Current Federal Tax Developments

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SECTION: ERC
PLAIN TEXT UNAMBIGUOUS MEANING OF A STATUTE VS. CONGRESSIONAL INTENT: A QUICK PRIMER

Citation: Notice 2021-49, 9/2/21

In recent discussions over whether Notice 2021-49,[1] which provides the "no living relatives" rule for controlling interest holders for purposes of the various iterations of the employee retention credit,[2] is valid, some commentators have argued that the Notice must be invalid on this point as it is at odds with what they believe Congress intended. At that point, the commentators dive into various arguments regarding how to divine that "true intent" of the relatives rule with the enactment of the employee retention credit itself, the reference to IRC §51(i)(1) and even the "true intent" of the text in IRC §51(i)(1) that gives rise to the issue. And, based on these sources outside the IRC, they argue that either position can be claimed with disclosure or can even be claimed without disclosing the position on the return.

But talking about such indirect sources of "intent" puts the cart before the horse in dealing with the statute. The courts do not generally consider such issues of intent except in cases where it is established that the text of the statute itself does not clearly lead to a single result.

Plain Text Meaning is Primary

Ambiguity in the statute must be shown before text outside the statute that Congress specifically enacted can be considered.[3] The Tax Court pointed this out in *CRI-Leslie, LLC v. Commissioner*, 147 T.C. No. 8, 14 (U.S.T.C. Sep. 7, 2016)[4]:

> "To determine whether section 1234A extends to section 1231 property, we must first turn to the relevant statutory text, Barnhart v. Sigmon Coal Co., 534 U.S. 438, 450 (2002), which we interpret

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[1] Notice 2021-49, August 4, 2021, https://www.taxnotes.com/research/federal/irs-guidance/notices/irs-provides-erc-guidance-for-last-two-quarters-of-2021/76zpn?h=2021-49

[2] Notice 2021-49, Section IV.D., and Ed Zollars, "IRS Releases Additional Guidance on the Employee Retention Credit, And It's Not Good News for Majority Shareholders," *Current Federal Tax Developments* website, August 4, 2021, https://www.currentfederaltaxdevelopments.com/blog/2021/8/4/irs-releases-additional-guidance-on-the-employee-retention-credit-and-its-not-good-news-for-majority-shareholders

[3] One important point—the U.S. Supreme court is the ultimate arbiter of whether a statute has ambiguity. But, generally, if a number of lower courts have found the statute ambiguous, have not been overruled on appeal, and few or no opinions exist finding no ambiguity it is likely safe to conclude the statutory text is ambiguous. A similar rule would apply if lower courts are consistently finding the statute's text is unambiguous.

[4] *CRI-Leslie, LLC, et al v. Commissioner,* 147 T.C. No. 8, September 7, 2016, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/forfeited-deposits-are-not-capital-assets%2c-tax-court-says/1q4tn

> according to its plain meaning, Venture Funding, Ltd. v. Commissioner, 110 T.C. 236, 241-242 (1998), aff'd without published opinion, 198 F.3d 248 (6th Cir. 1999). ***We look beyond the plain meaning of the words used in the statute only when their meaning is "inescapably ambiguous". Id. (quoting Garcia v. United States, 469 U.S. 70, 76 n.3 (1984)). (emphasis added)*** We therefore interpret a statute "with reference to the legislative history primarily to learn the purpose of the statute and to resolve any ambiguity in the words contained in the text." Allen v. Commissioner, 118 T.C. 1, 7 (2002). Ultimately "[o]ur task is to give effect to the will of Congress, and where its will has been expressed in reasonably plain terms, 'that language must ordinarily be regarded as conclusive.'" Griffin, 458 U.S. at 570 (quoting Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980)). "[5]

The taxpayer in *CRI-Leslie, LLC,* who had been arguing for looking at Congressional intent on the question of whether gain on the expiration of an option to sell a §1231 asset is a capital gain under IRC §1234A, appealed this decision to the Eleventh Circuit Court of Appeals.[6] But the Eleventh Circuit agreed with the Tax Court that the plain language of IRC §1234A, which applied to rights related to capital assets, excluded §1231 as they are not capital assets--and that the fact the result may be at odds with other evidence of Congressional intent is not a relevant consideration.

As the Eleventh Circuit notes, the taxpayer objected to a purely plain text reading of the statute, arguing:

> Not so fast, CRI-Leslie insists. A plain-text reading of the Code, CRI-Leslie vigorously asserts, impermissibly yields a result that is "illogical, absurd, and directly contrary to the objective of § 1234A." Br. of Appellant at 34.[7]

The taxpayer had made the same argument before the Tax Court, as that opinion also noted before rejecting the view:

> Even if the statute is unambiguous, petitioner contends that the legislative history is clearly contrary to the statute's plain meaning. Petitioner would have us hold that a "clear and unambiguous expression of legislative purpose" to include section 1231 property within the ambit of section 1234A overrides the "plain meaning" of section 1234A as extending to capital assets only.[8]

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[5] CRI-Leslie, LLC, et al v. Commissioner, 147 T.C. No. 8, September 7, 2016

[6] *CRI-Leslie, LLC, et al v. Commissioner,* CA11, 882 F.3d 1026, affirming *CRI-Leslie LLC v. Commissioner,* 147 T.C. No. 8 (2016), February 15, 2018, https://www.taxnotes.com/research/federal/court-documents/court-opinions-and-orders/forfeited-deposit-from-failed-property-sale-is-not-capital-gain/26wt3?h=CRI-Leslie

[7] *CRI-Leslie, LLC, et al v. Commissioner,* CA11, 882 F.3d 1026, February 15, 2018

[8] *CRI-Leslie, LLC, et al v. Commissioner,* CA11, 882 F.3d 1026, February 15, 2018

But while agreeing the result was "odd" and likely at odds with the intent of Congress, the Eleventh Circuit panel rejected throwing out the result of a plain text interpretation of the law Congress passed to instead come to a result that relies on this likely intent:

> In a contest such as we have here, between clear statutory text and (even compelling) evidence of sub- or extra-textual "intent," the former must prevail. See, e.g., *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) ("[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.").[9]

The panel goes on to note that there are valid reasons to hold Congress to the statute they passed rather than resorting to trying to uncover some alternative result at odds with the plain text reading of the law that instead reflects their true intent.

> That is so for myriad well-established reasons that we needn't belabor but that, in view of the parties' contending arguments, we recap briefly. As a formal matter, it is of course only the statutory text (as relevant here, I.R.C. §§ 1221 and 1234A) that is "law" in the constitutional sense — that's all that was enacted through the bicameral legislative process and presented to the President for his signature. See U.S. Const. art. I § 7, cls. 2–3. And as a practical matter, conscientious adherence to the statutory text best ensures that citizens have fair notice of the rules that govern their conduct, incentivizes Congress to write clear laws, and keeps courts within their proper lane.[10]

The Absurd Result Doctrine

The Eleventh Circuit does note that there is a very limited exception to the plain text rule. That is, if the result produced is not only at odds with Congress's intent, but is clearly absurd to the extent of being a "monstrous" result then the courts may look beyond the unambiguous meaning of the law.

The panel notes that even an odd result that seems likely at odds with a result Congress intended does not meet this test:

> We cannot agree that enforcing the Code's plain language here produces a qualifyingly "absurd" result. The supposed anomalies that CRI-Leslie posits — between completed and canceled transactions, and between active managers and passive investors — may seem a little (or even more than a little) odd, but oddity is not absurdity. See, e.g., *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 565 (2005). While "[t]here is an absurdity exception to the plain meaning rule," it is necessarily "very narrow," *United States v. Nix*, 438 F.3d 1284, 1286 (11th Cir. 2006), and applies only when a straightforward

[9] *CRI-Leslie, LLC, et al v. Commissioner,* CA11, 882 F.3d 1026, February 15, 2018

[10] *CRI-Leslie, LLC, et al v. Commissioner,* CA11, 882 F.3d 1026, February 15, 2018

> application of statutory text would compel a truly ridiculous — or to use Justice Story's word, "monstrous" — outcome. We are not in that ballpark here — particularly given that, when the sale fell through, CRI-Leslie got to keep not only the $9.7 million deposit (albeit at an ordinary-income tax rate) but also the Radisson Bay Harbor.[11]

As was noted, this is a very difficult test to meet, and requires results that simply end up being "monstrous" in nature rather than merely odd or the opposite of what Congress intended. It seems highly unlikely that simply not giving a controlling interest holder a credit for retaining employees on his/her own wages is monstrous result when such a credit is clearly denied for any relative of that same interest hold.

We've Been Down This Road Before (Very Recently)

If clearly expressed Congressional intent that is contrary to statute is enough to give rise to desired results, there'd be much less need for technical corrections to tax statutes. See, for instance, when Congress passed the Tax Cuts and Jobs Act, it failed to provide for a specific life for qualified improvement property as defined at IRC §168(e)(6). Rather IRC §168(e)(6) provided:

> The term "qualified improvement property" means any improvement made by the taxpayer to an interior portion of a building which is *nonresidential real property (emphasis added)* if such improvement is placed in service after the date such building was first placed in service.

In this case, the law as written provided that nonresidential real property had an applicable recovery period of 39 years found at IRC §168(c) and no alternative life was provided for qualified improvement property in the statute that overrode that result.

But the committee reports on the TCJA clearly indicated that the property was meant to be 15-year property. If Congressional intent overrode the statute as written, this would have been a textbook example where no additional Congressional action was needed. But, as was noted above, that's not how we deal with unambiguous statutory text.

The property remained 39-year property until Congress, in the CARES Act, added IRC §168(e)(3)(E)(vii) that retroactively added qualified improvement property to the definition of 15-year property.

The qualified improvement property result from a plain text reading seems much more clearly at odds with the plain text of Congressional reports, as there is nowhere any discussion by Congress in reports related to the CARES Act (or subsequent legislation with regard to the ERC) about who exactly is a "relative" of a direct or indirect controlling interest holder as defined at §267(c), and certainly nothing to suggest that one of these §267(c) controlling owners are exempted from being treated as a relative of another such §267(c) controlling interest holder.

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[11] *CRI-Leslie, LLC, et al v. Commissioner,* CA11, 882 F.3d 1026, February 15, 2018

So When Can Indications of Congressional Intent Be Used?

As the opinions note, the plain text controls when it is unambiguous, meaning that the text cannot be the subject of multiple distinct meanings. When the text has multiple reasonable readings based on the plain text, then such Congressional sources are useful sources to determine which of the competing interpretations possible from the text should be used.

But, ultimately, if the plain text leads solely to one result, that is the one that must be used. As the Supreme Court stated in *Connecticut National Bank v. Germain*:[12]

> In any event, canons of construction are no more than rules of thumb that help courts determine the meaning of legislation, and in interpreting a statute a court should always turn first to one, cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, e. g., *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 241-242 (1989); *United States v. Goldenberg*, 168 U. S. 95, 102-103 (1897); *Oneale v. Thornton*, 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete." *Rubin v. United States*, 449 U. S. 424, 430 (1981); see also *Ron Pair Enterprises*, supra, at 241.[13]

Thus, when attempting to look at the impact of a provision in the IRC, to move beyond the text of the IRC itself the commentator must first show where, in the text of the statute in question, there is such an ambiguity that must be resolved. As the Supreme Court noted, if there is no ambiguity then there is no point in talking about other sources, including supposed Congressional intent, that is contrary to that result.

If Congress truly disagrees with the result, Congress has the clear power to change that result. But until they do so, we are stuck with the plain language result of the statute.

So What Does This Mean for the Employee Retention Credit?

While I have long argued that the most likely and even the only way to read the plain text of IRC §§51(a)(1)(i) and 267(c) leads to the "no living relatives" rule, the ultimate decision on that issue would be left to the courts. But it is important to note that since I first published an article on the topic in early April 2021,[14] the IRS has issued guidance that independently came to the same conclusion.

While neither IRS Notices nor various Congressional documents related to the law are considered authorities that override the statute, the existence of that Notice does

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[12] *Connecticut National Bank v. Germain*, 503 US 249, 253-254 (1992), https://supreme.justia.com/cases/federal/us/503/249/

[13] *Connecticut National Bank v. Germain*, 503 US 249, 253-254 (1992)

[14] Ed Zollars, "Tax Advisers' Area 51 - Employee Retention Credit and Majority Shareholders," *Current Federal Tax Developments* website, April 3, 2021, https://www.currentfederaltaxdevelopments.com/blog/2021/4/3/tax-advisers-area-51-employee-retention-credit-and-majority-shareholders

complicate the situation for a taxpayer wishing to claim the credit or a professional advising the client to take the position that the "no living relative" rule is invalid and claim the IRC on wages paid to an impacted controlling owner.

For a professional to advise a client to take this position on a return and to prepare a return with such a position, the prepare must be ready to demonstrate either that there exists substantial authority for the position if there is not proper disclosure of the position[15] or a reasonable basis for the position if there is disclosure as defined at IRC §6662(d)(2)(B)(ii)(I).[16] A failure to meet those requirements means that the professional is at risk for a preparer penalty under IRC §6694.

Substantial authority is defined at Reg. §1.6662-4(d) which provides the specific authorities that must be consulted in such a case. While both the IRC and Congressional documents are listed at Reg. §1.6662-4(d)(3)(iii) as authorities that should be consulted, a professional must remember that the regulation requires considering the weight of the authorities taken as a whole[17], considering both those authorities in favor of the taxpayer's position and those contrary to it. And that will include dealing with Notice 2021-49 and how it impacts the overall weight of authorities on the issue.

As was noted earlier, the text of the statute sits very near the top of the pile of authorities in the view of the U.S. Supreme Court and an unambiguous position overrides all other authorities.

If the position is disclosed, then the preparer merely needs to meet the reasonable basis standard, but it's not "open season" on claiming a position that is merely arguable or colorable, and is significantly higher than simply being not frivolous or patently improper.[18] The regulation does provide a safe harbor of sorts:

> If a return position is reasonably based on one or more of the authorities set forth in section 1.6662-4(d)(3)(iii)[19] (taking into account the relevance and persuasiveness of the authorities, and subsequent developments), the return position will generally satisfy the reasonable basis standard even though it may not satisfy the substantial authority standard as defined in section 1.6662-4(d)(2). (See section 1.6662-4(d)(3)(ii) for rules with respect to relevance, persuasiveness, subsequent developments, and use of a well- reasoned construction of an applicable statutory provision for purposes of the substantial understatement penalty.)[20]

In both cases, the taxpayer will also be potentially subject to a 20% penalty for a substantial understatement if the return is examined, the taxpayer ends up paying tax

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[15] IRC §6694(a)(1), (2)(A)

[16] IRC §6694(a)(1), (2)(A)

[17] Reg. §1.6662-4(d)(3)(i)

[18] Reg. §1.6662-3(b)(3)

[19] This references the specific list of authorities that are to be analyzed in whole to come to the conclusion a position has substantial authority.

[20] Reg. §1.6662-3(b)(3)

when the position is not upheld and the substantial authority or disclosure with a reasonable basis standard is not met.

In my view, any professional who advises a client to take a position that the controlling interest holder with at least one living relative (other than a spouse) listed at IRC §267(c) can claim the employee retention credit on the controlling interest holder's wages must inform the client that such a position is directly contrary to a published IRS ruling on this issue. As such, the taxpayer should be advised this makes it far more likely the IRS will not concede this position without the taxpayer taking the agency to court if the return is examined. The client must determine how that potential cost impacts their willingness to move forward with this positions.

As well, the adviser needs to be able to show that either there exists a specific ambiguity in the statutory text that the adviser can defend (to allow consideration of evidence of Congressional intent) or that a plain text reading of only the statutory text clearly is contrary to the holding in Notice 2021-49.[21]

If the adviser believes he/she meets the first test (there is ambiguity), then the adviser must still establish that there is at least a reasonable basis the courts would decide the various types of evidence of Congressional intent would cause the court to override the specific ruling in Notice 2021-49. And if the adviser is not planning to advise disclosure, then it must be very clear that the evidence of Congressional intent the adviser is relying upon would have a high chance (not just a reasonable chance) of being found controlling in determining the application of the statute that the court would agree is ambiguous enough to bring in the Congressional documents.

If an adviser claims instead to meet the second test, then the analysis needs to come directly from the Code and the plain meanings of the terms. In this case Congressional reports would be irrelevant—if the meaning is plain, then no other documents need to be consulted.

But in either case, the adviser needs to be ready to provide the specific authorities and reasoning to support their argument there is either substantial authority or a reasonable basis for the position immediately upon an IRS challenge. Please note that CPE materials, comments by presenters (including myself) at CPE sessions, articles in tax publications (including this one), etc. are not themselves authorities that can be used for this purpose. At best, they can point the adviser to potential authorities that could be cited.

Similarly, a memorandum that might be written by counsel or another tax professional would not be authority itself, unless that professional was him/herself deemed to be the preparer of the return for this position. Again, the adviser would have to review and take personal responsibility for the validity of the position itself if that third party is not

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[21] I do believe the Notice is at odds with the plain text on the minor issue of including a person who lived with the taxpayer for the entire year on the list of relatives for whom the credit cannot be claimed due to the existence of the relationship to the controlling interest holder. IRC §51(i)(1)(A) only discusses not claiming the credit for relatives listed at subparagraphs (A) through (G) of IRC §152(d)(2). The person that lives with the taxpayer the entire year is listed at IRC §152(d)(2)(H). In fact, IRC §51(i)(1)(C) requires this full year household member must qualify as a dependent of the controlling interest holder for the wages paid to that person not to be eligible for the ERC.

taking on the mantle of being the preparer. This responsibility can't be outsourced without a third party agreeing to be the preparer for this purpose.

And that also leads to the final point—any position you take on this issue (and if you are around a client with this ERC issue you will have to take a position) requires you, as the professional, to independently confirm the basis for your position and be able to defend it with more than just pointing to an article you read, CPE sessions you attended or some discussion on an online forum.

SECTION: 6011
IRS MAKES PERMANENT PROGRAM ALLOWING E-SIGNATURES FOR A SPECIFIC LIST OF FORMS

Citation: "Details on using e-signatures for certain forms," FS-2021-12, September 1, 2021

After initially beginning a temporary acceptance of certain e-signatures during 2020 as a response to the COVID-19 pandemic, then extending that program twice, dropping the "temporary" designation in the most recent extension, the IRS now appears to have made the program permanent in IRS Fact Sheet 2021-12.[22]

The IRS justifies allowing e-signatures on certain forms as follows:

> To help reduce burden for the tax community, the IRS allows taxpayers to use electronic or digital signatures on certain paper forms they cannot file electronically. The agency is balancing the e-signature option with critical security and protection needed against identity theft and fraud. Understanding the importance of electronic signatures to the tax community, the IRS offers an overview about using them on certain forms.[23]

The Fact Sheet provides that it will accept a "wide range of electronic signatures." The notice goes on to list the following specific methods that are deemed acceptable:

- A typed name typed on a signature block
- A scanned or digitized image of a handwritten signature that's attached to an electronic record
- A handwritten signature input onto an electronic signature pad
- A handwritten signature, mark or command input on a display screen with a stylus device

[22] "Details on using e-signatures for certain forms," FS-2021-12, September 1, 2021, https://www.irs.gov/newsroom/details-on-using-e-signatures-for-certain-forms

[23] "Details on using e-signatures for certain forms," FS-2021-12, September 1, 2021

- A signature created by a third-party software.[24]

While the Fact Sheet does not bar the use of other forms of e-signatures, professionals likely will want to use one of the specifically approved methods, if possible, to eliminate the risk of the IRS claiming the specific method used is not appropriate.

The Fact Sheet notes that various methods can be used to capture the e-signature:

> The IRS doesn't specify what technology a taxpayer must use to capture an electronic signature. The IRS will accept images of signatures (scanned or photographed) including common file types supported by Microsoft 365 such as tiff, jpg, jpeg, pdf, Microsoft Office suite or Zip.[25]

One missing format on that list is the HEIC (High-Efficiency Image Format) image format used by default by iPhones and other Apple products running recent versions of the company's operating systems (such as iOS 11 and later versions), so most likely they should be converted to JPEG or PDF for permanent storage if a professional receives files in that format.

Apple switched to that format as it is more space efficient, but support outside of Apple products is more limited, specifically causing issues for Windows users who don't resort to third party software. The lack of native Windows support likely explains why the IRS does not list this format in its list of clearly acceptable formats.

The IRS added more forms to those for which e-signatures will be accepted as the program was extended. The list of forms for which the IRS will deem electronic signatures acceptable are, as of September 1, 2021:

- Form 11-C, Occupational Tax and Registration Return for Wagering;
- Form 637, Application for Registration (For Certain Excise Tax Activities);
- Form 706, U.S. Estate (and Generation-Skipping Transfer) Tax Return;
- Form 706-A, U.S. Additional Estate Tax Return;
- Form 706-GS(D), Generation-Skipping Transfer Tax Return for Distributions;
- Form 706-GS(D-1), Notification of Distribution from a Generation-Skipping Trust;
- Form 706-GS(T), Generation-Skipping Transfer Tax Return for Terminations;
- Form 706-QDT, U.S. Estate Tax Return for Qualified Domestic Trusts;
- Form 706 Schedule R-1, Generation Skipping Transfer Tax;

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[24] "Details on using e-signatures for certain forms," FS-2021-12, September 1, 2021

[25] "Details on using e-signatures for certain forms," FS-2021-12, September 1, 2021

- Form 706-NA, U.S. Estate (and Generation-Skipping Transfer) Tax Return;
- Form 709, U.S. Gift (and Generation-Skipping Transfer) Tax Return;
- Form 730, Monthly Tax Return for Wagers;
- Form 1066, U.S. Income Tax Return for Real Estate Mortgage Investment Conduit;
- Form 1120-C, U.S. Income Tax Return for Cooperative Associations;
- Form 1120-FSC, U.S. Income Tax Return of a Foreign Sales Corporation;
- Form 1120-H, U.S. Income Tax Return for Homeowners Associations;
- Form 1120-IC DISC, Interest Charge Domestic International Sales – Corporation Return;
- Form 1120-L, U.S. Life Insurance Company Income Tax Return;
- Form 1120-ND, Return for Nuclear Decommissioning Funds and Certain Related Persons;
- Form 1120-PC, U.S. Property and Casualty Insurance Company Income Tax Return;
- Form 1120-REIT, U.S. Income Tax Return for Real Estate Investment Trusts;
- Form 1120-RIC, U.S. Income Tax Return for Regulated Investment Companies;
- Form 1120-SF, U.S. Income Tax Return for Settlement Funds (Under Section 468B);
- Form 1127, Application for Extension of Time for Payment of Tax Due to Undue Hardship;
- Form 1128, Application to Adopt, Change or Retain a Tax Year;
- Form 2678, Employer/Payer Appointment of Agent;
- Form 3115, Application for Change in Accounting Method;
- Form 3520, Annual Return To Report Transactions With Foreign Trusts and Receipt of Certain Foreign Gifts;
- Form 3520-A, Annual Information Return of Foreign Trust With a U.S. Owner;
- Form 4421, Declaration – Executor's Commissions and Attorney's Fees;
- Form 4768, Application for Extension of Time to File a Return and/or Pay U.S. Estate (and Generation-Skipping Transfer) Taxes;

- Form 8038, Information Return for Tax-Exempt Private Activity Bond Issues;
- Form 8038-G, Information Return for Tax-Exempt Governmental Bonds;
- Form 8038-GC; Information Return for Small Tax-Exempt Governmental Bond Issues, Leases, and Installment Sales;
- Form 8283, Noncash Charitable Contributions;
- Form 8453 series, Form 8878 series, and Form 8879 series regarding IRS e-file Signature Authorization Forms;
- Form 8802, Application for U.S. Residency Certification;
- Form 8832, Entity Classification Election;
- Form 8971, Information Regarding Beneficiaries Acquiring Property from a Decedent;
- Form 8973, Certified Professional Employer Organization/Customer Reporting Agreement; and
- Elections made per Internal Revenue Code Section 83(b).[26]

The IRS Fact Sheet indicates that these are forms that cannot be filed using IRS e-file.[27] Thus, it seems unlikely that the IRS will allow e-signatures to be used for forms that can be electronically filed with the IRS and that any form on this list that is later added to IRS e-file may be removed from the list.

Advisers must take care not to use this option for any forms not on the list. As we reported in July, the use of an unapproved signature method can cause the filing to be rejected as lacking a signature.[28]

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[26] "Details on using e-signatures for certain forms," FS-2021-12, September 1, 2021

[27] "Details on using e-signatures for certain forms," FS-2021-12, September 1, 2021

[28] See Ed Zollars, CPA, "Digital Signature on 2014 and 2015 Amended Returns Was Not a Valid Signature," *Current Federal Tax Developments* website, July 15, 2021, https://www.currentfederaltaxdevelopments.com/blog/2021/7/15/digital-signature-on-2014-and-2015-amended-returns-was-not-a-valid-signature