

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

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date: June 21, 2021

to: John J. McInelly  
Program Manager  
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from: Adrienne Griffin  
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**Adrienne  
E. Griffin**

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subject: Penalty for Failure to Deposit Taxes Deferred Under CARES Act Section 2302(a)(2)

This memorandum responds to your request for assistance concerning section 2302(a)(2) of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law 116-136, 134 Stat. 281 (March 27, 2020). This advice may not be used or cited as precedent.

ISSUES

If any portion of an employer's section 3111(a) (employer portion of social security)<sup>1</sup> taxes or so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(a), the payment and deposit due dates of which are deferred under CARES Act section 2302, is not deposited by the applicable installment due date, is the deferral of the deposit due date invalidated for all of the employer's deferred section 3111(a) or 3221(a) tax, rather than just the remaining delinquent portion? Is the result that the section 6656 penalty for failure to deposit taxes is applicable to the entire deferred amount, assuming that no exception to the penalty applies?

CONCLUSION

Yes to both questions. CARES Act section 2302(a)(2) conditions the deferral of deposits on the timely deposit of all amounts deferred by the applicable due dates of

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<sup>1</sup> All references in this memorandum to a section, without further specification, are references to the Internal Revenue Code.

December 31, 2021 and December 31, 2022.<sup>2</sup> For example, if an employer defers the deposit of its portion of the section 3111(a) tax (the employer's portion of social security tax) in the amount of \$50,000, and deposits and pays \$25,000 on December 31, 2021 but fails to make any additional deposits or payments by December 31, 2022, the employer is liable for a section 6656 penalty on the entire \$50,000 if no exception to the penalty applies.

## LAW AND ANALYSIS

Section 3111(a) imposes on every employer an excise tax (the employer's portion of social security tax) equal to 6.2 percent of the wages paid by the employer with respect to employment. An employer's section 3111(a) taxes are generally subject to the deposit rules found in Treasury regulations. See Treas. Regs. §§ 31.6302-1(a) & (e)(1)(ii). An employer that is a monthly depositor is required to deposit the section 3111(a) tax by electronic funds transfer no later than the 15th day of the calendar month following the month in which the employer paid wages to employees. See Treas. Regs. §§ 31.6302-1(c) & (h). Employers with larger employment tax obligations are subject to the semi-weekly deposit due dates. See Treas. Regs. § 31.6302-1(c)(2). If on any day within its regular deposit period, any employer has accumulated \$100,000 or more of employment taxes, those taxes must be deposited the next business day. See Treas. Regs. § 31.6302-1(c)(3). Certain safe harbor and de minimis exceptions may apply. See Treas. Regs. § 31.6302-1(f). Most employers report their employment tax liability and the deposits they have made on the quarterly Form 941, Employer's QUARTERLY Federal Tax Return. An employer who both files Form 944, Employer's ANNUAL Federal Tax Return, and has a small employment tax liability as described in regulations, is generally not subject to these deposit rules but may remit employment taxes with its timely filed Form 944. See Treas. Regs. § 31.6302-1(c)(5).

Section 3221(a) imposes on every employer that is subject to the Railroad Retirement Tax Act (RRTA), chapter 22 of the Internal Revenue Code, an excise tax (the employer's share of the social security portion of RRTA tax) that is similar to the excise tax imposed under section 3111(a). An employer's section 3221(a) taxes are subject to deposit rules that are similar to the deposit rules under Treas. Regs. § 31.6302-1. Treas. Regs. § 31.6302-2(a).

Section 6656 generally imposes a penalty for failure to deposit by any person required to deposit taxes, including section 3111(a) and 3221(a) taxes. The amount of the penalty depends on how delinquent the deposit is. The penalty is 10 percent of the

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<sup>2</sup> December 31, 2021 is the New Year's Day holiday in the District of Columbia. January 1, 2022 is a Saturday and January 2, 2022 is a Sunday. Thus, under section 7503, an employer may deposit and pay the first installment of its deferred employment taxes on January 3, 2022 and be considered timely. Similarly, December 31, 2022 is a Saturday, January 1, 2023 is a Sunday, and January 2, 2023 is the New Year's Day holiday in the District of Columbia. Again, under section 7503, an employer may deposit and pay the second installment of its deferred employment taxes by January 3, 2023 and be considered timely. For ease of reference, this memo refers to the installment due dates as December 31, 2021 and December 31, 2022, the due dates stated in the CARES Act.

underpayment if the failure is for more than 15 days. See I.R.C. § 6656(b)(1)(A)(iii). If the tax is not paid within 10 days of the first notice sent to the taxpayer demanding payment of any delinquent amount, the penalty is 15 percent of the underpayment of the tax. See I.R.C. § 6656(b)(1)(B). The penalty does not apply if the failure is due to reasonable cause and not due to willful neglect. See I.R.C. § 6656(a). Certain first-time depositors may be excepted from the penalty. See I.R.C. § 6656(c) & (d); Treas. Regs. § 301.6656-1(a) & (b). Subject to conditions and limitations, relief from the section 6656 penalty may be available to the extent that a failure to deposit (or a reduction of the amount of the deposit) was due to the anticipation of certain refundable credits allowed under the CARES Act and related Coronavirus relief enactments. See, e.g., Notice 2020-22, 2020-17 I.R.B. 664.

Section 2302(a)(1) of the CARES Act changes the due date for the payment of certain employment taxes to the applicable date defined later in the statute. Section 2302(a)(2) provides that deposits of those taxes will not be treated as due on the dates required by Treas. Regs. §§ 31.6302-1 and 31.6302-2, if certain conditions are met. Specifically, CARES Act section 2302(a)(2) provides that:

Notwithstanding section 6302 of the Internal Revenue Code of 1986, an employer shall be treated as having timely made all deposits of applicable employment taxes that are required to be made (without regard to this section) for such taxes during the payroll tax deferral period if all such deposits are made not later than the applicable date.

The term “applicable employment taxes” includes taxes imposed under section 3111(a) and so much of the taxes imposed under section 3221(a) as are attributable to the rate in effect under section 3111(a). CARES Act § 2302(d)(1).

The term “payroll tax deferral period” means the period beginning on the date of enactment of the CARES Act, March 27, 2020, and ending before January 1, 2021. CARES Act § 2302(d)(2).

The term “applicable date” means December 31, 2021, with respect to 50% of the eligible deferred amount of tax deferred under CARES Act section 2302(a); and December 31, 2022, with respect to the remaining tax so deferred. CARES Act § 2302(d)(3). If an employer pays any amount before the applicable dates, any such payment is first applied to reduce the employer’s liability for an amount due on December 31, 2021 and then to the amount due on December 31, 2022.

In other words, CARES Act section 2302(a)(2) allows an employer to defer, without incurring a penalty under section 6656, its deposits of the applicable employment taxes until December 31, 2021 and December 31, 2022, provided that the conditions stated in CARES Act section 2302(a)(2) are satisfied.

CARES Act section 2302(a)(2) conditions the deferral of deposits on the deposit of all deferred amounts by the applicable installment due dates. Specifically, the deferral of

the deposits is valid provided “all such deposits are made not later than the applicable date.” If any portion of the deposit is not made by the applicable date, whether December 31, 2021, as to the first installment, or December 31, 2022, as to the second installment, then the deferral is completely invalid. In that event, the deposits were due on the usual deposit due dates provided in Treas. Regs. §§ 31.6302-1 and 31.6302-2, which would be the due dates used in determining any penalties under section 6656.

The following examples illustrate the conclusion. Assume that an employer is liable for section 3111(a) tax, the employer’s share of social security tax. Under CARES Act section 2302(a), these taxes are not due until the applicable due dates of December 31, 2021 and December 31, 2022. The employer is also required to deposit these taxes by section 6302 and its implementing regulations. Assume that any failure to deposit is not due to reasonable cause, and no other exception is applicable. Additionally assume that an employer has deferred, under CARES Act section 2302(a)(2), the deposit for the maximum amount of the employer’s section 3111(a) tax for the 2020 tax year allowed to be deferred, and that this maximum amount deferred is a deposit of \$50,000 of section 3111(a) taxes. As a result, under CARES Act section 2302(d)(3), the employer must deposit \$25,000 by December 31, 2021, and the remaining \$25,000 by December 31, 2022.

If, for the 2020 tax year, the employer deposits \$5,000 on December 31, 2021, and makes no other deposits before December 31, 2021, the 10% penalty under section 6656(b)(1)(A)(iii), for failure to deposit tax for more than 15 days, applies to the entire \$50,000, and the penalty amount would be \$5,000. Because the first installment of \$25,000, due on December 31, 2021, was not deposited by that date, the deferral is invalidated as to the entire \$50,000. If, on February 7, 2022, the IRS issues a notice demanding payment of the balance of the first installment, and the employer does not pay the full amount demanded by February 17, 2022, the penalty rate increases to 15 percent.

If, for the 2020 tax year, the employer deposits \$25,000 on December 31, 2021, and deposits the remaining \$25,000 on February 28, 2023, the 10% penalty under section 6656(b)(1)(A)(iii), for failure to deposit tax for more than 15 days, applies to the entire \$50,000, and the penalty amount would be \$5,000. Because the second installment of \$25,000, due on December 31, 2022, was not timely deposited, the deferral is invalidated as to the entire \$50,000. If, on February 6, 2023, the IRS issues a notice demanding payment of the second installment of \$25,000, and the employer does not pay the full amount demanded by February 16, 2023, the penalty rate increases to 15 percent.

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Please contact Alexander Wu at (202) 317-6845 or by email if you have any further questions.