

## IRS Issues FAQs on New Rules for Research & Development Credit Refund Claims

Tax Alert

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On January 5, 2022, the Internal Revenue Service (IRS) issued [a set of frequently asked questions](#) (FAQs) on a change in IRS policy on refund claims for the Research and Development Credit under section 41 of the Internal Revenue Code (the R&D Credit) that were filed on amended returns. The IRS originally announced the new policy in an October 15, 2021 [Chief Counsel Memorandum](#) (the R&D Credit Memo). The R&D Credit Memo has provoked concern among tax practitioners since its release; the [American Bar Association](#) (ABA) and the [American Institute of CPAs](#) (AICPA) (among others) have submitted comment letters in opposition.

The R&D Credit Memo purports to impose a new set of requirements for a valid administrative refund claim for the R&D Credit filed on amended returns. The regulatory requirements for all administrative refund claims are set forth in Treas. Reg. §301.6402-2(b)(1), which has long been interpreted to set a relatively low bar. Under the regulatory standard, a taxpayer typically must only provide facts specific enough to alert the IRS to the nature of the claim. In the context of the R&D Credit, a refund claim was generally considered valid by submitting a complete and correct Form 6765, a worksheet that details how the taxpayer computed its R&D Credit along with the various inputs used in that computation. The R&D Credit Memo drastically increases the amount of information that a taxpayer must provide with an amended return for it to constitute a valid refund claim. Specifically, the R&D Credit Memo requires that a taxpayer provides the following information along with its amended return:

- All business components in connection with which the taxpayer is claiming the R&D Credit
  - For each business component:\All research activities performed
  - All individuals who performed each research activity
  - All the information each individual sought to discover
- Total qualified employee wage expenses
- Total qualified supply expenses
- Total qualified contract research expenses

The IRS issued a press release concurrently with the R&D Credit Memo that set the effective date for the new policy (January 10, 2022) and announced a transition rule. It also announced a one-year transition period during which the IRS will give taxpayers that submit deficient refund claims 30 days to perfect their claims before they are rejected. The press release did not mention as to whether notice of deficient refund claims would be provided after the deficiency period.

The FAQs issued on January 5 endeavor to answer some of the questions that have arisen since the IRS issued the R&D Credit Memo. The FAQs do not provide answers to certain fundamental questions omitted from the R&D Credit Memo and accompanying press release. For example, neither the R&D Credit Memo nor the FAQs provide a rationale for imposing a higher burden in the context of refund claims for the R&D Credit relative to refund claims for other tax items. Rather, the FAQs provide details on transition rules and some modest clarifications aimed at easing taxpayer compliance.

Regarding the effective date of the R&D Credit Memo and the transition period, the FAQs state that the R&D Credit Memo will only apply to amended returns that are postmarked on or after January 10, 2022. The FAQs also extend the time that a taxpayer

has to perfect a deficient refund claim during the one-year transition period from 30 to 45 days. During the transition period, taxpayers will be notified when the IRS determines that their refund claims are deficient and will be given the date by which they must perfect their claims. The FAQs provided no guidance for the process for informing taxpayers of deficient refund claims after the transition period.

The FAQs also aim to address concerns about the additional administrative burden the R&D Credit Memo will impose on taxpayers:

- Taxpayers can identify individuals performing research activities by title or position rather than first and last name.
- Taxpayers may group individuals that performed research activities in pursuit of the same information for one business component
- Taxpayers that use a statistical sample to determine their R&D Credit pursuant to Rev. Proc. 2011-42 must comply with the R&D Credit Memo but only must provide information on business components, employees, and the information sought with respect to the sampled units
- Taxpayers that use statistical sampling must still provide their total qualified expenses on their Forms 6765.

Finally, the FAQs provide that an amended return on which a taxpayer claims additional R&D Credit and other items will be considered deficient in its entirety if the information provided with respect to the R&D Credit is not considered sufficient under the R&D Credit Memo.

Despite the FAQs, principal concerns about the R&D Credit Memo remain. Read more about the R&D Credit Memo and the concerns it raises for taxpayers in [our article in the Winter 2021 issue](#) of the *Journal of Tax Practice and Procedure*.

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For more information, please contact:

[George A. Hani](#), [ghani@milchev.com](mailto:ghani@milchev.com), 202-626-5953

[Samuel A. Lapin](#), [slapin@milchev.com](mailto:slapin@milchev.com), 202-626-5807

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