



November 15, 2021

The Honorable Charles P. Rettig
Commissioner
Internal Revenue Service
1111 Constitution Avenue NW
Washington, DC 20224

**RE: ERTC and Infrastructure Investment and Jobs Act
Relief from Underpayment Penalties**

Dear Commissioner Rettig:

On behalf of charitable nonprofits throughout the country that have relied on the employee retention tax credit (ERTC) to retain and rehire staff to fulfill their missions in communities, I write to urge the Internal Revenue Service to use its authority to relieve organizations of potential underpayment penalties and unexpected costs resulting from the retroactive repeal of the ERTC in the *Infrastructure Investment and Jobs Act*, scheduled to be signed into law today by President Biden.

Throughout the pandemic, the National Council of Nonprofits has worked with and through the nation's largest network of nonprofits – with over 25,000 organizational members – to advance policy solutions that benefit charitable nonprofits and the communities they serve. The Council of Nonprofits has promoted the ERTC as an important tool for maintaining staff and organizational wellbeing. As a result, many charitable nonprofits have relied on the ERTC and its premature elimination is causing, or will cause, immense strain on the resources of organizations on which many Americans rely every day.

The ERTC, originally enacted in Section 2301 of the Coronavirus Aid, Relief, and Economic Security Act, has been a lifeline for many nonprofits, as it provides a financial incentive for employers to keep employees on their payrolls and continue to deliver important services during the pandemic and in its immediate aftermath. It has allowed the nation's nonprofits to retain critical employees in the face of the economic challenges caused by the pandemic. Amendments made by section 206 of the Taxpayer Certainty and Disaster Tax Relief Act of 2020 broadened the scope of the ERTC and allowed additional nonprofits to qualify for needed relief. Section 9651 of the American Rescue Plan Act enacted section 3134 of the Code, effective for calendar quarters beginning after June 30, 2021, to provide an employee retention credit for wages paid after June 30, 2021, and before January 1, 2022.

However, Title VI, Section 80604 of the *Infrastructure Investment and Jobs Act*, signed by President Biden today, terminates the ERTC for calendar quarters ending after September 30, 2021. Although the charitable nonprofit community is generally supportive of the new infrastructure law, which includes long-needed investment in various aspects of our country's infrastructure, we are disappointed by the retroactive elimination of the ERTC for the current quarter of this year. Numerous organizations have counted on fourth quarter access to an ERTC to support the financial commitment they have made to retain workers on the payroll and assure adequate operating capacity to serve their communities. (We note that we and our national nonprofit allies continue to lobby Congress to restore the ERTC for the fourth quarter of 2021.)

The Internal Revenue Service has provided several pieces of guidance to employers regarding calculation of the ERTC, interaction of the credit with other COVID-19 programs, and instructions on

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how to claim the credit (see generally IRS Notices 2021-20, 2021-23, and 2021-49). Despite the widespread publicity of the infrastructure legislation, most employers are unaware that it contains the provision that eliminates the ERTC for the fourth quarter of 2021. As a consequence, some employers have already reduced or will reduce current payroll deposits below the requirement amount needed to avoid imposition of a penalty.

Because of the retroactive passage of the new law, we join with other professional and business groups in recommending that the Internal Revenue Service and Treasury waive any underpayment penalties and provide a reasonable, practical method for payment of any unpaid employment taxes. We specifically ask the Internal Revenue Service to utilize its authority under Internal Revenue Code Section 6664 to provide that no penalty should be imposed under the reasonable cause and good faith exception.

We welcome the opportunity to discuss this issue or answer any questions you may have.

Sincerely,

Respectfully submitted,



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cc: Willam M. Paul, Chief Counsel
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