

Office of Chief Counsel  
Internal Revenue Service  
**memorandum**

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subject: TPP claim for ERC submitted on an aggregate employment tax return or claim for refund without an allocation schedule attached

This Program Manager Technical Advice responds to your request for assistance. This advice may not be used or cited as precedent.

ISSUES

- (1) Whether an aggregate Form 941, *Employer's QUARTERLY Federal Tax Return*, or an aggregate Form 941-X, *Adjusted Employer's QUARTERLY Federal Tax Return or Claim for Refund*, submitted by a third-party payer (TPP) under the TPP's own Employer Identification Number (EIN) to claim the Employee Retention Credit (ERC) on behalf of its common law employer clients is a valid return for the TPP's clients if the TPP fails to attach a Schedule R (Form 941): *Allocation Schedule for Aggregate Form 941 Filers*.
- (2) Whether an aggregate Form 941-X submitted by a TPP under the TPP's own EIN to claim the ERC on behalf of its common law employer clients is a formal claim for refund if the TPP fails to attach a Schedule R (Form 941).
- (3) Whether an aggregate Form 941-X submitted by a TPP under the TPP's own EIN to claim the ERC on behalf of its common law employer clients is an informal claim for refund if the TPP fails to attach a Schedule R (Form 941).
- (4) Whether an aggregate Form 941-X submitted by a TPP under the TPP's own EIN to claim the ERC on behalf of its common law employer clients is a protective claim for refund if the TPP fails to attach a Schedule R (Form 941).

## CONCLUSIONS

- (1) An aggregate Form 941 or Form 941-X submitted by a TPP under the TPP's own EIN to claim the ERC on behalf of its common law employer clients is not a valid return for the clients if the TPP fails to attach a Schedule R (Form 941).<sup>1</sup>
- (2) An aggregate Form 941-X submitted by a TPP under the TPP's own EIN to claim the ERC on behalf of its common law employer clients is not a valid formal claim for refund for the TPP's clients if the TPP fails to attach a Schedule R (Form 941).<sup>2</sup>
- (3) An aggregate Form 941-X submitted by a TPP under the TPP's own EIN to claim the ERC on behalf of its common law employer clients is not an informal claim for refund for the TPP's clients if the TPP fails to attach a Schedule R (Form 941).
- (4) An aggregate Form 941-X submitted by a TPP under the TPP's own EIN to claim the ERC on behalf of its common law employer clients is not a valid protective claim for refund for the TPP's clients if the TPP fails to attach a Schedule R (Form 941).

## BACKGROUND

The Commissioner of Internal Revenue (Commissioner) has placed a moratorium on the processing of claims for refund submitted on Forms 941-X due to concerns that many taxpayers who have submitted claims for the ERC are not entitled to the credits. During the moratorium, the Internal Revenue Service (Service) has scanned the Forms 941-X into reviewable documents and determined that approximately 2,700 of the amended returns have been submitted by TPPs without the requisite Schedule R (Form 941) allocating the claimed refund to each common law employer client as required by Notice 2021-20, 2021-11 I.R.B. 922, and the *Instructions for Forms 941-X*.

## LAW AND ANALYSIS

Employers generally are required to deduct and withhold Federal Insurance Contributions Act (FICA) taxes from wages paid to their employees under section 3102 and are separately liable for the employer's share of FICA taxes under section 3111. A common law employer may choose to enter into an agreement with a TPP pursuant to which the TPP withholds, deposits, and pays employment taxes with respect to the

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<sup>1</sup> Although this document specifically references Form 941 and Form 941-X, the analysis and conclusion with respect to Issue (1) is applicable to other aggregate employment tax returns such as the Form 943, *Employer's Annual Federal Tax Return for Agricultural Employees*, and the Form 943-X, *Adjusted Employer's Annual Federal Tax Return for Agricultural Employees or Claim for Refund*.

<sup>2</sup> Form 943-X serves the same purpose for Form 943, which is the employment tax return filed by certain agricultural employers. The *Instructions for Form 943-X* require that Certified Professional Employer Organizations ("CPEOs") (see FN.4, below for definition) and section 3504 agents attach Schedule R (Form 943): *Allocation Schedule for Aggregate Form 943 Filers*, to the Form 943-X, allocating the wages, taxes, and payments reported on the Form 943-X to each client. These instructions also require that TPP aggregate filers that are not CPEOs or section 3504 agents attach a Schedule R (Form 943) providing applicable employment tax information for any client for whom the aggregate filer is claiming the ERC. While this document specifically addresses Form 941-X, the analyses for Issues (2), (3), and (4) also apply to claims for refund made on a Form 943-X.

employees of the employer. Generally, the employer remains responsible to ensure that tax returns are filed and deposits and payments are timely even when the employer contracts with a TPP to perform these acts. In certain arrangements, the TPP pays wages to the employees of its common law employer clients (clients)<sup>3</sup> and files an aggregate Form 941 reporting employment taxes for multiple clients on one return using its own EIN (herein referred to as “TPP aggregate filers”). Examples of TPP aggregate filers include Certified Professional Employer Organizations (CPEOs)<sup>4</sup>, TPPs authorized as agents under section 3504 (section 3504 agents)<sup>5</sup>, and non-certified Professional Employer Organizations (PEOs).<sup>6</sup>

Both CPEOs and section 3504 agents are required to attach a Schedule R (Form 941) to aggregate Forms 941.<sup>7</sup> Schedule R (Form 941) is an allocation schedule on which the TPP lists the name and EIN of each client for whom the TPP is filing and allocates the wages, taxes, and payments reported on the aggregate return to each client. A TPP aggregate filer who is not a CPEO or a section 3504 agent typically does not attach a Schedule R (Form 941) to an aggregate Form 941 because they are not required to do so unless they are claiming certain credits for one or more clients.

Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. 116-136, 134 Stat. 281 (2020), as originally enacted, provided an ERC for eligible employers that paid qualified wages after March 12, 2020, and before January 1, 2021. The ERC under section 2301 of the CARES Act was later amended and extended by the Taxpayer Certainty and Disaster Tax Relief Act of 2020 (Relief Act), enacted as Division EE of the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (2020), to qualified wages paid after December 31, 2020, and before July 1, 2021. The American Rescue Plan Act of 2021 (ARP), Pub. L. 117-2, 135 Stat. 4 (2021), provided a substantially similar ERC under section 3134 of the Code,

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<sup>3</sup> For purposes of this memo, it is assumed that the “client” is the common law employer of the employees to whom the TPP makes wage payments, and that the TPP is not an employer under section 3401(d)(1).

<sup>4</sup> The CPEO program is a voluntary program for TPPs to apply to the IRS to become certified as a CPEO under sections 3511 and 7705 relating to the federal employment tax consequences and certification requirements, respectively, of a CPEO. Under these provisions, a TPP who becomes certified as a CPEO will be treated as the employer of any worksite employee performing services for any client of the TPP, but only with respect to wages paid by the TPP to the worksite employee.

<sup>5</sup> Section 3504 states that in situations where a TPP has the control, receipt, custody, or disposal of, or pays the wages of an employee or group of employees, employed by one or more employers, the Service may authorize the TPP as an agent to perform such acts as are required of employers. Treas. Reg. § 31.3504-1 provides that an employer and TPP may request the TPP be designated a section 3504 agent by application. Form 2678, *Employer/Payer Appointment of Agent*, is used to request the Service to authorize a TPP to act as a section 3504 agent of the employer.

<sup>6</sup> Pursuant to Treas. Reg. § 31.3504-2, in certain situations the Service will designate a TPP to perform acts required of an employer where the employer has entered into a service agreement with the TPP under which the TPP performs the employment tax obligations of the employer for wages paid by the TPP to the employer’s employees.

<sup>7</sup> Filing an aggregate Form 940, *Employer's Annual Federal Unemployment (FUTA) Tax Return*, is allowed for section 3504 agents of home care service recipients and is required for CPEOs. Schedule R (Form 940): *Allocation Schedule for Aggregate Form 940 Filers*, is the allocation schedule prescribed for aggregate Forms 940. Because the ERC is not claimed on the Form 940, this return is not addressed herein.

enacted by section 9651 of the ARP, with respect to qualified wages paid after June 30, 2021, and before January 1, 2022.

Section 2301(l)(3) of the CARES Act (as amended by section 206 of the Relief Act and applicable to calendar quarters in 2020) and section 2301(l)(2) of the CARES Act (as amended by section 207 of the Relief Act and applicable to calendar quarters in 2021) provide that the IRS shall issue the forms, instructions, regulations, and guidance that are necessary “with respect to the application of the [ERC] to TPPs (including [PEOs], [CPEOs], or [section 3504 agents]), including regulations or guidance allowing such [TPPs] to submit documentation necessary to substantiate the eligible employer status of employers that use such [TPPs].”<sup>8</sup>

The IRS complied with this directive in Notice 2021-20, which provided information specific to TPPs in section M, “Special Issues for Employers: Use of Third-Party Payers.”<sup>9</sup> Concerning employers who utilize TPPs to report and pay employment taxes, Question and Answer (Q&A) #62 of the notice provides that such employers are entitled to the ERC regardless of their use of a TPP. For CPEOs and section 3504 agents, Q&A #62 provides that, in order to claim the ERC for their clients, these TPPs will need to report the ERC claim for each client on the Schedule R (Form 941) that they are already required to attach to their Form 941. For TPP aggregate filers who are not a CPEO or section 3504 agent, and who typically do not attach a Schedule R (Form 941) to their aggregate Form 941, Q&A #62 provides that, to claim the ERC for their clients, these TPPs will need to also report the ERC claim for each client on a Schedule R (Form 941) attached to their aggregate Form 941. However, they are not required to include on the Schedule R (Form 941) any clients for whom they are not claiming an ERC. The Instructions for Form 941 provide these same requirements that TPP aggregate filers report any ERC claims for their clients on a Schedule R (Form 941) attached to their employment tax return.

Form 941-X is the form designated by the IRS for employers to correct errors and claim refunds for overpayments of tax from a previously filed Form 941. Employers who were eligible for the ERC in a previous calendar quarter but who did not claim the ERC on their original Form 941 filed for that quarter may later claim the ERC on a Form 941-X and receive a refund for any overpayment of tax resulting from the claimed ERC. The *Instructions for Form 941-X* require that TPP aggregate filers filing Form 941-X to claim the ERC for their clients report any ERC claims for their clients on the Schedule R (Form 941)<sup>10</sup> attached to the Form 941-X.

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<sup>8</sup> This provision was originally enacted as section 2301(l)(4) of the CARES Act, but it was subsequently redesignated by sections 206 and 207 of the Relief Act.

<sup>9</sup> The IRS also provided information concerning the ERC and TPPs in various forms and instructions and information provided on [irs.gov](https://www.irs.gov).

<sup>10</sup> The Schedule R (Form 941) is used by TPP aggregate filers for both Form 941 and Form 941-X.

- (1) An aggregate Form 941 or Form 941-X submitted by a TPP aggregate filer to claim the ERC on behalf of the TPP's clients that does not have a Schedule R (Form 941) attached is not a valid return for the TPP's clients.

An employer is generally required to file an employment tax return for each calendar quarter in which it pays wages subject to FICA tax. See Treas. Reg. § 31.6011(a)-1(a). In general, every person required to deduct and withhold federal income tax from wages must file an employment tax return for each calendar quarter in which the person is required to deduct and withhold such tax. See Treas. Reg. § 31.6011(a)-4.

Section 6501(a) provides generally that the amount of any tax imposed by Title 26 shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed).

Section 6511 provides that the period of limitations for filing a claim for refund is three years from the time the return was filed, or two years from the time the tax was paid, whichever is later. Employers that ascertain an employment tax overpayment error and choose to correct the error by making an interest-free adjustment must file an adjusted return before the expiration of the period of limitations on credit or refund under section 6511.

The Service has broad authority to determine what information should be submitted with a tax return, and how that information should be submitted. To determine whether a return is valid, courts look to the test outlined in Beard v. Commissioner, 82 T.C. 766, 777 (1984), aff'd per curiam, 793 F.2d 139 (6th Cir. 1986). The Beard test requires that: (1) sufficient data be supplied to calculate tax liability; (2) the document purport to be a return; (3) there be an honest and reasonable attempt to satisfy the requirements of the tax law; and (4) the return be executed under penalty of perjury. Id. If a return meets the Beard test (also known as the "substantial compliance" standard), the return is a valid return for purposes of commencing the period of limitations on assessment under section 6501.

Where the TPP aggregate filer does not attach a Schedule R (Form 941) to its aggregate Form 941, the Service has no way of knowing the Form 941 is an aggregate return, and no way of determining to which client(s) the taxes and payments reported on the return should be allocated. Because of this omission, the data sufficiency requirement of the Beard test had not been satisfied and the Form 941 does not constitute a valid return for the TPP's clients for purposes of commencing the period of limitations on assessment under section 6501 for the TPP's clients.

Similarly, if a TPP aggregate filer attempts to amend its originally filed aggregate Form 941 (that did have a Schedule R (Form 941) attached) using Form 941-X and does not attach a Schedule R (Form 941) to this Form 941-X, the data sufficiency requirement of the Beard test has not been satisfied. Therefore, an aggregate Form 941-X without a Schedule R (Form 941) does not satisfy the requirements of the Beard test and is not a valid return for the TPP's clients for purposes of claiming a credit

on an adjusted return within the time required under section 6511. This position is consistent with the Service's past determinations concerning aggregate employment tax returns filed without an allocation schedule attached.<sup>11</sup>

- (2) An aggregate Form 941-X submitted by a TPP aggregate filer claiming the ERC on behalf of its clients that does not have a Schedule R (Form 941) attached is not a formal claim for refund for any of the TPP's clients.

When a taxpayer is required to file a claim for refund using a particular form, then the claim "shall be filed in a manner consistent with such form, form instructions, publications, or other guidance found on the IRS.gov Web site." Treas. Reg. § 301.6402-2(a)(2). The claim must provide "facts sufficient to apprise" the Service of the basis of the claim. Treas. Reg. § 301.6402-2(b).

In this case, Form 941-X is the prescribed form for filing refund claims for overpayments of tax from a previously filed Form 941, including overpayments of tax resulting from the application of an ERC that an employer failed to claim on the originally filed Form 941. Notice 2021-20 provides that all TPP aggregate filers claiming the ERC for their clients will need to report ERC claims for each client on a Schedule R (Form 941) attached to their Form 941. More specifically, the *Instructions for Form 941-X* explicitly state that "Approved section 3504 agents and CPEOs must complete and file Schedule R (Form 941)." The instructions also provide that "other third-party payers that file aggregate Forms 941, such as non-certified PEOs, must complete and file Schedule R (Form 941)" in certain circumstances, including if they have clients that are claiming the ERC.

TPP aggregate filers in this case are using Form 941-X to claim the ERC on behalf of their clients. The TPPs must follow the form's instructions in filing a refund claim, and here, the instructions explicitly require attaching a Schedule R (Form 941). See Treas. Reg. § 301.6402-2(a)(2). Therefore, a TPP that submits an aggregate Form 941-X without an attached Schedule R (Form 941) does not comply with Treas. Reg. § 301.6402-2.

The submission of an aggregate Form 941-X without a Schedule R (Form 941) also violates the requirement that the refund claim set out the grounds of the refund and facts sufficient to apprise the Service of the basis of the claim. Treas. Reg. § 301.6402-2(b). The list of the TPP's clients included on the aggregate Form 941-X and amount of the claim attributable to each is only available on a Schedule R (Form 941). Without a Schedule R (Form 941) an aggregate Form 941-X does not set forth the specific taxpayers for whom the claim is filed and the specific amount of each claim for each specific taxpayer. Absent this information, the Service has insufficient information to determine the validity of the claim or even to initiate an administrative investigation of the merits of each taxpayer's claim. Therefore, aggregate Forms 941-X submitted

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<sup>11</sup> For example, see CCA 201438021, 2014 WL 4650265 (Jul. 17, 2014), which included advice that the Service could successfully argue that the assessment period of limitations under section 6501 does not start to run when an aggregate Form 941 is filed without Schedule R attached.

without a Schedule R (Form 941) are not formal refund claims for amounts claimed on behalf of the TPP's clients. The Schedule R (Form 941) is required to be attached by TPPs under Treas. Reg. § 301.6402-2 and the form instructions, and a form submitted without the attachment does not constitute a valid formal refund claim for the TPP's clients.

- (3) An aggregate Form 941-X submitted by a TPP aggregate filer claiming the ERC on behalf of its clients that does not have a Schedule R (Form 941) attached is not a valid informal claim for refund for any of the TPP's clients.

An informal claim is a timely filed refund request that satisfies all of the essential informational requirements of a claim for refund but otherwise fails to satisfy a formal requirement. A timely filed refund request can be an informal claim if it has a written component, is sufficient to put the Service on notice that a refund is sought, and focuses the Service's attention on the merits of the claim. United States v. Kales, 314 U.S. 186, 194 (1941).

The aggregate Form 941-X satisfies the written component requirement in this case because it is a written document. The Form 941-X also notifies the Service that a refund is sought on behalf of the filing party because that information is indicated on the form along with the amount of the refund requested. However, without a Schedule R (Form 941) these Forms 941-X fail the "merits of the claim" requirement. As discussed above, the aggregate Form 941-X does not include sufficient information on the basis for the refund that is being claimed. Information about the employers included on the aggregate Form 941-X and the portion of the total claim attributable to each would only be available if the aggregate Form 941-X included the information on the Schedule R (Form 941). The Service cannot determine which taxpayers are claiming a refund, and therefore cannot focus its attention on the merits of the claim, without that information. Therefore, the aggregate Form 941-X submitted without a Schedule R (Form 941) is not an informal claim for refund for the amounts claimed on behalf of the TPP's clients.

- (4) The aggregate Form 941-X submitted by a TPP aggregate filer claiming the ERC on behalf of its clients that does not have a Schedule R (Form 941) attached is not a valid protective claim for refund for any of the TPP's clients.

An aggregate Form 941-X submitted without a Schedule R (Form 941) would not by itself qualify as a protective claim for the TPP's clients. Protective claims are filed to preserve a taxpayer's right to claim a refund when the refund is contingent on future events that may not be ascertainable until after the period of limitation expires. AmBase v. United States, 731 F.3d 109, 118 (2d Cir. 2013); United States v. Kales, 314 U.S. 186, 196 (1941). Protective claims are filed when there is active litigation or expected changes in the law, where one element of the claim (usually the amount of the claim) is not certain within the limitations period. A Form 941-X submitted without a Schedule R (Form 941) would not constitute a valid protective claim for the TPP's clients absent further explanation, because the form and its required attachment are not subject to pending litigation or unclear events that may affect an element of the claim. Although an

additional justification written on the return would be necessary in order for a Form 941-X to be considered a possible protective claim, the lack of a Schedule R (Form 941) would still preclude the Service from knowing which of the TPP's clients the protective claim was intended to cover and fails to comply with the rules set forth in Treas. Reg. § 301.6402-2 and the form instructions.

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