



## Tax News & Views

### Health care edition

#### **IRS and Treasury publish proposed regulations regarding donor advised funds**

On November 13, 2023, the IRS and Treasury released [proposed regulations](#) for publication in the Federal Register (REG-142338-07) (herein after referred to as the “proposed regulations”) regarding excise taxes on taxable distributions made by a sponsoring organizations from a donor advised fund as well as excise taxes on certain fund managers. The Pension Protection Act (“PPA”) of 2006 enacted various amendments to the Internal Revenue Code (IRC) regarding donor advised funds (DAFs). IRC section 4966 imposes an excise tax on taxable distributions from a DAF on both a sponsoring organization and any fund managers who agreed to the making of the distribution knowing it was a taxable distribution. Further, IRC section 4966 defines a DAF as a fund or account that is:

#### **Find it Fast**

IRS and Treasury publish proposed regulations regarding donor advised funds

Employee Retention Credit – withdrawal process for claims

House bill would revoke tax-exempt status of exempt organizations that support terrorism

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1. Separately identified by reference to contributions of a donor or donors,
2. That is owned and controlled by a sponsoring organization, and
3. With respect to which a donor (or any person appointed or designated by the donor, namely, a donor advisor) has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in the fund or account by reason of the donor's status as a donor.

The PPA also added section 4967, which imposes an excise tax on a donor, donor-advisor, related person and/or fund manager regarding a distribution from a DAF that results in such person receiving, directly or indirectly, a more than incidental benefit. Since the enactment of the PPA, the Treasury and IRS have issued additional guidance with respect to DAFs (Notices 2006-109, 2007-21, and 2017-73).

The proposed regulations provide additional guidance on the definitions of many of the terms under IRC section 4966 including DAF, sponsoring organization, donor, and donor-advisor. Items of note within these definitions include:

1. DAF: the definition starts with the statutory definition above and also clarifies that:
  - a. Whether a fund is separately identified by reference to contributions of a donor or donors is generally based on whether the sponsoring organization maintains a formal record of contributions to the fund or account. If there is no formal record, then all facts and circumstances are considered.
  - b. A fund or account does not fail to be a DAF merely because the sponsoring organization commingles the assets attributed to the fund or account with its other assets.
  - c. If a fund or account has a public charity (excluding disqualified supporting organizations) and/or a government entity as its donors, it is not considered a DAF for purposes of these rules.
  - d. The presence of advisory privileges or the reasonable expectation thereof is determined based on all facts and circumstances with many clarifications, including:
    - i. Advisory privileges will include those arising from service on an advisory committee, with certain exceptions.
    - ii. Advice provided in a person's capacity as an officer, director, or employee of a sponsoring organization would not by itself give rise to advisory privileges with respect to a fund or account.
    - iii. If there are multiple donors to the fund, each donor will be treated as having advisory privileges with respect to the entire fund or account.
2. Sponsoring organization is defined as a charitable organization that described in IRC section 170 (other than governmental units), is not a private foundation, and maintains one or more donor advised funds.

3. A donor means a person, other than a governmental unit or a public charity that is not a disqualified supporting organization, that makes contributions to a fund or account to a sponsoring organization.
4. Donor-advisor means a person appointed or designated by a donor to have advisory privileges with many clarifications, including:
  - a. A donor advisor does not include a public charity (other than disqualified supporting organizations) or governmental organization.
  - b. If a donor-advisor delegates advisory privileges to another person, that person is also a donor-advisor.
  - c. A personal investment advisor is not considered a donor-advisor if the personal investment advisor is providing services to the sponsoring organization as a whole (not just a specific donor advised fund).
  - d. A person recommended by a donor or donor-advisor to serve as a member of a distribution or investment committee is considered a donor-advisor, with some exceptions.

The proposed regulations also clarify that the definition of donor advised fund does not include:

1. Funds or accounts that make distributions to a single identified organization.
  - a. A sponsoring organization may substitute another single identified organization if the substitution is as a result of loss of exemption, substantial failure or abandonment of operations, or the identified organization ceasing to exist.
2. Certain funds or accounts that grant scholarships for travel, study, or other similar purposes if the selection of the recipients is not controlled by the donor and grants are made on an objective and nondiscriminatory basis.
3. Certain disaster relief funds that serve a charitable class for the purpose of providing relief from one or more qualified disasters and selections are made by an independent selection committee.
4. A fund or account established by a broad-based membership organization described in IRC section 501(c)(4) if the fund or account's sole purpose is to make grants to individuals for scholarships subject to certain requirements.

The definitions provided in the proposed regulations are important as they assist a taxpayer in evaluating whether a DAF, sponsoring organization, donor, or donor-advisor are subject to the excise taxes provided in IRC sections 4966 and 4967. Comments on the proposed regulations are requested by January 16, 2024.

## Employee Retention Credit – withdrawal process for claims

Due to an increasing number of improper Employee Retention Credit (ERC) claims, the IRS has taken steps to increase scrutiny of ERC claims and allow taxpayers who may have been misled to withdraw their claims to avoid future problems.

### Background

The ERC was created under section 2301 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act, P.L. 116-136, and was amended and extended by sections 206 and 207 of the Taxpayer Certainty and Disaster Relief Act of 2020, enacted as Division EE of the Consolidated Appropriations Act, 2021, P.L. 116-260. Section 9651 of the American Rescue Plan Act of 2021, P.L. 117-2, enacted section 3134 of the Internal Revenue Code, which codified, modified, and extended the ERC to the end of 2021. Section 80604 of the Infrastructure Investment and Jobs Act, P.L. 117-58, retroactively terminated the ERC effective September 30, 2021 except for recovery start-up businesses.

On September 14, 2023, the IRS issued news release [IR-2023-169](#) announcing a moratorium on the processing of ERC claims through the end of 2023 in order to allow IRS resources to add more safeguards to prevent future abuse of the ERC and protect businesses from predatory tactics of aggressive marketing of the ERC.

On October 19, 2023, the IRS issued news release [IR-2023-193](#) (“News Release”) which establishes a process by which taxpayers can withdraw ERC claims and avoid future repayment, interest, and penalties. This process is intended to help small business owners and other taxpayers who were pressured or misled by ERC marketers into filing ineligible claims.

Claims that are withdrawn before a refund has been paid by the IRS will be treated as if they were never filed.

### Who can withdraw an ERC claim

Taxpayers can use the withdrawal process if they meet all of the following criteria:

1. Made the ERC claim via an adjusted employment tax return ([Forms 941-X, 943-X, 944-X, CT-1X](#));
2. Filed the adjusted return only to claim the ERC, with no other adjustments;
3. Want to withdraw the entire amount of the ERC claim; and
4. The IRS has not yet paid the claim, or if the IRS has paid, the taxpayer has not yet cashed or deposited the refund check.

### How to withdraw an ERC claim

The IRS provides instructions to take advantage of the withdrawal process at [www.irs.gov/withdrawmyERC](http://www.irs.gov/withdrawmyERC). Taxpayers who worked with a professional payroll company to file the ERC claim should consult with that company on the withdrawal process.

The withdrawal process involves submitting a copy of the original adjusted employment tax return with notation for the request to withdraw, with a signature from an officer of the company. The IRS has set up a dedicated fax line to receive these requests.

### House bill would revoke tax-exempt status of exempt organizations that support terrorism

On November 14, 2023, David Kustoff (R-Tenn) introduced a [bill](#) in the House of Representatives that would amend the Internal Revenue Code to revoke tax-exempt status of terrorist supporting organizations. The bill would require the IRS to notify potential terrorist supporting organizations of the intent to designate the organization as such. The termination of the organization's tax-exempt status would be implemented 90 days after the notification if the organization is unable to demonstrate that it does not provide material support or resources to a terrorist organization.

## Did you know?

### 2024 updates to pension plan limitations and other retirement-related items

IRS has revised [Notice 2023-75](#) to provide for cost of living adjustments applicable to employee contributions to plans under IRC sections 401(k), 403(b) and 457.

### IRS announced new initiatives using Inflation Reduction Act funding

The Internal Revenue Service (IRS) announced in [IR-2023-194](#) new initiatives using Inflation Reduction Act funding to: (1) ensure large corporations and high-income, high-wealth individual taxpayers pay taxes owed; (2) improve taxpayer service; and (3) modernize core technology infrastructure. This comes following the IRS's previous announcement in [IR-2023-166](#), a sweeping effort to restore fairness in tax compliance by shifting more attention onto high-income taxpayers, partnerships, large corporations, and promoters abusing the tax laws.

### Latest on Tax law changes

The Tax News & Views: Capitol Hills briefings provides [articles](#) and [podcasts](#) on the latest developments with tax legislation on capitol hill.

## Upcoming Conferences & D-Briefs

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### Multistate Tax

#### Pillar Two: How global tax reform affects multistate tax

*Dec 6 | 1 p.m. ET | 17 GMT*

Pillar Two is reshaping the perspective on how companies view their domestic tax profile including the impact state and local tax has on an organization's global tax profile. There are several ways state and local tax practitioners can contribute to the Pillar Two analysis within their organization. Participants will identify how the latest global tax reform is affected by state and local taxes and how those taxes may affect global planning.

Register



### Global Mobility, Talent & Rewards

#### Executive compensation planning despite uncertainty

*Dec 7 | 2 p.m. ET | 18 GMT*

Last year, organizations were tasked with approving budgets and executive compensation programs despite continued uncertainty for many. Today, organizations once again are faced with making similar key determinations despite continued volatility from a macroeconomic, geopolitical, and corporate governance perspective. Despite these challenges, adoption of effective reward arrangements, which both motivate and retain key talent, is crucial to successful delivery of business strategy. Participants will identify the 2023 executive compensation landscape and prepare for the upcoming 2024 planning cycle.

Register



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