



March 14, 2021

Mr. William V. Spatz
CC:PA:LPD:PR (REG-115057-20)
Room 5203
Internal Revenue Service
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

VIA REGULATIONS.GOV

RE: IRS REG-115057-20—Mandatory 60-Day Postponement of Certain Tax-Related Deadlines by Reason of a Federally Declared Disaster

Dear Mr. Spatz:

Thank you for the opportunity to comment on the Proposed Regulations under Section 7508A (the “**Proposed Regulations**,” the preamble to which is the “**Preamble**”). For simplicity, these comments refer to periods described by Section 7508A(d)(1) and (d)(4) as “**(d)(1) periods**” and “**(d)(4) periods**.” In summary:

- Final regulations should reflect the clear statutory text and legislative history: (d)(1) and (d)(4) periods must be automatically disregarded for qualified taxpayers, not subject to the Secretary’s discretion.
- Given the legislative history’s clarity as to *for what purposes* (d)(1) periods must be disregarded, final regulations should follow the legislative history and automatically disregard (d)(1) periods for all purposes listed in Section 7508A(a).
 - The legislative history is clear: (d)(1) periods must be disregarded for *all* purposes listed in subsection (a).
 - The Preamble errs in disregarding this legislative history for not “comport[ing]” with the statutory language by being clear where the statutory text is ambiguous.
- The Proposed Regulations’ one-year limitation on (d)(1) and (d)(4) periods lacks basis in the text and legislative history of paragraphs (d)(1) and (d)(4) and should therefore be removed in final regulations.
- Final regulations should protect taxpayers who do not avail themselves of disregarded periods from extended assessment and collection periods.

I. The statutory framework and legislative history.

In the event of a Federally declared disaster or terroristic or military action, Section 7508A(a) (“**subsection (a)**”) authorizes the Secretary to designate a period to be disregarded for certain purposes.¹ This authority is discretionary, and the Secretary need not exercise it.²

Given certain preconditions,³ Section 7508A(d)(1) (“**paragraph (d)(1)**”) provides that a statutorily defined period related to a Federally declared disaster “shall be disregarded in the same manner as a period specified under subsection (a).” Section 7508A(d)(4) (“**paragraph (d)(4)**”) provides “a rule similar to the rule of paragraph [(d)(1)]” for certain pension and employee benefit plans and interested parties. Section 7508A provides no specific grant of regulatory authority.

There are three key relevant sources of legislative history: a Joint Committee on Taxation report on identical statutory language in a previous legislative proposal (the “**JCT Report**”)⁴; a House Ways and Means Committee report on the enacted provision (the “**W&M Report**”)⁵; and a floor statement by Representative Tom Rice of South Carolina, the former tax attorney who authored the provision as a member of the House Ways and Means Committee (the “**Rice Floor Statement**”).⁶

II. Paragraph (d)(1) provides the Secretary no discretion.

A. Subsection (a) provides the Secretary discretion in four regards.

The Secretary has wide discretion under subsection (a). The Secretary may specify:

1. *Whether* a period is disregarded;
2. *How long* a period is disregarded;
3. *For whom* a period is disregarded; and
4. *For what purposes* a period is disregarded.⁷

¹ Section references, unless otherwise provided, are to the Internal Revenue Code of 1986, as amended, and references to regulatory sections are to the Treasury Regulations thereunder.

² *See id.*; Treas. Reg. § 301.7508A-1.

³ There must be a “disaster area” with respect to a “Federally declared disaster,” a “declaration” related thereto, an “incident date” specified in that declaration, and at least one “qualified taxpayer.” *See* Section 7508A(d).

⁴ Joint Committee on Taxation, JCX-30-19 (Jun. 18, 2019).

⁵ H.R. Rpt. 116-379 (Jan. 21, 2020).

⁶ 165 Cong. Rec. H10599 (Dec. 17, 2019).

⁷ *See* Section 7508A(a).

B. Paragraph (d)(1) provides the Secretary no discretion as to *whether, how long or for whom* a (d)(1) period is disregarded.

As described below, the statutory text is clear that the Secretary has no discretion to determine the parameters of a (d)(1) period.

1. Paragraph (d)(1), not the Secretary, determines *whether* a (d)(1) period is disregarded.

Paragraph (d)(1) mandates that a (d)(1) period be disregarded:

In the case of any qualified taxpayer, **the period** beginning on the earliest incident date . . . and ending on the date which is 60 days after the latest incident date . . . **shall be disregarded** in the same manner as a period specified under subsection (a).

The Secretary cannot decide whether or not to disregard a period designated by the statute.

2. Paragraph (d)(1), not the Secretary, determines *how long* a (d)(1) period is disregarded.

A (d)(1) period “begin[s] on the earliest incident date . . . and end[s] on the date which is 60 days after the latest incident date”

The Secretary cannot change these beginning or ending dates.

3. Paragraph (d)(1), not the Secretary, determines *for whom* a (d)(1) period is disregarded.

A (d)(1) period is disregarded “[i]n the case of any qualified taxpayer.”

The Secretary cannot determine who is or is not a qualified taxpayer; Section 7508A(d)(2) fully defines the term.

C. Paragraph (d)(1) also provides the Secretary no discretion as to *for what purposes* a (d)(1) period is disregarded.

1. The statutory text is clear that a (d)(1) period must be disregarded for at least *some* purpose.

A (d)(1) period is disregarded “in the same manner as a period specified under subsection (a).”⁸ Any ambiguity in this phrase cannot be resolved to render

⁸ Section 7508A(d)(1).

discretionary *whether* a period is disregarded under paragraph (d)(1) for two reasons.

First, as described above, the statutory text provides that a (d)(1) period “shall” be disregarded. This contrasts with the permissive “may” language of subsection (a). Whatever the manner in which a (d)(1) period is disregarded, the period must be in *some* manner disregarded. To interpret this provision otherwise would permit some (d)(1) periods to *not* be disregarded, defying the statutory mandate that they “shall” be disregarded.

Second, any “period specified under subsection (a)” is disregarded for at least *some* purpose. The Secretary could not “specif[y] a period under subsection (a)” to be disregarded for no purpose. Thus, for a period to be disregarded “in the same manner as a period specified under subsection (a)” requires that the period be disregarded for at least some purpose.

In other words, even as the statutory text is ambiguous as to precisely for *which* purposes a (d)(1) period is disregarded,⁹ the text is clear that a (d)(1) period must automatically be disregarded for at least *some* purpose.

2. Legislative history confirms that a (d)(1) period must be disregarded for at least *some* purpose.

Both the relevant Ways and Means and Joint Committee on Taxation reports describe the provision as an “[a]utomatic extension of filing deadlines.”¹⁰ An extension dependent on the Secretary’s discretion would not be “[a]utomatic.”

Moreover, the Ways and Means report states the Committee’s belief “that the certainty and additional time provided by an automatic extension of filing deadlines . . . will ease the burden of tax compliance for taxpayers dealing with the hardship of disaster recovery.”¹¹ Interpreting paragraph (d)(1) to be discretionary would add no “certainty” to the experience of disaster-affected taxpayers.

Both the Ways and Means Committee and Joint Committee on Taxation reports explain that Section 7508A(d) “provides to qualified taxpayers in the case of a Federally declared disaster a mandatory 60-day period that is disregarded in determining whether the acts listed above were performed in the time prescribed; the amount of interest, penalty, additional amount, or addition to tax; and the amount of

⁹ The ambiguity as to for which purposes a (d)(1) period is disregarded is addressed below.

¹⁰ The W&M Report and JCT Report both title the section adding subsection (d) “Automatic extension of filing deadlines in case of certain taxpayers affected by Federally declared disasters.” W&M Report at 14, 97; JCT Report at 86.

¹¹ W&M Report at 99.

credit or refund.”¹² The statement that the period “is” disregarded does not support a discretionary construction of paragraph (d)(1).

Finally, Representative Rice in his floor statement on the provision stated that “I want to clarify that this extension is not limited to the current Internal Revenue Service (IRS) policy of extending by a declaration for FEMA Individual Assistance or FEMA Public Assistance, but may be triggered by any federal assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, as amended, and Related Authorities as of August 2016.”¹³ In sum, he intended the provision to be “triggered by” any Stafford Act declaration, and not by an IRS declaration.

D. Comparison of subsection (a) and paragraph (d)(1).

The distinctions between subsection (a)’s discretionary provisions and paragraph (d)(1)’s automatic provisions are illustrated by the following table:

| Aspect | Subsection (a) | Paragraph (d)(1) |
|---------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <i>Whether</i> to disregard | <u>Discretionary:</u> “the Secretary may specify a period” | <u>Automatic:</u> “the period . . . shall be disregarded” |
| <i>How long</i> to disregard | <u>Discretionary:</u> “ up to 1 year” | <u>Automatic:</u> “ beginning on the earliest incident date . . . and ending on the date which is 60 days after the latest incident date” |
| <i>For whom</i> to disregard | <u>Discretionary:</u> “a taxpayer determined by the Secretary to be affected” | <u>Automatic:</u> “any qualified taxpayer” |
| <i>For what purposes</i> to disregard | <u>Discretionary:</u> “a period . . . that may be disregarded in determining . . . any of the acts described in paragraph (1) of section 7508(a) . . . the amount of any interest, penalty, additional amount, or addition to tax . . . and the amount of any credit or refund” | <u>Automatic:</u> “the period . . . shall be disregarded in the same manner as a period specified under subsection (a)” |

¹² *Id.*; JCT Report at 87.

¹³ Rice Floor Statement.

III. Paragraph (d)(1) automatically disregards a period for *all* purposes listed in subsection (a).

A. In isolation, the statutory text is arguably ambiguous as to *for what purposes* a (d)(1) period is disregarded.

Although paragraph (d)(1) is clear that a (d)(1) period must be disregarded for at least *some* purpose, its text is arguably unclear as to the scope of that disregard. In this respect, the Preamble states that:

[T]he statutory text is ambiguous in at least two respects. First, it is unclear what time-sensitive acts are to be postponed. . . .¹⁴

And:

[S]ection 7508A(d) does not specify the time-sensitive tax acts to be postponed¹⁵

B. Subsection 7508A(d)(2) suggests that a (d)(1) period is disregarded for *all purposes* listed in subsection (a).

Under Subsection 7508A(d)(2), “qualified taxpayer[s]” eligible for relief under subsection (d) include “any taxpayer whose records necessary to meet a deadline for an act described in section 7508(a)(1) are maintained in a disaster area.”¹⁶

In turn, Section 7508(a)(1) lists 11 categories of tax-related acts. This list is imported in full by Section 7508A(a)(1). The fact that a taxpayer potentially unable to carry out or comply with any act listed in subsection (a) is entitled to relief suggests that a (d)(1) period is postponed with respect to all such acts.

C. The legislative history is clear: a (d)(1) period is disregarded for *all purposes* listed in subsection (a).

As previously noted, both the Ways and Means Committee and Joint Committee on Taxation reports state that Section 7508A(d) “provides to qualified taxpayers in the case of a Federally declared disaster a mandatory 60-day period that is disregarded in determining whether the acts listed above were performed in the time prescribed; the amount of interest, penalty, additional amount, or addition to tax; and the amount of credit or refund.”¹⁷

¹⁴ 86 Fed. Reg. 2610.

¹⁵ *Id.*

¹⁶ *See* Section 7508A(d)(2)(D).

¹⁷ W&M Report at 99; JCT Report at 87.

Drawn from Section 7508(a)(1) by way of Section 7508A(a), the “acts listed above” in both the House Ways & Means and Joint Committee on Taxation reports are:

1. Filing any return of income, estate, gift, employment, or excise tax;
2. Payment of any income, estate, or gift, employment, or excise tax or any installment thereof or of any other liability to the United States in respect thereof;
3. Filing a petition with the Tax Court for redetermination of a deficiency, or for review of a decision rendered by the Tax Court;
4. Allowance of a credit or refund of any tax;
5. Filing a claim for credit or refund of any tax;
6. Bringing suit upon any such claim for credit or refund;
7. Assessment of any tax;
8. Giving or making any notice or demand for the payment of any tax, or with respect to any liability to the United States in respect of any tax;
9. Collection of the amount of any liability in respect of any tax;
10. Bringing suit by the United States in respect of any liability in respect of any tax; and
11. Any other act required or permitted under the internal revenue laws specified in regulations prescribed by the Secretary of the Treasury.¹⁸

This confirms the reading suggested by Section 7508A(d)(2): a (d)(1) period is disregarded for *all* purposes listed in subsection (a).

IV. The Preamble errs in disregarding the legislative history.

The Preamble states that:

The “Explanation of Provision” section of the House Committee Report is inconsistent with the report’s “Reason[s] for Change” section, and neither section comports with the statutory text of section 7508A(d) as enacted, because the statutory text does not reference which specified acts (let alone all) are postponed under section 7508A(a).¹⁹

The “Reasons for Change” cited by the Preamble provides:

The Committee believes that the certainty and additional time provided by an automatic extension of filing deadlines for taxpayers affected by Federally declared disasters will ease the burden of tax compliance for taxpayers dealing with the hardship of disaster recovery.²⁰

¹⁸ W&M Report at 98; JCT Report at 86-87.

¹⁹ 86 Fed. Reg. 2610.

²⁰ W&M Report at 99.

Meanwhile, the “Explanation of Provision” cited by the Preamble provides:

The provision provides to qualified taxpayers in the case of a Federally declared disaster a mandatory 60-day period that is disregarded in determining whether the acts listed above were performed in the time prescribed; the amount of interest, penalty, additional amount, or addition to tax; and the amount of credit or refund.²¹

The Preamble offers two justifications for disregarding the legislative history: the “Reasons for Change” and “Explanation of Provision” sections are “inconsistent”; and neither “comport[]” with the statutory text.²² These assessments are mistaken for the following reasons.

A. Any “inconsisten[cy]” is illusory: both sections are consistent with the list of acts described in subsection (a) and listed in the House Ways & Means and Joint Committee on Taxation reports.

It is unreasonable to expect a one-sentence “Reasons for Change” section to fully recapitulate Congress’s intended meaning for subsection (d). The aspects mentioned as postponed in the “Reasons for Change” section—“filing deadlines for taxpayers”—are simply a subset of those mentioned in the “Explanation of Provision” section (the “acts listed above”).

The fact that the “Reasons for Change” mentions a subset of the total list where the “Explanation of Provision” mentions the total list is not an inconsistency. It is a consequence of Congress’s reasonable desire to avoid fully repeating its explanation in two adjacent sections. This is reinforced by the fact that the Joint Committee on Taxation report recapitulates word-for-word the fuller description of the “Explanation of Provision” and does not use the looser summary of “filing deadlines for taxpayers.”²³

B. Even if the sections were inconsistent, they agree as to “filing deadlines for taxpayers.”

Even if “filing deadlines for taxpayers” were intended as an exhaustive list of acts Congress intended to be postponed, it would not support the rule suggested by the Proposed Regulations. Rather, it would suggest that paragraph (d)(1) must be read to postpone those “filing deadlines for taxpayers”—the item of clear overlap between the two relevant legislative history sections.

²¹ *Id.*

²² 86 Fed. Reg. 2610.

²³ JCT Report at 87.

C. If legislative history is clear where statutory text is ambiguous, the legislative history cannot be disregarded for not “comport[ing]” with the statutory text.

The legislative history clearly states what acts Congress intended to be postponed: the “acts listed above,” which are the acts listed in subsection (a). The statutory text, meanwhile, is arguably ambiguous beyond requiring that at least *some* act listed in subsection (a) be postponed.

Legislative history is consulted as a tool of statutory interpretation when statutory text is ambiguous. If the legislative history is clear, it informs the proper construction of the statutory text. The fact that the legislative history here clearly lists the items to be disregarded during a (d)(1) period cannot be regarded as a failure to “comport[]” with the statutory text meriting disregard of the legislative history. Instead, its clarity means that its explanation of the provision should be adopted.

V. The Proposed Regulations’ one-year limitation has no statutory basis.

Proposed Regulations § 301.7508A-1(g)(3)(ii)(A) would limit a (d)(1) period to no more than one year. The Preamble explains this as follows:

Ambiguities in applying section 7508A(d) arise when the incident date is specified in the declaration as beginning on a certain date but remaining open-ended for an extended period of time. In those cases, the calculation of the mandatory 60-day postponement period could result in a prolonged postponement of specified time-sensitive acts that could span well beyond the one-year discretionary period authorized under section 7508A(a). It defies logic for the Secretary’s discretionary postponement period under section 7508A(a) to be limited to “a period of up to 1 year,” and there be no limit on the mandatory *60-day* postponement period under section 7508A(d). If section 7508A(d) were interpreted as requiring such prolonged postponement periods, that interpretation would be contrary to the directive of section 7508A(d)(1) that the mandatory 60-day postponement period must “be disregarded in the same manner as a period specified under [section 7508A(a)].” For the foregoing reasons, these proposed regulations provide that the phrase “shall be disregarded in the same manner as a period specified under subsection (a)” in section 7508A(d)(1) means that the mandatory postponement period cannot exceed the one-year period authorized under section 7508A(a).²⁴

²⁴ 86 Fed. Reg. 2611-12.

The Preamble thus presents three arguments for imposing a one-year limit on (d)(1) periods:

- “It defies logic” for a (d)(1) period to be longer than the one year permitted for a discretionary period under subsection (a);
- The label “60-day” in subsection (d)’s caption should in some manner limit the length of a (d)(1) period; and
- The phrase “be disregarded in the same manner as a period specified under subsection (a)” should in some manner govern the length of a (d)(1) period.

These arguments are not compelling for the following reasons.

A. The statutory language clearly defines the length of a (d)(1) period.

A (d)(1) period “begin[s] on the earliest incident date specified in the declaration to which the disaster area . . . relates, and end[s] on the date which is 60 days after the latest incident date so specified.” The text suggests no limit on the length of a (d)(1) period aside from these parameters.

B. There is no logical connection between the length of a (d)(1) period and the one-year limit on the Secretary’s discretion under subsection (a).

Paragraph (d)(1) is intended to provide “certainty” to taxpayers affected by disasters. The provision establishes a floor for the length of a relief period at the length of a disaster plus 60 days. The Secretary is free, under subsection (a), to specify an *additional* period of up to one year to also be disregarded. There is no surplusage or logical contradiction between the provisions.

C. The label “60-day” in subsection (d)’s caption does not pertain to the total length of a (d)(1) period.

Subsection (d) is confusingly captioned as “Mandatory 60-day extension.” If the phrase “60-day” were understood to limit the length of a (d)(1) period, it would be expected to limit such a period to 60 days, not one year. But in fact, a (d)(1) period must be at minimum 61 days, encompassing the date of a one-day disaster and the 60 days following that date.

The fact that the phrase “60-day” appears in subsection (d)’s caption has no bearing on the substance of subsection (d): the phrase does not appear in (and actually contradicts) the operative language. As noted by the Supreme Court, “headings and titles are not meant to take the place of the detailed provisions of the text.”²⁵

²⁵ *Bhd. of R.R. Trainmen v. Balt. & Ohio R.R.*, 331 U.S. 519, 528 (1947). *See also Lawson v. FMR LLC*, 571 U.S. 429, 446 (2014); *Yates v. United States*, 574 U.S. 528, 559 (2015).

D. The phrase “be disregarded in the same manner as a period specified under subsection (a)” does not pertain to the length of a (d)(1) period.

The length of a (d)(1) period is clearly established in paragraph (d)(1). There is no reason to suppose that the phrase “be disregarded in the same manner as a period specified under subsection (a),” which explains *for what purposes* a (d)(1) period is disregarded, should override the clear time language of paragraph (d)(1).

Even if it were ambiguous whether this phrase applies to the length of a (d)(1) period, which it is not, the legislative history would resolve that ambiguity against the interpretation adopted by the Proposed Regulations: “The 60-day period begins on the earliest incident date specified in the declaration of the relevant disaster and ends on the date which is 60 days after the latest incident date so specified.”²⁶

VI. Paragraph (d)(4) also provides the Secretary no discretion.

Like (d)(1) periods, (d)(4) periods also must begin automatically and not discretionarily. This follows from Section 7508A(d)(4)’s implementation of “a rule similar to the rule of paragraph (1)” and the fact that, as explained above, paragraph (d)(1) imposes an automatic postponement period.

Similarly, for the reasons described above with respect to (d)(1) periods, there is no basis for a one-year limitation on (d)(4) periods.

VII. Congress, not Treasury or the Service, can change Section 7508A(d).

Adopting these suggestions, as we believe the statute requires, would mean automatic postponement periods for each COVID-19-related major disaster declaration. Although not explicitly acknowledged in the Preamble, the positions adopted in the Proposed Regulations may be motivated in part by a desire to avoid an unusually long postponement due to COVID-19.

The Proposed Regulations’ approach is unfortunate, however, because it comes at the cost of certainty for taxpayers affected by other disasters. Indeed, the Proposed Regulations prevent paragraphs (d)(1) and (d)(4) from providing reliable relief to taxpayers affected by flooding, hurricanes, wildfires and other disasters unless the Secretary takes action—precisely the state of affairs Congress sought to change.

If Congress desires a different result, it is free to amend subsection (d). If the Department of the Treasury and the Internal Revenue Service desire a different

²⁶ W&M Report at 99; JCT Report at 87. Unfortunately, the legislative history follows subsection (d)’s caption in confusingly describing what is *at minimum* a 61-day period as a “60-day” period.

result, they may suggest that Congress amend subsection (d). However, unless and until Congress amends subsection (d), any regulations must follow the law as enacted.

VIII. Compliant taxpayers should not face extended collection periods.

Although the Secretary has no discretion as to which acts are subject to a postponement period under paragraph (d)(1), the Secretary can choose whether and how to exercise her authority during that period.

Congress intended subsection (d) to provide “certainty and additional time” to taxpayers affected by disasters. Some qualified taxpayers do not need relief and comply with their otherwise expected tax obligations without issue. It would be surprising and unfair for such taxpayers to be subject to an extended period of assessment, notice or demand, collection action or lawsuit by the United States.

To deal fairly with those taxpayers in a manner consistent with the text and purpose of subsection (d), final regulations should provide that the government will take advantage of the postponement period for those government-initiated actions only if the taxpayer first acts in reliance on the automatic postponement period.²⁷ This could be achieved by, for example, clarifying that otherwise-qualified taxpayers will only be treated as qualified taxpayers with respect to government-initiated actions if those taxpayers first take advantage of the postponement period.

²⁷ *Accord* Treas. Reg. 301.7508A-1(f), Example 2 (assessment deadline postponed when the IRS “determines postpone of government acts is necessary”).

IX. Conclusion.

For the foregoing reasons, we recommend that final regulations automatically disregard (d)(1) and (d)(4) periods, without respect to whether the Secretary has designated a period under subsection (a). In so doing, we recommend that (d)(1) periods be disregarded for all purposes listed in the legislative history. In the alternative, we recommend that final regulations automatically disregard (d)(1) periods at least with respect to filing deadlines.

Additionally, we recommend that the atextual one-year limitation on (d)(1) and (d)(4) periods be removed in final regulations. Finally, we recommend that compliant taxpayers be protected from unexpected extensions of limitations periods on government-initiated actions.

* * * * *

Thank you for the opportunity to share these comments.

Respectfully submitted,



Jonathan L. Holbrook



Spencer F. Walters

Ivins, Phillips & Barker, Chartered