



Current Federal Tax Developments 2024

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The Year in Review

- 2024 is mainly a year where Congress again failed to pass any major tax legislation
 - The situation looked ready to change in January when the House overwhelmingly passed a combination business tax issue extender and ERC reform bill
 - But the bill quickly stalled out in the Senate
 - It is possible that some or all of the bill could be brought up in a lame duck session--but it's more likely nothing happens
- US Supreme Court rules on a number of tax issues - including putting the final nail in the coffin for *Chevron* deference and upsetting some estate plans involving closely held entities
- The BOI reports continue to be the big short term item on the horizon
- The IRS continues to attempt to deal with the ERC claim backlog

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Tax Cuts and Jobs Act - Expiring Provisions

When Congress has mainly succeeded in taking no action on tax bills in the recent past, the upcoming expiration of many TCJA provisions represents the biggest short term tax issue.



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Tax Cuts and Jobs Act - Its History

- The TCJA was the key tax provision of the Congress elected in 2016
- That election gave the Republicans control of both chambers of Congress and the Presidency
- But even if they all agreed on what they wanted to do (which they didn't), the Senate's rules impose their own limits on what can be done
- A key portion of those rules meant to limit the ability of a Congress to increase deficits more than 10 years out is the reason so many of the TCJA provisions are set to expire at the end of 2025



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Tax Cuts and Jobs Act - Its History

- The Act was passed into law in late 2017, with most provisions taking effect in 2018
- Because the majority had failed to pass its “repeal and replace” of the Affordable Care Act, there was pressure on the Congress and the President to prove they had accomplished a major policy achievement heading into the then upcoming 2018 election where the party wished to retain control of both chambers

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House/Senate Rules and Major Tax Bills

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Rules of the House and Senate

- Each chamber is given the power to adopt rules that govern the chamber's voting and operations
- Normally the rules are adopted at the beginning of each session of Congress
- The rules tend to see limited changes from session to session, especially in the U.S. Senate
- These rules are key to both why we have these expiration dates in TCJA and what is likely to happen to provisions being extended or not in the upcoming Congress

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Passing a Bill in the House

- In the U.S. House, if a bill has the unanimous support of the majority party, passage of that bill will be relatively simple
 - Under the rules, the minority party has very limited options to attempt to derail such a bill - really need to make the vote uncomfortable for some members of the majority party
 - This fact is important to remember to understand, because this absolute rule of the majority party does not normally apply to the United States Senate
 - Thus, to pass major tax legislation, the United State Senate generally is where most of the action takes place.

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Passing a Bill the United States Senate (Normal Bills)

- The Senate rules give significant rights to the minority party that can be used in most cases to block attempts by the majority party to force through bills with only vote from that party
 - While a simple majority of votes cast determines if a bill passes the chamber, it's not easy to get a floor vote scheduled
 - Before the Senate can end debate on a bill and call for a vote, a motion for "cloture" must be passed with a super majority vote (60 votes)
 - If the minority party can get 41 members to vote against letting the bill move forward to a vote, that party can block the bill from passing the US Senate



Avoiding Cloture Issues

- As the minority party must have 41 votes to deny cloture on a bill, an obvious way around the problem is for the majority party to win a large enough majority to hold at least 60 seats (if all of those Senators will vote for cloture)
- The last time that happened was with the Congress that began its session in January 2009
- However, before that session ended, Senator Ted Kennedy died and the Republicans flipped the seat in a special election in 2010



Avoiding Cloture Issues

- Another way around cloture is to make use of the budget reconciliation process
 - Note - will require that the majority party in the Senate also control the House and the White House to use this provision to force through the majority party agenda
 - We've seen this happen primarily when a new President is elected and brings along a majority in both houses
- The final option is to come up with a bipartisan compromise - for instance, see the following bills (CARES Act, SECURE Act, and SECURE 2.0 Act)



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Budget Reconciliation Process



Budget Reconciliation Process

- As we've had an increasing level of partisanship in Congress, minority parties have become increasingly likely to use the cloture process to either block a bill with majority support or at least force changes to such bills
- Given a decreasingly willingness of partisans to accept compromises, the process is used to simply block actions on high profile bills
- This clearly presents a major problem for bills that must be passed on a regular schedule, such as bills related to the annual budget



Budget Reconciliation Process

- The budget reconciliation process generally works as follows:
 - The bills must be provided for in a reconciliation resolution passed at the beginning of the process
 - The bills must only contain provisions related to spending/raising funds for the government (that includes tax provisions) but no unrelated policy items
 - The bill must not commit the government to an increased deficit outside of a 10-year window
 - Details rules regarding how such bills are handled must be followed (thus, the bill we call the Tax Cuts and Jobs Act had that clause removed due to a violation of the reconciliation process)



Budget Reconciliation Process

- If possible, those pushing for various items would prefer they be in a bill that passes other than via reconciliation
- However, in recent years the calculus has been that obtaining a bill with terms only set by the majority party is a better result for the party than being able to pass a bill with permanent provisions that increase the deficit
- Thus the reason why we see so many tax provisions that are repealed before 10 years are up in most of these tax bills



Major Bills Passed Through Reconciliation

- Economic Growth and Tax Relief Reconciliation Act of 2001 - did have support from some Democrats, but fell just short of 60 votes
- Healthcare Reconciliation Act (2010) - a "patch" bill to make changes to the Affordable Care Act when the Senate had the Massachusetts party change via the special election after the Senate had passed their version of the ACA
- Tax Cuts and Jobs Act - this begins a series of bills that did not come close to getting the 60 votes



Major Bills Passed Through Reconciliation

- Inflation Reduction Act of 2022 - again passed with a bare majority of votes
- Big questions
- Will either party be in a position to use reconciliation to force through their agenda on items expiring the end of next year?
- If not, will the parties be willing to come to a compromise to preserve any of the provisions set to leave the law?

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Expiring Provisions

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Provisions in TCJA

- Permanent provisions:
 - Many (but not all) business related provisions are permanent (lower corporate tax rates, research and development capitalization, etc.)
- Many other provisions are ending at the end of 2025 or shortly thereafter
 - Tax cut provisions such as the individual tax rates, Section 199A deduction related to passthrough income, high standard deductions, etc.)
 - Revenue raising provisions (state and local individual tax deduction limits, denial of any deduction for miscellaneous itemized deductions, denial of personal casualty losses not related to a federally declared disaster)



Provisions in TCJA

- If no action is taken by Congress, then these provisions will simply expire and will no longer be part of the law
- Because TCJA was a Republican law, the Democrats have succeeded in enacting some provisions they favor that also expire at that date, assuming the Republicans may not have sufficient control or agreement to pass a bill without their votes



Considerations for What Congress Will Do

- Since TCJA was passed, inflation concerns have become much more significant in the minds of voters
- Similarly, concerns have grown regarding the size of federal deficits - but that was there in the past, as both TCJA and IRA had their scope reduced to meet a target of no more than a certain fixed amount by members of the majority party to obtain the votes of those Representatives and Senators
- Similarly there is concern about the impact on the economy if the stimulus given by TCJA is suddenly removed from the economy.



What We'll Discuss

- We will review what was enacted by Congress in 2017 for each item, including what is scheduled to be removed from the law
- We will look at the cost/revenue raising score of extending each provision
- Discuss potential planning strategy
 - Steps that would be helpful if the provision does expire
 - Risks of taking those steps if Congress does end up extending these provisions after the client has implemented the planning strategy



Individual Income Tax Rates

- A major change of TCJA was the reduction in tax rates for ordinary income of individuals (note: capital gain tax rates were not changed)
 - Under TCJA the rates are 10%, 12%, 22%, 24%, 32%, 35% and 37%
 - If the law is not changed the rates in 2026 will be 10%, 15%, 25%, 28%, 33%, 35%, and 39.6%
- Per the Congressional Budget Office, the ten-year cost of extending the current lower rates comes in at \$1.8 trillion (a very expensive provision to extend)



Individual Income Tax Rates

- Steps to consider to take to offset an increase in these rates in 2026
 - Take steps to accelerate income into 2025, which is contrary to normal practice
 - If a taxpayer is considering a Roth IRA conversion, may want to take a portion of that conversion in 2025 to take advantage of the lower rates
 - Similarly, taxpayers may wish to delay deductions into 2026 when they will be more valuable
 - Remember to use present value computations to insure that the lower rates are worth more than the loss of a tax deferral



Individual Income Tax Rates

- Risks of taking the steps to mitigate the higher rates if the rates don't go up
 - The taxpayer will have given up a tax deferral benefit for no offsetting benefit
 - Clients may look to hold the CPA responsible for having "guaranteed" that the steps would reduce taxes
 - Since the planning steps must take place by December 31, 2025, there is a significant risk Congress could retroactively restore the lower rates
 - Congress may feel there's not rush since there won't be a real impact so long as they pass a fix by the end of 2026 itself
 - We have a rather long history of Congress making such fixes well into the impacted year



Individual Income Tax Rates

- How to mitigate the risk
 - Be sure you have communicated in writing to the client the downside of this plan should the law revert to the TCJA rates
 - Let the client tell you what they believe Congress will do - don't be overconfident in your predictions of what Congress will do, because that is how you end up on the hook when Congress doesn't do what you expect
 - Clients may hate your unwillingness to give them a "simple" answer, but the truth is we don't know and we need to be sure we tell clients the truth



Reduction in the Individual Standard Deduction

- TCJA greatly increased the standard deduction, sharply increasing the number of taxpayers claiming the standard deduction rather than itemizing
- The 10-year cost of extending the current standard deduction levels is set at \$1.0 trillion (so this is another expensive provision to extend)

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Reduction in the Individual Standard Deduction

- Planning steps to consider to deal with this potential change
 - Even if taxpayer is currently itemizing deductions, consider pushing such deductions (medical, mortgage interest and charitable contributions) to 2026
 - Make sure the client delays paying for as many items not deductible under TCJA to 2026 as possible
 - State and local non-business, non-investment taxes
 - Miscellaneous itemized deductions (investment advisory fees, tax planning/preparation fees, employee business expenses)
 - Do want to consider if the benefit of these moves will be limited by the alternative minimum tax returning to its old rules

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Reduction in the Individual Standard Deduction

- Risks of this strategy if the standard deduction is extended
 - In this case the taxpayer is not giving up a current deduction in most cases
 - The only real downside is the disruption to the client's standard processes for paying bills or making charitable contributions - but note that some clients may consider that quite an imposition on them



Personal Exemption/Child & Dependent Tax Credit

- In TCJA Congress modified the tax benefit given to taxpayers for dependents claimed on his/her return, eliminating personal exemptions but greatly increasing the child tax credit. Remember, though, that both the old law exemptions and TCJA credits are eventually phased out for taxpayers with high enough income
- Extending the elimination of personal exemption deductions would raise \$1.6 trillion over 10 years
- Extending the child/dependent credits at their TCJA levels would cost \$592.5 over 10 years



Personal Exemption/Child & Dependent Tax Credit

- Planning options
 - Assuming divorced parents are willing to cooperate (a big if) there may be some opportunities
 - A lower earning parent will generally get more value from getting the larger tax credit
 - Conversely the higher earning parent would be better off with the exemption
 - So you could look to modify an agreement to assure the lower earning spouse gets the dependent for 2025, with the higher earning parent getting the dependent for 2026
 - Note: this assumes each would still get a benefit in each case



Personal Exemption/Child & Dependent Tax Credit

- Risks of the planning strategy
 - The higher earning parent who gives up the credit he/she would have gotten in 2025 will have paid more tax in 2025 (effectively paid tax earlier) without an adequate offsetting benefit
 - Because interactions are often difficult between the parties following a divorce, the CPA may find the harmed parent extra irate should that party not get the future benefit



Itemized Deduction Changes

- A series of itemized deduction changes, most of which reduced deductions allowed, are discussed on the following slides.
- The CBA estimates that if these changes are allowed to remain in the law, they would raise \$908 billion in revenue. This represents a relatively large source of revenue that could be used to offset the costs of extending tax cut provisions



Itemized Deduction Changes: Charitable Deductions

- TCJA increased the maximum percentage of adjusted gross income for cash charitable contributions to 60% from 50%
- Planning strategy
 - Assuming your client normally maximizes their charitable contributions to the AGI percentage limit, you want to assure that they make the 60% contribution in 2025, perhaps even going slightly over the limit to insure that 10% is not left on the table
- Risks if Congress extends this provision
 - Unless the client would not normally contribute 60%, there seems to be little downside risk as the client would have made the contribution anyway



Itemized Deductions: State and Local Tax Cap

- As part of the TCJA, Congress capped the maximum Schedule A deduction for state and local taxes (other than those for business or related to a §212 activity) to \$10,000
- This provision has already attracted the attention of the Presidential candidates
 - Repeal of this provision has been a Democratic priority since the TCJA passed
 - However, recently former President Trump stated at a rally on Long Island that he is now in favor of removing this from the law as well



Itemized Deductions: State and Local Tax Cap

- Planning strategy
 - Simply shift paying as much of the taxpayer's deductible state and local personal taxes to 2026 as possible
 - Be sure you haven't defaulted your software to suggest that final state/local tax payments be paid by December 31 -- and explicitly tell clients you want them to delay that 4th quarter estimate to January 2026 (habits die hard with clients)
 - Understand your state/local rules for payments of property taxes, again attempting to insure that clients don't pay any property taxes in 2025 that are allowed to be paid in 2026



Itemized Deductions: State and Local Tax Cap

- Risks of the strategy
 - No major risk if the client makes these changes to payments at the end of 2025 if Congress does continue the \$10,000 cap into 2026
 - However, be sure to remind clients to go back to accelerating the payment of taxes again at the end of 2026 if the cap is no longer around (again, what a client hears may not be what you said, and they may just do “what you told me to do last year” at the end of 2026)



Itemized Deductions: Home Mortgage Interest

- Congress limited the deduction of acquisition debt to interest on no more than \$750,000 of such debt for non-grandfathered debts, down from \$1,000,000; Interest on up to \$100,000 of home equity debt will be deductible again beginning in 2026
- Planning strategy
 - So if the final payment on the debt for the 2025 could be delayed into 2026 if the taxpayer has outstanding impacted acquisition debt in excess of \$750,000 that would increase the deductible interest
 - Clearly, be sure not to early pay any payments on the home mortgage debt in 2025 that can be paid in 2026 - may consider borrowing such debt in 2026



Itemized Deductions: Home Mortgage Interest

- Risks
 - Delaying payment on the acquisition debt would reduce the deduction on the 2025 return with no increased amount allowed on the 2026 return if this provision is retained.
 - Bigger risk is if the client takes out a home equity loan in 2026 based on the assumption it will be deductible and Congress retroactively restores the bar on deducting such interest



Itemized Deductions: Personal Casualty Losses

- TCJA removed the deduction for most personal casualty losses (as defined in IRC §165) except those related to federally declared disaster areas
- Not a whole lot of planning to be done here--it's not as if you can schedule a flood or move it to a later year
- However, be sure you understand the narrow definition of a personal casualty loss (thefts related to investment scams are generally deductible even under TCJA's restrictions)



Itemized Deductions: 2% Miscellaneous Deductions

- TCJA removed the ability to claim a deduction for 2% miscellaneous itemized deductions such as investment advisory fees, tax preparation fees, etc.
- Planning
 - Consider delaying such payments into 2026 if possible if there would be a tax benefit
 - Trust tip: Note that the impact there is larger, due to the impact of investment advisory fees - they will again somewhat reduce DNI. They already generally reduce trust accounting income by 50% of those costs.



Itemized Deductions: Return of Denial of Excess Itemized Deductions

- The limitation on total itemized deductions under IRC §68, with deductions reduced by 3% of the amount by which a taxpayers' AGI excess thresholds, limited to a reduction of 80% of itemized deductions
- Planning steps
 - May wish to accelerate potentially impacted deductions into 2025 assuming there would be tax benefit received from such deductions
- Risks
 - Watch for general itemized deduction issues to insure that any accelerated deduction will give a benefit.



Alternative Minimum Tax

- Alternative minimum tax rates, phase-outs and exemptions return to their pre-TCJA amounts (after updating for an inflation adjustment), all of which are less taxpayer friendly
- The 10-year cost of extending this provision is \$1.0884 Billion over 10 years.



Alternative Minimum Tax

- May wish to accelerate minimum tax adjustments and preference items into 2025 to get a tax benefit from the payment that, based on your calculations, would be lost if paid in 2026.
- Risks:
 - There seems little risk to these program as presumably moving these items into 2025 will be tax beneficial in getting a tax deduction earlier even if there is no AMT issue for 2026



Moving Expense Reimbursement

- Taxpayers can again exclude moving expense reimbursements to an employee from their income beginning in 2026
- Extending this provision for 10 years is estimated by CBO to cost \$6.7 billion
- Planning steps
 - If a taxpayer is going to undertake an employer paid move, see if the move can be pushed into 2026 to allow for the exclusion
 - Employers should be made aware of this issue as well



Moving Expense Reimbursement

- Risks
 - An employer who delays the move may incur additional costs not having the employee on location under 2026 vs. having them move in 2025
 - A similar issue could impact an employee, especially if the new position comes with a pay increase



§199A Deduction

- TCJA added a 20% deduction based on “qualified business income” on individual returns. Special limits apply to Specialized Service Trades or Businesses and a limit applies based on wages or wages and unadjusted basis immediately after acquisition. This deduction will not apply to 2026 and later years.
- The 10-year cost of extending this provision is estimated by CBO to be \$548 Billion.

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§199A Deduction

- Planning options
 - This is another case where accelerating QBI into 2025 or reducing deductions against that income in 2025 would serve to get a benefit, but in this case it's a permanent benefit rather than merely timing
 - A more radical option that may make sense is considering converting the business from a passthrough to a C corporation. Corporate tax rates will remain at a flat 21%, while the maximum rate on business income reported on the individual tax return will rise to 39.6% from an effective rate of 29.6% (37% less 7.4%). As will be discussed under risks, this is a rather high risk option, but the annual tax savings could be very substantial.

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\$199A Deduction

- Risk
 - Accelerating net QBI into 2025 will almost certainly result in paying tax earlier than it would otherwise be paid, especially if both the individual rates and §199A deduction provisions from TCJA are continued by Congress
 - While converting to a C corporation appears to give (and frankly would give) a major annual tax break on income retained in the business, remember that the C corporation double taxation issue is still around. However, if the entity is not currently an S corporation you might also want to see if the §1202 exclusion might apply to a new C corporation. That would serve to mitigate the impact of any double taxation pushed out on the sale of the entity.



Bonus Depreciation

- Bonus depreciation is in the process of being phased out (it was originally 100%), although it will not be fully removed from the law until 2026 for most acquisitions.
- The projected 10-year cost of making this permanent would be \$325 billion per the CBO



Bonus Depreciation

- Planning options:
 - Since we are already in a phase-out period, the earlier a taxpayer can place assets in service the more bonus depreciation the taxpayer will qualify for.
 - If a taxpayer qualifies to take a §179 deduction, the taxpayer should consider taking the §179 deduction in lieu of depreciation. But remember that §179 deductions are subject to business income and dollar amount limitations. As well, for items otherwise treated as real property, using §179 on a qualified portion of the property will render that property not eligible for a §1031 exchange and is subject to §1245 recapture.



Bonus Depreciation

- Risks of planning options
 - A unique risk here that Congress, if they look to restore bonus depreciation, may return it to 100% bonus depreciation but not do so retroactively. In that case, a taxpayer that accelerated equipment acquisitions may have a significant less advantageous cost recovery for the asset than the taxpayer would have had the acquisition been delayed
 - All things being equal, bonus depreciation is generally treated more favorably than §179 expensing. In most cases the difference is not significant, but most is not all, so be sure to check to see if your client would be at risk of a worse result if Congress restored bonus but your client claimed Section 179-- though in this case you should be able to amend the return to remove the §179 election



Estate and Gift Tax

- The estate and gift tax exclusions are scheduled to be reduced to an inflation adjusted level tied to the pre-TCJA \$5 million exclusion (likely around \$7 million in 2026), down from an exclusion of just under double that amount under TCJA
- CBO estimates the 10-year cost of extending this provision would be \$126.5 billion, one of the least expensive major provisions to continue



Estate and Gift Tax

- Planning
 - On paper, a taxpayer whose estate would be impacted by this provision would put his/her estate and heirs in the best position by gifting any remaining exclusion up to the maximum by the end of 2025. The IRS held that taxpayer will get the full benefit of that exclusion even if the exclusion is lower when the taxpayer dies.
- Risks
 - My experience is that taxpayers are not thrilled with making gifts of large portions of their assets during life. And the heirs may be less than thrilled when they discover that the gifted assets won't get a step-up in basis. While these may be accepted if estate tax is saved ultimately, but if not, things may not go well for the CPA.



Not TCJA But Related: Premium Tax Credit

- In the Inflation Reduction Act of 2022, Congress extended the COVID relief special rule to qualify taxpayers for the Premium Tax Credit. In addition to increasing the credit for most taxpayers (anyone can get it for a qualified premium in excess of 8% of income), the law also eliminated the income cliff where taxpayers could go from qualifying for a significant credit to having to pay the entire advance payment of the credit back based on a small income difference. The provision ends at the end of 2025.



Not TCJA But Related: Premium Tax Credit

- Planning
 - Taxpayers exposed to a reduced credit in 2026 might consider if they could shift income into 2025 to lower their 2026 income and, in the two years combined, expect a larger credit
 - More importantly, clients need to understand that the risks imposed by the cliff where the credit immediately drops to \$0 may be returning to the law
- Risks
 - If income is moved into 2025 and this provision is continued past 2025, the taxpayer may have unnecessarily given up credits for 2025 and accelerated the payment of tax on that income



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Steps to Take with Clients

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Working with Clients

- Clients must first understand the significant level of uncertainty about what is going to happen regarding these expiring provisions
- While inflation appears to be easing, concerns about reigniting inflation may find it difficult to get a majority to pass an extension of all the provisions even if the same party controls the Presidency, House and Senate
- There are deficit hawks in both parties who are likely to balk at costly multiple trillion dollar bills

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Working with Clients

- Tax planning calculations will be more complex, needing to take into account various possibilities that may need to be considered for what Congress will do
- You will need to monitor Congressional action, especially when bills are passed out of the House Ways & Means and the Senate Finance Committees
- Actions can be discussed, but implementation should be delayed as long as possible



Working with Clients

- Raise with clients that there is a very real possibility that Congress may not act before the end of 2025, at which point they will need to make a decision on what to do or not to do, either of which may prove to be less than optimal

Recent Tax Legislation: SECURE 2.0 Act of 2022 and Final Regulations

The most recent tax bill predates the soon to be leaving Congress, passed at the end of the prior Congress. But provisions continue to come into effect and important regulations have been released during 2024



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SECURE 2.0 Act/SECURE Act

- SECURE 2.0 act, passed at the end of 2022, is the most recent significant tax bill enacted by Congress
- Effective dates were staggered for various provisions, so many continue to be just coming into effect
- As well, we had final regulations issued on required minimum distribution provisions originally modified in 1999's original SECURE Act and further adjusted by 2022's SECURE 2.0 Act



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Final Regulations – RMDs, SECURE Act & SECURE 2.0 Act

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IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - Proposed regulations were released in 2022 providing guidance for changes to required minimum distribution rules found in 2019's SECURE Act
 - Before the regulations could be finalized, Congress passed the SECURE 2.0 Act in 2022 which made additional changes to some of these provisions
 - One of the major provisions of the Act was the elimination of most "stretch IRA" programs, requiring all funds be out of defined contribution programs by 10 years after the year of death

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IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - General rule - so long as there is a *designated beneficiary* the entire balance must be distributed out of the plan by the end of the 10th year following the year of death
 - The 10-year rule applies regardless of whether or not the decedent had lived beyond his/her required beginning date and thus had been receiving required minimum distributions
 - But the IRS noted that IRC §401(a)(9)(B) was not repealed or overridden by either Act.

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IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

§401(a)(9)(B) Required distribution where employee dies before entire interest is distributed.

(i) Where distributions have begun under subparagraph (A)(ii). A trust shall not constitute a qualified trust under this section unless the plan provides that if--

(I) the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), and

(II) the employee dies before his entire interest has been distributed to him,

the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death.

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IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - Under the prior law, the IRS had concluded that “at as rapidly” meant over the life expectancy of the designated beneficiary with the shortest life expectancy if all beneficiaries were designated beneficiaries.
 - Entities (estates, charities, etc.) have a life expectancy of 0 years (not an eligible beneficiary)
 - Eligible beneficiaries determined as of September 30 of the year following the year of death



IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - Many commentators had read the SECURE Act provision to eliminate those annual distributions for accounts in pay status at the date of death and only have the 10-year rule apply
 - That meant no distributions would be due in the first 9 years (although distributions could be taken)
 - Any remaining balance would come out in year 10
 - That position was used by many taxpayers for 2021 RMDs for decedents that died in 2020



IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - The proposed regulations held that position was in error
 - Rather distributions had to satisfy both
 - The annual distribution rule based on the shortest life expectancy of the *designated beneficiaries* (assuming all beneficiaries were designated beneficiaries) in years 1-9 and
 - Any remaining balance had to be distributed in year 10
 - Same rules applied to minor children of the deceased when they reached age of majority (special class of *eligible designated beneficiaries*)



IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - The law allowed stretch IRAs only for
 - Benefits inherited from a decedent who died prior to 2020 and
 - For certain *eligible designated beneficiaries*
 - In those cases, life expectancy payouts could continue
 - However, if the beneficiary that inherited the account died, the next level beneficiaries would come under the 10-year rule



IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - Due to many comments received by the IRS and the fact that many individuals inheriting impacted IRAs and defined contribution plan balances in pay status the IRS released a number of relief Revenue Notices that applied to distributions that would have due in years 1-9 from 2021-2024
 - Notices 2022-53, 2023-54 and 2024-35
 - Provided that no penalties would be imposed for failure to take the annual distributions
 - Also, there would be no sanctions on plans that failed to make such distributions



IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - Final regulations adopted the proposed regulations with only minor changes
 - Revised required beginning dates (eventually moving the RBD to age 75 for those born in or after 1960)
 - Most similar changes found in SECURE 2.0 Act
 - However, decided some SECURE 2.0 issues impacting RMD needed to have proposed regulations issued



IRS Finalizes Regulations on SECURE Act and SECURE Act 2.0 RMDs

- TD 10001, July 19, 2024
 - The required distributions in years 1-9 were retained in the final regulations
 - No requirement was added in the regulations to “catch up” for any distributions skipped under the Notices in 2021-2024 (some had concerns about this)
 - Does mean those distributions will be required in 2025 and subject to penalties and plan sanctions if not made in that year or later years

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Changes That Encourage Employee Participation

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Changes That Encourage Employee Participation

- **Automatic Enrollment (12/31/2024)**
 - § 101 requires employers to automatically enroll employees in their 401(k) and 403(b) plans when the employee becomes eligible
 - Exclusions
- **Small Financial Incentives for Plan Participation (12/29/2022)**
 - § 113 allows employers to provide de minimis incentives to employees who begin participation in a 401(k) or 403(b) plan

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Changes That Encourage Employee Participation

- **Starter 401(k) Plans (12/31/2023)**
 - § 121 establishes a new type of retirement plan called a “starter 401(k) deferral-only arrangement” Employee contributions only – auto enrollment – 3 –15%
- **Replacement of SIMPLE Plan with 401(k) Plan (12/31/2023)**
 - § 332 allows an employer to replace a SIMPLE IRA plan with a safe harbor 401(k) plan that requires mandatory employer contributions any time during a plan year
 - No longer required to change plans on a calendar year basis

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Changes That Encourage Employee Participation

- **Increase/Change of the Employer Pension Plan Start Up Costs Credit (12/31/2022)**
 - § 102 increases credit for employers with less than 50 employees from 50% to 100%
 - Still limited to \$5,000 for first 3 years

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Changes That Encourage Employee Participation

- **Additional Credit for Employer Contributions (12/31/2022)**
 - § 102 also created a new additional credit for employers with less than 100 employees that make employer contributions to defined contribution plans. Additional credit is a percentage of the amount contributed by the employer up to a per-employee cap of \$1,000.
 - Credit is based on amount contributed by the employer—100% of contributions allowed in the 1st and 2nd years, 75% in the 3rd year, 50% in the 4th year, 25% in the 5th year, and no credit after 5th year.
 - Full credit is limited to employers with 50 or fewer employees and phased out for employers with between 51 and 100 employees.

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Changes That Encourage Employee Participation

- **Automatic Portability Transactions (12/29/2023)**
 - § 120 allows automatic transfers of 401(k) accounts to a new employer when changing jobs
 - “Retirement plan service provider” provides plans with automatic portability services
- **Increasing Part Time Employee Participation (12/31/2024)**
 - Employees who worked three consecutive 12-month periods with at least 500 hours of service each year must be covered by a 401(k) plan
 - Decrease from 1,000 hours under prior law

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Changes That Encourage Employee Participation

- **Excludible Employees Elimination from Top Heavy Rules (12/31/2023)**
 - Because of top heavy testing, small businesses have an incentive to exclude lower paid and part-time employees from the plan
 - § 310 allows top-heavy separate testing on excludable and non-excludable employees making it easier to pass and reducing the incentive to remove excludable employees from the plan
- **SEP Plans for Domestic Employees (years beginning after 12/29/2022)**
 - § 118, permits employers of domestic employees to provide retirement benefits for such employees under a Simplified Employee Pension (“SEP”)
 - Previously, could only use SIMPLE plans

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Improve or Simplify Plan Maintenance Requirements

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Improve or Simplify Plan Maintenance Requirements

- **MEP Expansion to IRC Section 403(b) Plans (years beginning after 12/31/2022)**
 - § 106 allows MEP and PEP participation for IRC 403(b) retirement plans
 - Already permitted for 401(k) plans
- **Retirement Plan Overpayment Recovery (12/29/2022)**
 - § 301 permits the use of fiduciary discretion in deciding whether to seek recovery
 - And if a plan decides to recover overpayments, limitations and protections apply to safeguard retirees

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Improve or Simplify Plan Maintenance Requirements

- **Repayment of Birth or Adoption Distributions (12/29/2022 and retroactive for 3 years before)**
 - § 311 requires that birth or adoption distributions can only be repaid to the plan within 3 years
- **Change in Excise Tax Statute of Limitations (12/31/2022)**
 - Statutes of limitations no longer tied to Form 5329, but rather to filing of 1040, for excess contributions tax (6%) and RMD tax—now 25%
 - 3-year statute established for excess contributions tax
 - 6-year statute established for RMD excise tax

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Improve or Simplify Plan Maintenance Requirements

- **Plan Amendment and Funding Time Frames Expanded**
 - § 316 allows discretionary amendments that increase participants' benefits to be adopted by the due date of the employer's tax return instead of the end of the plan year as in previous law (years beginning after 12/31/2023)
 - § 317 also allows sole proprietorships and single member LLCs to fund plans up to the due date of the employer's return (years beginning after 12/29/2022)
- **Notice Elimination (years after 12/31/2022)**
 - § 320 eliminates notice requirements to nonparticipants in retirement plans

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Improve or Simplify Plan Maintenance Requirements

- **Paper Documents Required (after 12/31/2025)**
 - § 338 requires that a paper benefit statement be provided to participants at least once a year for a defined contribution plan and once every 3 years for a defined benefit plan
 - Other required statements can be provided electronically, and a participant can waive the paper document requirement
- **Notice of Financial Risk Relative to Lump Sum Withdrawals (01/01/2024)**
 - § 342 requires certain notices to be provided regarding lump sum withdrawals from defined benefit plans
 - Value of lifetime benefits, details about the election period, and other information, 90 days prior to the applicable election period

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Improve or Simplify Plan Maintenance Requirements

- **Defined Benefit Plan Funding Notices (after 12/31/2023)**
 - § 343 requires plan sponsors of defined benefit plans to include additional information regarding plan funding status
- **Clarification of Requirements for Independent Audits of Plans (12/29/2022)**
 - § 345 clarifies that plans filing under a Group of Plans need only to submit an audit opinion if they individually have 100 participants or more

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Improve or Simplify Plan Maintenance Requirements

- **Defined Benefit Plan Cash Balance Rule (years beginning after 12/29/2022)**
 - § 348 eliminates the requirement that a cash balance plan with a variable interest crediting rate must use the most recent interest crediting rate (which could be "0") as the projected rate for purposes of back-loading testing
 - Plan is now permitted to specify a reasonable estimate of the projected crediting rate, not to exceed 6 percent
- **Premium Index for Underfunded Plans (12/29/2022)**
 - § 349 eliminates the PBGC variable rate premium, paid by underfunded pension plans, changing the fee from an indexed amount to a flat \$52 per \$1,000 of unfunded vested benefits
 - No longer be automatic increases in the PBGC variable rate premiums

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Improve or Simplify Plan Maintenance Requirements

- **Expansion of 403(b) Plan Investments – Maybe (12/29/2022)**
 - § 128 amends the IRC to expand 403(b) plan investment options to include collective investment trusts (CITs)
 - Although § 128 removes the tax rule against 403(b) plans investing in CITs, it didn't change the securities laws that prevent CITs from holding 403(b) plan assets
 - Security law changes coming?

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Improve or Simplify Plan Maintenance Requirements

- **Safe Harbor for Corrections of Deferral Failures (12/31/2023)**
 - § 350 extends the penalty safe harbor, allowing for a grace period to correct without penalty, reasonable errors in administering plan automatic enrollment and automatic escalation features
 - Errors must be corrected prior to 9 ½ months after the end of the plan year in which the mistakes were made
- **Roth IRAs in SIMPLE and SEP Plans (years after 12/31/2022)**
 - § 601 allows SIMPLE IRAs to accept Roth contributions
 - Also, allows employers to offer employees the ability to treat employee and employer SEP contributions as Roth (in whole or in part)

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Improve or Simplify Plan Maintenance Requirements

- **Roth Treatment for Elective Catch-up Contributions (after 12/31/2023) (pushed back 2 years by IRS)**
 - § 603 *requires that all catch-up contributions* to qualified retirement plans be made on a Roth basis
 - Exception for participants whose prior year wages did not exceed \$145,000
- **Elective Roth Treatment for Matching Contributions (12/29/2022)**
 - Under prior law, Roth treatment for matching contributions was not permitted
 - § 604 now allows plans to provide participants with the option of receiving matching contributions on a Roth basis

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Improve or Simplify Plan Maintenance Requirements

- **Extended Payment of Retiree Health Benefits from Overfunded Plans (12/29/2022)**
 - § 606 allows overfunded pension plans, now defined as those over 110% funded, to transfer up to 1.75% of plan assets to a program used to pay for retiree health and retiree life benefits
- **Pooled Employer Plan (PEP) Modification (years after 12/31/2022)**
 - The SECURE Act (2019) created Pooled Employer Plans (PEPs) that allow unrelated employers to join together to participate in one plan without any commonality requirement
 - § 105 clarifies that a PEP may designate a named fiduciary (other than an employer in the plan) to collect contributions to the plan



Improve or Simplify Plan Maintenance Requirements

- **Plan Amendments Due to SECURE Act 2.0 Modifications**
 - § 501 allows plan amendments made to comply with changes in SECURE Act 2.0 to be made on or before the last day of the first plan year beginning on or after January 1, 2025 (2027 in the case of governmental plans)



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Changes Affecting Contributions

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Changes Affecting Contributions

- **Saver's Match (years after 12/31/2026)**
 - Instead of the current scheme of providing a credit equal to part of the amount contributed to an eligible plan, the new rule will require the credit amount to be deposited into the retirement account—like a partial matching contribution
 - The match is 50 percent of IRA or retirement plan contributions up to \$2,000
 - The match phases out between \$41,000 and \$71,000 (MFJ – indexed)

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New Development - IRS Request for Comments on Saver's Match

- Notice 2024-65, September 5, 2024
 - Asks 29 questions seeking comments on various aspects of implementing this provision – Comments due by November 4, 2024
 - Eligibility for Saver's Match Contributions
 - How Saver's Match Contributions Are Claimed
 - How to Designate the Destination for Saver's Match Contributions
 - How the Treasury Department Completes Saver's Match Contributions

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New Development - IRS Request for Comments on Saver's Match

- Notice 2024-65, September 5, 2024
 - Asks 29 questions seeking comments on various aspects of implementing this provision – Comments due by November 4, 2024
 - Saver's Match Recovery Tax on Specified Early Distributions
 - Reporting and Disclosure
 - Miscellaneous Issues

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Changes Affecting Contributions

- **Indexing IRA Catch-up Limits (after 12/31/2023)**
 - Section 108 indexes the \$1,000 catch-up amount beginning for tax years beginning after 12/31/2023
 - Must be adjusted in 10% increments, so there was no adjustment for 2024 (still \$1,000) (IRC §219(b)(5)(C)(iii))

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Changes Affecting Contributions

- **New Catch-up Amount for Retirement Plan Participants Aged 60 – 63 (years after 12/31/2024)**
 - § 109 increases catch-up limits to the greater of \$10,000 or 50 percent more than the regular catch-up amount for individuals who have attained ages 60, 61, 62 and 63
 - The increased amounts are indexed for inflation after 2025
- **IRA Student Loan Payments Qualify for Matching Contributions Limits (after 12/31/2023)**
 - § 110 allows employers to make matching contributions to retirement accounts based on student loan payments made by plan participants

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Changes Affecting Contributions

- **Small Employer Military Spouse Eligibility Credit (12/29/2022)**
 - § 112 provides small employers a tax credit if they—
 - Make military spouses eligible for plan participation within two months of hire
 - Make the military spouse eligible for any matching contribution
 - And make the military spouse 100% immediately vested in all contributions
 - The tax credit equals the sum of—
 - \$200 credit for each military spouse that participates in the plan, plus
 - Up to \$300 for employer contributions made to each military spouse



Changes Affecting Contributions

- **Additional Nonelective Contributions to Simple Plans (after 12/31/2023)**
 - § 116 allows employers to make, in addition to the required nonelective or matching contributions, voluntary nonelective contributions
 - The additional contribution may not exceed 10% of the employee's compensation—up to a maximum contribution of \$5,000 (indexed)



Changes Affecting Contributions

- **SIMPLE Plan Contribution Limits (years after 12/31/2023)**
 - § 117 increases the limit on annual employee elective deferral contributions to SIMPLE IRAs and 401(k)s
 - Employers with less than 26 employees, may increase the contribution limits, including catch-up contributions for employees who are age 50 or older, by 10% above any normal cost-of-living increase
 - The limits also increase for employees between 26 – 100, but only if the employer provides a 4% employer matching contribution or a 3% nonelective contribution to all eligible employees



Changes Affecting Contributions

- **Emergency Savings Accounts (after 12/31/2023)**
 - Employers may offer non-highly compensated participants an emergency savings account as part of their retirement plan
 - Employees may voluntarily contribute or may be automatically enrolled at up to 3% of their annual pay (capped at \$2,500)
 - Participants may take distributions from their savings accounts at any time
 - Contributions are made on a Roth-like basis
 - Contributions to emergency savings accounts must be eligible for the same matching contributions that apply for elective deferrals, but the employer matching contributions are made to the retirement plan instead of the savings account



Changes Affecting Contributions

- **Removal of “1st Day of Month” Request Rule for 457(b) Plans (12/29/2022)**
 - § 306 allows deferral rate change elections to be made at any time prior to the date that the compensation being deferred is available



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Changes Affecting Withdrawals



Changes Affecting Withdrawals

- Increase Age of Required Minimum Distributions (RMDs)

Birth Year	Age At Which RMDs Begin
Before July 1, 1949	70½
July 1, 1949 – Dec 31, 1950	72
1951 – 1959	73
1960 or later	75

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Changes Affecting Withdrawals

- Increase Age of Required Minimum Distributions (RMDs)

Effective For Individuals Attaining	RMD Age	
Age 70 ½	70 ½	Prior to the SECURE Act*
Age 70 ½ after 12/31/2019	72	SECURE Act (2019)
Age 72 after 12/31/2022 and before 1/1/2033	73	Change with SECURE 2.0
Age 74 after 12/31/2032	75	Change with SECURE 2.0

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Proposed Regulations Address the Problem of Those Born in 1959

- REG-103529-23, July 12, 2024
 - The problem is that those born in 1959 attain
 - Age 73 in 2032 and (applicable age 73)
 - Age 74 in 2033 (applicable age 75)
 - IRS resolves this issue by using the lower age
 - Note that this should be addressed by Congress in a technical corrections bill, assuming one gets passed before 2032
 - The regulations may serve to force Congress to act

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Proposed Regulations Address the Problem of Those Born in 1959

- REG-103529-23, July 12, 2024
 - Does *Loper Bright Enterprises* impact this?
 - Will have to see how the courts interpret this
 - However, it seems unlikely a court would disturb this as there is no real evidence what Congress thought, but seems most likely they were just getting rid of the age 74 applicable age that was initially found in SECURE 2.0
 - Also, age 73 distributions literally satisfies both rules
 - Remember Congress has to fix statute text that unambiguously comes to a requirement they don't agree with

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Changes Affecting Withdrawals

- **New Withdrawals Permitted Without 10% Penalty**
 - § 115 – Withdrawals for Emergency Expenses (after 12/31/2023)
 - Unforeseeable emergency—1 per year—\$1,000 limit
 - § 314 – Withdrawals for Domestic Abuse Survivors (after 12/31/2023)
 - Domestic abuse victims—self-certify—lesser of \$10,000 or 50% of account
 - § 326 – Early Distributions for Terminally Ill Participants (12/29/2022)
 - Reasonably be expected to live for no more 84 months (7 years)
 - Evidence required

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Changes Affecting Withdrawals

- **New Withdrawals Permitted Without 10% Penalty**
 - § 329 – Public Safety Officers (12/29/2022)
 - Strikes “age 50” and inserts age 50 or 25 years of service under the plan
 - Extends the exception to public safety officers with at least 25 years of service
 - § 308 – Distributions to Firefighters (12/29/2022)
 - “Qualified public safety employees” under age 50 rule extended to private sector fire fighters

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Changes Affecting Withdrawals

- **New Withdrawals Permitted Without 10% Penalty**
 - § 330 – Exemption extended to State and Local Corrections Employees (12/29/2022)
 - Public safety officer exception extended to corrections officers and to forensic security employees
 - § 334 – Purchase of Long-term Care Insurance (12/29/2025)
 - Permits retirement plans to distribute up to \$2,500 per year (indexed) for the payment of premiums for long term care insurance contracts



Changes Affecting Withdrawals

- **New Withdrawals Permitted Without 10% Penalty**
 - § 333 – Corrective Distributions (12/29/2022)
 - Exempts the excess contribution and earnings allocable to the excess contribution from the 10% additional tax on early distributions
 - § 323 – Clarification of Equal Periodic Exception (after 12/31/2023)
 - Exception continues to apply in the case of a rollover of the account, an exchange of an annuity providing the payments, or an annuity that satisfies the required minimum distribution rules



Changes Affecting Withdrawals

- **Permanent Rules for the Use of Retirement Funds in Federally Declared Disasters**
 - § 331 allows first \$22,000 of distributions made on account of a federally declared disaster—that is withdrawn within 180 days of the disaster—to be exempt from the 10% additional tax
 - For the distribution to qualify for the exemption, the individual's principal residence must be in a federally declared disaster area
 - And there must be a corresponding economic loss
 - Distributions may be included in income ratably over 3 years
 - Distributions can be repaid to the plan within 3 years



Changes Affecting Withdrawals

- **Permanent Rules for the Use of Retirement Funds in Federally Declared Disasters**
 - § 331 increases the limits on loans taken from a plan on account of a disaster to \$100,000 for loans withdrawn within 180 days of the disaster
 - Delays repayments due within 180 days of the disaster for up to 1 year
 - A distribution for the purchase or construction of a principal residence beginning on the date which is 180 days before and ending 30 after the disaster can be repaid
 - § 331 is retroactively effective for disasters occurring on or after January 26, 2021



Changes Affecting Withdrawals

- **Excise Tax Reduction for Incorrect Required Minimum Distributions (RMDs) (after 12/29/2022)**
 - § 302 reduces the penalty for failure to take required minimum distributions (RMDs) from 50 to 25%, and further to 10% if corrected within 2 years
 - Applies to all people who take RMDs, including those already taking RMDs under prior rules
- **Conforming Roth Plan Distribution Rules (after 12/31/2023)**
 - § 325 eliminates the pre-death distribution requirement for Roth accounts in employer plans—e.g., 401(k) plans



Changes Affecting Withdrawals

- **Repeal of Direct Payment Requirement for Exclusion for Public Safety Officers for Health and Long-Term Care Insurance (12/29/2022)**
 - Current law provides an exclusion from gross income (\$3,000) for a distribution from a governmental retirement plan to a public safety officer to pay for their health insurance premiums
 - Current exclusion requires that the plan *directly* pay the insurance premiums
 - § 328 repeals the direct payment requirement
- **Conforming Hardship Withdrawals for 403(b) Plans (after 12/31/2023)**
 - § 602 conforms the hardship rules for 403(b) plans to those for 401(k) plans



Changes Affecting Withdrawals

- **RMD Rules Clarified for Special Needs Trusts (12/29/2022)**
 - § 337 clarifies that, in the case of a special needs trust established for a beneficiary with a disability, an accumulation trust can have a charitable organization as the remainder beneficiary
- **Election for Qualified Charitable Distribution to a Split Interest Trust and Indexing for Qualified Charitable Distribution (QCD) Limit (12/29/2022)**
 - § 307 expands the IRA QCD provision to allow for a one-time, \$50,000 (indexed) distribution to charities through a CGA, CRUT, or CRAT
 - In addition to \$100,000 per year directly to qualifying charities from an IRA
 - § 307 also indexes the \$100,000 (\$105,000 for 2024 – Notice 2023-75)



Changes Affecting Withdrawals

- **Limitation Removal for Employees of Rural Electric Coops (12/29/2022)**
 - IRC § 415 limits the amount that may be paid by a pension plan to the lesser of \$265,000 (2023) or 100 percent of the participant's average compensation
 - § 119 eliminates the participant's average compensation-based limit for those who are non-highly compensated employees in a rural electric cooperative plan
- **Rollovers of Section 529 Plans (after 12/31/2023)**
 - § 126 allows 529 account owners to roll over up to an aggregate lifetime limit of \$35,000 from a 529 plan into a Roth IRA for the 529 plan beneficiary
 - The 529 plan must have been in existence for at least 15 years prior to the rollover and 529 contributions made within the last 5 years are ineligible



Changes Affecting Withdrawals

- **Surviving Spouse Election to be Treated as Employee/Owner (after 12/31/2023)**
 - § 327 allows a surviving spouse of a participant in a defined contribution plan to be treated as the deceased employee for purposes of the RMD rules
 - Provides a new option if an account owner dies after he or she started RMDs
- **IRAs Involved in Prohibited Transactions (after 12/29/2022)**
 - § 322 clarifies that if an individual has multiple IRAs, only the IRA with respect to which the prohibited transaction occurred will be disqualified



Agency Actions

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Agency Actions

- **Promotion of Savers Match (07/01/2026)**
 - § 104 directs Treasury to “advance public awareness” of the Saver’s Match to increase use of the match by low and moderate income taxpayers
- **Savings Bond Information Sharing (12/29/22)**
 - § 122 requires Treasury to share information with the states relating to savings bonds that are 3 years past maturity and are registered to an owner with a last known or registered address in that state —
 - The name and applicable address of the registered owner
 - The name and applicable address of any registered co-owner or beneficiary
 - The serial number of any applicable savings bond

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Agency Actions

- **Retirement Account Lost and Found (12/29/2024)**
 - § 303 requires the DOL to create and administer a national online searchable lost and found database for retirement plans
 - Requires plan administrators to provide annual reporting of information about unclaimed accounts and their dispositions

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Agency Actions

- **Expansion of the Employee Plans Compliance Resolution System (12/29/2024)**
 - § 305 requires modification of the IRS Employee Plans Compliance Resolution System (EPCRS) expanding self-correction of errors or mistakes
 - Sponsors of qualified retirement plans can self-correct "insignificant" operational failures at any time
 - "Any failure that occurs despite practices and procedures that are reasonably designed to promote and facilitate compliance with requirements"

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Agency Actions

- **Asset Allocation Funds Performance Benchmarks (12/31/2025)**
 - § 318 directs the DOL to modify regulations under Section 404 of ERISA so that an investment that uses a mix of asset classes (e.g., target date funds) can be benchmarked against a blend of broad-based securities market indices
- **Report to Congress About Reporting and Disclosure Requirements (12/31/2025)**
 - § 319 directs the Treasury, DOL, and the PBGC to review the reporting and disclosure requirements for pension plans and to make recommendations to Congress to consolidate, simplify, standardize, and improve reporting and notice requirements

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Agency Actions

- **Review of Pension Risk Interpretive Bulletin (12/29/2023)**
 - § 321 requires the DOL to review Interpretive Bulletin 95-1 governing pension risk transfers to determine whether amendments are warranted and to report to Congress its finding, including an assessment of any risk to participants
 - Congress apparently wants the rules for determining the financial strength of transferees (primarily insurance companies) of pension liabilities to be reviewed and updated

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Agency Actions

- **Guidance on Rollovers (01/01/2025)**
 - § 324 requires Treasury to simplify and standardize the rollover process by issuing sample forms for direct rollovers that may be used by both the incoming and outgoing retirement plan or IRA
- **Correction of Mortality Tables (12/29/2022)**
 - § 335 provides that, for purposes of the minimum funding rules, a pension plan cannot assume that after the valuation date there will be future mortality improvements of greater than 0.78 per year for valuation
 - Will tend to reduce actuarial liability in pension plans

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Agency Actions

- **Correction of Mortality Tables**

Example

Hypothetically, assume that 1% of 65-year-olds die every year. When projecting future mortality of 65-year-olds, Section 355 prohibits a reduction in that percentage by more than 0.78%, meaning 1% could not be reduced below 0.9922%, even if the best available data suggests the rate would be lower.



Agency Actions

- **Report on Section 402(f) Notices (06/29/2024)**

- § 336 requires the GAO to issue a report to Congress on the effectiveness of Section 402(f) notices
- IRC 402(f) notices are given by employer retirement plans in the case of a distribution to a participant that is eligible for rollover to another tax preferred retirement account and describes distribution options and tax consequences



Agency Actions

- **Defined Contribution Plans Fee Disclosures (12/29/2025)**
 - GAO found that 40 percent of 401(k) plan participants do not understand and have difficulty using the fee information that the DOL requires plans to provide to participants in fee disclosure notices
 - § 340 requires the DOL to review disclosure requirements and submit a report to Congress on such findings, including recommendations for legislative changes



Agency Actions

- **Consolidation of Defined Contribution Plan Notices (12/29/2024)**
 - Current law requires certain retirement plan notices to be provided to participants as individual notices
 - § 341 addresses notices required to provide plan participants with information regarding their rights and obligations relative to the plans, withdrawals from the plans, and rights relative to non-discrimination provisions, and directs Treasury and DOL to amend regulations to include them in a single notice
- **Report Regarding the Impact of Inflation on Retirement Savings (03/29/2023)**
 - § 347 directs the DOL and Treasury to study the impact of inflation on retirement savings and submit a report to Congress



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Provisions Affecting Annuities

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Provisions Affecting Annuities

- Modification of RMD Rules for Life Annuities (12/29/2022)
 - § 201 removes RMD barriers for life annuities, allowing:
 - Annuities to have increasing payments of less than 5%, that is, cost of living adjustments (COLAs), to satisfy RMD rules
 - A lump sum payment that results in a shortening of the payment period
 - Acceleration of the receipt of annuity payments that are scheduled to be received within the next 12 months
 - A payment in the nature of a dividend
 - A final payment upon death that does not exceed the consideration paid for the annuity payments, less the aggregate amount of prior distributions

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Provisions Affecting Annuities

- **Qualifying Longevity Annuity Contracts (12/29/2022)**
 - § 202 expands the RMD exemption for Qualified Longevity Annuity Contracts (QLACs) by:
 - Eliminating the requirement that the QLAC premium not exceed 25% of the individual's account or IRA balance
 - Increasing the QLAC dollar limit from \$125,000 to \$200,000 (indexed)
 - Permitting the QLAC to include a provision that allows the individual to rescind the contract within 90 days



Provisions Affecting Annuities

- **Qualifying Longevity Annuity Contracts**

Example

A married couple, both aged 65 with adequate retirement income, wants to make sure they can pay increasing premiums on their life insurance late in retirement. If they use \$100,000 of their IRA account to purchase a QLAC that provides lifetime income starting at age 85 of \$35,000 per year, they can assure they will have enough to pay the premiums.



Provisions Affecting Annuities

- **Insurance-dedicated Exchange Traded Funds (ETFs) (12/29/2029)**
 - § 203 allows insurance companies to include exchange-traded funds (ETFs) as investment options in variable annuities and directs Treasury to amend the regulations
 - Treasury regulations have prevented ETFs from being widely available through individual variable annuities because the regulations were written before ETFs existed
- **Eliminating Bifurcation on Partial Annuitization (12/29/2029)**
 - § 204, allows for participants to elect to aggregate distributions from both portions of a retirement account (annuity and non-annuity) in order to determine if the distributions meet the RMD rules



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Other Provisions



Other Provisions

- **Tax Deferral for Sales of Employer Stock to Employee Stock Ownership Plans (sales after 12/31/2027)**
 - Under IRC 1042, the owner of stock in a non-publicly traded C corporation that sponsors an employee stock ownership plan ("ESOP") may elect to defer the recognition of gain from the sale of such stock to the ESOP if the seller reinvests the sales proceeds into qualified replacement property
 - § 114 expands the gain deferral provisions of IRC Section 1042, with a 10% limit on the deferral of sales of employer stock to S corporation ESOPs



Other Provisions

- **Certain Securities Treated as Publicly Traded (years after 12/31/2027)**
 - § 123 allows certain non-exchange traded securities to qualify as "publicly traded employer securities" if they:
 - Are subject to priced quotations by at least four dealers on a US Securities and Exchange Commission-regulated interdealer quotation system
 - Are not a penny stock
 - Are not issued by a shell company, blank check company, or subject to bankruptcy proceedings
 - And have a public float which has a fair market value of at least \$1,000,000 and constitutes at least 10% of outstanding shares.



Other Provisions

- Worker Ownership, Readiness, and Knowledge (WORK) Act (FY 2025 – 2029)**
 - § 346 is an act in itself—The WORK Act requires the DOL to establish an Employee Ownership Initiative at the state level to promote employee ownership:
 - By making state-level grants, by acting as a clearinghouse on techniques employed by new and existing programs and existing state-level programs, and by funding projects for information gathering on those techniques
 - By providing oversight, direction, training, and expertise
- The WORK Act also requires the DOL to develop standards and procedures to establish good faith fair market value for shares of a business to be acquired by an employee stock ownership plan

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Other Provisions

- Modification of the Age Requirement for ABLE Plans (after 12/31/2025)**
 - § 124 increases the eligibility age for an ABLE account to 46 from the current 26
- Exclusion of Disability Payments (after 12/31/2026)**
 - § 309 permits first responders to exclude service-connected disability pension payments from gross income after reaching retirement age
- Recognition of Tribal Government Domestic Relations Orders (12/31/2022)**
 - § 339 adds tribal courts to the list of courts authorized under federal law to issue qualified domestic relations orders

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Other Provisions

- **Reform of Family Attribution Rules Relative to Nondiscrimination Testing (after 12/31/2023)**
 - § 315 updates two stock attribution rules in IRC §§ 1563(e) and 318(a) as they relate to IRC § 414 (attribution rules for purposes of qualified retirement plans):
 - Inequities exist where spouses with separate businesses reside in a community property state when compared to spouses who reside in separate property states—family attribution rules are changed by removing attribution for spouses with separate and unrelated businesses who reside in community property states
 - Attribution is eliminated for parents who have minor children with separate and unrelated businesses.



Other Provisions

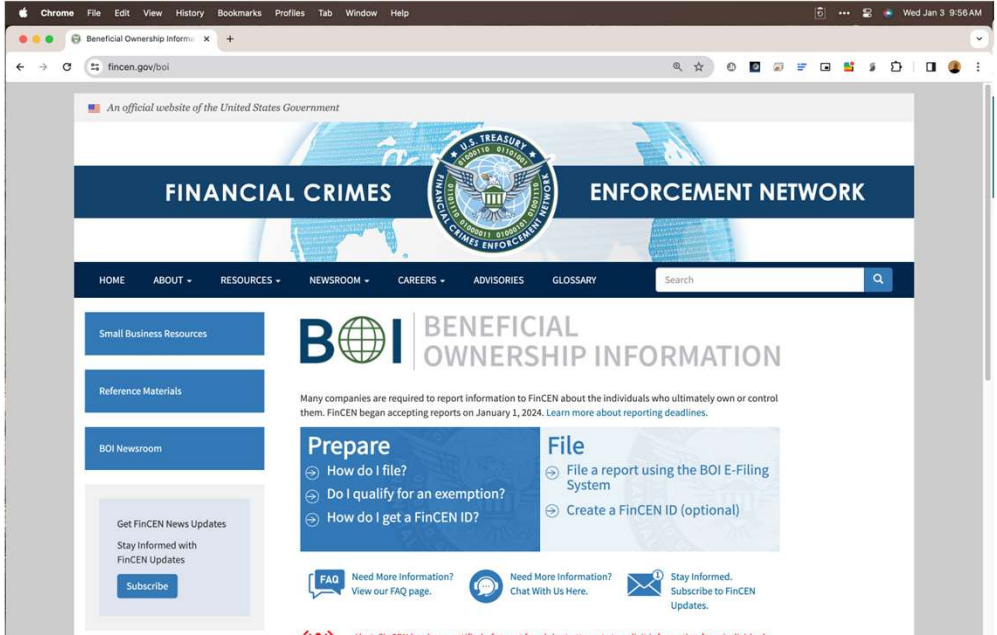
- **Charitable Conservation Easements (12/29/2022)**
 - § 605 disallows a charitable deduction by pass-through entities for a qualified conservation contribution if the deduction claimed exceeds two and one-half times the sum of each partner's basis in the contributing partnership . . .
 - Unless the contribution meets a 3-year holding period test, substantially all the contributing partnership is owned by members of a family, or the contribution relates to the preservation of a certified historic structure

Beneficial Ownership Information Reports Update

2024 saw additional information provided about the upcoming reporting obligations, as well the first required filing dates having already passed for certain entities formed in 2024



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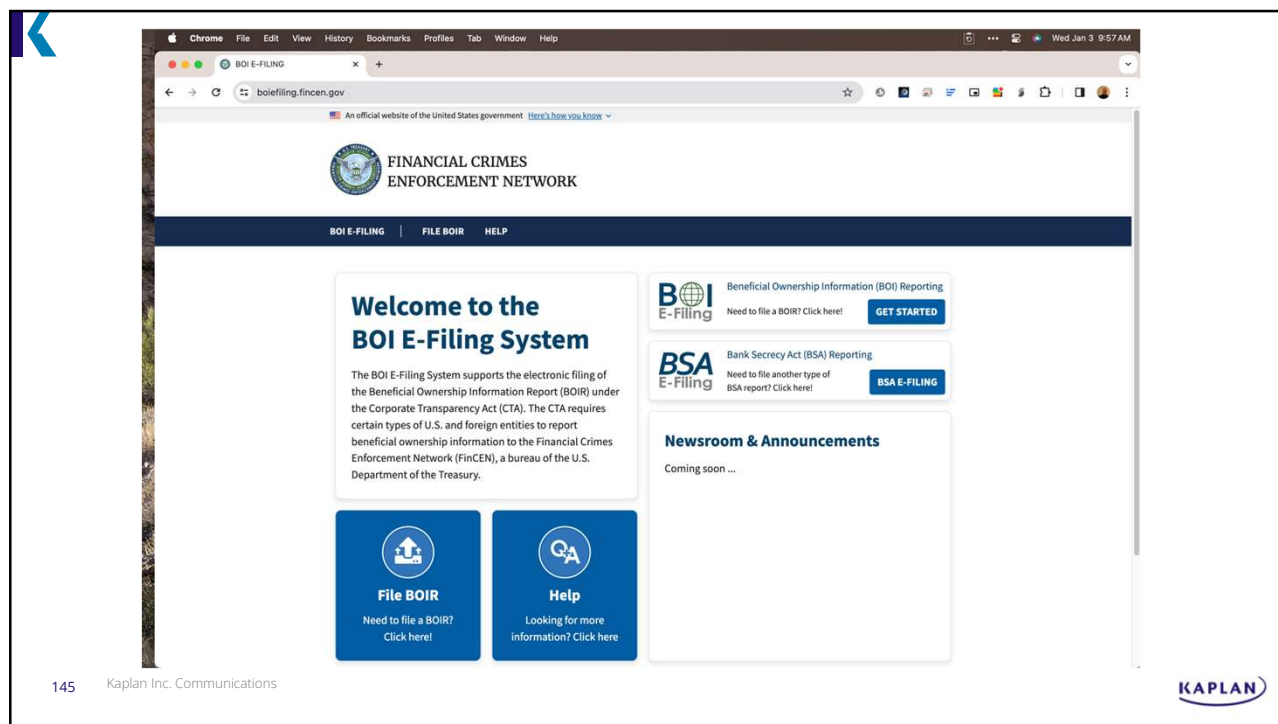


The screenshot shows the official website of the Financial Crimes Enforcement Network (FinCEN) for Beneficial Ownership Information (BOI). The page is titled "FINANCIAL CRIMES ENFORCEMENT NETWORK" and "BENEFICIAL OWNERSHIP INFORMATION". It includes a navigation bar with links to HOME, ABOUT, RESOURCES, NEWSROOM, CAREERS, ADVISORIES, and GLOSSARY. The main content area is divided into two columns. The left column contains links to "Small Business Resources", "Reference Materials", and "BOI Newsroom". The right column features a "Prepare" section with links to "How do I file?", "Do I qualify for an exemption?", and "How do I get a FinCEN ID?". Below this is a "File" section with links to "File a report using the BOI E-Filing System" and "Create a FinCEN ID (optional)". At the bottom, there are links to "FAQ", "Need More Information? View our FAQ page.", "Need More Information? Chat With Us Here.", and "Stay Informed. Subscribe to FinCEN Updates." A red alert banner at the bottom states: "Alert: FinCEN has been notified of recent fraudulent attempts to solicit information from individuals".

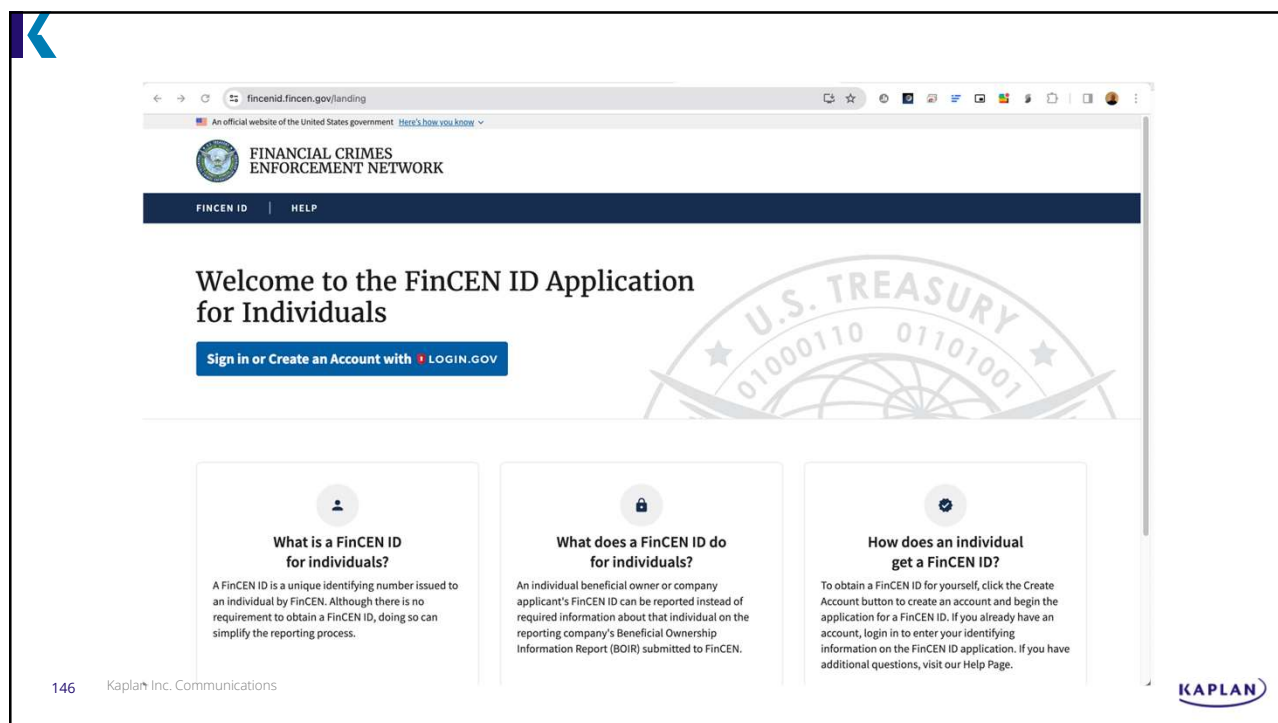
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Most Misunderstood Items

- Single member LLCs generally must file – “disregarded” isn’t disregarded for purposes of BOI reporting
- CPA firms are required to file generally unless they are registered under Sarbanes Oxley
- This is not an annual filing
 - Frequency of filings is based on the happening of events, not mere passage of time
 - But once an event takes place, there is very little time to act
- Outside of a couple of states (such as New Jersey) you are unlikely to find anything directly on point regarding the practice of law issue



Most Misunderstood Items

- FinCEN clarified a number of issues during 2024 including:
 - Filing requirements for homeowners’ associations
 - What about entities that in “zombie mode” with the state (not formally dissolved but also not in good standing)
 - Filing deadlines for entities that were in existence on January 1, 2024, were exempt at that date, but lost their exemption during 2024
 - These questions are addressed in the FAQ posted on the BOI website (<https://www.fincen.gov/boi-faqs>)
 - Most recent update when these slides were produced was made on October 3, 2024 (and has been updated throughout the year)



Alabama District Court Case

- *National Small Business United v. Yellen*, USDC N.E. D Ala., March 1, 2024
 - National Small Business Association filed suit on the CTA claiming
 - Congress exceeded its powers in enacting the CTA
 - The law violates the First, Fourth, Fifth, Ninth & Tenth Amendments and
 - Is impermissibly vague in its term
 - Court released its 52-page opinion late on a Friday afternoon



Alabama District Court Case

- *National Small Business United v. Yellen*, USDC N.E. D Ala., March 1, 2024
 - Court found that Congress failed to show this fit within its enumerated powers, taking into account the necessary and proper clause
 - Foreign affairs power
 - Commerce (interstate and international)
 - Taxing power
 - Did indicate there were ways it could be drafted to pass muster (limit applicability to entities engaged in interstate and/or international commerce)



Alabama District Court Case

- *National Small Business United v. Yellen*, USDC N.E. D Ala., March 1, 2024
 - As the Court had found the law in its entirety was void, decided no point in looking further at issues with First, Fourth and Fifth Amendments
 - Relief for now is only for plaintiffs in the suit, which likely includes members of the the NSBA



11th Circuit

- Ruling has been appealed to the 11th Circuit
 - Oral arguments have been heard
 - No decision has yet been rendered
 - *Tax Notes Today Federal* reported that the panel appears to be leaning towards sending the case back to the District Court to specifically consider 11th Circuit precedent which does not agree with the District Court's reasoning
- *Firestone, et al. v Janet Yellen, et al.*, Case No. 3:24-cv-1034 (D. Ore.), September 2024 denied a request for a preliminary injunction and disagreed with the logic of the *National Small Business United* District Court ruling

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FinCEN Documents

- Final rule on reporting issued in late 2022
- FAQ issued by FinCEN on March 24, 2023
- One page PDF of key reporting dates
- Second one page PDF on beneficial ownership reporting
- Proposed (and now final) rule pushed back initial report for entities formed in 2024
- 54 page guide issued for small entities
- Reporting site opened up on schedule on January 1, 2024

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BENEFICIAL OWNERSHIP INFORMATION REPORT FILING DATES

2024 FinCEN will begin accepting beneficial ownership information reports from reporting companies¹ that are not exempt² on January 1, 2024, the effective date of the reporting requirement.

INITIAL REPORTS

Existing reporting companies
Created or registered to do business in the United States before January 1, 2024.
Reports due by **January 1, 2025**.

New reporting companies
Created or registered to do business in the United States on or after January 1, 2024.
Reporting companies created or registered on or after **January 1, 2024** and before **January 1, 2025** have **90 calendar days** after receiving actual or public notice that their company's creation or registration is effective to file their initial BOI reports.
Reporting companies created or registered on or after **January 1, 2025** will have **30 calendar days** from receipt of actual or public notice that their creation or registration is effective to file their initial BOI reports.

UPDATED REPORTS

Required when there is a change to previously reported information about the reporting company itself or its beneficial owners.
Updated reports due within **30 calendar days** after a change occurs.

CORRECTED REPORTS

Required when previously reported information was inaccurate when filed.
Corrected reports due within **30 calendar days** after the reporting company becomes aware or has reason to know of an inaccuracy.

More information can be found at www.fincen.gov/boi.

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BENEFICIAL OWNERSHIP REPORTING – KEY QUESTIONS

This document is explanatory only and does not supplement or modify any obligations imposed by statute or regulation. Please refer to the beneficial ownership information reporting final rule, available at www.fiscen.gov/boir, for details on specific provisions.

1. Does my company have to report its beneficial owners?

While certain types of entities are exempt, if you are a small corporation or LLC, you will likely be required to report your beneficial ownership information to FinCEN. A key factor in determining whether your company will have to report is whether you had to file a document with your state's secretary of state or a similar office to create your company or, for foreign companies, register it to do business in the United States.

2. Who is a beneficial owner of my company?

A beneficial owner is any individual who exercises substantial control over your company, or who owns or controls at least 25 percent of your company.

3. Does my company have to report its company applicants?

There can be up to two individuals who qualify as company applicants — (1) the individual who directly files the document that creates, or first registers, the reporting company; and (2) the individual that is primarily responsible for directing or controlling the filing of the relevant document. Your company is only required to report its company applicants if it is created or registered on or after January 1, 2024.

4. What specific information does my company need to report?

A reporting company will need to provide: (1) its legal name and any trade name or DBA; (2) its address; (3) the jurisdiction in which it was formed or first registered, depending on whether it's a U.S. or foreign company; and (4) its Taxpayer Identification Number (TIN).

For each of your company's beneficial owners and each company applicant (if required), your company will need to provide the individual's: (1) legal name; (2) birthdate; (3) address (in most cases, a home address); and (4) an identifying number from a driver's license, passport, or other approved document for each individual, as well as an image of the document that the number is from.

5. When and how should my company file its initial report?

If your company is created or registered before January 1, 2024, file by January 1, 2025. Otherwise, file within 30 calendar days of receiving actual or public notice from your state's secretary of state or similar office that your company was created or registered. FinCEN will accept reports electronically beginning January 1, 2024.

6. What if there are changes to or inaccuracies in reported information?

Your company will have 30 days to report any changes to reported information. For updates, the 30 days start from when the relevant change occurs. For corrections, the 30 days start after you become aware of, or have reason to know of, an inaccuracy in a prior report.

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Filing Requirements

- Reporting companies are required to file these reports 31 USC §5336(b)(1)
- What entity types are covered?
 - LLCs
 - Corporations
 - Other entities required to register with a state, tribe, etc. or created by filing a document with the same governments
 - However, may be exempt from filing

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Explanation of the Filing Requirements Under the Corporate Transparency Act

- Can file reports now (and likely should do so if haven't already done so)
- When initial reports are required to be filed
 - A reporting company created or registered to do business before January 1, 2024 - **January 1, 2025**
 - A reporting company created or registered on or after January 1, 2024 and before the end of 2024 - **90-day deadline** runs from the time the company receives actual notice that its creation or registration is effective, or after a secretary of state or similar office first provides public notice of its creation or registration, whichever is earlier



Explanation of the Filing Requirements Under the Corporate Transparency Act

- When initial reports are required to be filed
 - Entities created on or after January 1, 2025 will only have **30 days** to file their initial registration



Explanation of the Filing Requirements Under the Corporate Transparency Act

- Previously exempt entity becomes no longer exempt - **file a report within 30 calendar days** after the date that it no longer meets the criteria for any exemption



Definition and Characteristics of a Reporting Company

- Domestic reporting company -
 - a corporation,
 - a limited liability company, or
 - any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.



Definition and Characteristics of a Reporting Company

- Foreign reporting company -
 - a corporation, limited liability company, or other entity formed under the law of a foreign country, and
 - registered to do business in any U.S. state or in any Tribal jurisdiction, by the filing of a document with a secretary of state or any similar office under the law of a U.S. state or Indian tribe.



Definition and Characteristics of a Reporting Company

- A “state” means
 - any state of the United States,
 - the District of Columbia,
 - the Commonwealth of Puerto Rico,
 - the Commonwealth of the Northern Mariana Islands,
 - American Samoa,
 - Guam,
 - the U.S. Virgin Islands, and
 - any other commonwealth, territory, or possession of the United States.



Exempt Entities

- The statute provides for 23 types of entities that are exempt from the requirements to file reports even though they otherwise would be a reporting company
- Important to note that ***there is no small business exemption from the filing requirements.***
- The main concern is all about small, non-operating companies or companies with minimal operations that exist primarily to confuse the ownership chain

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Exempt Entities

- Certain types of securities reporting issuers.
- A U.S. governmental authority.
- Certain types of banks.
- Federal or state credit unions as defined in section 101 of the Federal Credit Union Act.
- Any bank holding company as defined in section 2 of the Bank Holding Company Act of 1956, or any savings and loan holding company as defined in section 10(a) of the Home Owners' Loan Act.

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Exempt Entities

- Certain types of money transmitting or money services businesses.
- Any broker or dealer, as defined in section 3 of the Securities Exchange Act of 1934, that is registered under section 15 of that Act (15 U.S.C. 78o).
- Securities exchanges or clearing agencies as defined in section 3 of the Securities Exchange Act of 1934, and that is registered under sections 6 or 17A of that Act.
- Certain other types of entities registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934.



Exempt Entities

- Certain types of investment companies as defined in section 3 of the Investment Company Act of 1940, or investment advisers as defined in section 202 of the Investment Advisers Act of 1940.
- Certain types of venture capital fund advisers.
- Insurance companies defined in section 2 of the Investment Company Act of 1940.



Exempt Entities

- State-licensed insurance producers with an operating presence at a physical office within the United States, and authorized by a State, and subject to supervision by a State's insurance commissioner or a similar official or agency.
- Commodity Exchange Act registered entities.
- Any public accounting firm *registered in accordance with section 102 of the Sarbanes-Oxley Act of 2002.*

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Exempt Entities

- Certain types of regulated public utilities.
- Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.
- Certain pooled investment vehicles.
- Certain types of tax-exempt entities.
- Entities assisting a tax-exempt entity described in the prior bullet

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Exempt Entities

- Large operating companies with at least 20 full-time employees, more than \$5,000,000 in gross receipts or sales, and an operating presence at a physical office within the United States. (This the exception that has the broadest applicability.)
- The subsidiaries of certain exempt entities.
- Certain types of inactive entities that were in existence on or before January 1, 2020

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Exempt Entities

- Remember these exemptions are to be interpreted narrowly - so you must look at the details for any exemption you believe cover a particular organization
- These details are found in the Beneficial Ownership Information Reporting Regulations at 31 CFR § 1010.380(c)(2)

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Large Operating Company

- Must meet all of the following requirements:
 - Employ more than 20 employees on a full time basis in the United States
 - Filed federal income tax returns in the previous year that reported more than \$5,000,000 in gross receipts or sales in the aggregate, including the receipts or sales of
 - other entities owned by the entity; and
 - other entities through which the entity operates
 - Has an operating presence at a physical office in the United States



Large Operating Company

- Counting employees for this test
 - Borrows definitions found in the regulations for the applicable large employer (ALE) provisions of the Affordable Care Act (ACA) for full time employees (does not count full time equivalents)
 - These regulations are found at
 - Treasury Reg. §54.4980H-1(a) (which provides definitions of employees and full time employees) and
 - Treasury Reg. §54.4980H-3 (which determines full time employees under the ACA for the ALE rules)



Large Operating Company

- Counting employees for this test
 - Employer ALE regulations allows aggregating certain group of related entities as a single employer
 - Full time employee
 - generally is an employee who is employed an average of at least 30 hours a week in a calendar month,
 - working 130 hours per month being treated as equivalent of being employed on average at least 30 hours a week in a calendar month

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Large Operating Company

- Counting employees for this test
 - Definition of "United States" is modified from the ACA one. For this purpose, the "United States" is made up of:
 - The States of the United States,
 - the District of Columbia,
 - **the Indian lands (as that term is defined in the Indian Gaming Regulatory Act), and**
 - **the Territories and Insular Possessions of the United States.**
 - The last two categories are not part of the United States for ACA purposes

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Large Operating Company

- Counting employees for this test
 - Unlike under the ACA, though, FinCEN has indicated in the FAQ that you cannot combine related employers for counting employees
 - As well, they do not consider PTO or leased employees to be the employees of the party they ultimately perform services for

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Large Operating Company

- \$5,000,000 test
 - Filed a Federal income tax or information return in the United States for the previous year demonstrating more than \$5,000,000 in gross receipts or sales, as reported as gross receipts or sales (net of returns and allowances) on the entity's
 - Form 1120 (including consolidated returns)
 - Form 1120-S,
 - Form 1065 or
 - Other applicable form

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Large Operating Company

- \$5,000,000 test
 - Excludes gross receipts or sales from sources outside the United States, as determined under Federal income tax principles.
 - For corporations that file a consolidated return, the test will apply to the amount reported on the consolidated return for the group



Inactive Entity

- All of these had to have existed on January 1, 2020 (so over time we will have fewer of these)
- Is not engaged in active business;
- Is not owned by a foreign person, whether directly or indirectly, wholly or partially;
- Has not experienced any change in ownership in the preceding twelve month period;



Inactive Entity

- Has not sent or received any funds in an amount greater than \$1,000, either directly or through any financial account in which the entity or any affiliate of the entity had an interest, in the preceding twelve month period; and
- Does not otherwise hold any kind or type of assets, whether in the United States or abroad, including any ownership interest in any corporation, limited liability company, or other similar entity.



Definition of a Beneficial Owner

- If not otherwise excluded, with respect to an entity, an individual who, directly or indirectly, through any contract, arrangement, understanding, relationship, or otherwise—
 - exercises **substantial control** over the entity; or
 - **owns or controls not less than 25 percent** of the ownership interests of the entity



Substantial Control

- Note - don't need to have any ownership to be in this category.
- An individual exercises substantial control if the individual:
 - Serves as a senior officer of the reporting company;
 - Has authority over the appointment or removal of any senior officer or a majority of the board of directors (or similar body);



Substantial Control

- An individual exercises substantial control if the individual:
 - Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding (not an exclusive list):
 - The nature, scope, and attributes of the business of the reporting company, including the sale, lease, mortgage, or other transfer of any principal assets of the reporting company;
 - The reorganization, dissolution, or merger of the reporting company;
 - Major expenditures or investments, issuances of any equity, incurrence of any significant debt, or approval of the operating budget of the reporting company;
 - The selection or termination of business lines or ventures, or geographic focus, of the reporting company;



Substantial Control

- An individual exercises substantial control if the individual:
 - Directs, determines, or has substantial influence over important decisions made by the reporting company, including decisions regarding (not an exclusive list):
 - Compensation schemes and incentive programs for senior officers;
 - The entry into or termination, or the fulfillment or non-fulfillment, of significant contracts;
 - Amendments of any substantial governance documents of the reporting company, including the articles of incorporation or similar formation documents, bylaws, and significant policies or procedures; or
 - Has any other form of substantial control over the reporting company. (Catch-all category based on facts and circumstances of the situation).

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Substantial Control

- Substantial control can be exercised (directly or indirectly) in any of the following manners:
 - Board representation;
 - Ownership or control of a majority of the voting power or voting rights of the reporting company;
 - Rights associated with any financing arrangement or interest in a company;
 - Control over one or more intermediary entities that separately or collectively exercise substantial control over a reporting company;

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Substantial Control

- Substantial control can be exercised (directly or indirectly) in any of the following manners:
 - Arrangements or financial or business relationships, whether formal or informal, with other individuals or entities acting as nominees; or
 - any other contract, arrangement, understanding, relationship, or otherwise.



Ownership Interests

- Any equity, stock, or similar instrument; preorganization certificate or subscription; or transferable share of, or voting trust certificate or certificate of deposit for, an equity security, interest in a joint venture, or certificate of interest in a business trust; in each such case, without regard to whether any such instrument is transferable, is classified as stock or anything similar, or confers voting power or voting rights;
- Any capital or profit interest in an entity;
- Any instrument convertible, with or without consideration, into any share or instrument described in the prior two bullets, any future on any such instrument, or any warrant or right to purchase, sell, or subscribe to a share or interest described in the prior two bullets, regardless of whether characterized as debt;



Ownership Interests

- Any put, call, straddle, or other option or privilege of buying or selling any of the items described in the first three bullets without being bound to do so, except to the extent that such option or privilege is created and held by a third party or third parties without the knowledge or involvement of the reporting company; or
- Any other instrument, contract, arrangement, understanding, relationship, or mechanism used to establish ownership.



Ownership or Control of an Ownership Interest

- Direct or indirect through any contract, arrangement, understanding, relationship, or otherwise, including (again, not an exhaustive list):
 - Joint ownership with one or more other persons of an undivided interest in such ownership interest;
 - Through another individual acting as a nominee, intermediary, custodian, or agent on behalf of such individual;



Ownership or Control of an Ownership Interest

- Direct or indirect through any contract, arrangement, understanding, relationship, or otherwise, including (again, not an exhaustive list):
 - With regard to a trust or similar arrangement that holds such ownership interest:
 - As a trustee of the trust or other individual (if any) with the authority to dispose of trust assets;
 - As a beneficiary who:
 - Is the sole permissible recipient of income and principal from the trust; or
 - Has the right to demand a distribution of or withdraw substantially all of the assets from the trust; or
 - As a grantor or settlor who has the right to revoke the trust or otherwise withdraw the assets of the trust; or



Ownership or Control of an Ownership Interest

- Direct or indirect through any contract, arrangement, understanding, relationship, or otherwise, including (again, not an exhaustive list):
 - Through ownership or control of one or more intermediary entities, or ownership or control of the ownership interests of any such entities, that separately or collectively own or control ownership interests of the reporting company.



Calculation of Total Ownership Interests

- Calculated as a percentage of the total outstanding ownership interests of the reporting company as follows:
 - For corporations, entities treated as corporations for federal income tax purposes, and other reporting companies that issue shares of stock, the applicable percentage shall be the greater of:
 - the total combined voting power of all classes of ownership interests of the individual as a percentage of total outstanding voting power of all classes of ownership interests entitled to vote, or
 - the total combined value of the ownership interests of the individual as a percentage of the total outstanding value of all classes of ownership interests; and



Calculation of Total Ownership Interests

- Calculated as a percentage of the total outstanding ownership interests of the reporting company as follows:
 - If the facts and circumstances do not permit the calculations described the prior two bullets to be performed with reasonable certainty, any individual who owns or controls 25 percent or more of any class or type of ownership interest of a reporting company shall be deemed to own or control 25 percent or more of the ownership interests of the reporting company.



Senior Officers

- Holding the position *or exercising the authority of* a:
 - president,
 - chief financial officer,
 - general counsel,
 - chief executive officer,
 - chief operating officer,
 - or any other officer, regardless of official title, who performs a similar function.



Excluded Individuals (Not a Beneficial Owner)

- A minor child, as defined in the State in which the entity is formed, if the information of the parent or guardian of the minor child is reported in accordance with this section;
- An individual acting as a nominee, intermediary, custodian, or agent on behalf of another individual;
- An individual acting solely as an employee of a corporation, limited liability company, or other similar entity and whose control over or economic benefits from such entity is derived solely from the employment status of the person (does not cover senior officers);
- An individual whose only interest in a corporation, limited liability company, or other similar entity is through a right of inheritance (future interest only); or
- A creditor of a corporation, limited liability company, or other similar entity, unless the creditor meets the requirements of ownership discussed earlier (that is, simply being a creditor won't make someone a beneficial owner).



Company Applicant

- Only required for entities created or registered on or after January 1, 2024
- Company applicant is:
 - For a domestic reporting company, the individual who directly files the document that creates the domestic reporting company;
 - For a foreign reporting company, the individual who directly files the document that first registers the foreign reporting company; and
 - Whether for a domestic or a foreign reporting company, the individual who is primarily responsible for directing or controlling such filing if more than one individual is involved in the filing of the document.



No More than 2 Company Applicants

- The two would be:
 - the individual who directly files the document that creates, or first registers, the reporting company; and
 - the individual that is primarily responsible for directing or controlling the filing of the relevant document.
- If only one person was involved in filing the relevant document, then only that person should be reported as a company applicant.



Information to Be Provided

- About the entity*
- About beneficial owners* and
- About company applicants (only for entities formed after January 1, 2024)

* Must be continually updated so long as the entity is a reporting entity

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Information About the Entity

- The full legal name of the reporting company;
- Any trade name or “doing business as” name of the reporting company;
- A complete current address consisting of:
 - In the case of a reporting company with a principal place of business in the United States, the **street address** of such principal place of business; and
 - In all other cases, the **street address** of the primary location in the United States where the reporting company conducts business
- The State, Tribal, or foreign jurisdiction of formation of the reporting company

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Information About the Entity

- For a foreign reporting company, the State or Tribal jurisdiction where such company first registers; and
- The Internal Revenue Service (IRS) Taxpayer Identification Number (TIN) (including an Employer Identification Number (EIN)) of the reporting company, or where a foreign reporting company has not been issued a TIN, a tax identification number issued by a foreign jurisdiction and the name of such jurisdiction.

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Information About the Entity

- Entity must also indicate if is filing:
 - An initial report,
 - A correction of a prior report or
 - An update to a prior report

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Information to Be Provided for Beneficial Owners and Company Applicants

- The full legal name of the individual;
- The date of birth of the individual;
- A complete current address consisting of:
 - In the case of a company applicant who forms or registers an entity in the course of such company applicant's business, the **street address of such business**; or
 - In any other case, the individual's **residential street address**



Information to Be Provided for Beneficial Owners and Company Applicants

- A unique identifying number and the issuing jurisdiction from one of the following documents:
 - A non-expired passport issued to the individual by the United States government;
 - A non-expired identification document issued to the individual by a State, local government, or Indian tribe for the purpose of identifying the individual;
 - A non-expired driver's license issued to the individual by a State; or
 - A non-expired passport issued by a foreign government to the individual, if the individual does not possess any of the prior three documents
- An image of the document from which the unique identifying number was obtained.



General Rules for Updated Reports

- If there is any change with respect to required information previously submitted to FinCEN concerning a reporting company or its beneficial owners, including any change with respect to who is a beneficial owner or information reported for any particular beneficial owner, the reporting company shall file an updated report in the form and manner specified **within 30 calendar days** after the date on which such change occurs.



General Rules for Updated Reports

- An updated report required to be filed shall reflect **any change with respect to required information previously submitted** to FinCEN concerning a **reporting company** or its **beneficial owners**
- **Newly exempt entities** - An updated report required to be filed shall indicate that the filing entity is no longer a reporting company.



General Rules for Updated Reports

- **Death of a beneficial owner** - If an individual is a beneficial owner of a reporting company by virtue of property interests or other rights subject to transfer upon death, and such individual dies, a change with respect to required information will be deemed to occur when the estate of the deceased beneficial owner is settled, either through the operation of the intestacy laws of a jurisdiction within the United States or through a testamentary deposition. The updated report shall, to the extent appropriate, identify any new beneficial owners.



General Rules for Updated Reports

- **Formerly a minor child** - If a reporting company has reported information with respect to a parent or legal guardian of a minor child, a change with respect to required information will be deemed to occur when the minor child attains the age of majority.
- **Changes to identifying document** - With respect to an image of an identifying document required to be reported, a change with respect to required information will be deemed to occur when the name, date of birth, address, or unique identifying number on such document changes



General Rules for Updated Reports

- And everything else:
 - Address change
 - Gifting interests to another party
 - Sale of interest
 - Anything either
 - On initial or updated report that is now different
 - Not on initial or updated report but now should be there
 - On either report that no longer should be there

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Corrected Reports

- When an error is made in an initial or updated report, a corrected report is required
 - If any report under this section was inaccurate when filed and remains inaccurate, the reporting company shall file a corrected report within 30 calendar days after the date on which such reporting company becomes aware or has reason to know of the inaccuracy.
 - A corrected report filed within this 30-day period shall be deemed to satisfy the rules for a proper first report if filed within 90 calendar days after the date on which the inaccurate report was filed.
 - Note these are two different provisions - being outside either time limit can lead to penalties

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Reporting Violation

- Subject to potential civil and/or criminal penalties - it is unlawful for any person to
 - willfully provide, or attempt to provide, false or fraudulent beneficial ownership information, including a false or fraudulent identifying photograph or document, to FinCEN in accordance or
 - willfully fail to report complete or updated beneficial ownership information to FinCEN
- A person provides or attempts to provide beneficial ownership information to FinCEN if such person does so directly or indirectly, including by providing such information to another person for purposes of a report or application

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Civil Penalties

- The civil penalty is not more than **\$500 for each day** that the violation continues or has not been remedied
- Note that there is no limit found in the statute for the amount of a civil penalty (you'll see some references to a \$10,000 cap, but that is only the criminal fine we'll talk about next)

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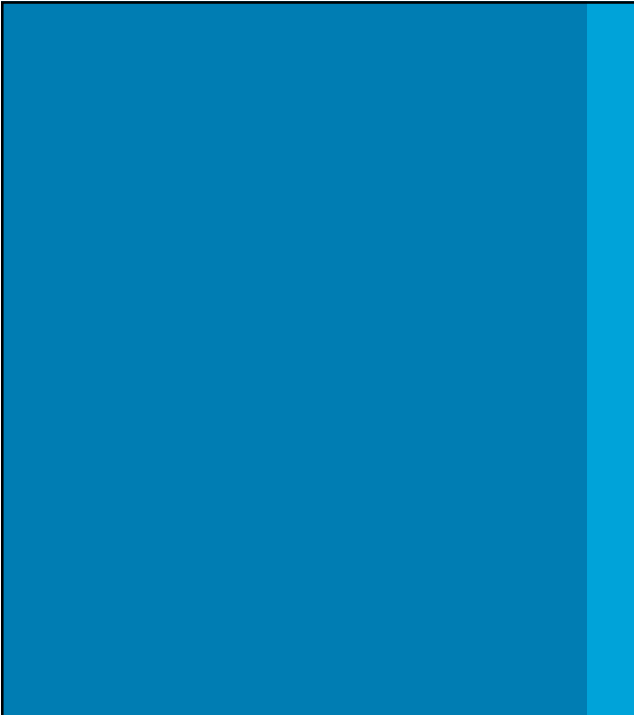
Criminal Penalties

- The criminal penalties are:
 - A fine of not more than \$10,000;
 - Imprisonment for not more than 2 years or
 - Both

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Status of Employee Retention Credit Claims and IRS Programs

The IRS is now attempting to handle the backlog of ERC claims, as well as issuing rejection notices. We'll look at where we stand on this program today and what options exist for clients who are still awaiting action on their claim.



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ERC Programs

- End of the ERC Claims Filing Process
 - Last day to file claims for 2021 ERC claims will generally be April 15, 2025
 - Statute is already closed for 2020 for virtually all taxpayers
 - Still a chance that Congress will retroactively push the statute back to January 31, 2024 (likely not possible if a bill isn't passed by this Congress)
- IRS has a large backlog of unprocessed claims that have been sitting around for a long time
- Issues to cover
 - IRS voluntary withdrawal program
 - Pursuing a suit for refund-an option for most but not really a cost effective one for most
 - Voluntary disclosure second program through November
 - National taxpayer advocate noted issues



Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- When the IRS announced the temporary suspension of processing new ERC claims in September 2023, they indicated two new programs would be announced in the fall:
 - A program to voluntarily withdraw claims not yet paid and
 - A program for those who have been paid to voluntarily return those funds with (maybe) certain relief



Photo by [Tarik Haiga](#) on [Unsplash](#)

Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- The voluntary withdraw program has now been announced. Eligible employers must meet all of the following:
 - They made the claim on an **adjusted employment tax return** (Forms 941-X, 943-X, 944-X, CT-1X).
 - They filed the adjusted return only to claim the ERC, and they made **no other adjustments**.

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Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- The voluntary withdraw program has now been announced. Eligible employers must meet all of the following:
 - They want to withdraw **the entire amount** of their ERC claim.
 - The IRS **has not paid** their claim, or the IRS has paid the claim, but they haven’t cashed or deposited the refund check.

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- The program cannot be used if the employer needs to
 - Reduce the amount of their ERC claim
 - Make other changes to their adjusted return
- The ERC FAQ page has information for those employers

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Used a Payroll Service
 - Must contact the professional payroll service
 - They may file one large claim for all of their employers

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Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Not Yet Received a Refund and Not Notified of an Exam
 - Make a **copy** of the adjusted return with the claim they wish to withdraw.
 - In the left margin of the first page, write **“Withdrawn.”**

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Not Yet Received a Refund and Not Notified of an Exam
 - In the right margin of the first page:
 - Have an authorized person **sign** and **date** it.
 - Write their **name** and **title** next to their signature.

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Not Yet Received a Refund and Not Notified of an Exam
 - **Fax the signed copy** of the return to the IRS’s ERC claim withdrawal fax line at 855-738-7609. This is the withdrawal request. Keep the copy with tax records.
 - Do have instructions for those who are unable to fax the return

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Have Not Received a Refund But Have Been Notified are Under Audit
 - Prepare the withdraw request as in the prior case but do not fax or send it in
 - If they’ve been assigned an examiner, they should communicate with the examiner about how to fax or mail the withdrawal request directly to them.

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Have Not Received a Refund But Have Been Notified are Under Audit
 - If they haven't been assigned an examiner, they should respond to the audit notice with the withdrawal request, using the instructions in the notice for responding.

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Received a Refund Check But Have Not Cashied or Deposited It
 - Mail the voided check with their withdraw request
 - Prepare the **claim withdrawal request** as in the prior 2 cases, but don't fax the request.
 - Write “**Void**” in the endorsement section on the back of the refund check.

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Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Received a Refund Check But Have Not Cashed or Deposited It
 - Include a **note** that says, “ERC Withdrawal” and briefly explain the reason for returning the refund check.
 - Make **copies for tax records** of the front and back of the voided check, the explanation notes and the signed and dated withdrawal request page.

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Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Received a Refund Check But Have Not Cashed or Deposited It
 - Don’t staple, bend or paper clip the voided check; include it with your claim withdrawal request and **mail it** to the IRS at:

Cincinnati Refund Inquiry Unit
PO Box 145500
Mail Stop 536G
Cincinnati, OH 45250

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Withdraw Request - Received a Refund Check But Have Not Cashed or Deposited It
 - Track your package to confirm delivery.
 - May want to consider using registered mail for this purpose (not an IRS recommendation, but provides a very detailed record of handling of the package)

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Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- The IRS will send taxpayers a notification indicating if their withdraw request has or has not been approved
 - If not approved, pay close attention to why the request was not approved
 - Be concerned if the IRS provides limited details - may suggest taxpayer should look to consult legal counsel

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Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Employers Who Have Received a Refund
 - IRS indicates they are working on guidance for these taxpayers, to be released this fall
 - Unfortunately, the IRS has not said they are pausing issuing exam notices in this case, so may need to consider pros and cons of not immediately filing if employer believes the claim was not at all justified

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Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Employers with valid claims who have not yet filed
 - The statute of limitations continues to run on claims
 - 2020 claim statute runs for most taxpayers on April 15, 2024
 - But have more than the word of a consultant getting a contingent fee that the employer qualifies

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Current Federal Tax Developments

Program for Employers to Voluntarily Withdraw ERC Refund Claims Announced by the IRS



Photo by [Tarik Haiga](#) on [Unsplash](#)

- “Help for businesses: Steps for withdrawing an Employee Retention Credit claim,” Fact Sheet FS-2023-24, October 19, 2023
- Practical problem - the fee the consultant wants
 - Not likely to agree the claim is invalid
 - Client will likely need to bring in legal counsel to attempt to get the fee waived

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A Suit for Refund?

- Taxpayers must submit an administrative claim prior to suing the IRS for a refund
- Cannot file suit under IRC §6532 until the first of the following two events
 - The IRS disallows part or all of the claim for refund or
 - Six months has passed since the date the claim was filed with the IRS
- If the IRS disallows the claim, then a suit must be commenced no later than 2 years after the date of disallowance by the IRS
 - Can only be extended by a written agreement executed between the IRS and the taxpayer
 - No other extension is possible (*even if the taxpayer files a formal appeal of the disallowance*) §6532(a)(2), (4)
- The appeals problem was confirmed this year in the case of *Moy v. United States*, USDC ND Calif, Docket No. 5:23-CV-03151, May 21, 2024

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IRS Reopens ERC Voluntary Disclosure Program, Though Not Quite as Generous



Photo by [Tim Mossholder](#) on [Unsplash](#)

- IR-2024-213, IRS Announcement 2024-30, Aug. 15, 2024
 - The IRS has decided to reopen the ERC Voluntary Disclosure Program through November 22, 2024
 - Only applies to claims for the 2021 credits (can no longer do voluntary disclosure for 2020 credits under this program)
 - This time the employer will have to repay 85% of the credit they received (up from 80% in the original program)

IRS Reopens ERC Voluntary Disclosure Program, Though Not Quite as Generous



Photo by [Tim Mossholder](#) on [Unsplash](#)

- IR-2024-213, IRS Announcement 2024-30, Aug. 15, 2024
 - Again the employer
 - Will not be charged interest or penalties if balance due is paid at the time of signing the closing agreement
 - Will not have to repay any interest paid to the employer with the ERC refund they received
 - Will have to provide the names, addresses, telephone numbers and details about the services provided by any advisors or tax preparers who advised or assisted them with their claims.

IRS Reopens ERC Voluntary Disclosure Program, Though Not Quite as Generous



Photo by [Tim Mossholder](#) on [Unsplash](#)

- IR-2024-213, IRS Announcement 2024-30, Aug. 15, 2024
- Must have already received an ERC for a period in 2021 and:
 - The employer hasn't already applied to the first ERC VDP for the same tax periods. (IRS is still processing those at this time.)
 - The employer isn't under criminal investigation.
 - The employer isn't under an IRS employment tax examination for the tax period for which they're applying to the VDP.

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IRS Reopens ERC Voluntary Disclosure Program, Though Not Quite as Generous



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- IR-2024-213, IRS Announcement 2024-30, Aug. 15, 2024
- Must have already received an ERC for a period in 2021 and:
 - The employer hasn't received a Letter 6577-C, Employee Retention Credit (ERC) Recapture, or an IRS notice and demand for repayment of part or all of its ERC claim.
 - The employer hasn't already filed an amended return to eliminate their ERC.

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IRS Reopens ERC Voluntary Disclosure Program, Though Not Quite as Generous



Photo by [Tim Mossholder](#) on [Unsplash](#)

- IR-2024-213, IRS Announcement 2024-30, Aug. 15, 2024
 - Must have already received an ERC for a period in 2021 and:
 - The IRS hasn't received information from a third party or directly from an enforcement action that the taxpayer is not in compliance.
 - Will again use Form 15434, *Application for Employee Retention Credit Voluntary Disclosure Program* submitted electronically to apply to enter the program

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IRS Reopens ERC Voluntary Disclosure Program, Though Not Quite as Generous



Photo by [Tim Mossholder](#) on [Unsplash](#)

- IR-2024-213, IRS Announcement 2024-30, Aug. 15, 2024
 - An employer that outsources its payroll to a third party that reports, collects and pays employment taxes on the employer's behalf using the third party's Employer Identification Number must have the third party file the Form 15434
 - Again the program does *not* provide protection from criminal prosecution so employers should seek legal counsel before going this route - the employer may need to instead use CID's voluntary disclosure program (which is not nearly as generous, but does take criminal prosecution off the table)

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Current Federal Tax Developments

National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
- Begins by noting recent IRS actions NTA approves of, including
 - Beginning to process claims to issue 50,000 ERC refunds
 - Extend processing claims through those filed by January 31, 2024

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Current Federal Tax Developments

National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
- However notes that tax professionals have raised questions about issues with the denial letters recently issued
 - Claims that should have been allowed have been rejected with no IRS contact nor a complete explanation for the denial
 - Many of the notices failed to provide information about employer's appeal rights

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K Current Federal Tax Developments

National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
 - Describes unusual process the IRS used on these claims
 - Claims are being denied based solely on a risk-scoring analytic process
 - No examination is conducted nor is any opportunity given to taxpayers to submit information in support of their claims

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National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
 - Describes unusual process the IRS used on these claims
 - Also modifies how Appeals will be processed
 - Will first be sent to a Revenue Agent for consideration
 - Agent will now review the claim and may ask for additional information

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National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
 - Describes unusual process the IRS used on these claims
 - Also modifies how Appeals will be processed
 - If the Revenue Agent decides that the claim should not be paid, only then will the claim be sent on to the Office of Appeals

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*If it looks like
a duck and
walks like a
duck...*



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Current Federal Tax Developments

National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
- Notes this may create a "ping-pong" possibility
 - Appeals does not generally consider information the IRS did not review first
 - Thus if the IRS provides the taxpayer with no opportunity to respond to the disallowance, the taxpayer would first be able to do so in Appeals
 - And that then that would go back to exam...
 - And this is going to be an even longer process

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Current Federal Tax Developments

National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
- NTA suggests that taxpayer might be able to speed up the process by considering entering the Appeals Fast Track program - but the IRS needs to clarify if these claims would qualify for this program

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Current Federal Tax Developments

National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
 - Also notes that filing an Appeal does *not* suspend the statute of limitations for filing suit in court to challenge the IRS findings
 - Could finally win at Appeals only to find that the process took so long that no refund can be now be paid
 - Taxpayer will need to request an extension of the statute (Form 907) but the IRS must agree

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Current Federal Tax Developments

National Taxpayer Advocate's Blog Post Deals with ERC Disallowance Issues



- "Did You Receive a Notice of Claim Disallowance for Your Employee Retention Credit Refund Claim? If So, Now What?," NTA Blog, August 21, 2024
 - NTA points out that going to court may be far too expensive to make challenging the IRS in court economical
 - Reminds taxpayers to do due diligence is selecting an adviser to advise the client if they should continue to pursue the claim if they receive a disallowance

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Estate and Gift Tax Developments

The Supreme Court issued a decision that has a big impact on entity owned life insurance used in buy-sell arrangements as well the IRS switching the agency's position on revisions to IDGTs



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Current Federal Tax Developments

Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
- Issue involves a buy/sell at death arrangement where the corporation holds a life insurance policy intended to fund the buyout
 - Per the 11th Circuit when valuing the entity, the redemption liability fully or at least partially offsets the value of the insurance proceeds
 - The 8th Circuit had ruled in this case that that liability does not reduce the value, though the proceeds do increase the value

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Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
- Closely held entities often will use life insurance to fund a buy-sell agreement to provide liquidity to allow other owners to continue the business as a whole - but there are two options to do so
 - Cross-purchase arrangement - each equity holder buys proportionate share of deceased's interests and holds insurance on each to fund this
 - Redemptions agreement - the entity redeems the interest and holds the insurance policy



Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
- In this case a corporation was owned by 2 brothers
 - Michael Connelly who held 77.18% of the shares
 - Thomas Connelly who held the remaining 22.82%



Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
 - Buy/sell agreement provided that at either brother's death an independent valuation would be undertaken
 - The other brother would first have the option to acquire the shares at fair market value
 - If the brother declined, then the company was required to redeem the shares at that price
- Michael Connelly died in 2013

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Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
 - Buy/sell agreement provided that at either brother's death an independent valuation would be undertaken
 - The other brother would first have the option to acquire the shares at fair market value
 - If the brother declined, then the company was required to redeem the shares at that price
- Michael Connelly died in 2013 with Thomas as the executor of his estate and his son as the heir

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Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
 - Thomas did not have the valuation performed, but rather he negotiated a “fair” price with Michael’s son
 - The corporation had a \$3.5 million life insurance policy on Michael’s life
 - The corporation redeemed Michael’s shares for \$3 million
- Thomas reported the value of the shares as \$3 million on Michael’s estate tax return



Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
 - When the IRS examined the estate tax return, Thomas obtained a valuation
 - The firm valuing the interest took the position outlined in *Estate of Blount v. Commissioner*, 428 F. 3d 1338 (CA11 2005) that the redemption price was a liability to be considered
 - The IRS disagreed, holding that the redemption proceeds did not reduce the value of the entity, finding the value of Michael’s shares with that adjustment were \$5.3 million, not \$3 million



Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
 - The Supreme Court sided with the IRS in a unanimous decision
 - A key factor was the Court's finding that when a corporation redeems shares, the value must go down - but to accept the estate's numbers we had to find that the corporation was worth the same amount the day after it wrote a \$3 million check to redeem an equity interest as it was the day before

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Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
 - The Court in oral arguments noted that Thomas received value from Michael's estate in addition to Michael's son
 - Michael got \$3 million in exchange for his father's interest in the company
 - But Thomas now had a 100% ownership interest in a company worth \$3.86 million rather the 21.82% interest in a company *worth the same amount* on the day before Michael died

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Supreme Court Determines Estate Valuation Impact of Funded Stock Redemption Agreements



Image from Unsplash+/Getty Images

- *Estate of Connelly v. United States*, USSC Case No. 23-146, June 6, 2024
 - The Justices believed that the transfer of value to Thomas was going untaxed if the court followed the 11th Circuit's reasoning
 - The decision raises questions about the use of redemption agreements where the insurance policies to fund the agreement are held by the entity
 - Justice Thomas pointed out that a cross-purchase arrangement would have resulted in a lower valuation, but the brothers decided against going that route



IRS Now Provides Negative Gift Tax Consequences Exist if a Tax Reimbursement Clause Added to an IDGT



Photo by 黒木混株 cdd20 on Unsplash

- Chief Counsel Advice 202352018, December 29, 2023
 - Intentionally Defective Grantor Trusts (IDGT) are used in estate planning
 - Income generated from assets taxed to the grantor under the grantor tax rules
 - But is treated as a completed gift for transfer tax purposes
 - In PLR 201647001 the IRS held that adding a tax reimbursement clause after initial adoption did not create a transfer tax issue


Current Federal Tax Developments

IRS Now Provides Negative Gift Tax Consequences Exist if a Tax Reimbursement Clause Added to an IDGT



Photo by 墨木混株 cdd20 on [Unsplash](#)

- Chief Counsel Advice 202352018, December 29, 2023
 - Revenue Ruling 2004-64 provided that such a clause at the time of adoption of a trust did not create an issue
 - Now the IRS has issued a CCA that seeks to limit that ruling to solely cover the case of original adoption - any later change is a gift from the beneficiaries to the donor
 - IRS admits this presents complex valuation problems

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Current Federal Tax Developments

IRS Now Provides Negative Gift Tax Consequences Exist if a Tax Reimbursement Clause Added to an IDGT



Photo by 墨木混株 cdd20 on [Unsplash](#)

- Chief Counsel Advice 202352018, December 29, 2023
 - Also raises questions about whether a portion of the IDGT is now considered back in the grantor's estate

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Tax Practice Issues

2024 is the year that *Chevron* deference was formally put to rest by the Supreme Court, so what does that mean for tax issues?



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Current Federal Tax Developments

Key Cases on Regulations



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- Two cases decided at the end of the term may have a major impact on the ability of taxpayers to mount court challenges to regulations
 - *Loper Bright Enterprises v. Raimondo* – Holds Courts do not have to give absolute deference to agencies on interpretation of ambiguous statutes
 - *Corner Post Inc. v. Federal Reserve* – The statute of limitations for a taxpayer to challenge a regulation under the Administrative Procedures Act does not begin to run until the taxpayer is first damaged by the rule, not when the agency releases the regulation
- So have more time to file a challenge against a regulation and have an easier time challenging the regulation

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Current Federal Tax Developments

The End of Chevron Deference



Photo by [Ian Hutchinson](#) on [Unsplash](#)

- Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - Not a tax issue, but deals solely with whether a court is bound by the Supreme Court's *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837 (referred to as *Chevron* deference)
 - The Court had been chipping away at *Chevron*, creating a number of special cases that worked around *Chevron* but had not explicitly overturned the case
 - In 2010 the Supreme Court had issued the opinion in *Mayo Foundation for Medical Ed. and Research v. United States*, 562 U.S. 44 (2010) that did cite *Chevron* but also found a delegation by Congress to the IRS at IRC §7805(a) (Justice Roberts wrote both opinions)

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Current Federal Tax Developments

The End of Chevron Deference



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- Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - What was *Chevron* deference? Applied a two-pronged test for a court to determine a tax regulation's validity
 - First, did the IRC itself unambiguously address and provide an unambiguous answer on the matter is question – if so that is the answer & a contrary regulation is invalid
 - If there is ambiguity, is Treasury's regulation a reasonable interpretation of the law? If so, the regulation is valid even if the Court believes there exists a better reasonable interpretation using standard statutory interpretative techniques

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Current Federal Tax Developments

The End of Chevron Deference



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- Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - Case involved cases on fishing rules where the court had decided the case based solely on reliance on *Chevron* deference
 - Found the statute was ambiguous on the issue in question (charges to certain boats to pay for observers)
 - However, courts concluded applying such charges to the boat owners was a reasonable interpretation of the statute (thus valid under *Chevron*)
 - Did not consider if that was the “best” interpretation of the law

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Current Federal Tax Developments

The End of Chevron Deference



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- Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - Majority opinion found that the *Chevron* was in violation of the Administrative Procedures Act
 - Courts are in charge of the proper interpretation of legal issues
 - Agency's position is deserving of respect assuming there is a reasonable amount of evidence behind it
 - However, the Court is not *required* to accept that position, even if it is a reasonable interpretation of the law
 - Rather Court applies standard methods of statutory interpretation

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The End of Chevron Deference



Photo by [Ian Hutchinson](#) on [Unsplash](#)

- *Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - That respect can extend to legal issues that are impacted by the agency's special expertise, but not all legal issues benefit from the agency's subject matter expertise
 - Agencies will receive more respect for their position on factual issues related to their expertise
 - Argued that Chevron did not provide uniformity or predictability for application of the law, one of the key arguments of the government and the dissent

The End of Chevron Deference



Photo by [Ian Hutchinson](#) on [Unsplash](#)

- *Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - *Stare decisis* is not adequate to save *Chevron* in the majority's view, as it was poorly decided and not useful
 - However, the mere fact a precedential case issued before this opinion was decided based on *Chevron* deference does not mean it is automatically invalid


Current Federal Tax Developments

The End of Chevron Deference



Photo by [Ian Hutchinson](#) on [Unsplash](#)

- Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - Tax impacts – while it will be easier to challenge an IRS regulation in court, that only helps if you truly can afford to take the IRS to court
 - Don't expect IRS agents to accept such a challenge absent existing clear controlling precedent (you need someone else to get it to trial)
 - However, if a client has the resources and it would make economic sense to take the matter to trial, you may find the IRS decides to settle before the matter could get to court if Counsel believes your case may have merit (want to avoid a problematic decision) - *Jarrett et al v. United States* where the IRS avoided trial on staking

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The End of Chevron Deference



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- Loper Bright Enterprises v. Raimondo*, USSC Case Nos. 22-451 and 22-1219, June 27, 2024
 - As *Chevron* only affects regulations, may see the IRS lean harder on unofficial guidance (website, announcements, etc.)
 - Since the “correct” answer seems unclear to judges at times (see the 6-2 decision in this case), expect to see more Circuit splits (where a taxpayer lives may have an impact on the law unless the taxpayer can litigate at Court of Claims or get SCOTUS to hear the case)
 - Will also need to see how much difference the “respect” test makes vs. *Chevron* deference

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Challenges to Regulations Under APA Statute Begins When Plaintiff First Suffered Injury



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- *Corner Post Inc. v. Federal Reserve*, USSC Case No. 22-1008, July 1, 2024
 - Under the APA a challenge can be brought up to 6 years after “the right of action first accrues”
 - Six Circuits have held that a facial challenge to a regulation, a right of action accrues, and the limitation period begins, upon publication of the regulation
 - However, the Sixth Circuit held that the limitation period begins only when the party is injured by the final action
 - Supreme Court notes that under the law, the party could not have sued over this issue until they had incurred an injury

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Challenges to Regulations Under APA Statute Begins When Plaintiff First Suffered Injury



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- *Corner Post Inc. v. Federal Reserve*, USSC Case No. 22-1008, July 1, 2024
 - Government argued that a claim “accrues” when the final regulation is published, so six years from that date the APA claim would be outside of statute for everyone
 - Supreme Court finds a right of action accrues when the plaintiff has a complete and present cause of action – that is, the right to bring suit

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Challenges to Regulations Under APA Statute Begins When Plaintiff First Suffered Injury



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- *Corner Post Inc. v. Federal Reserve*, USSC Case No. 22-1008, July 1, 2024
 - That only occurs under the Act when the party suffers an actual injury, not when the causes that may lead to the injury took place
 - The injury test for a cause of action is the standard rule and there's no indication Congress intended a different interpretation – and Congress has written such earlier start dates into other laws but not this one

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Challenges to Regulations Under APA Statute Begins When Plaintiff First Suffered Injury



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- *Corner Post Inc. v. Federal Reserve*, USSC Case No. 22-1008, July 1, 2024
 - As well, it doesn't matter that some other person had the right to sue on the date the final rule was published (in this particular case existing businesses were being charged interchange fees for accepting debit cards at the time the rule was finalized)
 - The majority opinion also rejected claims that the statute should start when the rule is finalized to give certainty and not disadvantage those who have relied upon the regulation for years – it finds that “administrative convenience” does not override the clear wording of the statute and there are other means by which a long-standing regulation can be challenged.

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K Current Federal Tax Developments

Challenges to Regulations Under APA Statute Begins When Plaintiff First Suffered Injury



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- *Corner Post Inc. v. Federal Reserve*, USSC Case No. 22-1008, July 1, 2024
 - Impact on tax
 - Allows impacted taxpayers to challenge the regulation via failure to properly follow the APA along with other existing options
 - Arguably will make it easier to bring challenges to those regulations
 - Could be useful combined with the repeal of the Chevron rule to bring certain regulations back before the courts

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Regulatory Challenges Following Cases



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- Likely won't know the impact until we see how courts react to these Supreme Court cases
 - Immediate impact is likely limited until/unless your client is willing to litigate (and IRS believes they aren't bluffing)
 - Key questions will be how much difference the lower courts see between respect and deference for agency positions
 - With increased activity by the courts in using APA issues to invalidate guidance, the Corner Post case may be the more substantial one

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Taxpayer Can Rely on Erroneous Date Shown on Original Notice of Deficiency



Photo by [Brett Jordan](#) on [Unsplash](#)

- *Dodson v. Commissioner*, 162 TC No. 1, January 3, 2024
 - Taxpayer received Notice of Deficiency mailed on October 7, 2021 that showed December 5, **2022** as the last date to file a Tax Court petition
 - The next day the IRS sent a corrected version of the Notice of Deficiency showing January 6, 2022 as the last day to file a petition with the Tax Court
 - Taxpayers, claiming never having received the second notice, filed their petition in March of 2022

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Taxpayer Can Rely on Erroneous Date Shown on Original Notice of Deficiency



Photo by [Brett Jordan](#) on [Unsplash](#)

- *Dodson v. Commissioner*, 162 TC No. 1, January 3, 2024
 - IRS argued the petition was filed too late, thus the case had to be dismissed
 - The Tax Court disagreed, beginning with pointing out the last sentence of IRC §6213(a) which allows taxpayers to rely on the date shown on the Notice of Deficiency
 - As well, IRC §6212(d) only allows for issuance of a revised Notice of Deficiency if the taxpayer agrees to the withdrawal of the first notice

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Taxpayer Can Rely on Erroneous Date Shown on Original Notice of Deficiency



Photo by [Brett Jordan](#) on [Unsplash](#)

- *Dodson v. Commissioner*, 162 TC No. 1, January 3, 2024
 - Court found the law controlled, dismissing the IRS argument that this was a clear error and the taxpayer and their counsel should have realized the error. That is, even if that was the case (the taxpayer and their counsel knew this was an error) it wasn't relevant.

Use of Wrong FedEx Service Meant Tax Court Petition Was Filed Late



Photo by [Obi - @pixel8propix](#) on [Unsplash](#)

- *Nguyen v. Commissioner*, TC Memo 2023-151, December 20, 2023
 - IRC §7502(f) timely filing rules allows IRS to establish *specific services* (not companies) that qualify for treatment like certified/registered mail
 - Notice 2016-30 contains the current list with specific services from DHL Express, FedEx and UPS
 - Specifically, FedEx does not include the FedEx Ground service

Use of Wrong FedEx Service Meant Tax Court Petition Was Filed Late



Photo by [Obi - @pixel8propix](#) on [Unsplash](#)

- *Nguyen v. Commissioner*, TC Memo 2023-151, December 20, 2023
 - Taxpayer's petition delivered to the Tax Court by FedEx Ground one day after the last date for filing the petition
 - Obviously, the taxpayer had given the petition to FedEx prior to the filing deadline
 - While agreeing that FedEx Ground wasn't listed, he argued that it was "substantially identical" to FedEx 2-Day (wouldn't doubt he was told that by someone at the FedEx location)

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Use of Wrong FedEx Service Meant Tax Court Petition Was Filed Late



Photo by [Obi - @pixel8propix](#) on [Unsplash](#)

- *Nguyen v. Commissioner*, TC Memo 2023-151, December 20, 2023
 - Taxpayer argued he, therefore, should be able to make use of the "timely mailing" provision of IRC §7502
 - Tax Court disagrees as even if FedEx Ground is substantially identical to FedEx 2-Day only the latter is on the list
 - Congress limited treatment as the same as certified/registered to those services that the IRS identified

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Current Federal Tax Developments

Use of Wrong FedEx Service Meant Tax Court Petition Was Filed Late



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- *Nguyen v. Commissioner*, TC Memo 2023-151, December 20, 2023
 - Note that this case would be appealed to the Tenth Circuit Court of Appeals
 - In *Culp v. Commissioner*, 75 F.4th 196, 205 (3d Cir. 2023) the Third Circuit found the Tax Court could grant equitable relief
 - However, the Tax Court does not apply that ruling outside of the Third Circuit as it disagrees with the holding

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Current Federal Tax Developments

Refund Claim Received After Statute Closed Not Treated as Revision to Timely Informal But Flawed Claim



Photo by [Behnam Norouzi](#) on [Unsplash](#)

- *American Guardian Holdings, Inc. v. United States*, USDC ND Ill., Case No. 1:23-cv-01482, February 7, 2024
 - In 2019 taxpayer's accountant discovered an error in 2015 return, believing the tax had been overpaid by \$1,179,563
 - Prepared an amended return, but it appears the return as never actually sent to the IRS
 - Hired a new accountant in the fall of 2019
 - Prepared a new amended return that now showed no tax at all was due for 2015
 - Attached first amended return to the second

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Current Federal Tax Developments

Refund Claim Received After Statute Closed Not Treated as Revision to Timely Informal But Flawed Claim



- American Guardian Holdings, Inc. v. United States*, USDC ND Ill., Case No. 1:23-cv-01482, February 7, 2024
 - The second amended return's originally reported column came from the first (never filed) amended return, not the original tax return
 - IRS returned the amended return as not processible since the originally reported column did not agree with the original return (the only one filed with the IRS) and asks to correct the numbers (but did not provide a deadline for responding)

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Current Federal Tax Developments

Refund Claim Received After Statute Closed Not Treated as Revision to Timely Informal But Flawed Claim



- American Guardian Holdings, Inc. v. United States*, USDC ND Ill., Case No. 1:23-cv-01482, February 7, 2024
 - Accountant prepared and submitted another amended return in February 2020 in response
 - This time also stated this return was meant to intend to allow the taxpayer to file a Form 1120-PC (property & casualty insurance company) instead of a Form 1120
 - Now, for the first time, the return showed a large negative income number of more than \$127,000,000

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Refund Claim Received After Statute Closed Not Treated as Revision to Timely Informal But Flawed Claim



Photo by [Behnam Norouzi](#) on [Unsplash](#)

- *American Guardian Holdings, Inc. v. United States*, USDC ND Ill., Case No. 1:23-cv-01482, February 7, 2024
 - IRS argued that this claim was too late - one position they took was that even if the first two claims were an informal claim for refund, this last one wasn't a simple update to that claim but rather a totally different one
 - The Court agreed with the IRS that this was a completely new claim - and, as such, was filed late
 - Had an entirely different basis for the refund
 - Informal claim must appraise the IRS of the basis of the claim

Passthrough Updates

Self-employment taxes and limited partners takes center stage following the Tax Court's ruling in *Soroban Capital Partners, L.P.*


Current Federal Tax Developments

State Law Limited Partner Still Subject to Functional Test for Self-Employment Income Purposes



Photo by [Brett Jordan](#) on [Unsplash](#)

- Soroban Capital Partners LP et al. v. Commissioner*, 161 TC No. 12, November 28, 2023
 - First case to see if someone who is a state law limited partner automatically is treated as a "limited partner, as such" for IRC §1402(a)(13)
 - Renkemeyer* and later decisions imposed a functional test on LLC, LLP, etc. members - but those aren't state law limited partners
 - In this case partnership was formed as a limited partnership

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Current Federal Tax Developments

State Law Limited Partner Still Subject to Functional Test for Self-Employment Income Purposes



Photo by [Brett Jordan](#) on [Unsplash](#)

- Soroban Capital Partners LP et al. v. Commissioner*, 161 TC No. 12, November 28, 2023
 - Limited partners were each paid a guaranteed payment (which was shown as self-employment income) and an allocation of remaining income (not shown as subject to self-employment tax)
 - The Tax Court focuses on why the term "as such" was included by Congress in IRC §1402(a)(13), rather than merely referring to a "limited partner"

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State Law Limited Partner Still Subject to Functional Test for Self-Employment Income Purposes



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- *Soroban Capital Partners LP et al. v. Commissioner*, 161 TC No. 12, November 28, 2023
 - The court concludes that “as such” means that such a partner cannot merely be a limited partner in name, but that a functional test as imposed on the LLP members in *Renkemeyer* and *Castigliola* must be applied
 - As this was a decision on a motion for summary judgement, the Court did not address whether, in fact, the limited partners here passed or failed the functional test

Business Updates

Cannabis businesses may face a sea change in their taxation following the proposed rescheduling of marijuana - what would the impact be and could it be retroactive?


Current Federal Tax Developments

DOJ Submits Formal Proposed Rule to Reschedule Marijuana to Schedule III, Would Impact IRC §280E



- Proposed Rule, Docket No. DEA-1362; A.G. Order No. 5931-2024, "Schedules of Controlled Substances: Rescheduling of Marijuana," May 16, 2024
 - DOJ has now formally announced the proposed rule to move marijuana to schedule III that was reported to be coming a couple of weeks earlier
 - Once published in the Federal Register there will be 60 days for comments to be received and 30 days for parties to file a request for a public hearing
 - The key income tax impact revolves around IRC §280E

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Current Federal Tax Developments

DOJ Submits Formal Proposed Rule to Reschedule Marijuana to Schedule III, Would Impact IRC §280E

IRC §280E

No deduction or credit shall be allowed for any amount paid or incurred during the taxable year in carrying on any trade or business if such trade or business (or the activities which comprise such trade or business) consists of trafficking in controlled substances **(within the meaning of schedule I and II of the Controlled Substances Act)** which is prohibited by Federal law or the law of any State in which such trade or business is conducted.

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DOJ Submits Formal Proposed Rule to Reschedule Marijuana to Schedule III, Would Impact IRC §280E



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- Proposed Rule, Docket No. DEA-1362; A.G. Order No. 5931-2024, "Schedules of Controlled Substances: Rescheduling of Marijuana," May 16, 2024
 - Does not make marijuana fully legal under federal law, but does remove the bar on deductions
 - Key impacts are on state legal cannabis businesses
 - Very big impact on dispensaries, as they have only limited costs in costs of sale
 - Lesser (but still significant) impact on producers
 - In neither case does §280A UNICAP apply (though will if this is adopted)

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DOJ Submits Formal Proposed Rule to Reschedule Marijuana to Schedule III, Would Impact IRC §280E



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- Proposed Rule, Docket No. DEA-1362; A.G. Order No. 5931-2024, "Schedules of Controlled Substances: Rescheduling of Marijuana," May 16, 2024
 - In a May 8 story, *Tax Notes Today* reported that IRS Commissioner Daniel Werfel, testifying at a hearing of the House Appropriations Financial Services and General Government subcommittee, reported that the agency will be looking to work with the cannabis community on the impact

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IRS News Release Warns About Premature Refund Claims Related to DOJ Proposed Rule

- IRS News Release IR-2024-177, June 28, 2024
 - IRS had begun to receive claims for refund from cannabis businesses based on the proposed rule issued in May to reschedule marijuana from Schedule I to Schedule III
 - The claims are asking for a refund of taxes based on deducting expenses previously omitted from the tax return under IRC §280E
 - No refund will be allowed at this time as none is due
 - Currently marijuana remains a Schedule I substance to which §280E applies



IRS News Release Warns About Premature Refund Claims Related to DOJ Proposed Rule

- IRS News Release IR-2024-177, June 28, 2024
 - Regardless of whether or not the rule becomes final, there appears to be no authority to justify filing a claim for refunds based on deducting expenses paid or incurred before the date the rescheduling takes place
 - Rather the deductions should be allowed beginning on the day the rescheduling takes place
 - Presumably guidance on this issue will be part of the guidance the IRS told Congress they plan to work on with the industry



Current Federal Tax Developments

DOJ Schedules Hearing on Marijuana Rescheduling for December 2



Photo by [Matthew Brodeur](#) on [Unsplash](#)

- RIN 1117-AB77, Schedules of Controlled Substances: Rescheduling of Marijuana, Notice of Public Hearing, August 29, 2024
 - DOJ has announced a scheduled hearing on the proposal to reschedule marijuana on December 2, 2024
 - Proposal would have a major impact on cannabis businesses by eliminating the business deduction ban found at IRC §280E
 - IRS has also warned those filing refund claims for prior years not to do so—but some attorneys are recommending protective refund claims.

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Current Federal Tax Developments

DOJ Schedules Hearing on Marijuana Rescheduling for December 2



Photo by [Matthew Brodeur](#) on [Unsplash](#)

- RIN 1117-AB77, Schedules of Controlled Substances: Rescheduling of Marijuana, Notice of Public Hearing, August 29, 2024
 - Some had been hoping that the rule would be formalized before the election - but with this hearing date it's unlikely
 - Most likely the rule won't be finalized (or not) after the end of the year

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The logo for Kaplan, featuring the word "KAPLAN" in a bold, white, sans-serif font. A white curved line, resembling a stylized "U" or a swoosh, is positioned below the text, starting under the "K" and ending under the "N".

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