

NOTICE TO CHAPTER 7 AND 13 TRUSTEES REGARDING TREATMENT OF RECOVERY REBATES AND TAX CREDITS FOR CONSUMER BANKRUPTCY DEBTORS UNDER THE AMERICAN RESCUE PLAN ACT OF 2021¹

The American Rescue Plan Act of 2021, Pub. L. No. 117-2 (the “ARP”), was enacted on March 11, 2021. It provides relief for qualified individuals to address the impact of COVID-19, including additional recovery rebates and expanded child tax credits. This notice supplements the previous United States Trustee Program (“USTP”) notice provided under the Coronavirus Aid, Relief, and Economic Security Act of 2020, Pub. L. No. 116-136 (the “CARES Act”), and addresses additional questions that may arise under the ARP regarding the treatment of recovery rebates and tax credits in bankruptcy cases filed by individual debtors.

In Summary

Chapter 7 and 13 trustees should not consider recovery rebates or child tax credits in administering estate assets or calculating disposable income in chapter 13 repayment plans. Trustees who believe that the specific facts in a case may require a different result are directed to contact the United States Trustee prior to taking any action to administer recovery rebates or to object to a chapter 13 plan based on the treatment of recovery rebates or the additional tax credit under the ARP. Additionally, United States Trustees will not consider recovery rebates or additional child tax credits under the ARP in making means test calculations, filing motions to dismiss for abuse under section 707(b)(2) and (3), objecting to chapter 13 plans, or taking related actions.

Recovery Rebates and the Bankruptcy Estate

The ARP provides for a third round of recovery rebates, which total at most \$1,400 per individual or \$2,800 per married couple filing jointly, with an additional \$1,400 paid for each qualifying dependent. The rebates are payable in full to qualifying individuals earning less than \$75,000, married couples filing jointly earning less than \$150,000, and heads of household earning less than \$112,500. The rebates decrease above those thresholds until completely phased out at \$80,000 for single filers, \$160,000 for joint filers, and \$120,000 for heads of household.

As part of the Consolidated Appropriations Act, 2021, Pub. L. No. 116-260 (the “CAA”), Congress amended 11 U.S.C. § 541 to exclude “recovery rebates made under section 6428 of the Internal Revenue Code of 1986” from bankruptcy estate property. 11 U.S.C. § 541(b)(11). Section 6428 implemented the first round of recovery rebates under the CARES Act. Pub. L. No. 116-136, 26 U.S.C. § 6428. The CAA also provided for a second round of recovery rebates by adding section 6428A to the Internal Revenue Code, providing that those rebates were “[i]n addition to the credit allowed under section 6428.” 26 U.S.C. § 6428A. The ARP similarly implemented the third round of recovery rebates under new section 6428B. 26 U.S.C. § 6428B.

¹ This notice supplements the “Notice to Chapter 7 and 13 Trustees Regarding Recovery Rebates Paid to Consumer Bankruptcy Debtors Under the CARES Act of 2020” issued by the USTP on April 7, 2020.

The best reading of 11 U.S.C. § 541(b)(11) is that it applies to all three rounds of recovery rebates, including those made under the ARP, to exclude them from bankruptcy estates. This interpretation is consistent with the plain language of section 541(b)(11) standing alone, as well as 26 U.S.C. §§ 6428, 6428A, and 6428B read in conjunction. It also is consistent with congressional intent as expressed by the CAA's amendment to section 541(b).

Further, even without section 541(b)(11), and as expressed in the USTP's April 7, 2020, notice regarding recovery rebates, the USTP expects that it is highly unlikely that chapter 7 trustees would administer recovery rebates after consideration of all relevant circumstances. Those circumstances include: the modest amount of the recovery rebate; the applicability of state and federal exemptions; any interest of a non-debtor spouse in the recovery rebate; the cost to the estate of recovering and administering the recovery rebate, including litigation to seek a judicial determination; and the extent to which recovering the recovery rebate will result in a meaningful distribution to creditors.

Recovery Rebates, Means Testing, and Disposable Income

Section 1113(b)(1) of the CARES Act amended 11 U.S.C. §§ 101(10A)(B)(ii) and 1325(b)(2) to exclude "payments made under Federal law relating to the national emergency declared by the President under the National Emergencies Act (50 U.S.C. § 1601 *et seq.*) with respect to the coronavirus disease 2019 (COVID-19)" from the statutory definitions of current monthly income and disposable income. Accordingly, recovery rebates received within six months before the filing of a bankruptcy petition should not be included in calculating a debtor's current monthly income in a chapter 7 or 13 case, and further should be excluded from projected disposable income available to pay creditors through a chapter 13 plan.²

Child Tax Credits, Means Testing, and Disposable Income

The ARP also expands the existing child tax credit for tax year 2021 by increasing it to \$3,000, or \$3,600 for children under six years old. The additional credit amount over the existing \$2,000 per eligible child credit phases out beginning at \$75,000 for individual filers, \$150,000 for joint filers, and \$112,500 for heads of household. The ARP also provides generally for advance payment of 50 percent of the estimated allowed child tax credit for tax year 2021. The USTP will not use the additional child tax credit amount, or advance payments of the child tax credit, under the ARP to determine whether a presumption of abuse arises under 11 U.S.C. § 707(b)(2) or to determine whether a case is abusive under 11 U.S.C. § 707(b)(3). The USTP does not expect the additional tax credits to be a factor in determining projected disposable income in chapter 13 cases because, among other reasons, the expanded tax credit is limited to tax year 2021.

² The CARES Act amendments to sections 101(10A)(B)(ii) and 1325(b)(2) expire on March 27, 2021, unless extended. H.R. 1651, the COVID-19 Bankruptcy Relief Extension Act of 2021, is pending before Congress and, if enacted, would extend the amendments through March 27, 2022.