Monthly Tax Update

Prof. John J. Connors, J.D., C.P.A., LL.M.
12403 North Hawks Glen Court
Mequon, WI 53097-2140
TaxesProf@msn.com

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INDIVIDUAL TAXATION:

Service Creates Handy "To-do List" for Individual Filers

As the IRS recently stated, with the nation's tax season rapidly approaching, it is reminding taxpayers that there are important steps they can take now to help "get ready" to file their 2023 federal tax return. **(Misc.; 2023 Tax Returns)**

> **Comment:** Take a look at this "**reminder page**" on the IRS website and perhaps it might be handy to pass it along to clients, or incorporate it into a firm newsletter.

☞IRS to Initiate New Security Self-mailer to Deliver IP PINs

Taxpayers who typically receive a **CP01A**, **We Assigned You an Identity Protection Personal Identification Number (IP PIN)**, may notice a change in the look of their mailed IP PINs in 2024. In addition to the traditional delivery of IP PINs in an envelope, the IRS is piloting the use of a "security self-mailer" for delivery of the IP PINs. Security self-mailers have perforated borders that recipients remove to open the correspondence.

Approximately 70% of taxpayers who receive the IP PIN will receive them in the *new* format. With identify theft on the rise, the IRS "is working to make correspondence safer and more secure, ensuring the protection of taxpayer data remains a top priority." As a result, some of these notices will also include a survey "to help determine the effectiveness of the pilot." If pilot feedback is positive, future use will expand to all **CP01As**. However, the way taxpayers use the IP PIN to file their taxes will *not* change. **(Misc.; IP PINs)**

☞ITIN Holders Can Registered for Online Access

The Service is reminding those taxpayers with an ITIN that they can access their IRS **online account**, which provides balance due, payment history, payment plans, tax records, and more.

ITIN holders, however, will first have to verify their identity through a "one-time video chat process." During this verification, they will provide documentation proving their identity, address, and ITIN. But once verified, taxpayers can access many IRS services including **Online Account**, **Get Transcript Online**, **Online Payment Agreement**, **Get an Identity Protection PIN (IP PIN)** and other available applications.

☞Propose Regs Deny Deductions for Certain Conservation Easement Contributions (REG-112916-23)

Treasury and the IRS have issued proposed regulations that provide guidance under a new subsection of **Code §170**

that disallows deductions for certain charitable conservation contributions by partnerships and other pass-through entities.

> **Comment:** Syndicated conservation easements have been included in the IRS' annual list of **Dirty Dozen** tax schemes for many years. And the **SECURE 2.0 Act of 2022** included a new "statutory disallowance rule" for qualified conservation easements. These proposed regulations are intended to serve as interim guidance. However, in addition to covering the disallowance rule, these proposed regulations provide "additional reporting requirements" for partners and S corporation shareholders that share in any *noncash* contributions (i.e., as shown on **Form 8283**) made by a partnership or S corporation as well.

The rules provide guidance on the "statutory disallowance rule" enacted by the **SECURE 2.0 Act**, pursuant to which "qualified conservation contributions" *after* Dec. 29, 2022, would be automatically disallowed if they *exceed 2.5 times* the sum of each partner's or S corporation shareholder's relevant basis. The proposed regulations also include definitions, appropriate methods to calculate the relevant basis of a partner or an S corporation shareholder, three statutory exceptions to the statutory disallowance rule, and related reporting requirements.

> **Comment:** There are some important exceptions to this general "2.5 times basis" rule. For example, the law does *not* apply to donations of easements on property held by an entity for *three or more years*, or if *substantially all* of the passthrough entity is owned by family members. A special set of rules also applies if the easement donation is made to a charity for preservation of a building that is a certified historic structure.

> **Comment:** Note that to even fall under this proposed "2.5 times basis" limitation, you must be first dealing with a "qualified conservation easement contribution" which entails that a number of prerequisites be met including the filing of **Form 8283**, inclusion of a qualified appraisal, etc. **(Code §170; Conservation Easements)**

RETIREMENT PLANS & FRINGE BENEFITS:

☞2024 FSA Contribution Limit Increases by $150 (IR-2023-234)

During open enrollment season for Flexible Spending Arrangements (FSAs), the IRS is reminding taxpayers that they may be eligible to use tax-free dollars to pay medical expenses *not* covered by other health plans through their FSA.

Increased FSA Contribution Limit for 2024: For 2024, there will also be a $150 increase to the contribution limit for these accounts. An employee who chooses to participate in an FSA can now contribute up to $3,200 through payroll deductions during the 2024 plan year. Amounts contributed are *not* subject to federal income tax, Social Security tax or Medicare tax. And, if the plan allows, the employer may also contribute to an employee's FSA. If the employee's spouse has a plan through their employer, the spouse can also contribute up to $3,200 to that plan. As a result, the couple could jointly contribute up to $6,400 for their household.

> **Comment:** Once the employee elects, for example, to set aside the full $3,200 FSA amount for 2024, that amount is available immediately at the beginning of the tax year. In other words, even though it would take setting aside about $267/month from their paycheck, that employee can utilize the entire $3,200 amount for qualified medical expenses immediately. And, should they happen to leave employment mid-year (i.e., meaning that they will no longer receive any paychecks from this former employer, they do *not* have to repay any monies used in excess of what they have actually contributed to their FSA as of that exit date).

For FSAs that permit the carryover of *unused* amounts, the maximum 2024 carryover amount to 2025 is $640. By comparison, for unused amounts in 2023, the maximum amount that can be carried over to 2024 is $610. But note that it is strictly up to the employer to have a provision in the FSA document that even permits "carryovers."

> **Comment:** Obviously, it is important for taxpayers to annually review their health care selections during health care open enrollment season and set aside an appropriate amount in anticipation of what they will need for possible medical expenses for the upcoming tax year.

Eligible employees of companies that offer a health flexible spending arrangement (FSA) need to act before their medical plan year begins to take advantage of an FSA during 2024. On the other hand, self-employed individuals are *not* eligible at all for such accounts (though, they are free to set up a health savings account given that they have a HDHP).

Eligible FSA Expenses: Throughout the year, taxpayers can use FSA funds for "qualified medical expenses" (i.e., as defined in **Code §213**) *not* covered by their health plan. These can include co-pays, deductibles and a variety of medical products. Also covered are services ranging from dental and vision care to eyeglasses and hearing aids. Interested employees should check with their employer for details on eligible expenses and claim procedures.

Before enrollment (i.e., given that an employer offers an FSA), review any expected health care expenses projected for the year. Participating employees should plan for healthcare activities when they calculate their contribution amounts. Among possible expenses would be:

- Updating medicine cabinet with necessary supplies
- Big ticket expenses
- Seasonal needs such as allergy products, sunscreen or warm steam vaporizers
- Routine checkups or visits with specialists that regular insurance plans do not cover.
- Many over-the-counter items that are FSA eligible
- Out-of-pocket costs eye exams or dental visits

> **Comment:** Once again, employers are *not* required to offer FSAs. Interested taxpayers should check with their employer to see if they offer an FSA. More information about FSAs can be found in **IRS Pub. 969, Health Savings Accounts and Other Tax-Favored Health Plans**. **(Code §125; FSAs)**

☞**Proposed Retirement Plan Regs for "Long-Term Part-Time Employees" (REG-104194-23)**

The IRS has issued proposed regulations that would amend the rules applicable to 401(k) plans to provide guidance in regard to participation requirements for "long-term, part-time employees" in a cash or deferred arrangement (CODA). The proposed regulations reflect statutory changes made by the **SECURE 1.0 Act** and the **SECURE 2.0 Act**. One of the changes made by the **SECURE Act** amended **Code §401(k)(2)(D)** to provide that a qualified CODA must permit certain employees to participate in the CODA even if they do *not* have at least 1,000 hours of service in a 12-month period. The changes will apply to plan years that begin *on or after* 1/1/24, but until final regulations are issued, taxpayers may rely on the proposed regulations. **(Code §401; Part-time Employees)**

> **Comment:** For 2024, 401(k) plans that now exclude part-timers or let them participate after working 1,000 hours must remove that language or change it, so that employees logging at least 500 hours yearly for three consecutive years can participate. In 2025, two more changes kick in. First, long-term part-timers who work at least 500 hours over two consecutive years are eligible. Second, the rules will also apply to 403(b) plans.

EMPLOYMENT TAXES:

IRS Issues Final Version of 2023 Form 943 and Instructions

The IRS has issued the *final* version of **Form 943 (Employer's Annual Federal Tax Return for Agricultural Employees)** and its instructions for 2023. For the 2023 tax year, **Form 943** is due by 1/31/24. However, the return may be filed by 2/12/24 if the employer made *all* tax deposits on time and in full. Returns received *after* the due date will be treated as filed on time if the envelope containing the form is properly addressed, contains sufficient postage, and is postmarked or sent by an IRS-designated private delivery service (PDS) *on or before* the due date. The instructions explain that **IRS Pub. 51 (Agricultural Employer's Tax Guide)** will be *discontinued* after 2023, and information specific to agricultural employers will be included in **IRS Pub. 15 (Employer's Tax Guide)** beginning in 2024. **(Code §3401; Form 943)**

☞**Service Denies 20,000 "Aggressive ERCs"Claims (IR-2023-230)**

As part of the "continuing efforts to combat dubious" Employee Retention Credit claims, the IRS is sending an initial round of more than 20,000 letters to taxpayers notifying them of disallowed ERC claims. Specifically, it is disallowing claims to entities that did *not* exist or did *not* have paid employees (i.e., so obviously, they would *not* have any "qualified wages") during the period of eligibility to prevent improper ERC payments from being made to ineligible entities.

The letters are being sent as the IRS "continues increased scrutiny of ERC claims in response to misleading marketing campaigns" that have targeted small businesses and other organizations. The IRS mailing is the latest in an expanded compliance effort that includes a "special withdrawal program" for those with pending claims who realize they may have filed an inaccurate tax return. Later this month, a "separate voluntary disclosure program" will be unveiled allowing those who have already received "questionable payments" to come in and avoid future IRS action.

After an initial review this fall, the IRS determined that "a large block of taxpayers did *not* meet basic criteria for the credit." As of the beginning of December, taxpayers who are ineligible for the credit began receiving copies of **Letter 105 C, Claim Disallowed**. Once again, this group of letters covers those aforementioned taxpayers ineligible for the ERC either because their entity did *not* exist or did *not* have employees for the time period when the credit was claimed.

"With the aggressive marketing we saw with this credit, it's not surprising that we're seeing claims that clearly fall outside of the legal requirements," said IRS Commissioner Danny Werfel. "The action we are taking today is part of an initial set of steps in our compliance work in this area, and more letters will be going out in the near future, including both disallowance letters as well as letters seeking the return of funds erroneously claimed and received."

"As we continue our audit and criminal investigation work

involving the Employee Retention Credits, we continue to urge people who submitted a claim to review the rules with a trusted tax professional. If they filed an inaccurate claim, we urge them to consider withdrawing their pending claim or use the upcoming disclosure program to repay improper refunds to avoid future action."

Following concerns about aggressive ERC marketing from tax professionals and others, the IRS announced Sept. 14 "a moratorium on processing new ERC claims through at least the end of 2023." The IRS noted that enhanced compliance reviews of existing claims submitted before the moratorium is critical to protect against fraud and also to protect businesses and organizations from facing penalties or interest payments stemming from bad claims pushed by promoters.

When properly claimed, the ERC is a refundable tax credit designed for businesses "that continued paying employees" during the COVID-19 pandemic while their business operations were either fully or partially suspended due to a government order or had a significant decline in gross receipts (i.e., 20% or more) during the eligibility periods.

> **Comment:** This again is a point to be argued where Congress never specifically addressed owner/employees (e.g., S corporations) as *not* being eligible to qualify a portion of their wages for the ERC. In fact, the initial FAQs indicated that their wages would qualify. It was not until Aug. 4th when the IRS issued a "Notice" (Note: This was *not* in the form of regulations, a revenue ruling, or some higher level of guidance) outlining a "double attribution" rule that would exclude owner/employees if, let alone paying their rank-and-file employees during a downturn in their businesses, they managed to continue paying some level of wages to themselves as they struggled to keep their companies open.
>
> **Comment:** This "double attribution" rule essentially meant that the owner/employee seeking to qualify their wages for a potential ERC claim had to be an "orphan." Namely, they could not have any lineal ascendants or descendants, nor any siblings. Where did Congress indicate this "legislative intent" when this special provisions of the CARES Act was enacted into law?

IRS Letter 105C, Claim Disallowed: These 20,000 letters focus on two ERC problem areas, according to the IRS and ""reflects just part of the ongoing IRS review of these claims." In this group, two categories of claims have been identified and are being disallowed:

- Entity *not* in existence during period of eligibility: The ERC applies to qualified wages for periods between March 13, 2020, and Dec. 31, 2021. Entities established after Dec. 31, 2021, are *not* entitled to the ERC under the law passed by Congress.

> **Comment:** It is hard to believe that if the company seeking to take the ERC asked almost any tax professional whether wages paid *after* 2021 would qualify, they would have gotten a definitive "no" response. Even those wages paid after 9/30/2021 (i.e., during the 4th quarter of 2021), would only count for "specified start-up businesses."

- There are no paid employees during the period of eligibility: The ERC is intended as a credit against qualified wages paid. Entities that did *not* pay any wages are *not* eligible for the ERC.

> **Comment:** This guidance, however, does *not* specifically address those wages paid to owner/employees.

The IRS plans additional letters beyond these initial disallowance letters. Plans are also being finalized for a "special voluntary disclosure program" involving ERC claims that will be announced later this month. The IRS is also continuing to review ERC claims and may request more information from taxpayers to support their ERC claim.

> **Comment:** The IRS is also continuing to accept and process requests to withdraw a taxpayer's full ERC claim under the special withdrawal process. Taxpayers have until at least the end of 2023 to request a withdrawal.
>
> **Comment:** For more information on ERC eligibility, see the ERC frequently asked questions and the **ERC Eligibility Checklist**, which is available as an **interactive tool** or as a **printable guide** (Note: Neither of these items mentions "owner" or "owner/employee.") **(Code §3401; ERC)**

☞**Tax Court Rules on Self-Employment Tax Exemption for Limited Partners (*Soroban Capital Partners LP*, 161 TC No. 12 (11/28/2023))**

In a case of first impression, the Tax Court ruled that a limited partner in a state law limited partnership must satisfy a "functional analysis test" to qualify for the "limited partner exemption" from self-employment tax. Here, the partnership made guaranteed payments to its limited partners which were included in the limited partners' S/E income (i.e., listed as GPs in **Box 4** as well as S/E income in **Box 14**), but *not* their shares of partnership ordinary income (i.e., in **Box 1** of their K-1s). The IRS, however, determined that the limited partners' S/E income should also include their shares of partnership ordinary income, saying that the "limited partner exemption" from S/E tax did *not* apply to them simply because they were limited partners in name only (i.e., they

were providing services well beyond that typical limited investor which justified the guaranteed payments). The Court agreed and found that it was necessary to examine the limited partners' "functions and roles" to determine whether they qualify for the limited partner exemption from S/E tax. **(Code §1402; S/E Tax)**

ADMINISTRATIVE & PROCEDURAL MATTERS:

☞Additional IRS Comments on Form 1099-K

On a recent call with reporters, the IRS clarified which types of transactions are applicable to **Form 1099-K**. Examples of where "reportable transactions" occur include online and social media marketplaces, craft or maker marketplaces, auction sites, resale sites, crowdfunding platforms and freelance marketplace. However, the IRS is *not* interested in what they call "friends and family transactions" such as birthday gifts, ride-share cost splitting, or dinner reimbursement. These transactions are *not* taxable events, the IRS explained, as opposed to sales where a gain or loss is realized and recognized for tax purposes which is "the focus of its information reporting regimes."

With regard to realized losses, **FS 2023-27** states that "If taxpayers sold at a loss, which means they paid more for the items than they sold them for, they'll be able to zero out the payment on their tax return by reporting both the payment and an offsetting adjustment on a **Form 1040, Schedule 1**." This IRS Fact Sheet goes on to comment that "This will ensure people who unnecessarily get these forms don't have to pay taxes they don't owe. If they were sold at a gain, which means they paid less than they sold it for, they will have to report that gain as income, and it's taxable. If you receive a **Form 1099-K** for a personal item sold at a gain, report it on both." **(Misc.; Form 1099-K)**

> **Comment:** Note that with regard to realized losses on sales of personal items, you can only offset any basis in the item being sold to the extent of proceeds (i.e., consideration) received. In other words, "personal losses" are still *not* allowed to be recognized for tax purposes (even though any gain from the holding of personal assets is fully taxable). Furthermore, if a capital loss is involved, there is still an annual cap of $3,000 of capital losses over capital gain. Note too, that this capital loss limitation was "doubled" from $1,500 to the current $3,000 limit in the late '70s but has never been adjusted for inflation since then.

☞FinCEN Issues Updated FAQs on BOI Reporting

The Financial Crimes Enforcement Network (FinCEN) has updated its **Frequently Asked Questions** on the Beneficial Ownership Information (BOI) reporting requirements that will take effect on 1/1/24. Enacted as part of the **Corporate Transparency Act**, certain business entities created or registered to do business in the United States (i.e., any entity otherwise required to register with their Secretary of State where formed) will be required to report identifying information about the beneficial owners to FinCEN. The updated FAQs include new questions and clarification about reporting companies, beneficial owners, company applicants, reporting requirements, initial reports, and reporting company exemptions.

> **Comment:** "Any entity required to be registered with the Secretary of State where formed" would include **Schedule C/F** proprietorships which choose to have limited liability as a SMLLC. On the other hand, general partnerships (e.g., a professional firm made up solely of individuals) would *not* be subject to these BOI rules.

Under FinCEN's rules, a "beneficial owner" is the individual (or, individuals) "who ultimately own or control the company." The updated FAQs are quite extensive in their scope and include *new* information about the reporting process, reporting companies, reporting requirements, initial reports, updated reports, compliance/enforcement, FinCEN identifiers (i.e., a unique code that can identify a beneficial owner without having to disclose all their identifying information), and third-party service providers. **(Misc.; BOI Reporting)**

> **Comment:** As was the case with the new **Schedule K-2** and **Schedule K-3** reporting rules when they were first issued, these BOI reporting requirements also represent "overreach" in their implementation. As a result, and due to practitioner and taxpayer complaints, do not be surprised if some of these provisions are rolled back as we get into the 2024 tax year. All you have to do is to open up this FinCEN website containing these FAQs to see just how extensive they are.

> **Comment:** Already the Treasury has rolled back the 30-day requirement for new entities to meet the BOI reporting guidelines. For example, a new entity as of 1/1/2024 onward would have had only 30 days to discern the correct manner in which to comply (or, otherwise be subject to a $500/day fine and a possible felony conviction and jail time). As a result, FinCEN has *tripled* the time period to 90 days.

☞IRS Updates Information Return E-filing Waiver

For 2024, taxpayers who file 10 or more information returns of *any* type in total must do so electronically (Note: This would include all of the W-2 and Form 1099 series going out by the end of Jan. 2024). Previously, the threshold to electronically file information returns was 250 returns of a *single* type. Filers "who may suffer an undue hardship" if they were to file electronically, can request a waiver from the electronic filing requirement by filing **Form 8508 (Application for a Waiver from Electronic Filing of Information Returns)**. The IRS updated **Form 8508** to

reflect this new "reduced electronic filing threshold." The waiver must be filed *at least 45 days before* the due date of the return (i.e., 12/15/23 for those due by 1/31/24?). Some of the changes to **Form 8508** include the following: **Block 1a** requires the filer to indicate the tax year of the waiver; **Block 6** contains a check box for religious exemption from utilizing technology; and **Block 7** requires filers to indicate whether the waiver is requested for corrections only.

IRS Information Returns Intake System: According to the IRS, business taxpayers, however, can file electronically *any* **Form 1099** series information returns for *free* with the **IRS Information Returns Intake System (IRIS)**. IRIS accepts 1099 series forms for tax year 2022 and after. IRIS is available to any business of *any* size. It's secure and accurate and it requires no special software. It also reduces the need for paper forms.

With IRIS, business taxpayers are able to:

- Enter information into the portal or upload a file with a downloadable template in IRIS

- Download completed copies of Form 1099-series information returns

- Submit extensions

- Make corrections to information returns filed with IRIS

- Get alerts for input errors and missing information

- Get a confirmation in a little as 48 hours that the IRS received the return

- Reduce expenses on paper, postage, storage space and trips to the post office **(Misc.; Information Returns)**

IRS Website Outlines Details of Expanded Sec. 179D Deduction

The Service is reminding building owners who place in service "energy efficient commercial building property" (EECBP) or "energy efficient building retrofit property" (EEBRP) may be able to claim a tax deduction under **Code §179D**. To find out more on eligibility, and qualifications, the IRS has an "easy-to-understand e-poster, that you can post or distribute" on its "**Energy Efficient Commercial Buildings Deduction Page**." **(Code §179D; Sec. 179D Deduction)**

> **Comment:** Along with doing a cost seg when a client acquires a new or used building, consideration should be given to the available write-offs for enhancing its energy efficiency.

> **Comment:** The IRS has also published summary pages concerning the details for both home energy tax **credits** as well as the potential $5,000 **credit** for builders of energy-efficient homes.

IRS Independent Office of Appeals Releases Fiscal Year 2024 Priorities (IR-2023-233)

The Service's Independent Office of Appeals recently released its **Focus Guide** for fiscal year 2024. The guide highlights where Appeals "will be improving taxpayer service in its mission to resolve tax disputes in a fair and impartial manner without the need for litigation." "Appeals' participation in IRS transformation and modernization efforts is critical to effectively and efficiently serving taxpayers," said Deputy Chief of Appeals Liz Askey. "By leveraging technology, we can reduce cycle time and improve both the taxpayer and employee experience."

The Appeals' Focus Guide, which aligns with the objectives of the **IRS Strategic Operating Plan (SOP)**, outlines the "service initiatives taxpayers can expect over the coming year," including:

- Promoting digital platforms to improve how taxpayers communicate with Appeals

- Promoting paperless processes and other modernization efforts

- Helping taxpayers achieve tax certainty earlier in the dispute resolution process

- Expanding access to in-person conferences and promoting video conferences for taxpayers who do not live near an Appeals office

- Collaborating with the tax practitioner community on continuing education opportunities for the Appeals workforce

In line with the IRS' recently announced "paperless processing achievements," Appeals is "working to make it easier for taxpayers to communicate digitally." Appeals now includes information about secure messaging in letters to taxpayers and will continue efforts to ensure taxpayers can conveniently communicate about their cases.

At its **2023 Practitioner Perspective** series forum, tax practitioners shared insights with Appeals employees "through panels focused on issues of mutual interest." Recordings of the common penalties and international information reporting penalties discussions are now available online. Appeals will continue these discussions "to help ensure the best experience for taxpayers who have cases heard in Appeals."

"The IRS is focused on transforming the agency to resolve taxpayer disputes with legal certainty at the earliest possible stage," said Chief of Appeals Andy Keyso. "We're looking forward to restructuring the 'alternative dispute resolution process' this year to help achieve that objective, and we look forward to continuing to provide taxpayers an impartial

administrative forum for resolving tax disputes without litigation." **(Misc.; IRS Appeals)**

☞**2024 Standard Mileage Rate Increases to 67¢/mile (Notice 2024-08)**

This IRS Notice provides the optional 2024 standard mileage rates for taxpayers to use in computing the deductible costs of operating an automobile for business, charitable, medical, or moving expense purposes. This notice also provides the amount taxpayers must use in calculating reductions to basis for depreciation taken under the business standard mileage rate, and the maximum standard automobile cost that may be used in computing the allowance under a fixed and variable rate plan. Additionally, this notice provides the maximum fair market value of employer-provided automobiles first made available to employees for personal use in calendar year 2024 for which employers may use the fleet-average valuation rule in **Reg. §1.61-21(d)(5)(v)** or the vehicle cents-per-mile valuation rule in **Reg. §1.61-21(e)**.

Beginning on Jan. 1, 2024, the standard mileage rates for the use of a car (also vans, pickups or panel trucks) will be:

- 67 cents per mile driven for business use, up 1.5 cents from 2023

- 21 cents per mile driven for medical or moving purposes for qualified active-duty members of the Armed Forces, a decrease of 1 cent from 2023

- 14 cents per mile driven in service of charitable organizations (Note: This rate is set by statute and remains unchanged from 2023)

> **Comment:** These rates apply to electric and hybrid-electric automobiles as well as gasoline and diesel-powered vehicles.

Depreciation Recapture: If the vehicle is ever sold or exchanged in a taxable transaction, the portion of the business standard mileage rate each year that is treated as depreciation is 27 cents per mile for 2020, 26 cents per mile for 2021 and 2022, 28 cents per mile for 2023, and 30 cents per mile for 2024.

FAVR: The standard mileage rate for business use is based on an annual study of the *fixed and variable* costs of operating an automobile. The rate for medical and moving purposes is based on the *variable* costs. When computing the allowance under a Fixed and Variable Rate (FAVR) plan, the standard vehicle cost cannot exceed $62,000 for autos, trucks, or vans. The *same* value is also used for purposes of the fleet-average and vehicle cents-per-mile valuation rules.

It is important to note that under the **Tax Cuts and Jobs Act**, taxpayers cannot claim a 2% miscellaneous itemized deduction for unreimbursed employee travel expenses (i.e., previously on **Form 2106**). Taxpayers also cannot claim a deduction for moving expenses (i.e., previously on **Form 3903**), unless they are members of the Armed Forces on active duty moving under orders to a permanent change of station.

Taxpayers always have the option of calculating the *actual* costs of using their vehicle rather than using the standard mileage rates. Also, taxpayers can use the standard mileage rate but generally must opt to use it in the first year the car is available for business use. Then, in later years, they can choose *either* the standard mileage rate or actual expenses. Leased vehicles, however, must use the standard mileage rate method for the *entire* lease period (including renewals) if the standard mileage rate is initially chosen. **(Code §162; Standard Mileage Rate)**

☞**Practitioner Diligence Obligations Regarding FBAR Accounts (OPR 2023-12)**

Tax practitioners are subject to the standards of practice and disciplinary rules of **Circular 230, Regulations Governing Practice before the IRS**. This summary addresses the professional responsibility of practitioners concerning the **Report of Foreign Bank and Financial Accounts (FBAR)**.

FBAR Background: The **FBAR, FinCEN Report 114**, is an information report required by the **Bank Secrecy Act**. Although the FBAR is *not* a tax return, it is referenced in U.S. returns, such as **Form 1040 Schedule B**, which includes checkboxes to answer questions about foreign financial accounts. Similar questions and boxes are incorporated into **Forms 1041**, **Form 1065**, and **Form 1120 (Schedule N)**. Reporting of foreign bank or financial accounts is required of:

- United States persons who have a financial interest in, or signature or other authority over, a financial account in a foreign country; and

- The aggregate value of the account or accounts exceeds $10,000 at *any* time during the calendar year.

These individuals and entities must report their foreign accounts by (1) completing the applicable sections of U.S. tax or information returns (i.e., **Form 8938** for **Form 1040**, and (2) filing **FinCEN Report 114**. When a person required to file an FBAR does *not* file the report, the person is potentially subject to civil and criminal penalties for non-filing. Civil penalties apply to both willful and non-willful violations.

IRS FBAR Enforcement Efforts: On September 8, 2023, the IRS issued **IR-2023-166**, which announced a "sweeping effort to restore fairness to tax system with **Inflation Reduction Act** funding." Among the targets of the IRS's enhanced efforts are FBARs, about which **IR-2023-166** states: "High-income taxpayers from all segments continue to utilize Foreign Bank accounts to avoid

disclosure and related taxes…. IRS analysis of multi-year filing patterns has identified hundreds of possible FBAR non-filers with account balances that average over $1.4 million. The IRS plans to audit the most egregious potential non-filer FBAR cases in Fiscal Year 2024."

Tax Professionals' Role in FBAR Compliance: To fulfill their obligations to clients and to tax administration, practitioners (including tax return preparers in the **IRS's Annual Filing Season Program**) must meet certain standards prescribed in **Circular 230**.

- Diligence: Practitioners who prepare **Forms 1040, 1065**, or **1120** for clients have a duty of diligence under **Circular 230** "to inquire of their clients with sufficient detail to ascertain the information necessary to prepare correct responses to the foreign-account questions on the clients' tax returns." The level of diligence required is set out in **Sec. 10.22(a)** of **Circular 230**, which requires that a practitioner "exercise due diligence" in preparing and filing tax returns or other documents on a client's behalf with the IRS and "in ensuring that the practitioner's written or oral statements to clients and to the IRS are accurate."

- Knowledge: For purposes of due diligence, **Sec. 10.34(d)** allows a practitioner "to generally rely, in good faith and without verification, on information from a client." "Good faith reliance," however, contemplates that a practitioner "will make reasonable inquiries of a client who provides information that indicates possible overseas holdings subject to FBAR requirements." As a result, while a practitioner "may accept the client's responses at face value if it's reasonable to do so, the practitioner may *not* ignore the implications of information the practitioner knows or has received from the client." If the information from the client "appears to be incorrect, incomplete, or inconsistent with other facts the practitioner knows, then the practitioner must make further inquiry of the client for an explanation."

Additionally, if a practitioner learns that a current client did *not* comply with requirements for reporting foreign accounts for past tax years, the practitioner must, under **Sec. 10.21**, promptly inform the client of the "noncompliance, error, or omission" and any penalty or penalties that may apply.

- Standards for tax returns and other documents: When a practitioner "assists or advises a client in reporting income or other items on a tax return or as to positions taken on a return," standards in **Sec. 10.34** apply to the practitioner's activities. **Sec. 10.34(c)** requires a practitioner to advise a client of any potential penalties likely to apply to a position taken on a tax return the practitioner prepares for the client or when the practitioner has advised the client about the position taken. A practitioner must also inform the client of any opportunity to avoid any the penalties through adequate disclosure.

> **Comment:** A similar issue arose with the pressure put on clients from outside vendors insisting that the "employee retention credit" was nevertheless available despite their practitioner already doing a thorough analysis of their situation and determining that this was emphatically *not* the case.

In the FBAR context, a practitioner acting as a preparer or advisor to a client may determine that one or more foreign accounts exist that must be reported in designated places on the client's tax return. If so, the practitioner should prepare the return or advise the client accordingly. The practitioner is *not* obligated to prepare the FBAR form for the client unless the practitioner feels competent to do so and the client has agreed to this additional service. Nevertheless, the practitioner "does have an affirmative obligation to advise the client of the need to file an FBAR and the consequences of failing to file." **(Misc.; FBAR)**

> **Comment:** The Service could have added in this summary that failure of the client to follow appropriate and correct advice would likely result in the practitioner refusing to prepare and sign that return for the tax year in question. Furthermore, practitioners do need to complete **Form 8938**, if otherwise applicable, when filing the client's individual **Form 1040** return.

IRS Updates Reporting Procedure for Qualified Manufacturers of Electric Vehicles (Rev. Proc. 2023-38)

Rev. Proc. 2023-38 updates the procedures under **Code §30D(d)(3)** for "qualified manufacturers" to enter into *a written* agreement with the IRS under which these manufacturers agree to make periodic written reports to the Secretary providing vehicle identification numbers (VINs) and other information regarding vehicles eligible for a clean vehicle credit. Vehicles eligible for the clean vehicle credit under **Code §30D**, the qualified commercial clean vehicles credit under **Code §45W**, and the previously-owned clean vehicles credit under **Code §25E**, generally must be manufactured by a "qualified manufacturer" as described in **Code §30D(d)(1)(C)** and **(d)(3)**, as well as **Code §45W(c)(1)** and **Code §25E(c)(1)(D)(I)**.

This revenue procedure *consolidates* all the procedural requirements for "qualified manufacturers" in one document "for ease of reference," while also establishing the procedures for qualified manufacturers to submit information regarding vehicles for up-front review by the Department of Energy, to ensure the vehicles are actually eligible for the **Code §30D** credit for the calendar year at issue. **(Misc.; Electric Vehicles)**

> **Comment:** Keep in mind that under the "excluded entity restriction," vehicles are *not* eligible for the clean vehicle credit if the battery contains battery components manufactured or assembled or

applicable critical minerals extracted, processed or recycled by a "foreign entity of concern" (FEOC).

Comment: The bottom line is that this guidance provides procedural rules for "qualified manufacturers" of new clean energy vehicles to comply with the reporting, certification, and attestation requirements regarding the excluded entity restriction, under which the IRS, with analytical assistance from the Department of Energy, will review compliance with the "excluded entity restrictions." Nevertheless, regardless of promises made by the car salesperson at the dealer location, purchasers should go to the IRS website (which will continually be updated) to assure themselves that the acquired vehicle will indeed be eligible for the tax credit.

Comment: Code §30D provides a credit for new clean vehicles that are placed in service by the taxpayer during the taxable year, worth a maximum credit of $7,500 per vehicle, consisting of $3,750 if certain "critical minerals requirements" are met and $3,750 if certain "battery components requirements" are satisfied.

☞**Service Offers Multiple Ways for Tax Pros to Stay Up-to-date (Tax Tip 2023-124)**

The IRS is reminding tax professionals that it has newsletters "for a variety of tax topics and audiences." Anyone can sign up for the following automatic email updates to get IRS information, news and tips

- **IRS Outreach Connection:** Up-to-date materials for tax professionals and partner groups inside and outside the tax community. **Outreach Connection** has information designed for subscribers to share with their clients or members through email, social media, internal newsletters, emails or a website.

- **IRS Tax Tips:** Plain language tips that cover topics of interest to taxpayers. They include the latest on tax scams, tax reform, tax deductions, filing extensions and amending returns.

- **IRS Newswire:** Up-to-date news releases on tax administration issues such as breaking news and detailed legal guidance.

- **IRS News in Spanish:** IRS news releases, tax tips and updates in Spanish.

- **e-News for Tax Professionals:** Weekly roundup of news releases and legal guidance for tax professionals.

- **e-News for Small Businesses:** Tax information for small business owners and self-employed people.

Comment: Tax professionals can find a list of all IRS e-News subscriptions and sign up at the **e-News Subscriptions** webpage of **IRS.gov**. **(Misc.; IRS News)**

FROM CONSULTING CALLS:

☞**Roth IRA Rules Can Be Complicated**

What follows is a comprehensive review of the various tax rules which can impact both contributions as well as distributions from a Roth IRA. Last month's newsletter cover the possible funding of a health savings account (HSA) from funds which are transferred from a deductible (i.e., regular) IRA or, as an alternative, monies extracted first from the basis that a taxpayer might have in a Roth IRA. But, if the following rules are *not* carefully followed, unexpected tax results might arise when drawing these funds out of a Roth IRA.

Background: Although contributions to a Roth IRA have to be made with after-tax dollars, the earnings inside of the account accumulate tax-free so long as certain prerequisites are satisfied. Generally speaking, earnings on the investments held in a Roth IRA are *not* taxed if extracted after age 59½ **and** the account has been in existence for at least five years from the date of the initial contribution. Of course, an individual is permitted to withdraw their basis in a Roth IRA at any point in time (i.e., regardless of age or how long the account has been in existence). But distributions of the earnings portion of the Roth IRA is *not* only subject to income tax but is also exposed to a "10% early withdrawal penalty" (i.e., an additional tax pursuant to **Code §72(t)**) if either of these rules is violated.

Five-year Rule: The "five-year rule" commences the first time money is deposited into *any* Roth IRA that the taxpayer owns, through either a contribution or a conversion from a traditional IRA. But, the "clock does *not* restart" for later Roth contributions or for newly-opened Roth IRA accounts.

Example: "59½ Age Test Met; 5-Year Rule Failed"
Assume that the taxpayer is 58 years old when their first and only Roth IRA is established. Four years later (i.e., from the actual date of this first contribution; *not* in terms of tax years), they take a distribution that exceeds their current basis in the Roth IRA and is therefore deemed to also be coming out of the accumulated earnings in the account. The amount of any "basis" in the Roth IRA (i.e., the total of contributions made to-date into the account) is tax-free, but the earnings portion will be subject to income tax.

Comment: The taxpayer in the example above will *not*, however, be subject to the "10% early withdrawal penalty" since they are at least 59½ years old at the time of this distribution.

Example: "Subsequent Roth IRA Grandfathered; Distribution Not Taxed" Assume that the taxpayer opened their first and only Roth IRA six years ago. During the current tax year a second Roth IRA is established. Then, only three years later but when the taxpayer is at least 59½ years old, they extract not only their basis but also some of the tax-deferred earnings in this second Roth IRA. Because this taxpayer funded their first Roth over five years ago, they are *not* required to wait for a separate 5-year period of time with regard to this second Roth IRA to extract any earnings (i.e., given that they are at least 59½ years old at the time of this distribution).

Comment: Any time a distribution is made from a Roth IRA, it is deemed first to come from any basis (i.e., accumulated contributions or converted amounts from a regular IRA made to-date). In other words, there is no need to "pro rate" the distribution as coming partially from "basis" v. the "earnings" portion of the Roth IRA.

Separate 5-Year Rule for Roth IRA Conversions: This second five-year rule applies specifically to Roth IRA conversions and pertains to whether the **Code §72(t)** early withdrawal penalty will apply. It is important to note that this separate 5-year rule does *not* affect new contributions to Roth IRAs, but only to conversions of pre-tax income from traditional IRAs to Roth IRAs.

Comment: So, "back-door Roth IRA conversions" done with *nondeductible* regular IRA contributions (i.e., as shown on **Form 8606**) would also *not* be impacted by this special 5-year rule.

Under this rule, if the taxpayer is *not* yet age 59½ when they do a Roth conversion of *pre-tax dollars* from their regular IRA, and then later takes a distribution within five years of the conversion and when they are still *not* yet 59½ years old, then the amount of conversion principal that is withdrawn is hit with the 10% penalty. However, once the taxpayer reaches age 59½, there would *not* be any tax implications, even if they were to take a distribution *before* their conversion meets the normal five-year period. For example, there would be no 10% penalty if they were to do a conversion at age 57 and withdraw funds at age 61.

Comment: Keep in mind that the basis in one's Roth IRA of post-tax contributions can always be accessed without any tax implications. It is only when the distributions to-date exceed their basis in the account and the distribution is then deemed to be out of the Roth IRA's earnings and/or pre-tax monies previously converted over from the individual's regular IRA.

There is another special tax consideration insomuch as each conversion has its own *separate* five-year period, which differs significantly from the first five-year rule discussed above. For example, if an individual does *multiple* Roth IRA conversions of pre-tax dollars, there will be *multiple* five-year time periods (i.e., one to each conversion), even if each conversion is done into the *same* Roth IRA account that the taxpayer has owned for many years.

Example: "Roth Conversions of Pre-tax Dollars" Assume the taxpayer is 50 years old and they convert pre-tax dollars from their regular IRA over into their Roth IRA that was established many years ago. Under the normal rules, this conversion is a taxable event. Then, four later, the Roth IRA is completely liquidated with all of its funds being distributed. The result is that any post-conversion earnings will be subject to ordinary income tax rates along with the **Code §72(t)** "10% early withdrawal penalty" being imposed since the individual is *not* at least 59½ years old at the time of the distribution. In addition, the taxpayer's basis from the earlier conversion of pre-tax funds from their regular IRA into their Roth IRA will also be hit with the 10% penalty.

Yours very truly,

John J. Connors

Prof. John J. Connors,
J.D., C.P.A., LL.M.

Note: The completely revised and updated 2024 Annual Tax Guides will be available in the next few weeks. If you have received them in the past, you will be automatically notified. The four guides are as follows:

- "2024 Complete Guide to Depreciation, Amortization and Transfers of Property - Issues, Answers & Tax Strategies"

- "2024 Real Estate Taxation Guide"

- "2024 Partnership/LLC Tax Guide" (w/ Problem Set and Solutions)

- "2024 Passive Loss Guide - Cases & Rulings and Outline" (w/ PPT Slides)