



FEDERAL TAX WEEKLY

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Proposed Regulations Issued on Sales and Exchanges of Digital Assets by Brokers

NPRM REG-122793-19; IR-2023-153

In an effort to clarify and standardize digital asset reporting practices, the Treasury Department and IRS have issued proposed regulations requiring brokers of digital assets to report certain sales and exchanges.

For sales or exchanges of digital assets taking place on or after January 1, 2025, the proposed regulations would require brokers to report gross proceeds on new Form 1099-DA and provide payee statements to customers. Brokers would also be required to include gain or loss and basis information for certain sales that take place after January 1, 2026, on these information returns and statements.

Brokers affected by these proposed regulations include digital asset trading platforms, digital asset payment processors, and certain digital asset hosted wallets.

Real Estate Reporting

Under the proposed rules, real estate reporting persons treated as brokers with respect to reportable real estate transactions would also be required to file information returns and furnish payee statements with respect to real estate purchasers who use digital assets to acquire real estate in transactions that close on or after January 1, 2025.

These real estate reporting persons would also be required to include the fair market value of digital assets paid to sellers of real estate in certain real estate transactions on Form 1099-S.

Comments and Public Hearing Dates

Written or electronic comments must be received by October 30, 2023. A public hearing on the proposed regulations has been scheduled for November 7, 2023, with a second public hearing date on November 8, 2023, if the number of requests to speak at the first hearing exceed the number that can be accommodated in one day.

Comments can be submitted electronically via www.regulations.gov (indicate IRS and Proposed Regulations, NPRM REG-122793-19) by following the online instructions for submitting comments. Paper submissions should be sent to: CC:PA:LPD:PR (Proposed Regulations, NPRM REG-122793-19), Room 5203, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044.

IRS Reassures Participants Concerning Catch-Up Contributions

IR-2023-155

The IRS addressed a technical error in the SECURE 2.0 Act of 2022 (P.L. 117-328) that affects participants' ability to make pre-tax catch-up contributions in 2024. The IRS also announced a two-year transition period to assist in the implementation of the SECURE 2.0 Act's Roth catch-up contribution requirement. Under this guidance, plans have until 2026 to treat highly paid participants' catch-up contributions as Roth contributions.

Background

Code Sec. 414(7), added by the SECURE 2.0 Act, provides that catch-up contributions on behalf of plan participants who earn more than \$145,000 must be made on a Roth (after-tax) basis. This provision is effective for plan years beginning after 2023. Plan administrators and recordkeepers have requested more time to modify systems to implement the Roth catch-up contribution requirement.

In a conforming amendment to the provision enacting the Roth catch-up contribution requirement, the SECURE 2.0 Act eliminated Code Sec. 402(g)(1)(C). This provision allows participants age 50 and over to exceed the limit on pre-tax elective

Premium Tax Credit Table, Required Contribution Percentage Updated

The IRS has updated the applicable percentage table used to calculate an individual's premium tax credit and required contribution percentage for plan years beginning in calendar year 2024. The percentage is used to determine whether an individual is eligible for affordable employer-sponsored minimum essential coverage; the percentage is used to determine whether an individual is eligible for an exemption from the individual shared responsibility payment because of a lack of affordable minimum essential coverage. For plan years beginning in 2024, the required contribution percentage under Code Sec. 36B is 8.39 percent. The IRS and the Treasury department have determined that the failsafe exception described in Code Sec. 36B(b)(3)(A)(ii) (III) applies for calendar year 2024 and no additional adjustment under Code Sec. 36B(b)(3)(A)(ii)(II) is required for calendar year 2024. The guidance is effective for tax years and plan years beginning after December 31, 2023.

Rev. Proc. 2014-37, I.R.B. 2014-33, 363 is supplemented.

Rev. Proc. 2023-29

deferrals to make catch-up contributions, as provided under Code Sec. 414(v). Some practitioners have noted that striking this provision technically eliminated the ability to make any pre-tax catch-up contributions, even for participants making less than \$145,000.

are not subject to the SECURE 2.0 Act provisions requiring Roth catch-up contributions and satisfy Code Sec. 414(v). The IRS concluded that pre-tax catch-up contributions are not includible in these participants' gross income under Code Sec. 402(g)(1)(A).

Catch-Up Contributions in 2024

The IRS indicated that the elimination of Code Sec. 402(g)(1)(C) does not prohibit plans from allowing any pre-tax contributions for participants not subject to the Roth requirement in 2024. The IRS cited Code Sec. 414(v)(1), which provides that qualified plans are not treated as failing to meet any requirement of the IRC solely because they permit an eligible participant to make catch-up contributions. Participants with compensation that does not exceed \$145,000

Two-Year Transition Period

To allow plans more time to implement the Roth catch-up contribution requirement, the IRS will treat the first two tax years beginning after December 31, 2023, as an administrative transition period. Specifically, until tax years beginning after 2025, catch-up contributions will be treated as satisfying Code Sec. 414(v)(7)(A) even if the contributions are not designated as Roth contributions. Also, a plan that does not provide for designated Roth contributions will be treated as satisfying Code Sec. 414(v)(7)(B).

REFERENCE KEY

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

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AICPA Recommends Changes to Forms 3520 and 3520-A and Related Instructions

The American Institute of CPAs is recommending changes to Forms 3520 and 3520-A and their instructions.

In an August 14, 2023, letter to the Internal Revenue Service, the organization highlighted seven general changes to these forms related to transactions involving foreign trusts. The updates to the forms and instructions range from ensuring the information requests are consistent to clarifications on the information that is being requested in these forms.

Certain Penalty Relief for Withholding Agents Extended

The IRS has updated question 23 of the Frequently Asked Questions (FAQs) on the FATCA - FAQs General webpage, under the section, General Compliance, extending penalty relief for the 2022, 2023, and 2024 calendar years to situations in which a withholding agent withholds and reports on Forms 1042 and 1042-S by September 15 of the applicable year. The penalty relief will apply to dividend equivalent payments made with respect to a derivative referencing a partnership.

AICPA also is looking for instructions to clarify when the forms are due and how extensions are used with them.

“For Form 3520, clarify that if a U.S. person required to file a Form 3520 has filed their form 1040, U.S. Individual Income Tax Return, on or before the original due date, it is still possible to extend the due date for filing a Form 3520 by filing an extension (in the case of an individual, a Form 4868, Application for Automatic Extension of Time to File U.S. Individual Income Tax

Return) on or before the original date of the U.S. person’s return (April 15 in the case of an individual),” the letter states.

The group made some other recommendations, including allowing the forms to be electronically filed, clarifying when an employer identification number is needed, and other changes.

A copy of this and other AICPA 2023 tax policy and advocacy letters can be found at <https://us.aicpa.org/advocacy/tax/2023taxadvocacycommentletters.html>.

AICPA Requests Changes to Penalty Procedures Related to Late Filed Forms 3520 and 3520-A

The American Institute of CPAs is asking the Internal Revenue Service to change its procedures related to penalties that result from the late filing of Forms 3520, Annual Return to Report Transactions With Foreign Trusts and Receipts of Foreign Gifts, and 3520-A, Annual Information Return of Foreign Trust with a U.S. Owner.

“We understand that the IRS has a policy of systemically assessing maximum penalties when it receives a late filed Form 3520 or Form 3520-A,” even with a reasonable cause statement, AICPA wrote in an August 14, 2023, letter to the agency. AICPA notes that taxpayers receiving

penalties can submit a request for penalty relief, but in nearly all cases, penalty relief is denied, leaving the IRS Independent Office of Appeals as the only recourse.

“AICPA is appreciative of the role of Appeals to act as a safety valve to prevent unwarranted denial of penalty abatement,” the letter states. “In many cases, Appeals fully concedes these cases based on reasonable cause. We understand that the grounds for resolving these cases are documented in” Appeals Case Memoranda.

The organization is recommending that Appeals “provide ACMs reflecting a 100 percent abatement (or refund) of Form

3520 or Form 3520-A penalties for reasonable cause to Campus personnel handling the initial consideration of reasonable cause.”

AICPA said that this proposal will not address all the challenges with the systemic assessment of late filing penalties, but it might lead to quicker resolution with the IRS and reduce the caseload within the Appeals office.

A copy of this and other AICPA 2023 tax policy and advocacy letters can be found at <https://us.aicpa.org/advocacy/tax/2023taxadvocacycommentletters.html>.

NTA Reiterates Call To Stop Automatically Assessing IIR Penalties

National Taxpayer Advocate Erin Collins is reiterating her call for the Internal Revenue Service to stop automatically assessing penalties related to international information returns.

In an August 22, 2023, blog post, she also called on the agency to “provide taxpayers due process by affording them the opportunity to administratively present their reasonable cause defense and request

FTA [first time abatement] and consideration by the Independent Office of Appeals prior to any assessment.”

The blog post noted that relief was needed because there is “a misconception

that IIR penalties affect primarily bad-faith, wealthy taxpayers who are experiencing consequences of their own making.”

However, that is not the case. Collins wrote that the automatic penalty regime “disproportionately affects individuals and businesses of more moderate resources, and is by no means just a rich person’s problem. Wealthy individuals and large businesses tend to have knowledgeable and well-informed representation and as a result have fewer foot faults. Immigrants, small businesses, and low-income individuals may not be as well-informed about IIR penalties and may not have return preparers with the same technical expertise on international penalties.”

NTA noted that from 2018-2021, 71 percent of the penalties were assessed to

taxpayers with incomes of \$400,000 or less, with an average penalty to these people being more than \$40,000.

One example of how penalties can be triggered is when an immigrant who is a U.S. citizen starts a small business and includes family members who live abroad. This arrangement could trigger the need for an IIR and if it is not filed, the taxpayer could be automatically assessed penalties, which are defined in Internal Revenue Code Sec. 6038 and 6038A. The blog goes through a number of other scenarios which would require an IIR and penalties for failure to do so.

However, when “taxpayers voluntarily correct their failure to file, this good-faith action can sometimes have the unexpected

effect of causing the IRS to automatically assess the penalty,” the blog states. “If the IRS does not administratively abate the penalty, taxpayers will need to pay the penalty in full before challenging by filing suit refund in the United States District Court or the United States Court of Federal Appeals.”

Collins continues to advocate for legislative changes that would allow for changes in due process so cases could be heard in court before any penalties are paid, as well as providing a more “efficient and equitable regime governing the initial imposition of IIR penalties and the mechanisms by which they can be challenged by taxpayers while also protecting their rights.”

Hawaii Victims of Wildfires Granted Tax Relief

IR-2023-151; Hawaii Disaster Relief Notice (HI-2023-05)

The president has declared a federal disaster area in Hawaii. The disaster is due to wildfires that began on August 8, 2023. The disaster area includes:

- Maui; and
- Hawaii

Taxpayers who live or have a business in the disaster area may qualify for tax relief.

Hawaii Filing Deadlines Extended

The IRS extended certain deadlines falling on or after August 8, 2023, and on or before February 15, 2024, to February 15, 2024. 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.

Hawaii Payment Deadlines Extended

The relief includes extra time to make tax payments. This includes estimated tax payments due on or after August 8, 2023, and before February 15, 2024. Further, taxpayers have until February 15, 2024, to perform other time-sensitive actions due on or after August 8, 2023, and before February 15, 2024.

The IRS excused late penalties for employment and excise tax deposits due on or after August 8, 2023, and before

September 7, 2023. But, the taxpayer must make the deposits by September 7, 2023.

Casualty Losses

Affected taxpayers can claim disaster-related casualty losses on their federal income tax return. Taxpayers may get 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: “Hawaii, Wildfires” at the top of the return. This will allow the IRS to speed refund processing.

Also, the IRS will provide affected taxpayers with copies of prior year returns without charge. To get 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.

Fourth Quarter 2023 Interest Rates Increase

Rev. Rul. 2023-17; IR-2023-154

The over and underpayment interest rates for the fourth quarter of 2023

have increased. The fourth quarter begins on October 1, 2023. The rates will be:

- 8 percent for overpayments;

- 7 percent for corporate overpayments;
- 8 percent for underpayments; and
- 10 percent for large corporate underpayments.

The interest rate for the part of a corporate overpayment exceeding \$10,000 is 5.5 percent.

Computation of Fourth Quarter 2023 Interest Rates

The IRS computes these interest rates quarterly. The fourth quarter rates are based on

the federal short-term rate for July 2023 which is 5 percent.

For noncorporate taxpayers:

- the overpayment rate is the short-term rate plus 3 percent; and
- the underpayment rate is the short-term rate plus 3 percent.

For corporate taxpayers:

- the underpayment rate is the short-term rate plus 3 percent;

- the overpayment rate is the federal short-term rate plus 2 percent;
- the rate on the part of a corporate overpayment that exceeds \$10,000 for a tax period is the short-term rate plus 0.5;
- the underpayment rate for large corporations is 5 percent.

Charitable Contribution Deductions No Longer Allowed for Organizations

Announcement 2023-24

The IRS has announced that the following organizations no longer qualify under Code Sec. 170(c)(2) as an organization for which deductions for charitable contributions are allowed.

- Margaret B. Gilfillan Charitable Trust, of Pennsylvania. Effective revocation date: January 1, 2020.
- Alpine Country Club, of Texas. Effective revocation date: June 1, 2019.
- United Way Detroit, of New York. Effective revocation date: January 1, 2021.
- American Cancer Foundation of Ohio, of New York. Effective revocation date: January 1, 2021.
- American Cancer Society for Adults, of New York. Effective revocation date: January 1, 2021.

- American Cancer Foundation of Arlington, of New York. Effective revocation date: January 1, 2021.
- American Cancer Foundation of Corpus Christi, of New York. Effective revocation date: January 1, 2021.
- American Cancer Foundation for Children Inc., of New York. Effective revocation date: January 1, 2021.
- American Cancer Foundation of Philadelphia, of New York. Effective revocation date: January 1, 2021.
- American Cancer Foundation of Pittsburgh, of New York. Effective revocation date: January 1, 2021.

However, contributions made to the organization before August 28, 2023, will generally be deductible, unless made by a person who (1) knew of the revocation, (2) was aware that the revocation was

imminent, or (3) was responsible, in whole or in part, for the activities or deficiencies that gave rise to the loss of qualification.

If the organization files suit, in a timely manner, for declaratory judgment under Code Sec. 7428, challenging the revocation of its status as an eligible donee of deductible charitable contributions, Code Sec. 170 contributions will continue to be deductible. Protection under Code Sec. 7428(c) would begin on August 28, 2023. The maximum amount of individual contributions protected would be \$1,000, with a husband and wife treated as one taxpayer. This protection is not afforded to anyone who was responsible, in whole or in part, for the acts or omissions of the organization that resulted in revocation of qualification.

Student Loan Educational Assistance Program Reminder Provided

IR-2023-152

The IRS has reminded employees and employers of educational assistance programs which can be used to help pay student loan obligations. In an effort to raise awareness to this benefit, the IRS has scheduled a free webinar on September 14, 2023 at 2 p.m. ET. To register for the webinar or for more information, taxpayers can visit the Webinars for Tax Practitioners page or the Webinars for

small businesses page on the official IRS website.

“The IRS wants to remind both employers and employees about this special feature that can help with student loans,” IRS Commissioner Danny Werfel said. “There is a limited window of time for this educational assistance program, and the IRS wants to make sure employers don’t overlook this option that can help businesses attract and retain workers.” Further, the IRS has urged employers

who don’t have an educational assistance program to consider setting one up. Though educational assistance programs have been available for many years, the option to use them to pay student loans has been available only for payments made after March 27, 2020, and, under current law, will continue to be available until December 31, 2025. Tax-free benefits under an educational assistance program are limited to \$5,250 per employee per year.

Abuse of Discretion

An individual failed to show extraordinary circumstances which could prove abuse of discretion by the IRS. The taxpayer did not meet the Tax Court's standard for granting a motion to reopen. He did not demonstrate that the new evidence that was sought to introduce probably would change the outcome of the case. The evidence that the taxpayer sought to introduce through his motion to reopen went only to the issue of negligence. It was irrelevant to the question of substantial understatement.

Ray, CA-5, 2023-2 USTC ¶150,218

Exempt Organizations

Three organizations had their exempt status revoked for not qualifying under Code Sec. 501(c)(3). The exempt status of the first organization was revoked as more than an insubstantial part of the activities were found to be not in furtherance of an exempt purpose. Organization activities benefitted individual and private interests of organization members. The second organization distributed scholarships to the working volunteers. However, the organization distributed scholarships in return for the work assigned to the volunteer by the organization. The third organization was established to raise money for

educating the youth and the general public. However, a majority of the activities of the organization to raise funds were not considered exempt activities.

IRS Letter Ruling 202334016; IRS Letter Ruling 202334017; IRS Letter Ruling 202334018

Income of States and Municipalities

A corporation's income was derived from exercising an essential governmental function. Therefore, it was excluded from the taxpayer's gross income under Code Sec. 115. The taxpayer's activity consists of enhancing economic development. The taxpayer was a component unit of an authority delegated redevelopment powers from a political subdivision. Its income would accrue to a state or a political subdivision.

IRS Letter Ruling 202334002

Statute of Limitations

Indictment against an individual on two counts of tax evasion in violation of Code Sec. 7201 was not barred by the statute of limitations. The indictment could fairly be read to allege any or all of the averred affirmative acts took place on or after a date that fell within or reasonably near the alleged timeframe for the taxpayer's criminal conduct.

Aumiller, DC Pa., 2023-2 USTC ¶150,217

Multiple entities had sufficient facts to support a cause of action. The taxpayers filed a refund claim under two years Code Sec. 7422(a) from when the IRS mailed a notice of the disallowance for the part of the claim for this case. The taxpayers also submitted a "duly filed" refund request with the IRS within three years from the date of the tax return under Code Sec. 6511(a). The court found full dismissal of the equitable estoppel claim was unwarranted at this early stage.

Myers, DC Calif., 2023-2 USTC ¶150,219

Trusts

The IRS Chief Counsel has made recommendations regarding a certain recently marketed trust structure. The Chief Counsel recommended that for a trust using this structure, the trust's income tax returns should be examined to ensure that (1) the trust is reporting all of its taxable income, including capital gains and any income that is described as an extraordinary dividend, and (2) the trust is disallowed any deduction claimed with respect to such income solely because the trustee, acting in good faith, has allocated such income to the corpus of the trust.

IRS Advice Memorandum AM 2023-006