Commissioner of Internal Revenue*, U.S. DEP'T OF TREASURY (April 30, 2020), (highlighting that $17.4 billion of the $68.7 billion Earned Income Tax Credit payments made in Fiscal Year 2019 were improper), https:// www.treasury.gov/tigta/auditreports/2020reports/202040025_oa_highlights.html.

[136] See, for example, the investigating reporting done on the TARP bailouts, written about extensively by Matt Taibi. Matt Taibi, *Secrets and Lies of the Bailout*, ROLLING STONE (Jan. 4, 2013, 9:25 PM), https://www.rollingstone.com/politics/politics–news/secrets–and–lies–of–the–bailout–113270/.

tax periods.[137] From an economic perspective, the net operating loss rules have generally stood on sound tax policy. The idea being that income taxes paid to the federal government should be smoothed out over time and not subject to exceptionally good or bad years for business.[138]

The TCJA modified the net operating loss rules in a number of important ways. First, it limited net operating loss deductions to eighty percent of taxable income.[139] The eighty percent, like the ninety percent limit for AMT, does not appear to have any specific policy aside from eliminating taxpayers from completely reducing taxable income to zero. Second, the previous two–year carry back rules were eliminated by the TCJA.[140] From a time value of money perspective this also was a powerful government revenue raiser, because when taxpayers utilized a carryback, the government refund had to be issued relatively quickly.[141] Third, carry forwards no longer had to be claimed within twenty years,[142] instead the net operating loss could be claimed for an indefinite period going forward.[143]

The CARES Act modified the TCJA's changes to the net operating loss rules in a number of ways.[144] The CARES Act was supplemented by IRS guidance, including IRS Notice 2020–26 and Revenue Ruling 2020–24.[145] For tax years 2018 and 2019, a five year carry back for current losses

---

[137] Corporations are the largest per dollar entity type to claim net operating losses, however, under I.R.C. § 172, individuals, trusts, and estates may also claim the loss.

[138] It worth noting that this income smoothing effect can have public policy outcomes that would surprise many individual taxpayers. For example, Amazon, has paid very little federal income tax. *See* Stephanie Saul & Patricia Cohen, *Profitable Giants Like Amazon Pay $0 in Corporate Taxes, Some Voters Are Sick of It*, N.Y. TIMES (Apr. 29, 2019), https://www.nytimes.com/2019/04/29/us/politics/democrats–taxes–2020.html. Without seeing Amazon's corporate tax return, it is impossible to know exactly what type of tax planning Amazon is implementing. That said, it is speculated that a major tax provision Amazon uses to reduce its federal income tax is the net operating loss rules. Rey Mashayekhi. *Why Amazon May Pay No Federal Income Taxes This Year*, FORTUNE (Mar. 1, 2019, 8:30 AM), https://fortune.com/2019/03/01/amazon–federal–corporate–income–tax/.

[139] I.R.C. § 172(a)(2)(B)(ii).

[140] I.R.C. § 172(b)(1)(A)(i)–(iii).

[141] Performing a time value of money calculation can be powerful for the government because it essentially ensures that largest and undiscounted refunds requested by taxpayers are no longer available.

[142] I.R.C. § 172(b)(1)(A)(ii)(I).

[143] I.R.C. § 172(b)(1)(A)(ii)(II).

[144] CARES Act, Pub. L. No. 116–136, § 2303, 134 Stat. 281, 352–56 (2020) (codified at 26 U.S.C. § 172).

[145] I.R.S. Notice 2020–42, I.R.B. 2020–26. 986; I.R.S., REV. PROC. 2020–24, EXAMINATION OF RETURNS AND CLAIMS FOR REFUND, CREDIT, OR ABATEMENT; DETERMINATION OF CORRECT TAX LIABILITY (2020), https://www.irs.gov/pub/irs–drop/rp–20–24.pdf.

is now allowed,[146] along with an indefinite carry forward.[147] The eighty percent cap on taxable income was also removed.[148] Beginning in tax year 2020, a twenty year carryforward is allowed for all net operating losses generated before January 1, 2018.[149] In addition, a net operating loss can be taken for the lessor of: all net operating losses generated after December 31, 2017 or eighty percent of taxable income.[150]

With all of these recent changes, the Joint Committee on Taxation's (JCT) scoring of the budget effects of the changes to INTERNAL REVENUE CODE section 172 is insightful from both a taxation and economy perspective.[151] For instance, because the JCT is required to assess how the entire CARES Act will affect the federal government revenue, on a provision–by–provision and year–by–year basis, taxpayers and economists may be surprised to see that for the federal government's tax year of 2020, the change from TCJA NOL rules to the CARES Act NOL rules, will cost federal government almost $80 billion in revenue.[152] In tax year 2021, the JCT estimates that the change in NOL rules will cost the government approximately $8.671 billion.[153] However, due to the reinstatement of the eighty percent cap on taxable income on tax years beginning in the year 2020, the JCT actually reports a net revenue raiser for the federal government in years 2022 through 2030.[154]

---

146 I.R.C. § 172(b)(1)(D)(i)(I).

147 I.R.C. § 172(b)(1)(A)(ii)(II).

148 I.R.C. § 172(b)(1)(D).

149 I.R.C. § 172(a)(2)(B).

150 *Id.*

151 J. COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 748, THE "CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ('CARES') ACT," AS PASSED BY THE SENATE ON MARCH 25, 2020, AND SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MARCH 27, 2020, JCX–11–20 (2020), https://www.jct.gov/publications/2020/jcx–11–20/.

152 The assumption built into this number presumably takes into account three major factors. First, the CARES Act reinstated taxpayers with the ability to carry back net operating losses, where previously the TCJA had removed this capability. Second, because carry backs are immediately available to taxpayers, unlike distant NOLs that may be used in the future, the time value of money factor of carrybacks on each NOL does not reduce the present value benefit to the taxpayer, and thus requires the federal government to issue larger refunds in present value dollars. Third, taxpayers are going to experience historically large tax losses in the year 2020 due to historically poor economic conditions caused by the coronavirus.

153 J. COMM. ON TAXATION, *supra* note 151, at 1.

154 It is the author's opinion that these future estimates are likely only directionally correct, given the length and complexity of the CARES Act. For example, see the Payroll Protection Program that was instituted as part of CARES Act. Under 1102 of the CARES Act, Congress instituted a federally subsidized payroll program, whereby employers could apply for a forgivable loan to the extent the loan was used for payroll purposes. The loan, unlike other debt forgiveness, is not considered taxable income upon its discharge. The

The takeaway on the Net Operating Loss provisions in the CARES Act give taxpayers a view into how Congress works under extreme duress. Consider the following; in the first week of March, many United States politicians thought the coronavirus was a problem only in China.[155] Three weeks later the United States passed a law with "war time" level investment.[156] The estimates at the bill's passage was that the United States was willing to spend a total of $6 trillion.[157] When the nation is at war, Congress has many tools at its disposal, but not all of its tools are eligible to be dispatched immediately. This is particularly true of tax policy. When Congress only has weeks to act, a certain number of ready–made tax provisions are oftentimes sitting on a proverbial shelf in Washington D.C., and only during times of crisis do taxpayers get to see what is included in those bills. If it were not obvious already, it is now clear that net operating loss rules are one of the most important tax policies for providing economic relief that Congress controls.

### *B. Interest Expense Limitations*

While not as effective in providing increased cash flow via tax refunds as the changes made to INTERNAL REVENUE CODE section 172, the CARES Act also modified INTERNAL REVENUE CODE 163.[158] Under INTERNAL REVENUE CODE section 163, the amount of business interest expense that is eligible to be claimed as a deduction under INTERNAL REVENUE CODE section 162, is limited based on a

payroll expense, however, would not be deductible under I.R.S. Notice 2020–32, which was issued almost a month after the CARES Act was passed. Thus, at the time of passage, the Treasury Department should have been able to receive additional revenues by disallowing almost $610 billion in tax deductions. Given the taxpayer consternation this caused, this point ultimately became moot when P.L. 116–260 was passed, thus allowing PPP expenses to be deducted.

155 *See* Aaron Zitner, John McCormick & Dante Chinni, *How Coronavirus Is Breaking Down Along Familiar Political Lines*, WALL ST. J. (Apr. 4, 2020), https:// www.wsj.com/articles/how–coronavirus–is–breaking–down–along–familiar–political–lines–11586001600.

156 Lauren Hirsch, *House Unlikely to Vote on Historic $2 Trillion Coronavirus Stimulus Bill Wednesday*, CNBC (Mar. 24, 2020, 7:26 AM), https://www.cnbc.com/2020/03/24/coronavirus–updates–congress–gets–closer–to–a–deal–on–massive–stimulus–bill.html (reporting that Senator Mitch McConnell said the $2 trillion coronavirus stimulus bill was a "war–time level of investment in our nation").

157 *See* Zachary Evans, *Kudlow Projects Coronavirus Aid Package to Reach 'Roughly' $6 Trillion*, NAT'L REV. (Mar. 24, 2020, 6:55 PM), https:// www.nationalreview.com/news/coronavirus–relief–white–house–adviser–larry–kudlow–projects–aid–package–to–reach–roughly–6–trillion/.

158 CARES Act, Pub. L. No. 116–136, § 2306, 134 Stat. 281, 358–59 (2020) (codified at 26 U.S.C. § 163).

congressionally developed formula.[159] This formula, as set forth under the TCJA, includes rules that were put into place beginning in tax year 2018, but also includes pre–designed sunsetting rules that will automatically change the formula set forth in INTERNAL REVENUE CODE section 163.[160]

The TCJA greatly modified the rules under INTERNAL REVENUE CODE section 163(j). The purpose of the modification was twofold; to reduce the ability of businesses to deduct interest expense and to put leveraged investment on an equal footing with traditional equity investment for purposes of generating deductions from taxable income, and thus raise revenue for the federal government.[161] According to the JCT, which scored the entirety of the TCJA before its passage in Congress,[162] the modifications of Internal Revenue Code section 163(j) were estimated to raise approximately $253 billion in revenue for the federal government over a ten year period beginning in 2018 and ending in 2027.[163] In general, the modifications of Internal Revenue Code section 163(j) allowed taxpayers to only deduct business interest expenses to the extent it does not exceed 30% of the company's earnings before interest, taxes, depreciation, and amortization, namely "EBITDA."[164]

Under the CARES Act, Internal Revenue Code section 163(j) was again modified, however, the modifications only apply to tax years 2019 and 2020.[165] For those two taxable years, the 30% is changed to 50% for individuals, corporations, and S–corporations.[166] Interest expense from partnerships will remain subject to the 30% limit in 2019 and will be adjusted to 50% for 2020; however, 50% of the excess business interest

---

159 I.R.C. § 163(j).

160 I.R.C. § 163(j)(8)(A)(v).

161 STAFF OF JOINT COMM. ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT," JCX–67–17, at 3 (2017), https://www.jct.gov/publications/2017/jcx–67–17/. A purely economic argument could also be made for why Congress chose to limit the amount of interest expense that taxpayers deduct, which focuses more on Congress's goal of more closely aligning the tax effects of investors who chose to invest through debt and equity. The financing of debt, and payment of interest expense, is deductible (subject to limitations in section 163), while the distributions to shareholders is not an ordinary and necessary expense, does not reduce taxable income, but instead is governed by the I.R.C. § 301.

162 *Id.*

163 *Id.*

164 I.R.C. § 163(j)(8)(A)(v) (EBITDA is calculated by starting with Earnings and adding back Interest, Taxes, Depreciation, and Amortization. Beginning in tax year 2022, the TCJA designed the calculation to no longer be based on EBITDA, but instead on EBIT).

165 I.R.C. § 163(j)(10).

166 I.R.C. § 163(j)(10)(A)(i). In addition, for taxpayers owning a farm or real property, see I.R.S., REV. PROC. 2020–22, GUIDANCE PROVIDED FOR MAKING CODE. SEC. 163(J) ELECTIONS FOR LEGISLATION, FARMING, AND REAL PROPERTY, https:// www.irs.gov/pub/irs–drop/rp–20–22.pdf.

expense that is allocated to the partners in 2019 can be deducted in the 2020 tax year.[167] Moreover, when computing their 2020 income limit, taxpayers may instead choose to use their 2019 income calculation.[168] The Joint Committee on Taxation expects this change to reduce federal revenues in 2020 by $7.173 billion, and $4.915 billion in 2021.[169] However, beginning in 2022, the reductions become more modest, and an analysis of a ten year budget window reveals that the total reduction in federal revenue to be $13.39 billion.[170]

Allowing companies to deduct more interest expense in tax years 2020 and 2021 is certainly a business–friendly tax provision that Congress was seriously considering before the coronavirus became the federal government's priority. That said, providing temporary relief of the interest expense limitation appears to be consistent with the broader purpose of the CARES Act, which provides for a variety of emergency funding the federal government is willing to provide to businesses.[171] It is worth noting that all of the various methods of funding have varying degrees of success,

---

[167] Mark A. Luscombe, *Tax Strategy: Business Interest Deduction Limits Under the CARES Act*, ACCT. TODAY (May 29, 2020), https:// www.accountingtoday.com/opinion/tax–strategy–business–interest–deduction–limits–under–the–cares–act.

[168] I.R.C. § 163(j)(10)(B).

[169] STAFF OF JOINT COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN AN AMENDMENT IN THE NATURE OF A SUBSTITUTE TO H.R. 748, THE "CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ('CARES') ACT," AS PASSED BY THE SENATE ON MARCH 25, 2020, AND SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MARCH 27, 2020, JCX–11–20, at 2 (2020).

[170] *Id.*

[171] See for example, the CARES Act provides for Emergency Injury Disaster Loans (EIDL) of $10,000,000,000. CARES Act, Pub. L. No. 116–136, § 1110(7), 134 Stat. 281, 308 (2020) (codified at 15 U.S.C. § 9009). H.R. 266 section 101(b)(1) would later replace $10,000,000,000 with $20,000,000,000, thus replenishing the EIDL program with 100% more funds than originally allocated. EIDL is a program that existed within the Small Business Administration before the Coronavirus, unlike the PPP. The purpose of EIDL is to support regions of the country that have undergone a disaster as declared by the President of the United States. On March 13, President Trump declared the entire country a disaster and thus opened the eligibility of the EIDL to all businesses. Similar to the PPP, the money is limited to employers with 500 or fewer employees, however for EIDL purposes the 500 is calculated at each location and not for the entire business. Unlike the PPP, only up to $10,000 of the EIDL will be considered forgiven if used for a broad range of expenses including payroll and overhead (the EIDL may not be used for refinancing debt or paying dividends). Contrasted with the PPP, which limits the funds to a narrower list of uses, as defined earlier in the article. While taxpayers may receive an EIDL up to two million dollars, only ten thousand may be forgiven. In addition, the businesses are not eligible for both the EIDL and PPP. It is therefore best practice to recommend applying for PPP first (because the entire amount is forgivable) and then the EIDL second, if the taxpayer was denied the PPP.

however,[172] how one views modifications of Internal Revenue Code section 163(j) in the CARES Act likely relates largely to how important debt financing is to one's own business. If, for example, one's economic perspective is formed from the real estate market then Congress's changes to interest expense limits seem vital. In contrast, if one operates in a service or technology company where debt is either non–existent or an insignificant liability on the balance sheet, then increasing the amount the company can deduct as an expense on its tax return is likely moot in light of larger liabilities like payroll. Balancing these two viewpoints leads the authors to conclude that Internal Revenue Code section 163(j) changes are a piece of a larger bill, but relatively insubstantial as standalone legislation.

### *C. Technical Amendments: Fixing the "Retail Glitch"*

In the 2017 TCJA, Congress overhauled a number of depreciation rules that, in general, allowed taxpayers to greatly increase the speed at which they could expense property, plant, and equipment. Per the Joint Committee on Taxation, between 2018 and 2027, these changes reduced federal revenue by $86.3 billion.[173] There was one problem, however.[174] In the midst of the passage of the TCJA, and as some would argue due to the hasty nature of the TCJA's Congressional vote,[175] a number of errors were made, and therefore, technical corrections were needed.[176]

Technical corrections are common in Congress. Some corrections are more politically charged than others.[177] Both sides of the political aisle

---

172 See, for example, the EIDL program that was designed to loan up to $2 million to businesses, but according to investigative reporting, only loaned up to $15,000 to some businesses. Stacy Cowley, *Small Businesses Wait for Cash as Disaster Loan Program Unravels*, N.Y. TIMES (Apr. 9, 2020), https:// www.nytimes.com/2020/04/09/business/smallbusiness/small–business–disaster–loans–coronavirus.html?referringSource=articleShare.

173 STAFF OF JOINT COMM. ON TAXATION, ESTIMATED BUDGET EFFECTS OF THE CONFERENCE AGREEMENT FOR H.R. 1, THE "TAX CUTS AND JOBS ACT," JCX–67–17, at 3 (2017), https://www.jct.gov/publications/2017/jcx–67–17/.

174 The use of the word "problem" is, of course, problematic when discussing tax policy due to the inherent political bias that underscores every tax provision in the Internal Revenue Code. Nevertheless, using the word "problem" should be sufficient to convey that the legislation of the TCJA did not reflect the intent of the lawmakers who passed the law.

175 *See* Jim Tankersley & Alan Rappeport, *Rushed to Pass Tax Overhaul. Now It May Need to Be Altered*, N.Y. TIMES (Mar. 11, 2018), https:// www.nytimes.com/2018/03/11/us/politics/tax–cut–law–problems.html.

176 *See* HOUSE COMM. ON WAYS AND MEANS, 115TH CONG., DISCUSSION DRAFT TAX TECHNICAL AND CLERICAL CORRECTIONS ACT DISCUSSION DRAFT (Comm. Print. 2019), https://republicans–waysandmeansforms.house.gov/uploadedfiles/tax_technical_and_clerical_corrections_act_discussion_draft.pdf.

177 *See* Jeff Green & Sahil Kapur, *Tax–Law Typo Risks Bankrupting #MeToo Victims Without GOP Fix*, BLOOMBERG (June 5, 2018, 4:00 AM), https:// www.bloomberg.com/

have been known to make them.[178] That said, technical glitches provide a unique problem for Congress once they are acknowledged. In particular the problem can become irritating to the political party that passed the law, if the Congressional maneuvering to pass the law operated under the US Senates' Reconciliation process, and by extension the Byrd Rule.[179] Because the process of budget reconciliation is used when one political party has a majority power in the US Senate, but not a filibuster proof majority of 60 votes, technical glitches in legislation need to be "fixed" with an agreement by both parties.[180] Abiding by the Byrd Rule means, almost by definition, that the opposing party fundamentally agrees with a piece of legislation, any attempt to "fix" the legislation means asking the opposing party to vote in favor of a bill that they were completely opposed to originally.

With this legislative background in place, and the understanding that technical glitches are commonplace in some types of legislation, it is understandable how the "retail glitch" became one of the most significant pieces of legislation from a media and partisan perspective. Almost immediately recognized as a drafting error, republicans in Congress sought to include the fix to the rule in a number of pieces of legislation prior to the CARES Act. Like other legislation that was passed using the Byrd Rule, however, the opposing party refused to include the fix without significant concessions from the other side. Prior to the Coronavirus, no such deal could be made to fix the rule.

In one of the greatest times of financial need in recent history, this article contends that there is no better time for taxpayers to get a glance into Congress's greatest priorities. The inclusion of technical amendments in the CARES Act, is a telling story, and specifically the fixing of the retail glitch.[181] In essence, when the TCJA left out the words "any qualified

---

news/articles/2018–06–05/sexual–harassment–victims–could–lose–under–tax–law–meant–to–help.

178 The Affordable Care Act (ACA) is likely the best example of a recent bill that was passed, prior to the TCJA, with only the votes of one party. While not passed as quickly as the TCJA, the ACA (over 900 pages of statutes) dwarfed the size of the TCJA (186 pages) in terms of new statutes. And like the TCJA, the ACA had dozens or more technical corrections that one political party wanted to fix, while the other party opposed the changes. See, for example, Jonathan Weisman & Robert Pear, *Partisan Gridlock Thwarts Effort to Alter Health Law*, N.Y. TIMES (May 26, 2013), https:// www.nytimes.com/ 2013/05/27/us/politics/polarized–congress–thwarts–changes–to–health–care–law.html.

179 Named after Robert C. Byrd, the U.S. Senator from West Virginia.

180 For an excellent exploration of how the Byrd Rule operates within the rules of budget reconciliation, see BILL HENIFF JR., CONG. RSCH. SERV., RL30862, THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (2016).

181 See CARES Act, Pub. L. No. 116–136, § 2307(a), 134 Stat. 281, 359 (2020) (codified at 26 U.S.C. § 168), which modifies Amended I.R.C. § 168(e) in paragraph (3)(E), by striking "and" at the end of clause (v), by striking the period at the end of clause (vi) and

improvement property," (QIP) it effectively denied businesses (like retail and restaurants) that invest in new flooring, lighting fixtures, water sprinkler systems, remodeling and other types of interior improvements from benefiting from the faster depreciation methods as well as temporary federal bonus depreciation.[182] This same QIP was generally subject to a 15 year tax life and was eligible for bonus depreciation prior to the enactment of the TCJA.[183] The TCJA's effect on business owners did not go unnoticed.[184] Because depreciation is a non–cash expense that reduces taxable income, a change in depreciation rules can have a significant impact on business owners' tax liabilities.[185] The CARES Act changed the law to include language that would treat QIP as though it were covered retroactively. The IRS followed up with guidance.[186] The result is that businesses now can depreciate these improvements over a 15–year period while also still being eligible for 100% bonus depreciation.[187]

There is nothing inherently wrong with congressional members trying to fix legislative errors that were made in previous laws. Both parties make these mistakes. What is telling, however, is the importance congressional members (who make the errors) place on these errors. And while it may appear that congress is only passing laws that are vital to the national interest in times of crisis, a thorough reading of the CARES Act sheds light on the fact that taxpayers should be careful when they demand congress

---

inserting ", and", and by adding at the end a new clause (vii), and in paragraph (6)(A), by inserting "made by the taxpayer" after "any improvement". The change is effective as if it was included in section 13204 of the Tax Cuts and Jobs Act (P.L. 115–97) and applied to property placed in service after December 21, 2017.

[182] For the legal definition of qualified improvement property, see Treas. Reg. §1.168(b)–1(a)(5)(i)(C) (2020).

[183] See I.R.C. § 168 prior to the enactment of the TCJA.

[184] *See* Richard Rubin, *Four Words Missing in the New Tax Law Give Restaurants Heartburn*, WALL ST. J. (July 10, 2018), https://www.wsj.com/articles/four–words–missing–in–the–new–tax–law–give–restaurants–heartburn–1531215000.

[185] *See* Erica York, *The Fixtures Fix: Correcting the Drafting Error Involving the Expensing of Qualified Improvement Property*, TAX FOUNDATION (May 30, 2018), https://taxfoundation.org/fixtures–fix–qualified–improvement–property.

[186] See I.R.S. REV. PROC. 2020–25, which addressed how taxpayers apply the retroactive assignment of a 15–year recovery period to qualified improvement property (QIP) placed in service after 2017 now that QIP generally qualifies for bonus depreciation—typically at a 100 percent rate. Specifically, the I.R.S. issued the revenue procedure to require taxpayers who previously filed two or more returns using what is now an "incorrect" depreciation period (usually 39 years) to file an accounting method change on Form 3115 to claim bonus depreciation and/or depreciation based on the 15–year recovery period. I.R.S., REV. PROC. 2020–25, ADDITIONAL FIRST YEAR DEPRECIATION DEDUCTION FOR PROPERTY ACQUIRED AND PLACED IN SERVICE AFTER SEPTEMBER 27, 2017 (2020), https://www.irs.gov/pub/irs–drop/rp–20–24.pdf.

[187] I.R.C § 168(e)(3)(E)(vii).

pass crisis–related legislation because not all the provisions are crisis–related.

### *D. A Note on Federal Deficits: The TCJA and CARES Act*

Prior to the Coronavirus, the US tax system was already experiencing a reduction in federal revenues.[188] The Coronavirus has sped up the reduction of revenues with a net result that the US federal government is on a path to generate a $3.8 trillion deficit during 2020, and $2.1 trillion in 2021.[189] These deficits are in addition to $1 trillion deficit that the government was already on pace for.[190] What is more, these deficits do not take into account the House of Representative's HEROES Act, which was scored by the JCT to add approximately $3 trillion, over ten years, to the deficit.[191] These amounts have triggered plans on how to best pay for the deficits by both political parties.[192] As expected, the approaches vary by

---

188 *See* STAFF OF JOINT COMM. ON TAXATION, CORPORATE TAX RECEIPTS AND CORPORATE TAX LIABILITIES, JCX–4–20 (2020), https://www.jct.gov/CMSPages/GetFile.aspx?guid =a0213b6f–cdd4–4848–b365–a8937b616c9e. The House Committee on Ways and Means held a hearing for February 11, 2020, entitled "The Disappearing Corporate Income Tax." This document provides a summary of present law and accounting rules relevant to the Federal income tax liabilities and tax receipts of corporations. This document also discusses possible behavioral responses to Federal income tax and describes a review of 50 large C corporations undertaken by the Joint Committee staff related to corporate tax receipts.

189 COMM. FOR A RESPONSIBLE FED. BUDGET, *Budget Projections: Debt Will Exceed the Size of the Economy This Year* 1 (Apr. 13, 2020), http://www.crfb.org/blogs/new–projections–debt–will–exceed–size–economy–year.

190 CONG. BUDGET OFF., CON. OF THE U.S., THE BUDGET AND ECONOMIC OUTLOOK: 2020 TO 2030, at 5 (Comm. Print 2020), https://www.cbo.gov/system/files/2020–01/56020–CBO–Outlook.pdf.

191 *See* J. COMM. ON TAXATION, ESTIMATED REVENUE EFFECTS OF THE REVENUE PROVISIONS CONTAINED IN H.R. 6800, THE "HEALTH AND ECONOMIC RECOVERY OMNIBUS EMERGENCY SOLUTIONS ('HEROES') ACT," SCHEDULED FOR CONSIDERATION BY THE HOUSE OF REPRESENTATIVES ON MAY 15, 2020, JCX–15–20 (2020), https://www.jct.gov/publications/2020/jcx-15-20/

192 The Tax Foundation analyzed Joe Biden's proposed tax plan, as of April 2020. The Tax Foundation concluded the following a) Biden's plan would raise tax revenue by $3.8 trillion over the next decade on a conventional basis, b) when accounting for macroeconomic feedback effects, the plan would collect about $3.2 trillion over the next decade, and c) according to the Tax Foundation's General Equilibrium Model, the Biden tax plan would reduce GDP by 1.51 percent over the long term (on a conventional basis, the Biden tax plan would lead to 7.8 percent less after–tax income for the top 1 percent of taxpayers, 1.1 percent lower after–tax income for the top 5 percent, and around 0.6 percent less after–tax income for other income quintiles). The mechanisms by which his plan would achieve these macro effects are as follows: a) impose a 12.4 percent Social Security payroll tax on income earned above $400,000, evenly split between employers and employees, b) revert the top individual income tax rate for taxable incomes above $400,000 from 37

worldview.[193] In the build–up to the passage of the TCJA, democrats uniformly opposed the changes in the tax law. The complaints were varied depending on what part of the country critics were polled.[194] Some opposed the changes in tax law because of the size of the cut in the corporate rate,[195] and which upon further analysis, turned out to be a valid concern.[196] Others opposed the changes because certain proposals did not go far enough.[197] Some democrats simply opposed it based on the historic

percent under to the pre–TCJA level of 39.6 percent, c) tax long–term capital gains and qualified dividends at the ordinary income tax rate of 39.6 percent on income above $1 million, d) eliminate step–up in basis for capital gains taxation, e) cap the tax benefit of itemized deductions to 28 percent of value, f) restore the Pease limitation on itemized deductions for taxable incomes above $400,000, g) phase out Section 199A for filers with taxable income above $400,000, h) expand the Earned Income Tax Credit for childless workers aged 65+, i) provide renewable–energy–related tax credits to individuals, j) increase the corporate income tax rate from 21 percent to 28 percent, k) create a minimum tax on corporations with book profits of $100 million or higher, l) double the tax rate on Global Intangible Low Tax Income from 10.5 percent to 21 percent, m) establish a Manufacturing Communities Tax Credit to reduce the tax liability of businesses that experience workforce layoffs or a major government institution closure, n) expand the New Markets Tax Credit and make it permanent, o) offer tax credits to small business for adopting workplace retirement savings plans, p) expand several renewable–energy–related tax credits and deductions and ends subsidies for fossil fuels ,q) create a $8,000 tax credit for childcare, r) equalize the tax benefits of defined contribution retirement plans, s) eliminate real estate industry tax loopholes, t) expand the Affordable Care Act's premium tax credit, and u) create sanctions on tax havens and outsourcing. Huaquan Li, Garrett Watson & Taylor LaJoie, *Details and Analysis of Former Vice President Biden's Tax Proposals*, TAX FOUNDATION (Apr. 29, 2020), https://taxfoundation.org/joe–biden–tax–plan–2020/.

193 For a more conservative approach, see for example, Andrew Biggs & Joshua Rauh, *How to Pay for Stimulus Checks*, THE HILL (Apr. 27, 2020), https:// thehill.com/opinion/finance/494908–how–to–pay–for–stimulus–checks.

194 *See generally* John Harwood. *Few Americans Think They're Getting a Trump Tax Cut: NBC/WSJ Poll* 3, CNBC (Apr. 8, 2019, 10:26 PM), https:// www.cnbc.com/2019/04/05/few–americans–think–theyre–getting–a–trump–tax–cut–nbcwsj–poll.html.

195 *See* Paul Krugman, *The Tax Cut and the Balance of Payments (Wonkish)*, N.Y. TIMES (Nov. 14, 2018), https://www.nytimes.com/2018/11/14/opinion/the–tax–cut–and–the–balance–of–payments–wonkish.html.

196 *See* Jim Tankersley, Peter Eavis & Ben Casselman, *How FedEx Cut Its Tax Bill to $0*, N.Y. TIMES (Nov. 17, 2019), https://www.nytimes.com/2019/11/17/business/how–fedex–cut–its–tax–bill–to–0.html.

197 See for example Opportunity Zones, which were proposed on a bipartisan basis but once they became part of the TCJA, democrats refused to vote for the law and then debated their effectiveness. *See* Joshua Pollard, *Opportunity Zones Will Be Center Stage At The Presidential Debates*, FORBES (July 30, 2019, 2:53 PM), https:// www.forbes.com/sites/joshuapollard/2019/07/30/opportunity–zones–will–be–center–stage–at–the–presidential–debates/#78708f51996a.

level of lobbying that occurred.[198] Others opposed the TCJA due to distributional effects of previous tax cuts.[199] There was also a contingent that opposed the changes due to the increase in federal deficit that the TCJA would cause,[200] and the lack of savings that are associated with previous tax cuts.[201] This deficit–opposing contingent, in particular, was unique in its bipartisan chorus.[202] Recall that some republican congressional members almost did not vote for the TCJA because of the proposed deficit that the TCJA would create.[203]

Deficits and politics are fascinating issues to explore in light of major congressional legislation, especially in light of The Statutory Pay–As–You–Go Act of 2010.[204] On one hand, politicians divided on a perfectly partisan basis on the TCJA when there were corporate provisions that democrats did not approve. On the other hand, when similar provisions were included in the CARES Act, there was some pushback, but ultimately the bill passed on a nearly unanimous basis. To make matters more complicated, many voters are rating the deficit as a smaller political problem year–after–year even though the overall deficit has increased

---

198 *See* Jesse Drucker & Jim Tankersley, *How Big Companies Won New Tax Breaks From the Trump Administration*, N.Y. TIMES (Dec. 30, 2019), https:// www.nytimes.com/2019/12/30/business/trump–tax–cuts–beat–gilti.html.

199 Samara R. Potter & William G. Gale, *The Bush Tax Cut: One Year Later*, BROOKINGS INST. (June 15, 2002), https://www.brookings.edu/research/the–bush–tax–cut–one–year–later/.

200 *But see* Brian Reidl, *Tax Cuts Criticisms Grow More Incoherent*, INVESTOR'S BUSINESS DAILY (July 9, 2018, 2:46 PM), https:// www.investors.com/politics/commentary/tax–cut–criticisms–incoherent/. Seth Hanlon, Alan Cohen & Sara Estep, *Rising Deficits, Falling Revenues: The Fiscal Damage Caused by the New Republican Tax Law*, AMERICAN PROGRESS (Nov. 29, 2018, 9:00 AM), https://www.americanprogress.org/issues/economy/reports/2018/11/29/461579/rising–deficits–falling–revenues/.

201 *See* Alan J. Auerbach, *The Bush Tax Cut and National Saving*, NAT'L TAX ASS'N 1, 12 (2002), https://eml.berkeley.edu//~auerbach/bushtaxcut.pdf.

202 *See* Harry Stein, *How the Budget Resolution Will Make or Break Revenue–Neutral Tax Reform*, CTR. FOR AM. PROGRESS (Sep. 28, 2017, 5:00 AM), https:// www.americanprogress.org/issues/economy/reports/2017/09/28/439508/budget–resolution–will–make–break–revenue–neutral–tax–reform/.

203 Karl Rove, *The 30 Republicans Holding Up Tax Reform*, WALL ST. J. (Sep. 13, 2017), https://www.wsj.com/articles/the–30–republicans–holding–up–tax–reform–1505343197.

204 CARES Act, Pub. L. No. 116–136, § 6002, 134 Stat. 281, 505 (2020), as well as section 308 of the Paycheck Protection Program and Healthcare Act, specifically designates the funds to be designated under section 4(g) of Public Debt Limit Increase Pub. L. No. 111–139, 124 Stat. 8, which allows for emergency funds to be excluded from Office of Management and Budget (OMB) scorecard system. The purpose of the scorecard system is to trigger "sequestration." If Congress adjourns with more costs than savings on the scorecard, OMB is required to calculate, and the President must issue a sequestration order implementing, across–the–board cuts to a group of mandatory programs in an amount that offsets the net costs on the scorecard.

substantially over the prior two decades [205] What used to be a focal point of the republican party, the deficit has largely been treated as a non–issue as of late.[206]

## V. CONCLUSION

The Coronavirus is one the most unique crises that the United States has encountered in recent history. In this century, the only other two events that rival the Coronavirus pandemic in terms of deaths, stock market losses, and economic losses are the Great Recession of 2008 and the terrorist attacks on September 11, 2011. After both the Great Recession and September, 11, 2001, the federal government implemented landmark changes. After 2008, Dodd–Frank, along with a host of other laws and federal agencies, were created. After September 11, 2001, watershed government programs were instituted like the Patriot Act. With the Coronavirus, Congress's first response was to pass the CARES Act. Over 880 pages in length, the CARES Act aggressively modified the Internal Revenue Code. These changes included new and novel programs like the changing of the individual income tax deadline to July 15, Economic Impact Payments to individuals, and the creation of the Payment Protection Program. In addition, Congress sought to modify existing Internal Revenue Code sections like section 172 (net operating losses), section 163(j) (interest expense limitations), and technical corrections to section 168 (depreciation). All of these provisions had a direct effect on the federal government. What is most telling, however, is that these changes represent the *most important* priorities to Congress in a time of pandemic. These are the changes that Congress had most readily available at its fingertips when the crisis struck. For many these changes are on–point and will be vital to recovery. For others, these new provisions will seem ineffective and misdirected. Regardless, it's only in times of crisis are taxpayers afforded the opportunity to see what is of the highest priority to Congress and are able to compare these priorities to your own. The Coronavirus provided this opportunity.

---

205 *Federal Budget Deficit*, GALLUP, https://news.gallup.com/poll/147626/federal–budget–deficit.aspx

206 *See* Julian Zelizer, *Under Trump, the Deficit Has Ballooned, Exploding a GOP Myth*, CNN (Aug. 24, 2019, 9:40 PM), https://www.cnn.com/2019/08/24/opinions/trump–deficit–gop–myth–zelizer/index.html.