

2021 Nonprofit Tax Year-End Review

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Polling Question 1

Do you want CPE?

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Agenda

- Employee Retention Credit updates
- Paycheck Protection Program (PPP) loan forgiveness updates
- Charitable giving provisions from CAA
- Key court updates
- Change of Responsible Party
- Notice 2021-56 – LLCs as exempt organizations

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Agenda

- UBIT siloing
- Net operating losses
- 2020 and 2021 Form 990-T updates
- Other 990-T related items
- Foreign form updates
- General filing updates

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Agenda

- IR – 2021-202 – reliance on IRS FAQ guidance
- IRS Priority Guidance Plan 2021-2022
- IRC section 139 disaster relief payments
- Form W-8 series change
- Form 1098-T update
- Form 1099-NEC and 1099-MISC reminder

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Employee Retention Credit Update

- Created by the CARES Act in 2020; has been modified and expanded by subsequent legislation
- Provides a fully refundable tax credit to eligible employers based upon qualified wages paid to employees
- [Now enshrined in Section 3134](#)
- Various IRS Notices have provided further guidance
 - [Notice 2021-20](#); [Notice 2021-23](#); [Notice 2021-49](#); [Notice 2021-65](#)

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Employee Retention Credit Update (continued)

- Major change made by the Infrastructure Investment and Jobs Act (signed into law on November 15, 2021)
- Terminates the Employee Retention Credit for qualified wages paid October 1, 2021 through December 31, 2021 (except for recovery startup businesses)
- Does not require that the credit be claimed before October 1, 2021

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Employee Retention Credit Update (continued)

- See [Notice 2021-65](#) for more information
- For those employers who received advance payments: the employer must repay those amounts by the due date of the applicable employment tax return
- Most likely, this will be January 31, 2022, because the Q4 2021 Form 941 is due on that date
- Failure to repay could result in failure to pay penalties under section 6651

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Employee Retention Credit Update (continued)

- If employer reduced payroll tax deposits in anticipation of receiving the credit, then they need to make the deposit on or before the due date for wages paid on December 31, 2021 (regardless of whether they actually pay wages on that date), **and**
- The employer must report the tax liability on the applicable employment tax return (most likely the 941)
- Failure to comply could result in penalties under section 6656

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Employee Retention Credit Update (continued)

- All other quarters (March 13, 2020 – December 31, 2020, and January 1, 2021 – September 30, 2021) are still available to claim the credit
- Use Form 941-X to claim the credit
- It is taking several months for employers to receive their refunds

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Employee Retention Credit Update (continued)

- Reflections
 - Use the guidance provided in [Notice 2021-20](#) when determining whether you have experienced a full or partial suspension of services
 - Use [Notice 2021-20](#) guidance for determining what is includible in gross receipts
 - Employers may exclude forgiven PPP loans – [See Rev. Proc. 2021-33](#)
 - What is an appropriate governmental order? Must be (1) an **order** and (2) **apply to the employer**

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Employee Retention Credit Update (continued)

- The IRS has noted that it will begin training agents to audit Employee Retention Credits in the February – March 2022 timeframe, with exams to begin based on the timeline for training completion
- Factors for determining audit likelihood:
 - Size of credit
 - Type of industry
 - Other factors?
- Congress has extended the timeframe for assessment to five years (3134(l))

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PPP Loan Forgiveness Update

- May apply for forgiveness after loan funds are expended, up to the date of maturity (10 months after disbursement)
 - If you miss that date, you must start paying principal and interest. If you later file for and receive forgiveness, then you are entitled to a refund of the paid principal and interest.
- Interaction with Employee Retention Credit: may not use the same payroll costs that you used to obtain full forgiveness on a PPP loan as qualified wages for Employee Retention Credit and vice versa

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Charitable Giving Provisions

- Non-itemizing single filers and married-filing-separately may deduct up to \$300 for **cash** contributions made to **qualifying charities** for 2021
 - **No:** supporting organizations, DAFs, most private foundations, charitable remainder trusts, charitable lead trusts
 - Married-filing-jointly increased to \$600
- Unlike 2020, this is now a **below-the-line** deduction taken into account in arriving at taxable income, but not treated as an itemized deduction

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Charitable Giving Provisions (continued)

- For **itemizing taxpayers:** limit is increased to up to 100% of AGI for cash contributions to qualifying organizations
 - They must elect on their return to take the new limit for any qualified cash contribution
- For **C corporations:** increases corporate limit to 25% of taxable income for charitable cash contributions
 - They must elect the increased corporate limit on a contribution-by-contribution basis
 - Nonprofit corporations still limited to 10% (section 512(b)(10))
- **Donated food inventory** limits increased to 25%

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Polling Question 2

Does your organization plan on using the enhanced charitable giving provisions in its solicitation messaging this year?

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Key Court Updates

- *California v. Texas* – Affordable Care Act challenge
- *Americans for Prosperity Foundation v. Bonta* – California's donor disclosure requirement

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California v. Texas

- Challenge to the individual mandate portion of the ACA
- 2012 challenge characterized the “penalty” as a tax — which was then zeroed out by Congress in 2017
- **Plaintiff’s argument:** Since the tax is now zero, it is not a real tax — therefore, it is unconstitutional.
- **Threshold question:** Do the plaintiffs have standing to pursue litigation?

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California v. Texas (continued)

- In 7-2 decision, the Court decided that the plaintiffs lacked standing to bring suit
- **Holding:** No “personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief”
- Ironically, the lack of penalty was determined to mean that there would be no standing to bring the suit in the first place

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Americans for Prosperity Foundation v. Bonta

- Charitable organizations in CA were required to disclose identities of their major donors to CA Attorney General's office (collected on Form 990, Schedule B)
- 2010 – CA increased enforcement of this requirement
- AFPF stated that this violated its First Amendment rights, as well as donors'
- **Holding:** Exacting scrutiny should be applied here due to the freedom of association concerns. This requires narrowly tailored government restriction and a sufficiently compelling governmental interest. The Court found a mismatch between the governmental interest (preventing charitable fraud) and the method used.

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Americans for Prosperity Foundation v. Bonta (continued)

- CA, HI, NY, and NJ almost immediately suspended collection of unredacted Form 990, Schedule B information (effective July 1, 2021)
 - CA's Form 199 collection has not been suspended
- **NOTE:** Ruling does not apply to Form 990, Schedule B itself
- **Question:** Could a state find a more compelling governmental interest that would satisfy the exacting scrutiny?

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Change of Responsible Party

- A responsible party is the person who ultimately owns or controls the entity or who exercises effective control over the entity. They should have a level of control over the funds or assets of the organization. For tax-exempt organizations: usually the principal officer. See [Form SS-4 instructions](#).
- Entities with Employer Identification Numbers (EINs) should update their applications if there has been a change in the responsible party or contact information.

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Change of Responsible Party (continued)

- IRS regulations require EIN holders to update responsible party information **within 60 days** of any change by filing [Form 8822-B, Change of Address or Responsible Party - Business](#).
- The IRS highlighted this during 2021. This is a stated effort to maintain accurate information in cases of identity theft or other fraud issues related to EINs or business accounts.
- See [IR-2021-161, July 30, 2021](#) for more information.

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Notice 2021-56 – LLCs as Tax-Exempt Organizations

- Most tax-exempt organizations are incorporated
- The IRS will recognize an LLC as tax-exempt if articles of organization **and** operating agreement include:
 - Requirement that each LLC member be a 501(c)(3) organization, governmental unit under 170(c)(1), or wholly-owned governmental instrumentality;
 - A charitable purpose and dissolution provision;
 - A contingency plan should one or more of the members cease to be a 501(c)(3) organization or governmental unit; and
 - **If the LLC is a private foundation:** the chapter 42 provisions described in section 508(e)(1).

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UBIT Siloing

- Enacted as part of the 2017 TCJA, section 512(a)(6) requires that unrelated trade or business activities be tracked in separate silos and a net loss from one trade or business activity is no longer permitted to offset net income from a separate trade or business activity.
- Interim guidance included in Notice 2018-67 (September 2018)
- Proposed regulations were published April 24, 2020
- Final regulations were published in the Federal Register on December 2, 2020 (applicable to tax years beginning on or after December 2, 2020)

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UBIT Siloing (continued)

- Separate trade or business silos are identified by determining the 6-digit NAICS code applicable to an individual trade or business activity
 - Activities whose 6-digit codes share the same two leading digits are then permitted to be aggregated
 - The two leading digits correspond to 20 unique economic sectors
 - NAICS codes are maintained by the [U.S. Census Bureau](#)
 - NAICS codes may be looked up on the [NAICS site](#)
 - The final regs permit changes to NAICS codes without consent

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UBIT Siloing (continued)

- **Non-NAICS Business Activity Codes:**
 - 901101 – Investment activities, including: debt-financed income, qualifying partnership interests (QPI), Qualifying S corporation interests (QSI), certain gross income of 501(c)(7), (9), or (17) organizations
 - 901301 – Insurance income under section 512(b)(17)
 - 902### – Transition rule partnership interest (removed from 2021 instructions)
 - 903### – Passive income activities with 512(b)(13)-controlled organizations
 - 904### – Nonqualifying S corporation interests

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UBIT Siloing (continued)

- Investment activity
 - Debt-financed income
 - Qualifying partnership interests
 - De minimis test
 - Participation test
 - Qualifying S-corporation interests
 - De minimis test
 - Participation test

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UBIT Siloing (continued)

- Shared expenses must be allocated among silos
 - The final regs require shared expenses to be allocated on a reasonable basis
 - The IRS has reserved providing further, concrete guidance in this area in the future
 - The proposed regulations had specified that an allocation based on gross revenue is presumptively unreasonable
 - The final regulations remove this restriction unless there are different charges for different populations

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UBIT Siloing (continued)

- Post-2017 NOLs from a discontinued activity, regardless of why it is discontinued, are suspended
 - Applies to changes in NAICS code
 - Unlike passive-activity losses, suspended losses are not permitted to be used upon termination of an activity
 - Such suspended losses may be picked up and used in the future if a new trade or business in the same silo is initiated

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UBIT Siloing (continued)

- Challenges with implementation:
 - Choosing the correct NAICS code
 - Applying “qualified partnership interests” (QPIs) rules
 - Receiving required information from partnerships, specifically lower-tiered partnerships, to apply “look-through” rules
 - Allocating expenses in the absence of guidance
 - State conformity
 - Applying and tracking NOLs

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Polling Question 3

True or False:

The final UBIT siloing rules mandate that shared expenses must be allocated among the various silos.

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Net Operating Losses

- TCJA amended section 172 and limited NOLs for tax years beginning after December 31, 2017
 - May only be used to offset income from the same UBI silo
 - Limited allowable deduction to 80%
 - Carryforward indefinitely (used to be 20 years)
 - Carrybacks eliminated (except for farming losses and losses for certain insurance companies)

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Net Operating Losses (continued)

- CARES Act amended section 172 (March of 2020)
 - Provides for carryback of losses arising in tax years beginning after December 31, 2017, and before January 1, 2021, to each of the five tax years proceeding the year of the NOL
 - May waive carryback by attaching waiver to return filed (for 2018 and 2019 returns already filed, waiver may be attached to 2020 return)
 - Delayed 80% percentage limitation on use of losses until tax years beginning after January 1, 2021

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Net Operating Losses (continued)

- In summary, we have 3 buckets:
 - Pre-2018 NOLs – offset any income and carryforward unlimited (reported on Form 990-T, Line 6)
 - 2018 – 2020 NOLs – offset income in specific silo only for current year and going forward (reported on Schedule A, Line 16), carryforward definitely, carryback five years to offset any income
 - 2021 NOLs and beyond – offset income in specific silo only, carryforward indefinitely, no carryback, deduction is limited to 80% of income (reported on Schedule A, Line 16)

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2020 Form 990-T Updates

- Forms 990-T filed in February 2021 and later must be electronically filed
- 2020 [Form 990-T](#) core form content limited to:
 - Summarizing the unrelated business taxable income from all sources
 - Computing the tax
 - Reporting estimated tax payments and tax credits
 - A few statements regarding activities

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2020 Form 990-T Updates (continued)

- The new [Form 990-T, Schedule A](#) is completed for each unrelated trade or business
 - Schedule A is largely the same as the previous Schedule M
 - Item C, unrelated business activity codes at top of Schedule A, requires a 6-digit entry; enter 2-digit NAICS code followed by four zeros
 - If gross income total reported on all Schedule As is less than \$10,000, then the instructions allow for limited reporting

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2021 Form 990-T Updates

- 990-T, Part IV Statements Regarding Certain Activities and Other Information

- 4 Enter available pre-2018 NOL carryovers here ▶ \$. Do not include any post-2017 NOL carryover shown on Schedule A (Form 990-T). Don't reduce the NOL carryover shown here by any deduction reported on Part I, line 4.
- 5 Post-2017 NOL carryovers. Enter available Business Activity Code and post-2017 NOL carryovers. Don't reduce the amounts shown below by any NOL claimed on any Schedule A, Part II, line 17 for the tax year. See instructions.

Business Activity Code	Available post-2017 NOL carryover
	\$
	\$
	\$
	\$

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2021 Form 990-T Updates (continued)

- Form 990-T, Schedule A - Instructions were enhanced to include specific information required to be provided in Part XI Supplemental Information when an organization deems it necessary to change 2-digit NAICS code for a previously reported activity:

1. 2-digit NAICS code used in previous tax year
2. 2-digit NAICS code or business activity code used this year
3. Narrative explanation describing the reason for the change

Note: Any losses previously allocated to activity cannot be transferred to new code.

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Other 990-T Related Items

CARES Act provisions and taxability on 990-T

- PPP loan – Not included in income and expenses paid by the loan are fully deductible
- Employee Retention Credit – Not included in income but expenses for which credit was claimed are not deductible; wages for which ERC applied may not be taken into account for purposes of determining other credits
- Payroll credit for required sick pay and family leave – Deduction allocable to unrelated trade or business must be included in income
- State conformity?

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Other 990-T Related Items (continued)

CARES Act and Taxpayer Certainty and Disaster Relief Act of 2020 Charitable Contribution Deduction

- Nonprofit corporations – No change to 10% limitation on deduction
- Trusts –
 - Deduction typically limited to 50% for contributions made to organizations described in 170(b)(1)(A)
 - For contributions made to other organizations, deduction typically limited to the smaller of: a) 30%, or b) amount by which 50% of UBTI is more than the contributions allowed above
 - 2020 and 2021 – 100% deduction to organizations described in 170(b)(1)(A), except for supporting organizations and donor-advised funds

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Foreign Forms Update

- Form 5471, Information Return of U.S. Persons with Respect to Certain Foreign Corporations
- Form 8858, Information Return of U.S. Persons with Respect to Foreign Disregarded Entities and Foreign Branches
- Schedule K-2 (Form 1065 and Form 1120s), Partners' Distributive Share Items – International – New 2021
- Schedule K-3 (Form 1065 and Form 1120s), Partner's Share of Income, Deductions, Credits, etc. – International – New 2021

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General Filing Updates

- IRS response time – patience is needed
- Electronic signatures relief – extended through 10/31/23
- Upcoming IRS shutdown dates for filing business returns –
 - Modernized e-file cut-off 11:59 a.m. (noon) on 12/26/21
 - Other services until 11:59 p.m. (midnight) on 12/26/21
- Disaster filing relief: <https://www.irs.gov/newsroom/tax-relief-in-disaster-situations>

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IR- 2021-202, October 15, 2021 – Reliance on FAQs

- Addresses reliance on IRS FAQs (a lot of those coming out lately!)
- Taxpayer's reasonable reliance on an FAQ — even if it is later updated or modified — will be considered in determining whether certain penalties apply
- If taxpayer can demonstrate good faith reliance based upon a reasonable interpretation of FAQ, then not subject to negligence and accuracy-related penalties to the extent the reliance results in underpayment

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IRS Priority Plan Guidance 2021-2022

- Some of the items are fairly general and/or have been on the list for years
- Guidance on Rev. Proc. 80-27 (group exemption letters)
- Final regulations on section 509(a)(3) supporting organizations (proposed regs. published in February 2016)

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Section 139 Disaster Relief Payments

- IRC 139 provides an exclusion from gross income for payments that “reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster.” 139(b)(1)
- Federally declared disaster (139(c)(2)) on March 13, 2020
- May be used to make nontaxable payments to employees if within the contours of definition (Rev. Rul. 2003-12)
- Need to have requirements, vetting — but how much?

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Section 139 Disaster Relief Payments (continued)

- Should gather a questionnaire or some other documentation to substantiate the expenses that are incurred as a result of the disaster
- Most likely no need to gather receipts to substantiate that the amounts were expended to cover those costs, but do the best you can
- A written plan would be best practice, but not necessary

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Polling Question 4

True or False:

Section 139 allows tax-free payments to those who incurred reasonable and necessary expenses due to a qualified disaster.

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Form W-8 Series Change

- The form series used when making payments to foreign persons and entities for services
- Need to be collected from payee to determine withholding rate and other elements of payment
- Revision date of October 2021
- May accept old version through April 2022; may use old version if accepted prior to May 2022 until expiration date or change in circumstances renders them invalid

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Form W-8 Series Change (continued)

- [W-8BEN, W-8BEN-E, and W-8ECI](#) have been updated
- Most relevant changes were:
 - The Forms W-8BEN and BEN-E require more information for those individuals and entities that are claiming tax treaty benefits
 - Changes were made to the “type of entity” question
- Updated versions of Form W-8IMY and Form W-8EXP will be released soon

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Form 1098-T and HEERF Funds

- Some ambiguity initially regarding whether 1098-T reporting was required for student payments for qualified tuition and related expenses (QTRE)
- Initially, IRS noted that HEERF grants were disaster relief payments under 139 — further, could result in the IRS issuing notices of underreporting and confusion for students

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Form 1098-T and HEERF Funds (continued)

- Now, in [more recent FAQs](#), the IRS has noted that higher education institutions **must** report total QTRE — **including the QTRE paid with HEERF funds, regardless of whether the funds are from institutional portion or emergency financial aid portion** — in box 1 of the 1098-T
- No need to break out the amounts separately
- No need to report the grants separately in box 5

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Form 1099-NEC and 1099-MISC

- Beginning for payments made in 2020, nonemployee compensation totaling \$600 or more for the year must be recorded on box 1 of the 1099-NEC
- These were formerly recorded on the old 1099-MISC, box 7 (which has also been redesigned)
- Form 1099-NEC due on or before January 31, 2022; 1099-MISC due on or before February 28, 2022 (if paper-filing) or March 31, 2022 (if electronic)

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Form 1099-NEC and 1099-MISC (continued)

- Attorney payments
 - **If paying attorney or law firm for services rendered:** 1099-NEC, box 1 (even if a corporation)
 - **If paying attorney or law firm gross proceeds as part of settlement agreement:** 1099-MISC, box 10

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Questions?





Merry Christmas!

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