



April 19, 2018

The Honorable David J. Kautter  
Acting Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Mr. Douglas O'Donnell  
Commissioner  
Large Business & International Division  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Re: [Questions and Answers about Reporting Related to Section 965 on 2017 Tax Returns - IRS Update of April 13, 2018](#)

Dear Messrs. Kautter and O'Donnell:

The American Institute of CPAs (AICPA) appreciates the guidance provided by the Internal Revenue Service (IRS) related to the reporting requirements for section 965<sup>1</sup> as amended by [Pub. L. No. 115-97](#), commonly referred to as the Tax Cuts and Jobs Act (TCJA). The guidance issued to date has aided taxpayers and practitioners in complying with the provisions of the TCJA.

Recently, the IRS provided additional information on its website addressing the procedures for paying the section 965(h) liability and other amounts due on April 17, 2018 and in future years. Specifically, the IRS website was updated on April 13, 2018 adding two new FAQs, Q&A 13 and Q&A 14, to the guidance originally posted on March 13, 2018.

The AICPA urges the IRS to amend Q&A 13 and Q&A 14 to provide taxpayers the ability to direct the application of any overpayment resulting from their combined 2017 estimated taxes, 2017 extension payments and amounts paid specifically to satisfy the initial section 965(h) installment.

### **Background**

The new FAQs provide as follows:

*Q13. How will the IRS apply 2017 estimated tax payments (including credit elects from 2016) to a taxpayer's net tax liability under section 965?*

*A13. The IRS will apply 2017 estimated tax payments first to a taxpayer's 2017 net income tax liability described under section 965(h)(6)(A)(ii) (its net income tax determined without regard to section 965), and then to its tax liability under section 965, including those amounts that are subject to payment in installments pursuant to an election under section 965(h).*

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<sup>1</sup> Unless otherwise indicated, hereinafter, all section references are to the Internal Revenue Code of 1986, as amended, or to Treasury Regulations promulgated thereunder.

*Q14. If a taxpayer's 2017 payments, including estimated tax payments, exceed its 2017 net income tax liability described under section 965(h)(6)(A)(ii) (its net income tax determined without regard to section 965) and the first annual installment (due in 2018) pursuant to an election under section 965(h), may the taxpayer receive a refund of such excess amounts or credit such excess amounts to its 2018 estimated income tax?*

*A14. No. A taxpayer may not receive a refund or credit of any portion of properly applied 2017 tax payments unless and until the amount of payments exceeds the entire unpaid 2017 income tax liability, including all amounts to be paid in installments under section 965(h) in subsequent years. If a taxpayer's 2017 tax payments exceed the 2017 net income tax liability described under section 965(h)(6)(A)(ii) (net income tax determined without regard to section 965) and the first annual installment (due in 2018) pursuant to an election under section 965(h), the excess will be applied to the next successive annual installment (due in 2019) (and to the extent such excess exceeds the amount of such next successive annual installment due, then to the next such successive annual installment (due in 2020), etc.) pursuant to an election under section 965(h).*

Based upon the answer to Q&A 14, it appears that only after the entire section 965 liability is satisfied, would the IRS apply any remaining overpayment against a taxpayer's estimated tax liability for 2018 or issue a refund.

It is common practice for taxpayers to take a conservative approach when estimating their tax liability for purposes of estimated tax payments or a payment submitted with an extension request. Taxpayers take this action to ensure timely payment of their ultimate tax liability with the intention of either applying the resulting overpayments towards the subsequent year's estimated tax payments or requesting a refund.

In addition, taxpayers may have included payment for the additional estimated amount of their initial section 965(h) installment with their fourth quarter estimated tax payment in January 2018. The initial release of FAQs by the IRS on March 13, 2018, which included Q&A 10, specifically required a separate payment for the initial section 965(h) installment liability. Compliant taxpayers who abided by this guidance submitted a second payment for that amount as instructed. They had reasonably expected to have the ability to request a refund or direct the application of that additional and unexpected overpayment from their January estimated payment.

The AICPA submitted a letter on April 4, 2018 in which we requested that the IRS clarify the treatment of certain overpayments. Specifically, we recommended allowing a taxpayer to receive a refund or to elect the application of an overpayment of their initial section 965(h) installment to one or more of the following:

- second installment payment of the section 965 tax liability due in April 2019;
- regular tax underpayment for 2017 reflected on their filed tax return; or
- 2018 estimated tax payments.

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This request was predicated on the IRS guidance requiring separate payments for a taxpayer's regular tax liability and section 965(h) installment payment. We further recommended allowing a taxpayer to apply any overpayment of regular tax liability, at their sole discretion, to any underpayment of the separate section 965(h) installment liability. It was fully expected, that absent such an election, taxpayers could request a refund of any overpayment, apply it to their subsequent year's estimated taxes or some combination of the two.

### **Analysis**

The release of the two new FAQs on the afternoon of Friday, April 13 and the treatment they prescribe for the application of overpayments will have a detrimental impact on all affected taxpayers, including individuals, small businesses and large corporations.

Taxpayers who had anticipated applying an overpayment of their regular tax liability to their first quarter estimated tax payment were required to immediately submit an additional payment to the IRS to cover an unexpected shortfall. For many individual and small business taxpayers, obtaining available cash resources to cover this sudden, unanticipated liability is likely to have created a hardship. For those taxpayers unaware of this last-minute change, a late payment of the additional amount will likely result in imposition of an underpayment penalty. For large corporations, with potentially a substantial additional liability, a significant penalty amount could result.

The IRS's application of regular tax overpayment to an installment payment amount which is not legally due until a future date is seemingly inconsistent with Congressional intent. Section 965(h) and the accompanying [Joint Explanatory Statement of the Committee of the Conference](#) (Conference Report) support allowing a taxpayer to pay in installments without any added interest payment nor a requirement for estimated payments. Specific rules are included regarding the treatment of "deficiency" amounts – in general a "catch-up" payment for installments previously due and proration of the remainder to the subsequent future installments. In addition, provisions specifying circumstances which would constitute an acceleration triggering immediate payment of the remaining installments are included in the statute.

Finally, the IRS decision, announced via new FAQs on April 13, 2017, to now treat all tax payments made for the 2017 tax year (estimated tax payments, extension payments, and amounts paid specifically to satisfy the initial section 965(h) installment) as a single pool of funds is inconsistent with Q&A 10 released on March 13, 2018. This FAQ required taxpayers to make two separate payments, one designated for their regular 2017 tax liability and one designated to cover their entire initial section 965(h) installment.

### **Recommendation**

The AICPA urges the IRS to amend Q&A 13 and Q&A 14 to reflect the following. Taxpayers should have the ability to direct the application of any overpayment resulting from their combined 2017 estimated taxes, 2017 extension payments and amounts paid specifically to satisfy the initial section 965(h) installment in some combination of the following:

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- Application to 2018 estimated tax liability (non-section 965 tax liability); or
- Application to one or more future section 965(h) installment payments; or
- Refund to the taxpayer in whole or partial amounts.

We believe that allowing taxpayers a choice in how their tax payments are applied is consistent with the 8-year installment payment period enacted as part of code section 965(h) and necessary for the fair and sound administration of the tax system.

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We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. Please contact me at (408) 924-3508 or [Annette.Nellen@sjsu.edu](mailto:Annette.Nellen@sjsu.edu); Philip Pasmanik, Chair, AICPA International Taxation Technical Resource Panel, at (212) 686-7160, ext. 122 or [Philip.Pasmanik@hertzherson.com](mailto:Philip.Pasmanik@hertzherson.com); or Jonathan Horn, Senior Manager – AICPA Tax Policy & Advocacy, at (202) 434-9204 or [Jonathan.Horn@aicpa-cima.com](mailto:Jonathan.Horn@aicpa-cima.com).

Respectfully submitted,



Annette Nellen, CPA, CGMA, Esq.  
Chair, AICPA Tax Executive Committee

cc: The Honorable David J. Kautter, Assistant Secretary for Tax Policy, Department of the Treasury  
The Honorable Lafayette "Chip" G. Harter III, Deputy Assistant Secretary (International Tax Affairs), Department of the Treasury  
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