

# FEDERAL TAX WEEKLY

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## ABA Makes Supervisory Penalty Approval Recommendations

The American Bar Association offered the Internal Revenue Service a series of suggestions in response to a proposed regulation regarding supervisory approval of certain penalties.

In a July 7, 2023, letter to the agency, ABA noted that there has been "significant litigation regarding when the Service must obtain supervisory approval as well as who must approve the penalty and the form of that approval" under Code Sec. 6751(b).

The organization stated that the proposed regulations, which were published April 11, 2023, in the Federal Register, "provide specific timing rules for supervisory approval of (1) penalties subject to pre-assessment review in the Tax Court, (2) penalties raised for the first time in the Tax Court after a petition is filed, and (3) penalties not subject to pre-assessment review in the Tax court. The Proposed Regulations further define key terms, including 'immediate supervisor' and 'higher-level official,' and clarify the exemption to the approval requirement for penalties 'automatically calculated through electronic means,' in addition to other provisions.

ABA offered the IRS nine recommendations related to the proposed regulations, including:

- penalty approval should be required before the Service issues its 30-day letter, or substantive equivalent, regardless of whether the penalty is subject to pre-assessment Tax Court review;
- a revision to "immediate supervisor" to mean any individual who directly supervises the substantive work of the individual who first proposed the penalty;
- a revision of "higher level official" to specify that the "assigned job duties" that include penalty approval must be in writing;
- a revision of "personally approved (in writing)" to require the approve, if made electronically, by through a digital signature that includes a software-generated timestamp indicating precisely when and who signed the document; and
- a penalty should not be treated as "automatically calculated through electronic means" if an applicable penalty statute includes a defense that must be determined on a case-by-case basis except where Code Sec. 6751(b) expressly provides otherwise.

"We look forward to working with Treasury and the Service through the implementation process of the Proposed Regulations," ABA stated in the letter.

## RMD Beginning Date Transition Relief Announced

*Notice 2023-54*

The IRS announced transition relief for plan administrators, payors, plan participants, IRA owners, and beneficiaries in connection with the change to the required beginning date for required minimum distributions (RMDs) under Code Sec. 401(a)(9) and pursuant to the

SECURE 2.0 Act of 2022 (P.L. 117-328). The transition relief extends the deadline to roll over certain distributions that were mischaracterized as RMDs and allows beneficiaries under the 10-year rule to avoid taking an RMD in 2023. In addition, the IRS announced that final regulations related to RMDs will apply for calendar years beginning no earlier than 2024.

## Required Beginning Date

The required beginning date for an employee or IRA owner is April 1 of the calendar year after the calendar year in which the individual attains the applicable age. The SECURE 2.0 Act changed the applicable age from 72 to either age 73 or age 75, depending on the taxpayer's date of birth. As a result, IRA owners who turn 72 in 2023 will not have an RMD in 2023. Following enactment of the SECURE 2.0 Act, plan administrators and other payors indicated that automated payment systems would need to be updated to reflect the change in the required beginning date. As a result, some plan participants and IRA owners who take a distribution in 2023 may have those distributions mischaracterized as RMDs and therefore ineligible for rollover.

The IRS granted relief to relating to 2023 distributions that were mischaracterized as RMDs due to the change in the required beginning date from age 72 to 73. Under this guidance, a payor or plan administrator will not be considered to have failed to satisfy the requirements of Code Secs. 401(a)(31), 402(f), and 3405(c) merely because of a failure to treat these distributions as eligible rollover distributions. This relief applies to distribution made from a plan between January 1, 2023, and July 31, 2023, to a participant born in 1951 (or that participant's surviving spouse) that would have been an RMD but for the change in the required beginning date under the SECURE 2.0 Act.

## "Protect Your Clients, Protect Yourself" Campaign Launched for Tax Professionals

The Security Summit coalition of the IRS, on its eighth year anniversary announced a special summer campaign, "Protect Your Client; Protect Yourself". The campaign is aimed at ensuring that tax professionals stay alert against new and ongoing threats of tax-related identity theft. Tax professionals are the prime targets of identity thefts as they hold sensitive financial and tax information. The summer series and tax forums will provide information and basic security steps to protect these valuable sensitive data that tax professionals hold while also protecting their business from identity thieves.

The campaign will cover the following topics that will help ensure protection of sensitive data held by the tax professionals:

- the Written Information Security Plan (WISP): an easy-to-understand document developed by and for tax and industry professionals to keep customer and business information safe and secure;
- sign up clients for identity protection PINs;
- phishing, spear phishing, and whaling;
- tell-tale signs of identity theft; and
- cyber-smart tactics to protect clients working from home or traveling.

*IR-2023-124*

## 60-Day Rollover Deadline Extended

The IRS extended the 60-day rollover period for 2023 distributions mischaracterized as RMDs to September 30, 2023. Thus, if a taxpayer who was born in 1951 received a single-sum distribution between January 1, 2023, and July 31, 2023, part of which was treated as ineligible for rollover because it was mischaracterized as an RMD, that taxpayer will have until September 30, 2023, to roll over that mischaracterized part of the distribution.

The extension of the 60-day rollover period also applies to mischaracterized IRA distributions made to an IRA owner or the IRA owner's surviving spouse. This rollover is permitted even if the IRA owner or surviving spouse has rolled over a distribution within the last twelve months. However, making such a rollover of the portion of an IRA distribution mischaracterized as an RMD would preclude the

IRA owner or surviving spouse from rolling over a distribution in the next twelve months.

## Specified RMDs for 2023

A defined contribution plan will not be treated as having failed to satisfy Code Sec. 401(a)(9) for failing to make an RMD in 2023 that would have been required under the proposed regulations. Proposed regulations would interpret the 10-year rule to require the beneficiary of an employee who died after his required beginning date to take an annual RMD beginning in the first calendar year after the employee's death. This aspect of the 10-year rule differs from the old 5-year rule, which required no RMD until the end of the 5-year period. Thus, the IRS provided transition relief for 2021, 2022, and now 2023. The relief also applies to an individual who would have been liable for an excise tax under Code Sec. 4974.

### REFERENCE KEY

**USTC** references are to **U.S. Tax Cases**  
**Dec** references are to **Tax Court Reports**

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# IRS Finalizes Regulations Addressing Carryback of Consolidated NOLs

T.D. 9977

The IRS has issued final regulations addressing carryback of consolidated net operating losses (CNOLs). The regulations allow consolidated groups that acquire new members that were members of another consolidated group to elect, in a year subsequent to the acquisition year, to waive all or part of the pre-acquisition portion of the carryback period for certain losses attributable to the acquired members, if there is a retroactive statutory extension of the NOL carryback period.

These regulations finalize, without substantive changes, proposed regulations published in 2020 (NPRM REG-125716-18) (2020 proposed regulations), and remove related temporary regulations (T.D. 9900, I.R.B. 2020-30, 143) (2020 temporary regulations).

## 2020 Proposed Regulations and 2020 Temporary Regulations

The 2020 proposed regulations provided guidance that, in part, implemented amendments to Code Sec. 172 by the Tax Cuts and Jobs Act (TCJA) (P.L. 115-97) and the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (P.L. 116-136). Specifically, the 2020 proposed regulations provided guidance for consolidated groups regarding (i) the application of the 80-percent limitation in Code Sec. 172(a)(2), as originally enacted as part of the TCJA and subsequently amended by the CARES Act, and (ii) the absorption of NOL carrybacks and carryovers.

The 2020 temporary regulations provided guidance to consolidated groups

## IRS Reopens Taxpayer Assistance Centers; Adds Community Assistance Visits

After the Inflation Reduction Act provided long-term funding to the IRS as part of the IRS Strategic Operating Plan, the agency opened or reopened 35 Taxpayer Assistance Centers (TACs) across the country while also starting a special series of community assistance visits to address the needs of taxpayers who are unable to visit an in-person office. During these community assistance visits, the IRS will set up a temporary TAC to give taxpayers an opportunity to meet the IRS assistors face to face. The IRS has currently planned to hold additional community assistance visits in at least seven locations through October. The initial list includes Alpena, Michigan; Hastings, Nebraska; Twin Falls, Idaho; Juneau, Alaska; Lihue, Hawaii; Baker City, Oregon; and Gallup, New Mexico. Professional foreign language interpretation will be available in multiple languages through an over-the-phone translation service. For deaf or hard of hearing individuals who need sign language interpreter services, IRS staff will schedule appointments for a later date. Alternatively, these individuals can call TTY/TDD 800-829-4059 to make an appointment. Taxpayers who would like to get help can call 844-545-5640 from 7 a.m. to 7 p.m., to make an appointment to visit an existing IRS Taxpayer Assistance Center can do so contacting their local office.

[IR-2023-127](#)

regarding the application of the NOL carryback rules under Code Sec. 172(b), as amended by (i) Act Sec. 2303(b) of the CARES Act, and (ii) by future legislation enacting retroactive statutory amendments to NOL carryback rules more generally. Thus, the 2020 temporary regulations provided amended carryback rules applicable to CNOLs arising in tax years to which amended carryback rules become applicable after the acquisition of a member. Under these rules, an acquiring group possesses the opportunity to waive, on a tax-year-by-tax-year basis, all or a portion of the carryback period with regard to CNOLs attributable to acquired members for pre-acquisition years during which the acquired members were members of a former group.

Specifically, if there is a retroactive statutory extension of the NOL carryback period under Code Sec. 172 (a retroactive statutory extension), the 2020 temporary regulations permit consolidated groups that, before the enactment of the retroactive statutory extension, acquired new members that were members of another consolidated group to elect to waive, in a tax year subsequent to the tax year of the acquisition, all or part of the pre-acquisition portion of the carryback period for CNOLs attributable to the acquired members.

The text of the 2020 temporary regulations also served as the text of Proposed Reg. §1.1502-21(b)(3)(ii)(C) and (D) of the 2020 proposed regulations. The 2020 proposed regulations, other than Proposed Reg. §1.1502-21(b)(3)(ii)(C) and (D), were adopted as final regulations on October 27, 2020 (T.D. 9927).

## Final Regulations Implementing the Amended Carryback Rules for CNOLs

The final regulations adopt the rules in Proposed Reg. §1.1502-21(b)(3)(ii)(C) and (D) of the 2020 proposed regulations, without substantive changes, and make a few other changes to incorporate those rules into Reg. §1.1502-21(b) and to improve readability. The 2020 temporary regulations are removed.

Similar to the 2020 temporary regulations, the final regulations provide relief through two types of split-waiver elections for consolidated groups that (i) include one or more acquired members, and (ii) have CNOLs that, under the amended carryback rules, become eligible to be carried back for a greater number of years than under statutory law in effect at the time of the acquisition (a default carryback period).

One type of election (the amended statute split-waiver election) permits an acquiring group to relinquish that part of the carryback period during which an acquired member was a member of a former group (for the portion of a CNOL attributable to the acquired member), even though the acquiring group did not file a split-waiver election for the year in which the acquired

member became a member of the acquiring group.

The other type of election (an extended split-waiver election) applies solely to the extended carryback period (that is, the additional carryback years provided under the amended carryback rules). Through an extended split-waiver election, an acquiring group can ensure that amended carryback CNOLs are carried

back to tax years of former groups only to the extent those losses would have been carried back under prior law (that is, limiting CNOL carrybacks to the default carryback period).

The final regulations apply generally to CNOLs arising in a tax year ending after July 2, 2020. However, taxpayers may apply them to any CNOL arising in a tax year beginning after December 31, 2017.

## IRS Reminds Employers of New Electronic Filing Requirements for Forms W-2, W-2c

The IRS has reminded employers that the new lower threshold for required electronic filing of information returns applies to tax year 2023 Forms W-2, Wage and Tax Statement. They must be filed by January 31, 2024.

In T.D. 9972, the required electronic filing threshold for certain information returns (including the 1099 series forms and most Forms W-2) was reduced from

250 returns to 10 returns. This new lower threshold is effective for information returns required to be filed in calendar years beginning with 2024. Employers determine whether they must file their information returns electronically by adding the number of information returns and the number of Forms W-2 they must file in a calendar year. If the total is 10 or more, they must file the returns electronically.

Corrected information returns, like Form W-2c, should be treated separately and are not included in this calculation. The employer must file the Form W-2c that corrects the original Form W-2 in the same way that the original Form W-2 was filed, electronically or on paper.

Further information on Forms W-2 and W-2c can be found at: About Form W-2 and About Form W-2c.

## Vermont Victims of Flooding Granted Tax Relief

IR-2023-125

The president has declared a federal disaster area in Vermont. The disaster is due to flooding that occurred on July 9, 2023. Flooding victims anywhere in Vermont now have until November 15, 2023, to file various individual and business tax returns and make tax payments.

### Vermont Filing Deadlines Extended

The IRS extended certain deadlines falling on or after July 9, 2023, and on or before November 15, 2023, to November 15, 2023. This extension includes filing for most returns, including:

- individual, corporate, estate, and trust income tax returns;
- partnership and S corporation income tax returns;
- estate, gift, and generation-skipping transfer tax returns;

- the Form 5500 series returns;
- annual information returns of tax-exempt organizations; and
- employment and certain excise tax returns.

However, the extension does not include information returns in the Form W-2, 1094, 1095, 1097, 1098, or 1099 series or Forms 1042-S, 3921, 3922, or 8027.

### Vermont Payment Deadlines Extended

The relief includes extra time to make tax payments. This includes estimated tax payments due on or after July 9, 2023, and before November 15, 2023. Further, taxpayers have until November 15, 2023, to perform other time-sensitive actions due on or after July 9, 2023 and before November 15, 2023.

The IRS excused late penalties for employment and excise tax deposits due on or after July 9, 2023, and before July

25, 2023; but, the taxpayer must make the deposits by July 25, 2023.

### Casualty Losses

Affected taxpayers may obtain relief by claiming their losses on their 2022 or 2023 return. Individuals may deduct personal property losses not covered by insurance or other reimbursements.

Taxpayers claiming a disaster loss on their 2022 or 2023 return should write the disaster designation, "Vermont, flooding" at the top of the return. This will allow the IRS to speed refund processing.

The IRS will provide affected taxpayers with copies of prior year returns without charge. To obtain this expedited service, taxpayers should:

- add the disaster designation at the top of Form 4506, Request for a Copy of Tax Return, or Form 4506-T, Request for Transcript of Tax Return; and
- submit it to the IRS.



# Individual Willfully Misled IRS About Ability to Pay Taxes; Motion for Mistrial Correctly Denied

*K.L. Crandell, CA-5, 2023-2, USTC ¶150,200*

The district court did not abuse its discretion by denying an individual's motion for mistrial. A jury found him guilty of tax evasion in violation of Code Sec. 7201. The taxpayer raised two claims on appeal: first, that the evidence at trial was insufficient to support a conviction for tax evasion under Code Sec. 7201; and second, that the district court abused its discretion by denying his motion for a mistrial.

## Sufficiency of Evidence

The taxpayer argued that submitting a fraudulent Form 433-A, Collection Information Statement for Wage Earners and Self-Employed Individuals, was insufficient evidence that he violated Code Sec. 7201. The taxpayer concluded that even if his Form 433-A

was intentionally falsified, it did not "evade or defeat any tax imposed," but merely changed the timetable for repayment. However, understating his financial status on the Form 433-A did not change the taxpayer's tax liability in the abstract, but it did reduce the payments due on that debt. Additionally, the government presented evidence suggesting that the taxpayer manipulated his wages to artificially depress his income at the time he submitted the Form 433-A. Based on the evidence presented during trial, a rational juror could have concluded that the taxpayer knew that his true income was considerably higher than that listed on the form and willfully misled the IRS about his ability to pay. Moreover, the taxpayer's reliance on his tax preparer also did not constitute a sufficient defense because he did not fully rely on the tax preparer nor disclose all the relevant facts.

## Motion for Mistrial

The taxpayer argued that the government's questions about his taxes not related to the tax years at issue were irrelevant, prejudicial, and violated the rules for character evidence in a criminal trial. Further, the taxpayer averred that the government's decision to ask a second question along these lines, after the district court sustained an objection to the first one, showed that the government did not act in good faith. However, even assuming that the district court was right to sustain the government's objection, the taxpayer offered no reason to believe that the questions incurably prejudiced the jury. Given the weight of evidence presented to the jury in this case, there was no significant possibility that these two questions had a substantial impact on the verdict. Accordingly, the district court's judgement was affirmed.

Affirming an unreported DC Miss. opinion.

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## IRS Optimizing Service and Strengthening Enforcement

*IR-2023-126*

The IRS delivered dramatically improved service in 2023 filing season and continues to build on this progress by focusing on critical work across the agency in achieving world class service strengthening enforcement against high-income individuals who do not pay taxes owed, and modernizing core technology infrastructure to enable better service and improve data security. The IRS has cut phone wait times significantly and has digitized 80 times more returns than in the past year with the adoption of new scanning technology. Further,

it has cleared the backlog of unprocessed individual tax returns of the past year without any errors, launched two new digital tools, and enabled a new direct-deposit refund option for taxpayers with amended returns. The IRS has been focused on optimizing the means by which taxpayers are able to seamlessly interact with the agency in the ways that work best for them on the phone, in-person, and online, in addition to expanding in-person service and meeting taxpayers where they are, particularly those in underserved and rural communities.

The IRS has been working to ensure high-income filers pay the taxes they owe.

Prior to the Inflation Reduction Act, more than a decade of budget cuts prevented IRS from keeping pace with the increasingly complicated set of tools that the wealthiest taxpayers use to hide their income and evade paying their share. Further, IRS has been modernizing decades-old technology to drive the agency's efforts to provide world class customer service and protect taxpayers' data. For more details about the IRS Strategic Operating Plan, visit the IRS website.

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## Washington Round-up

**IRS reinforces internal whistleblower policies.** Internal Revenue Service Commissioner Daniel Werfel, in a July 7,

2023, memo to all employees, reinforced the various options agency employees have to voice their whistleblower concerns,

including, "but not limited to," the Treasury Inspector General for Tax Administration, relevant Congress oversight committees,

the U.S. Office of Special Counsel, and the U.S. Department of Justice Office of Inspector General. “I want it to be clear that we will always encourage a ‘see something, say something’ philosophy,” Werfel stated in the memo.

**Whistleblowers reporting noncompliance to the IRS received \$38 million in FY 2022.** According to its annual report to Congress, the IRS Whistleblower Office stated that in FY 2022 it issued 132 awards totaling nearly \$38 million to whistleblowers on proceeds collected of \$172.7 million as a result of whistleblowers reporting noncompliance. The dollar amount of awards increased from the previous year (\$36.1 million in FY 2021), but the number of awards decreased (179 awards in FY 2021). The total number of submissions received in FY 2022 was 5,048, nearly identical to the number of claims in FY 2021 (5,080). The most common allegations received by the office include unreported/underreported income; failure to file tax or information return; wage under reported; and general allegations of fraud, tax fraud, wire fraud, insurance fraud, etc.

**Child Tax Credit legislation forthcoming?** The Senate Finance Subcommittee on Taxation and IRS Oversight’s July 13, 2023, hearing, *Assessing 25 Years of the Child Tax Credit (CTC)* could be setting the stage for action this year after the expanded credit, which enjoyed bipartisan support,

failed to get extended in 2021. While there was much agreement on the early successes of the CTC, witnesses disagreed on what it has become, with Kevin Corinth, a senior fellow at the American Enterprise Institute, testifying that instead of “offsetting taxes and rewarding work, it was transformed into a universal child allowance” during the COVID-19 pandemic. Indivar Dutta-Gupta, president and executive director of the Center for Law and Social Policy, noted that research suggests that a permanent version of the expanded child tax credit found in the American Rescue Plan Act of 2021 “would return more than \$9 to society for each dollar spent with little to no harmful consequences. If policymakers can come together and establish a permanent and equitable Child Tax Credit, our entire nation will become more just and prosperous.”

**Tax changes needed to keep Social Security solvent.** Phillip Swagel, director of the Congressional Budget Office, told members of the Senate Budget Committee during a July 12, 2023, hearing that changes will be needed in tax rates in order to maintain the financial solvency of the Social Security program. He acknowledged that the only way to address looming shortfalls is either through new taxes or cuts to benefits. Amy Hanauer, executive director at the Institute on Taxation and Economic Policy, noted that many higher

income earners avoid potential contributions to the Social Security fund because their investment income, “which makes up a disproportionate share of earnings of those million-dollar earners,” is not subject to taxes for Social Security.

**Erroneous EITC payments continue.** The Treasury Inspector General for Tax Administration, in a June 15, 2023, report, noted that as of May 5, 2022, “there were a total of 7,486 electronically filed tax returns identified by the IRS’s prerefund filters and through TIGTA’s analysis that did not meet the requirements for self-only ETIC [earned income tax credit. However, with the appropriate legal authority, the IRS could reject these returns without creating and legal risk and prevent more than \$2.9 million in improper payments.” The report also noted that Child and Dependent Care Credits “were allowed which exceeded the statutory limits allowed by law due to employee errors and a lack of controls. For example, TIGTA identified 61 returns that received \$203,535 more refundable CDCC claims than allowed by law.” According to an analysis by the Treasury Department watchdog, a review of tax returns filed as of May 5, 2022, identified “3,573 returns with potentially erroneous CDCCs totaling \$6.8 million with obviously invalid care provider Taxpayer Identification Numbers.”

## TAX BRIEFS

### *Bad Debt Deduction*

An individual, who owned waterfront companies, was not allowed to claim bad debt deductions for the loans issued by its entities to other affiliated entities. Because the taxpayer’s companies advanced funds to affiliated entities as well as directly and indirectly to family members of the taxpayer, the tax court examined the transfers with heightened scrutiny.

*Allen, TC, Dec. 62,243(M)*

### *Charitable Contribution Deduction*

A group of individuals who were various members of a family was not entitled to

claim charitable contribution deductions stemming from their family S corporation. Further, the taxpayers were liable for accuracy-related penalties under Code Sec. 6662. Additionally, two of the taxpayers were liable for additions to tax for the failure to timely file a required return under Code Sec. 6651(a)(1).

*Braen, TC, Dec. 62,242(M)*

### *Exempt Organizations*

A corporation incorporated to assist youth and adults to learn to play soccer, understand sportsmanship, increase health and fitness, develop strong character traits, and

enhance individual dignity was denied exempt status as it failed the operational test. The corporation was found to not be operated exclusively for exempt purposes as set forth in Code Sec. 501(c)(3) and had more than an insubstantial amount of social and recreational activities. It was found that the corporation was not a qualified amateur sports organization as defined in Code Sec. 501(c)(2) because it did not foster national or international amateur sports competition or support and develop amateur athletes for national or international competition in sports.

*IRS Letter Ruling 202328021*

### [Private Foundations](#)

In each of two cases, an asset transfer qualified as a transfer of assets described in Code Sec. 507(b)(2). The asset transfers did not terminate the transferring foundations' private foundation statuses and did not cause any liability for the termination tax under Code Sec. 507(c). The transferring foundations' voluntary terminations after completion of the asset transfers would not result in imposition of tax. Further, the transfers would not give rise to any net investment income pursuant to Code Sec. 4940.

[IRS Letter Ruling 202328004](#); [IRS Letter Ruling 202328005](#)

### [Scholarship Procedures](#)

Two private foundations had their procedures for awarding scholarships/

educational grants approved under Code Sec. 4945. In the first case, the foundation proposed to operate an educational grant program to provide individual grants to graduate students, academic researchers, clinicians or other scholars who are contributing to science and health in their respective fields. The second foundation proposed to operate a program that awards scholarships to members of the company who qualify to attend a post-secondary institution, in addition to adult learners that qualify to attend a post-secondary institution of their choice. The awards were made on a nondiscriminatory basis and were subject to Code Sec. 117(b).

[IRS Letter Ruling 202328022](#); [IRS Letter Ruling 202328023](#)

### [Supreme Court Docket](#)

A petition for review was applied for in the following case:

*T.C. Minemyer, CA-10.*- The Tax Court incorrectly held that the IRS did not satisfy the approval requirement in Code Sec. 6751(b)(1) with respect to a civil fraud penalty. The IRS satisfies the requirement as long as written supervisory approval is obtained no later than the date that the IRS issues a notice of deficiency formally asserting the penalty. The case was remanded to the Tax Court to decide on evidence as to whether the taxpayer was liable for the fraud penalty.