

CCH® AnswerConnect

Virtual Coffee Talk

A discussion of the latest tax updates

Employee Retention Credits

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Oct. 31, 2023



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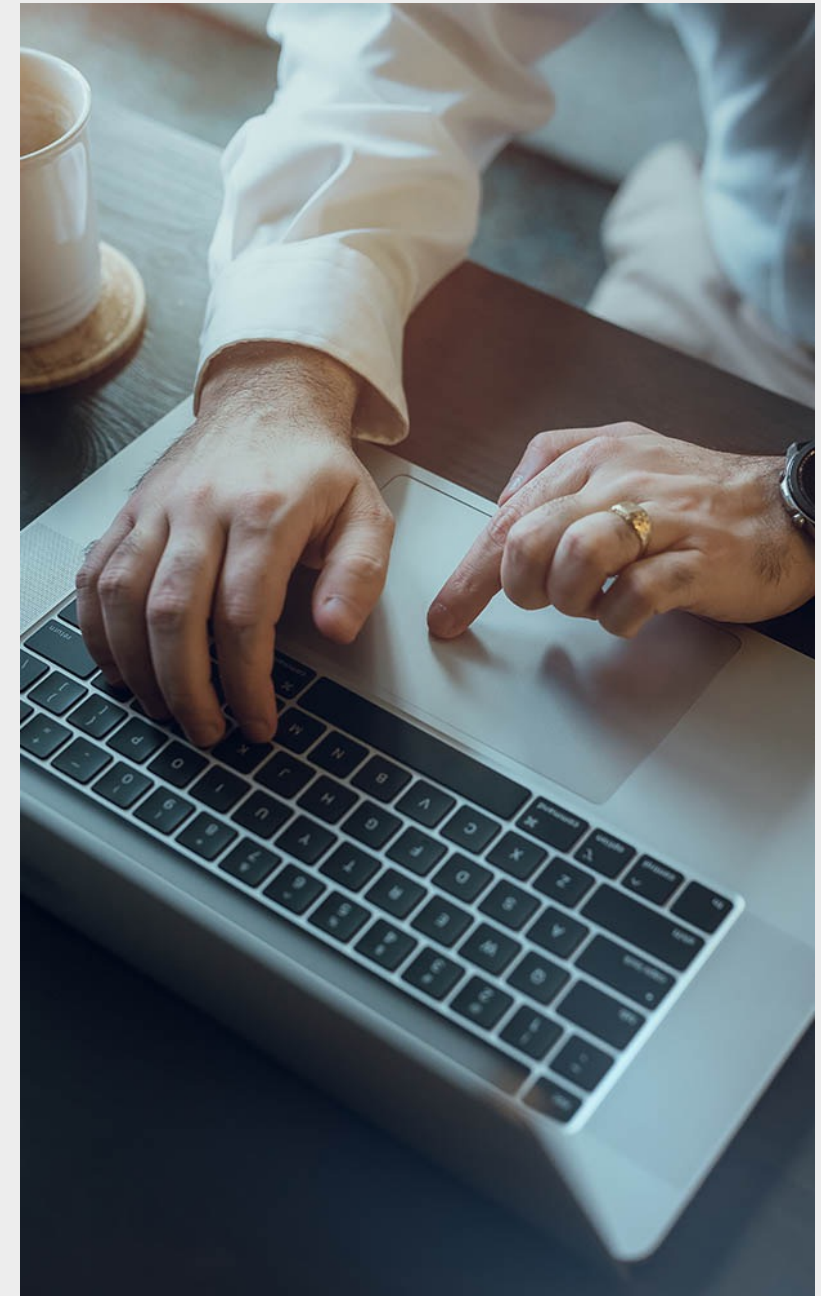
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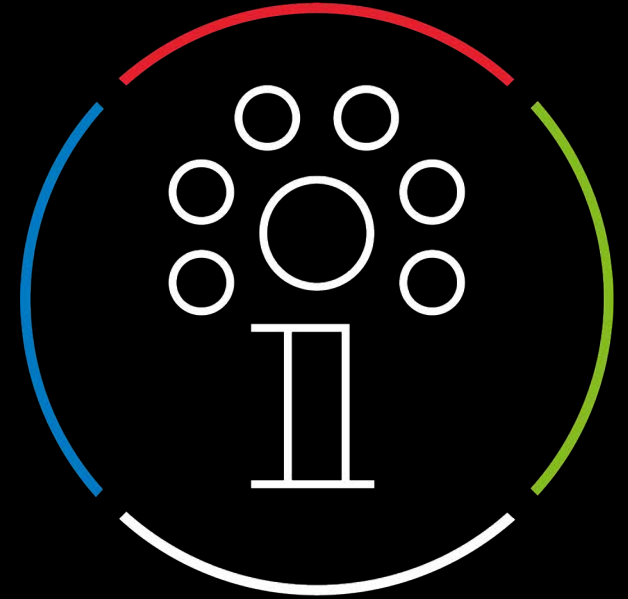
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Agenda

- Introduction to ERCs
- Qualification, Moratorium, Withdrawal and Whistleblowing
- ERCs in M&A Transactions
- ERC Audits, Penalties & Criminal Cases
- Additional Information in CCH[®] AnswerConnect



Introduction to ERCs



ERCs

The Employee Retention Credit (ERC)

- Refundable tax credit
- Filed against employment taxes
- Intended to incentivize employers to keep their employees on the payroll

2020

- Maximum credit of \$5,000 per qualifying employee.
- Employers with 100 or fewer FTEs in 2019 can take credit for **all** employees.
- Employers with greater than 100 FTEs in 2019 can only take credit on employees paid but **not** providing services.

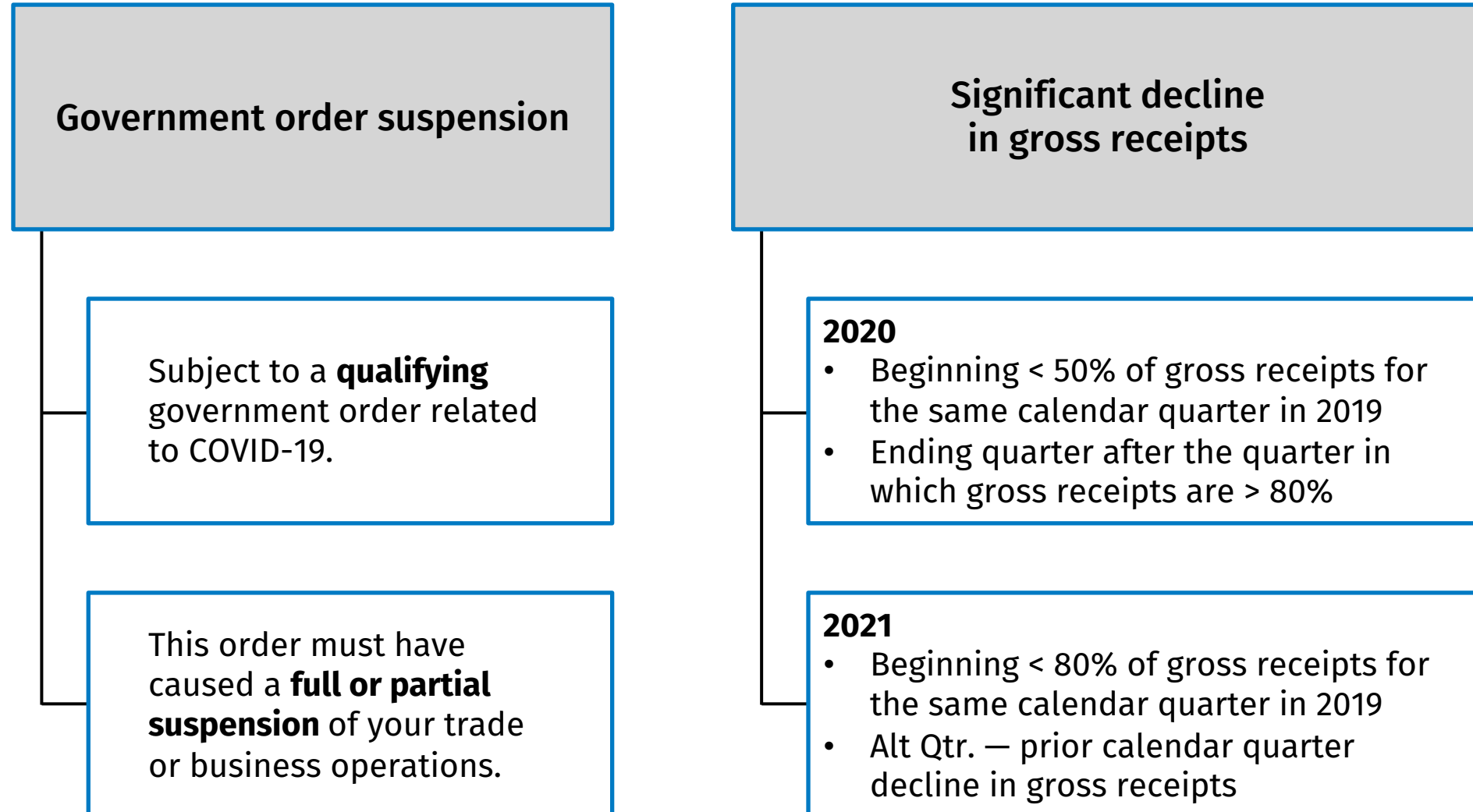
2021

- Maximum credit of \$7,000 per qualifying employee per quarter (Q1 – Q3). Total maximum credit of \$21,000 per employee.
- Employers with 500 or fewer FTEs in 2019 can take credit for **all** employees.
- Employers with greater than 500 FTEs in 2019 can only take credit on employees paid but **not** providing services.

Qualification, Moratorium, Withdrawal and Whistleblowing



Qualification Criteria



Polling question #1

Have you claimed ERCs?

- A. Yes
- B. No
- C. No, but we are considering it.



Moratorium

**Announced September 14, 2023 —
Will continue through at least the
end of 2023.**

Pause in processing new claims:

- Intended to allow the IRS to focus on other priorities
- Ensure the proper review and administration of existing claims
- Continuing to work on previously filed claims — but processing times will be longer.

***“Any businesses that have received ERC payments improperly
may be required to pay those funds back.”***

Shifting focus to:

- Review/audit
- Criminal investigation of promoters and businesses



Polling question #2

Have you been impacted by the IRS's moratorium?

- A. Yes
- B. No



Lawmakers demanded answers to a list of 10 questions, no later than October 17, 2023:

- 1 What steps will the IRS take to ensure legitimate ERTC claims filed before the moratorium beginning September 14, 2023, are processed in a reasonable amount of time?
- 2 How fast will existing ERTC claims be processed under this new moratorium?
- 3 What data points led you to implement the recently announced moratorium?
- 4 What is the most up-to-date total dollar figure of ERTC refunds that have been processed?
- 5 The IRS counts PEO claims as one claim, even though they may represent hundreds or thousands of claims by different small businesses. How many PEO claims are in the ERTC backlog?
- 6 When does the IRS expect the current backlog to be eliminated in its entirety?
- 7 What steps will be taken to expedite processing times of legitimate ERTC claims filed during the moratorium, which the IRS will begin processing no earlier than January 1, 2024?
- 8 What fraud prevention measures will the IRS take during the moratorium to be better equipped to combat fraud when processing new claims begins in 2024?
- 9 What legislative proposal is the IRS considering to address ERTC fraud as referenced in your July 25, 2023 remarks, and when do you plan to share this with Congress for consideration?
- 10 Is the IRS considering the creation of a "status check" portal for applicants to receive up to-date information regarding their claim? Why or why not?

The answer is to be determined

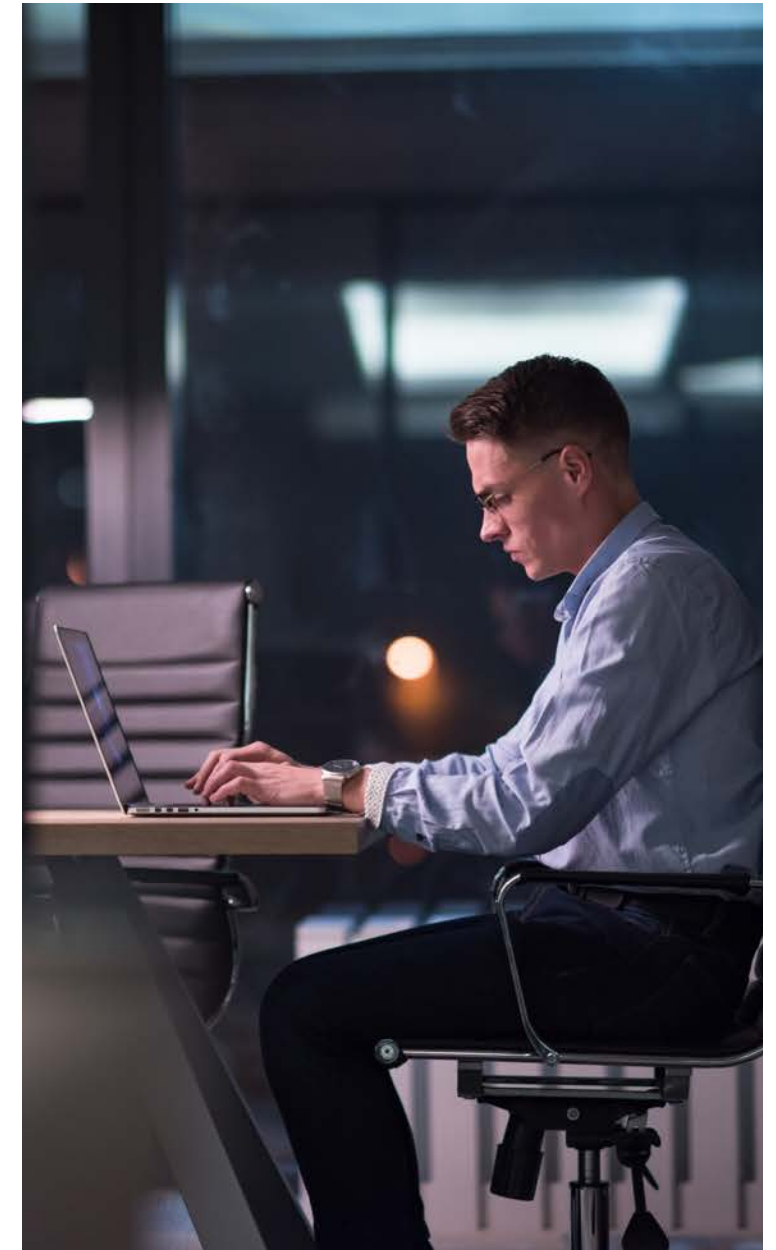
Withdrawal Process

For those who filed ERC claims but are now having second thoughts or suspect that they were misled by ERC marketers or promoters, the new withdrawal process offers a way out.

- Allows certain employers to withdraw their ERC claims, treating them as if they were never filed, without facing penalties or interest.
- The withdrawal option is designed to help well-meaning businesses that may have been pressured into filing ineligible claims
- Those who willfully filed fraudulent claims or conspired in such conduct will not be exempt from potential criminal investigation and prosecution.

Who can use the ERC claim withdrawal process? Employers who meet the following criteria:

1. Submitted the claim on an adjusted employment return (Forms 941-X, 943-X, 944-X, CT-1X).
2. Filed the adjusted return solely to claim the ERC and made no other adjustments.
3. Wish to withdraw the entire ERC claim.
4. IRS has not paid their claim or has not cashed or deposited the refund check.



Polling question #3

Have you withdrawn a previously filed claim?

- A. Yes
- B. No
- C. No, but we are considering it



Report Illegal Activities



**Who
to Report:**



- Tax-related, illegal activities relating to ERC claims
- Individuals who promote improper and abusive tax schemes
- Tax return preparers who deliberately prepare improper returns



**How
to Report:**



- Complete Form 14242, Report Suspected Abusive Tax Promotions or Preparers
- Include any supporting materials
- Provide your contact information: This is optional but will be helpful if we have questions and will let us acknowledge receipt of your referral.
- Send your form and materials by fax or U.S. mail to the IRS Lead Development Center in the Office of Promoter Investigations

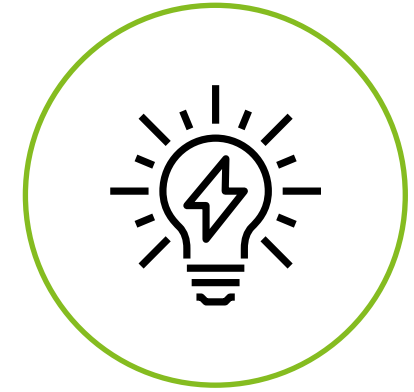
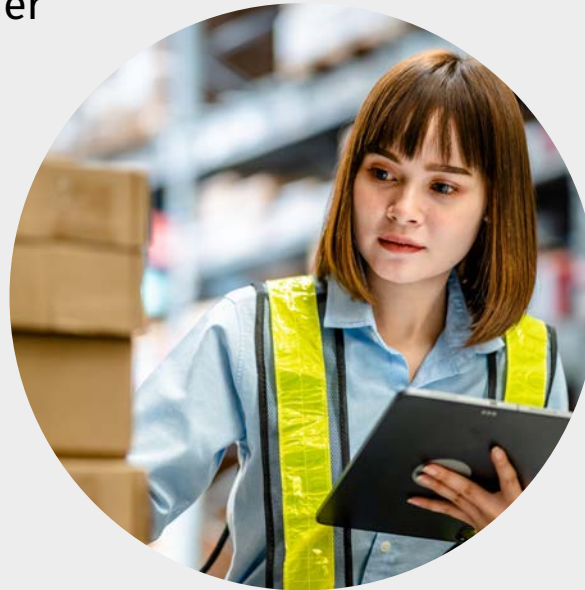
Supply Chain Disruption

Supplier must have been subject to a governmental order causing a suspension of operations AND the employer must provide records demonstrating:

- The actual government order
- The inability to obtain the supplier's goods or materials
- The inability to obtain from an alternate supplier

5 Scenarios & Analysis

- IRS Memorandum, AM 2023-005



Key takeaways

- A supply chain disruption, by itself, does not rise to the level of a full or partial suspension
- The goods or materials that are disrupted may not have an impact on the employers' operations that rises to the level of full or partial suspension
- The employer may have been able to obtain the goods or materials from an alternate supplier

Record-Keeping Requirements



In general, you need to have the records you relied on to show:

- ✓ Suspension of operations, including the specific government order
- ✓ Decline in gross receipts
- ✓ Employee qualified wages
- ✓ If you paid qualified wages only to employees who were not providing services
- ✓ How you allocated qualified health plan expenses
- ✓ How PPP loan forgiveness affects your ERC claim
- ✓ Relationship to other businesses or entities and how it affects your ERC claim
- ✓ Forms submitted to the IRS and any completed federal employment and income tax returns related to your claim for ERC.

What's Coming

“The IRS is developing new initiatives to help businesses who found themselves victims of aggressive promoters. This includes a settlement program for repayments for those who received an improper ERC payment; more details will be available this fall.”

— Taxpayer Advocate Service (taxpayeradvocate.irs.gov)

ERCs in M&A Transactions



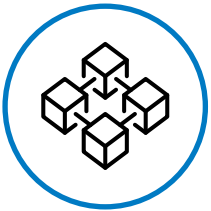
Common Compliance Issues in Transaction Diligence



Full or Partial Suspension of Operations



- Relying on CDC or OSHA recommendations
- Claiming credit for entire quarters instead of during the actual dates of the suspension
- Essential businesses electing to close



Supply Chain Disruptions



- Citing foreign companies
- Citing slow deliveries
- Unable to provide actual governmental order

How to Diligence ERCs in M&A Context



**What has
been claimed
and what's
the basis
for claim?**



**What work
has been
done?**



**Quality
of work?**



**Status
of claim?**



**Have returns
been amended
to reflect
ERCs?**

How to Diligence ERCs in M&A Context

Status of ERC Claim

- Target has applied and received ERCs
- Target has applied but hasn't received ERCs
- Target hasn't applied but wants the benefit of ERCs

Commercial Options

- Indemnification
- Escrow/holdback
- Ability to clawback equity or earnouts



ERC Audits, Penalties and Criminal Cases



ERC Audits



Added to IRS's Dirty Dozen List (March 20, 2023)

- IRS training auditors in SB/SE and CI regarding ERC claims

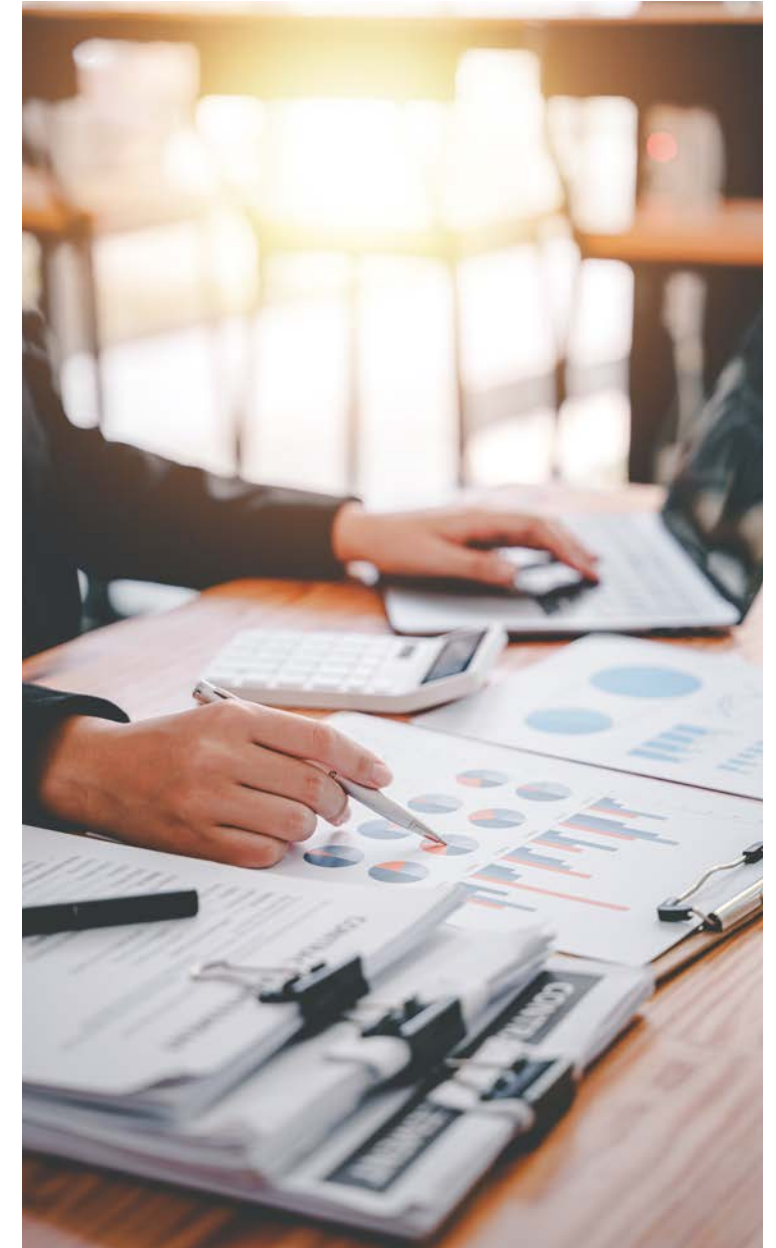


Statute of limitations (SOL) — Generally 3 years but extended by Congress to 5 years for Q3 and Q4 2021

- SOL runs from the date the tax return is filed or the due date of the return, whichever is later
- Amended returns — the statute of limitations runs from the amended return filing date
- Fraud/intentional misrepresentation — No statute of limitations

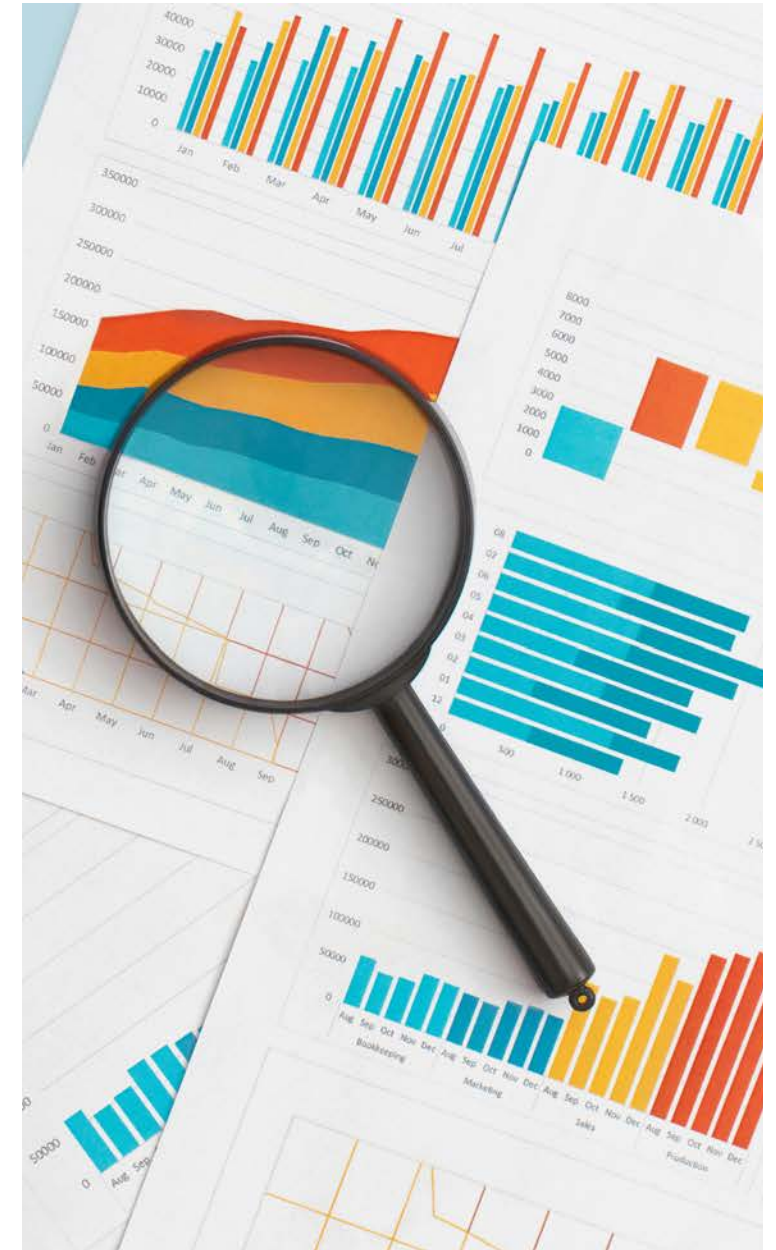


Documentation to show eligibility and support the credit (i.e. number of employees, wages, financial statements, payroll records, invoices, receipts)



ERC Audits

- ✓ **IRS is aggressively auditing ERC claims.**
No longer — pay first, ask questions later — IRS is now auditing ERC claims BEFORE they are paid ...
- ✓ **It is auditing each and every issue that relates to the ERC, including aggregation, eligibility, number of 2019 FTEs, qualifying wages, allocation of wages between ERC and PPP (and other credits), and other aspects of calculating the credit**
E.g., IRS is auditing the calculation of gross receipts to ensure there are no shifting between or among calendar quarters, and that the proper method of tax, accounting was used
- ✓ **IRS is asking for governmental orders and for an explanation of the effect they had on business operations**
Must be a US governmental order relating to Covid that affected the taxpayer's supplier, the supplier could not deliver critical goods because of the governmental order, the taxpayer could not obtain the goods from alternate sources, and the taxpayer suffered a full or partial suspension because of the disruption
- ✓ **IRS is asking for taxpayer interviews and site visits; asking about payment of contingent fees**
- ✓ **IRS is asking for general ledger details, and access to QuickBooks or other software**



ERC Penalties



Underpayment of taxes

May be required to pay back erroneously claimed ERC amount, resulting in additional tax liabilities



Fraud penalties



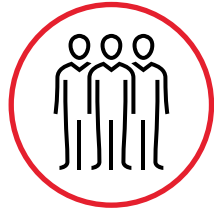
Accuracy-related penalties



Interest

Note: Warnings from the IRS may undermine reasonable cause defense to penalties on audit

ERC Criminal Investigation

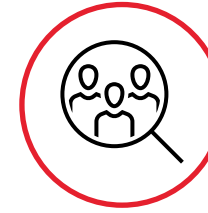


**Single or small group
of individuals**



CPAs/Return Preparers

- The preparer and co-conspirator pled guilty to Conspiracy, Wire Fraud, and False Returns when they submitted false Forms 7200 and Forms 941 claiming more than \$11 million in ERC
- They solicited single-member LLCs and convinced independent contractors to convert to LLCs to claim the funds (June 23, 2022)



**Promoters —
companies set up
businesses specifically
for these credits**

- New Jersey preparer/promoter arrested for seeking over \$124 million in ERC credits
- Charges a 15% fee based on money received.

ERC Criminal Cases



**Return preparer that plead guilty to aiding and assisting in the filing false returns.
U.S v. Walker, 22-Cr -00178 (D. Utah)**

The defendant worked at an accounting firm where he actively solicited independent contractors involved in door-to-door sales, rideshare drivers, and sole proprietors to convert their “businesses” into LLCs to allow them to qualify for ERC credits and sought ERC credits for LLCs regardless of whether they were statutorily eligible to receive the ERC, resulting in false and fraudulent claims.

The defendant claimed more than \$11 million in ERC and sick and family leave wage credits.

In court documents, the defendant claimed that his employer advised him that all businesses were impacted by COVID-19 and therefore qualified for the ERC and that the defendant should advise clients to list their spouse and children as employees regardless of whether that was true.

ERC Criminal Cases



Return preparer arrested for fraudulently seeking over \$124 million in ERC. US v. Haynes (New Jersey)

Haynes allegedly prepared and submitted approximately 1,387 false forms to the IRS claiming COVID-related tax credits on behalf of himself and his clients.

The complaint further alleges that Haynes falsely told his clients that the government was giving out COVID-relief money for businesses and that they were eligible for the money simply because they had a business.

Without consulting with his clients, Haynes then submitted forms to the IRS on behalf of their businesses that grossly overstated the number of employees and amount of wages paid. Haynes allegedly submitted similarly false forms for three of his own companies.

The IRS allegedly mailed Haynes multiple tax refund checks totaling \$1,007,966 for his own companies and allegedly disbursed a total of \$31.6 million in refunds to Haynes' clients and himself based on the false tax forms that Haynes submitted.

The complaint further alleges that Haynes charged many clients a fee of as much as 15% of the refund they received.

ERC Criminal Cases




**Hollywood man indicted for fraudulently seeking over \$65 million in ERC.
US v. Gregory (Central District of California)**

Kevin Gregory made false claims to the IRS for the payment of nearly \$65.4 million in tax refunds for a purported Beverly Hills-based farming-and-transportation company named Elijah USA Farm Holdings


The IRS issued a portion of the refunds Gregory claimed, and Gregory allegedly used that portion — more than \$2.7 million — for personal expenses.

ERC Criminal Cases — More to come ...



Internal Revenue Service
Media Relations Office
Washington, D. C.

Media Contact: 202.317.4000
Public Contact: 800.829.1040
www.irs.gov/newsroom

 News Release

IRS Criminal Investigation (IRS-CI) investigates a variety of COVID fraud allegations ranging from fraudulently obtained employee refund tax credits to falsified Paycheck Protection Program loans. To date, IRS-CI has uncovered suspected pandemic fraud totaling more than \$8 billion. As of July 31, 2023, IRS-CI has initiated 252 investigations involving over \$2.8 billion of potentially fraudulent Employee Retention Credit claims. Of those, fifteen of the 252 investigations have resulted in federal charges. Of the 15 federally charged cases, so far six matters have resulted in convictions, four of those cases have reached the sentencing phase with the average sentence being 21 months.

Criminal Investigation's work is in addition to ERC audits that have started. The IRS has already referred thousands of ERC cases for audit.

[View Full News Release](#)

Tips for Advising Clients



Amended Returns

- If the employer amends the employment tax return, also obligated to amend previously filed income tax return deducting qualified ages (otherwise wage deduction is overstated for income tax purposes)
- Businesses have 3 years to amend returns
- Protective returns can be utilized

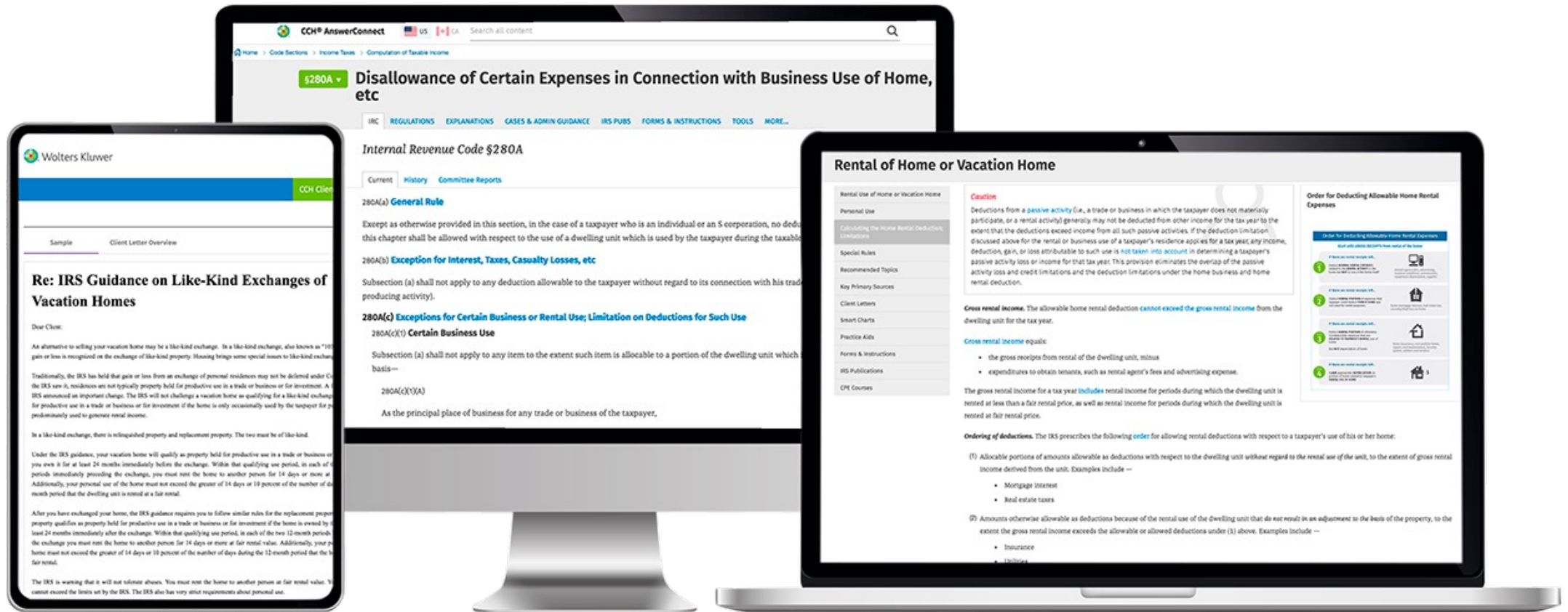


Voluntary Disclosure Program



IRS Whistleblower Office

CCH® AnswerConnect



Additional information in CCH[®] AnswerConnect



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Polling question #4

Would you like a more in-depth demo or further details on the resources and tools available in CCH® AnswerConnect?

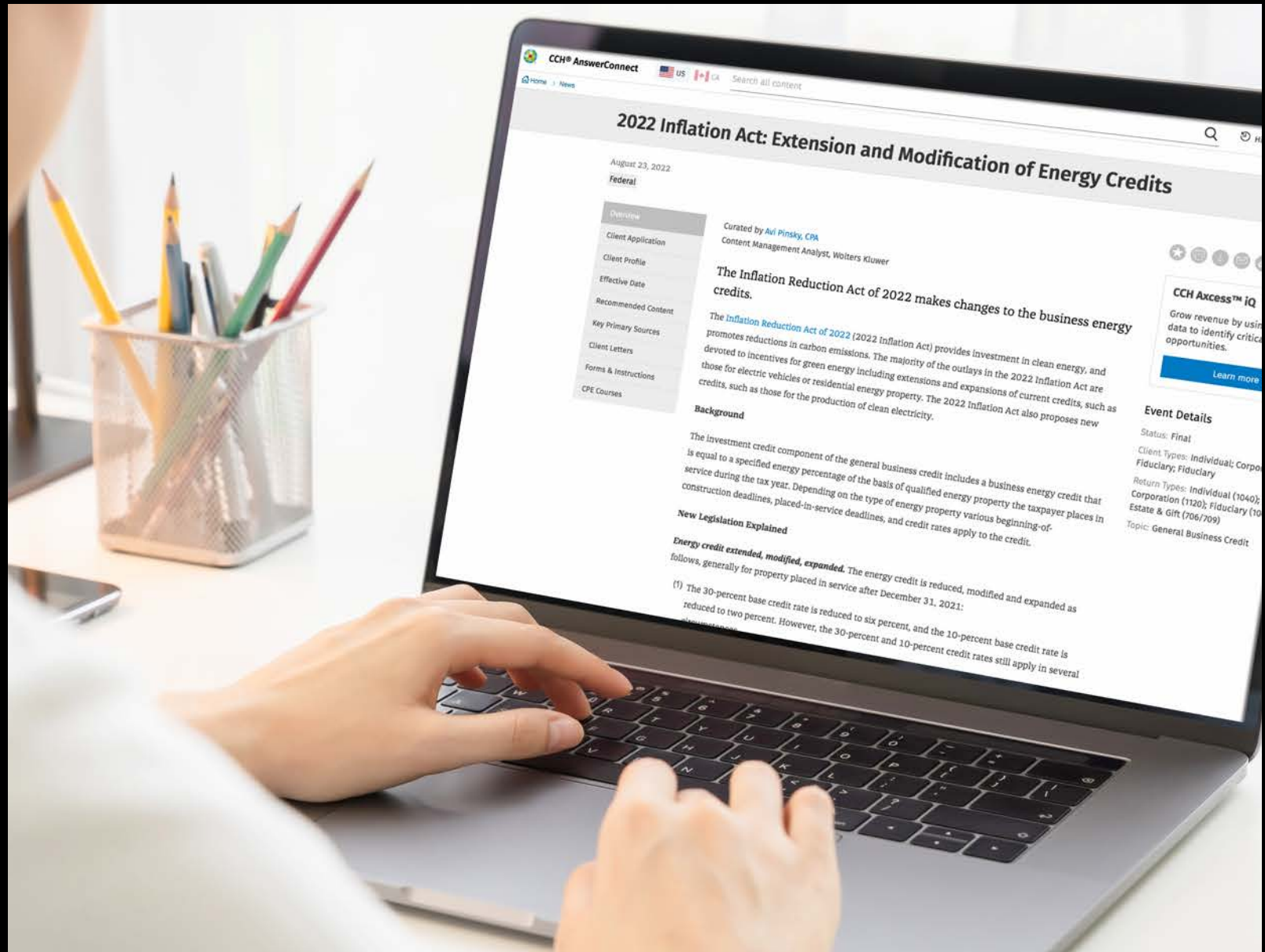
- A. Yes
- B. No



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Kevin M. Jacobs

Kevin M. Jacobs is a Managing Director with Alvarez & Marsal Tax, LLC in Washington D.C. and the National Tax Office Practice Leader. He brings more than 15 years of experience in tax matters in both the public and the private sectors.

Prior to joining A&M, Mr. Jacobs was a Senior Technician Reviewer (TCJA) with the IRS Office of Associate Chief Counsel (Corporate) for more than six years, where he advised on tax issues such as corporate re-organizations and corporation-shareholder issues, earning and profits, recovery and allocation of stock basis, liquidations, redemptions, bankruptcies, spin-offs and consolidated returns.

Mr. Jacobs was the principal Associate Chief Counsel (Corporate) attorney on several regulatory projects including the proposed section 382(h) regulations on built-in gains and losses, the global intangible low-taxed income regulations, and debt-equity regulations. He provided substantial contributions to numerous other guidance projects, such as the limitation on interest deductions regulations, and assisted in overseeing the Corporate Division's response to TCJA, including the coordination with Treasury's Offices of Tax Legislative Counsel and International Tax Counsel.

Mr. Jacobs earned a bachelor's degree in accounting, a master's degree in accounting (with a concentration in taxation), a J.D. (*magna cum laude*) from the University of Florida and an LL.M. in taxation from New York University. He is admitted to practice before multiple courts and to the District of Columbia and Florida Bars. He is also a licensed Certified Public Accountant (CPA) in Florida and Colorado. Mr. Jacobs is a member of several organizations including the American Bar Association, the American Institute of Certified Public Accountants, the International Fiscal Association, and the New York State Bar Association.

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Stephanie Doughty

Stephanie Doughty is a Managing Director with Alvarez & Marsal Tax, LLC in Houston. She brings more than 20 years of expert-level R&D tax credit experience and is considered a technical expert in her field, dedicating a significant portion of her time to developing advanced training materials and teaching continuing education courses.

Ms. Doughty has worked with companies of varying sizes, including large public companies that demand tailored solutions and small to mid-size businesses and their owners/shareholders. She offers comprehensive R&D credit consulting services that encompass various aspects, such as qualifying and quantifying federal and state credits and the various methods of usability. Ms. Doughty also provides guidance on how these credits impact tax planning and transaction planning for her clients.

Additionally, Ms. Doughty brings in-depth knowledge of supporting case law and has established herself as an authority in the realm of government contractors. She has a keen understanding of the intricate process of substantiating R&D credit claims and navigating the complexities involved. Her expertise allows her to provide valuable insights and guidance to government contractors seeking to leverage R&D credits effectively.

Ms. Doughty also brings significant expertise in advising on Section 174 research and experimentation expenses. Her primary focus revolves around the intricate dynamics between international research and experimentation and their intersection with U.S. activities. Ms. Doughty has also launched a Work Opportunity Tax Credit practice and oversees the development of the proprietary software. She also provides services including, fixed asset services (cost segregation studies), energy incentives, state credits and incentives, export incentives, meals and entertainment studies, HMRC R&D credits, audit support, and employee retention credits.

Prior to joining A&M, Ms. Doughty served as Senior Director with TRCG Advisors. Before that, she held a senior position with an international consulting firm.

Ms. Doughty earned a bachelor's degree in marketing (concentration in finance) from the University of New Orleans. She is a frequent speaker at technology, government contracting, and tax events in the U.S.

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Simon Bernstein

Simon Bernstein is a Managing Director with the Global Transaction Tax group of Alvarez & Marsal Tax, LLC in New York. Mr. Bernstein's primary areas of concentration are the tax aspects of mergers and acquisitions (M&A) with a focus on private equity acquisitions, dispositions, and recapitalizations, as well as in and out of court restructurings.

With more than 10 years of experience, Mr. Bernstein brings expertise in providing strategic counsel on domestic and international private equity and corporate tax matters, including tax due diligence, global tax structuring, cash tax modeling, capital structure planning, reorganizations, and integration of existing and acquired businesses.

Mr. Bernstein has advised clients across various industries, including financial services, healthcare, infrastructure, manufacturing, retail, software and technology, and wholesale distribution.

Mr. Bernstein has advised public and private "loss" companies (both pre-and post-bankruptcy) on the viability of their tax attributes, including the preparation of Section 382 analyses.

Mr. Bernstein earned a bachelor's degree in finance (summa cum laude) from Yeshiva University and a J.D. (taxation concentration), from the Benjamin N. Cardozo School of Law. He is a member of the New York and New Jersey State Bars.

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Sandra R. Brown

Sandra R. Brown is a principal of the law firm of Hochman Salkin Toscher Perez, P.C., in Beverly Hills, CA , USA, where she specializes in criminal tax investigations, including related grand jury matters, court litigation and appeals, as well as representing and advising taxpayers involved in complex and sophisticated civil tax controversies, including representing and advising taxpayers in sensitive-issue audits and administrative appeals, as well as civil litigation in federal, state and tax court.

Prior to entering private practice, Ms. Brown served as the Acting United States Attorney, First Assistant United States Attorney, and Chief of the Tax Division in the Office of the U.S. Attorney, Central District of California. During her 27 years as a federal trial lawyer, handling complex civil tax controversies and criminal tax investigations, including grand jury proceedings and litigation, she personally handled over 2,000 cases on behalf of the United States before the United States District Court, the Ninth Circuit Court of Appeals, the United States Bankruptcy Court, the United States Bankruptcy Appellate Panel and the California Superior Court. Included in those tax cases are two U.S. Supreme Court decisions and a multitude of published 9th Circuit decisions.

Ms. Brown obtained her LL.M. in Taxation from the University of Denver, is a fellow of the American College of Tax counsel, Co-Vice Chair of the ABA's Section of Taxations' Criminal and Civil Tax Penalties (CCTP) Committee, Co-Chair of the NYU Institute on Federal Taxation, Tax Controversies Section, and Co-Chair of the UCLA Tax Controversy Institute. Ms. Brown is a frequent lecturer and author on tax controversy topics, including international compliance matters. In addition to her many periodical publications, she is also a co-author of Tax Management's Tax Crimes Portfolio.



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Thank you for joining us today!

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