

## Moore Tax Law Group

*A Tax Controversy and Tax Litigation Boutique*

### Enforcement Trends – What's Hot and What's Not!



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- Panelists:
  - **Julie Foerster, Project Director, Digital Assets**  
*Internal Revenue Service*
  - **Daniel Mayo, Esq.,**  
*Withum, Smith & Brown, PC - Red Bank, NJ*
  - **Victor A. Jaramillo, Esq.,**  
*Caplin & Drysdale - Washington, D.C.*
- Moderator:
  - **Guinevere M. Moore, Esq.,**  
*Moore Tax Law Group, LLC - Chicago, IL*

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## Employee Retention Credits

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## What is the ERC?

- Refundable payroll tax credit
- Up to \$5,000 per employee in 2020 and up to \$7,000 per employee for each of the first three calendar quarters in 2021 (total of \$26,000 per employee)
- Exploded in December 2020 when the law changed to allow taxpayers that received a PPP loan to claim the ERC

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## 2 Main Tests for Eligibility

- Significant decline in gross receipts
  - >50% drop in gross receipts in any quarter in 2020 compared to the same quarter in 2019
  - >20% drop in gross receipts in any quarter in 2021 compared to the same quarter in 2019
- Full or partial suspension of operations
  - U.S. governmental order that limited commerce, travel, or group meetings due to Covid-19
  - Impact on business is more than nominal (measured by 2019 gross receipts or employee hours)
  - Cannot conduct operations comparably through telework

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## IRS Audits

- IRS is aggressively auditing ERC claims
- IRS is auditing many ERC claims before they are paid
- IRS is conducting detailed audits of the calculation of gross receipts to ensure there is no shifting between or among calendar quarters
- IRS is asking for copies of governmental orders and explanations regarding the effect they had on the taxpayer's business operations
- IRS is requesting taxpayer interviews

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## IRS Warning

- October 19, 2022 – IRS issues [press release](#) advising taxpayers to be wary of third parties that promise tax savings that are too good to be true
  - Tax credit shops are advising taxpayers to claim the ERC when they do not qualify
  - Red flag – large upfront fees or a fee that is contingent on the amount of the refund
  - Improperly claiming the ERC could result in taxpayers being required to repay the credit along with penalties and interest
  - **Likely signals increased IRS enforcement activity**

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## Digital Assets

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## Digital Asset Enforcement

- [IRS Notice 2014-21](#) provides that the IRS will treat virtual currency as property for federal tax purposes and provides guidance on how general federal tax principles apply to virtual currency transactions
- July 2018, the IRS announced a [Virtual Currency Compliance campaign](#) to, among other things, address tax noncompliance related to the use of virtual currency through outreach and examinations of taxpayers

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## Digital Asset Enforcement

- June 2020 – [Microtask CCA](#)
  - **Issue:** Is convertible virtual currency received by an individual for performing a microtask through crowdsourcing or similar platform taxable income?
  - **Conclusion:** Yes, a taxpayer who receives convertible virtual currency in exchange for performing a microtask through crowdsourcing platform has received consideration in exchange for performing a service and the convertible virtual currency received is taxable as ordinary income.

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## Digital Asset Enforcement

- IRS has now issued five **John Doe summons** to various digital asset exchanges (Coinbase, Kraken, Circle, SFOX, Bank Safra) seeking information on users with activity over \$20,000
- IRS believed to also have information on digital asset transactions obtained through filings by digital asset exchanges and other platforms of Payment Card and Third-Party Network Transactions/Third Party Settlement Organizations (TPSO)
  - A TPSO is required to report payments made to a merchant on a **Form 1099-K** if, for the calendar year, the gross payments made to the merchant **exceed \$600** (for calendar years 2022 and later)
  - A TPSO is the central organization which has the **contractual obligation** to make payment to participating payees of third-party network transactions.
  - Requires, among other things, an agreement or arrangement whereby persons have agreed to settle transactions for the provision of goods or services
- 1099-K, 1099-DA, the OECD's Crypto Asset Reporting Framework, and FATCA

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## Digital Asset Enforcement

- In July 2019, the IRS began sending letters to taxpayers with virtual currency transactions that had potentially failed to report income and pay tax from virtual currency transactions or did not report their transactions properly. See [IR-2019-132](#).
- By the end of August, more than 10,000 taxpayers received these letters.
- For taxpayers receiving these educational or soft letters, there are three variations:
  - Letter 6173
  - Letter 6174
  - Letter 6174-A
- Per the IRS, all three versions strive to help taxpayers understand their tax and filing obligations and how to correct past errors. The letters point to appropriate information on IRS.gov, including which forms and schedules to use and where to send them.
- Form 1040 for the 2021 tax year includes the question "At any time during 2021, did you receive, sell, send, exchange, or otherwise dispose of any financial interest in any virtual currency?" The question was first included in 2019.

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### Criminal Tax Enforcement

- Virtual currency is an ongoing focus area for IRS Criminal Investigation.
- The Chief of the Criminal Investigation of the IRS has announced that he anticipates the public announcement of criminal prosecutions of taxpayers who failed to report cryptocurrency transactions.

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### Draft – 2022 Form 1040, U.S. Individual Income Tax Return

<b>Form 1040</b>	Department of the Treasury—Internal Revenue Service		<b>2022</b>	OMB No. 1545-0074	IRS Use Only—Do not write or staple in this space.
<b>U.S. Individual Income Tax Return</b>					
<b>Filing Status</b> <input type="checkbox"/> Single <input type="checkbox"/> Married filing jointly <input type="checkbox"/> Married filing separately (MFS) <input type="checkbox"/> Head of household (HOH) <input type="checkbox"/> Qualifying surviving spouse (QSS) Check only one box. If you checked the MFS box, enter the name of your spouse. If you checked the HOH or QSS box, enter the child's name if the qualifying person is a child but not your dependent.					
Your first name and middle initial		Last name		Your social security number	
If joint return, spouse's first name and middle initial		Last name		Spouse's social security number	
Home address (number and street). If you have a P.O. box, see instructions.				Apt. no.	<b>Presidential Election Campaign</b> Check here if you, or your spouse if filing jointly, want \$3 to go to this fund. Checking a box below will not change your tax or refund. <input type="checkbox"/> You <input type="checkbox"/> Spouse
City, town, or post office. If you have a foreign address, also complete spaces below.			State	ZIP code	
Foreign country name		Foreign province/state/county		Foreign postal code	
<b>Digital Assets</b>	At any time during 2022, did you: (a) receive (as a reward, award, or payment for property or services); or (b) sell, exchange, gift, or otherwise dispose of a digital asset (or a financial interest in a digital asset)? (See instructions.)				<input type="checkbox"/> Yes <input type="checkbox"/> No

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## Tax Year 2022 Form 1040 – Instructions – Draft of 10/17/22

come, isn't filing a return, and can't be claimed as a dependent on another person's return.

### Presidential Election Campaign Fund

This fund helps pay for Presidential election campaigns. The fund reduces candidates' dependence on large contributions from individuals and groups and places candidates on an equal financial footing in the general election. The fund also helps pay for pediatric medical research. If you want \$3 to go to this fund, check the box. If you are filing a joint return, your spouse can also have \$3 go to the fund. If you check a box, your tax or refund won't change.

### Digital Assets

Digital assets are any digital representations of value that are recorded on a cryptographically secured distributed ledger or any similar technology. For example, digital assets include non-fungible tokens (NFTs) and virtual currencies, such as cryptocurrencies and stablecoins. If a particular asset has the characteristics of a digital asset, it will be treated as a digital asset for federal income tax purposes.

Check the "Yes" box next to the question on digital assets on page 1 of Form 1040 or 1040-SR if at any time during 2022, you (a) received (as a reward, award, or payment for property or

services); or (b) sold, exchanged, gifted, or otherwise disposed of a digital asset (or any financial interest in any digital asset).

For example, check "Yes" if at any time during 2022 you:

- Received digital assets as payment for property or services provided;
- Received digital assets as a result of a reward or award;
- Received new digital assets as a result of mining, staking, and similar activities;
- Received digital assets as a result of a hard fork;
- Disposed of digital assets in exchange for property or services;
- Disposed of a digital asset in exchange or trade for another digital asset;
- Sold a digital asset;
- Transferred digital assets for free (without receiving any consideration) as a bona fide gift; or
- Otherwise disposed of any other financial interest in a digital asset.

You have a financial interest in a digital asset if you are the owner of record of a digital asset, or have an ownership stake in an account that holds one or more digital assets, including the rights and obligations to acquire a financial interest, or you own a wallet that holds digital assets.

The following actions or transactions in 2022, alone, generally don't require you to check "Yes":

- Holding a digital asset in a wallet or account;
- Transferring a digital asset from one wallet or account you own or control to another wallet or account that you own or control; or
- Purchasing digital assets using U.S. or other real currency, including through the use of electronic platforms such as PayPal and Venmo.

Do not leave the question unanswered. You must answer "Yes" or "No" by checking the appropriate box. For more information, go to [IRS.gov/virtualcurrencyfaq](https://irs.gov/virtualcurrencyfaq).

### How to Report Digital Assets Transactions

If you disposed of any digital asset in 2022, that you held as a capital asset, through a sale, exchange, gift, or transfer, check "Yes" and use Form 8949 to calculate your capital gain or loss and report that gain or loss on Schedule D (Form 1040).

If you received any digital asset as compensation for services or disposed of any digital asset that you held for sale to customers in a trade or business, you must report the income as you would report other income of the same type (for example, W-2 wages on Form 1040 or 1040-SR, line 1a, or inventory or services from Schedule C or Schedule 1).

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## Digital Asset Enforcement

The Internal Revenue Service is focusing on cryptocurrency tax evasion with virtual currencies, employing data analytics to uncover transactions that crypto users assumed were hidden



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## Cannabis

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## Cannabis

- IRS has started publishing guidance on tax issues for the cannabis industry:
  - Cannabis Industry Frequently Asked Questions - <https://www.irs.gov/businesses/small-businesses-self-employed/cannabis-industry-frequently-asked-questions>
  - Providing Resources to Help Cannabis Business Owners Successfully Navigate Unique Tax Responsibilities - <https://www.irs.gov/about-irs/providing-resources-to-help-cannabis-business-owners-successfully-navigate-unique-tax-responsibilities>
- Much is up in the air regarding this issue.

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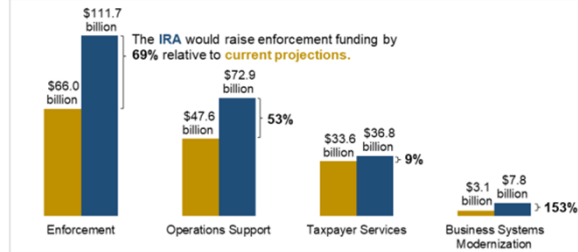
## IRS Funding

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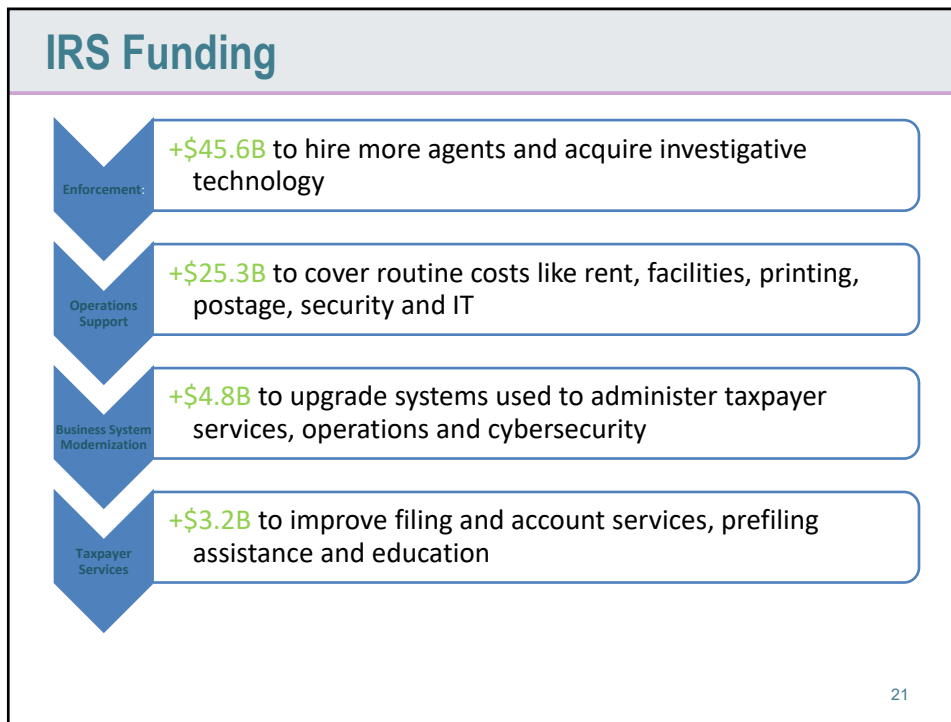
## IRS Funding

### \$80 billion in additional funding through FY2031

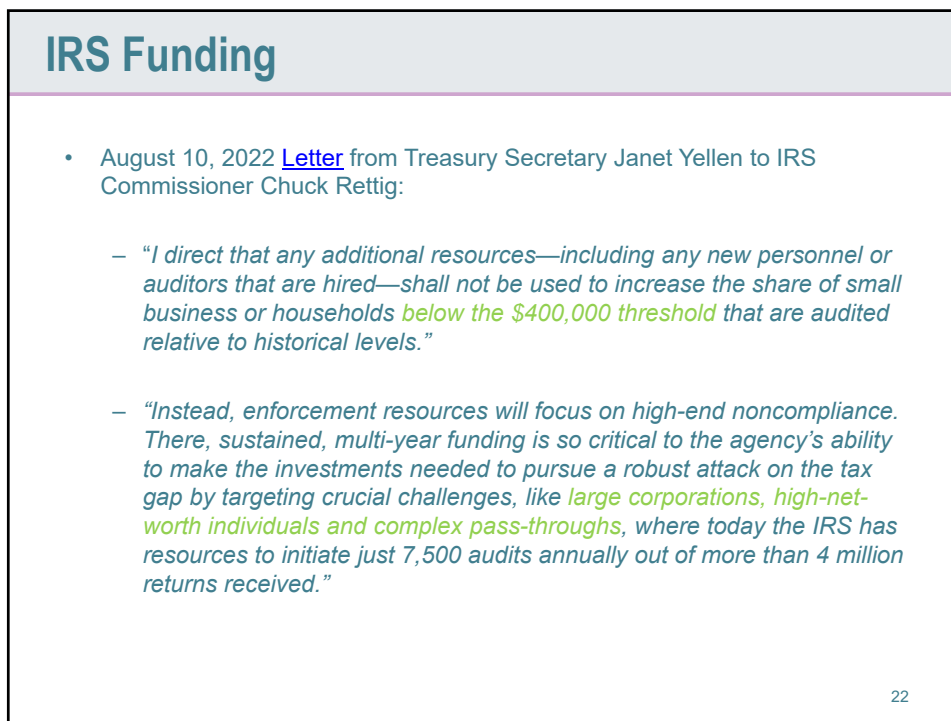
Figure 1. The IRS's Budget Authority Through FY2031 Under the Inflation Reduction Act



Source: <https://crsreports.congress.gov/product/pdf/IN/IN11977>



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## Campaigns/Dirty Dozen List

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## 2022 “Dirty Dozen” List

1. Use of charitable remainder annuity trusts (CRAT) to eliminate taxable gain
2. Maltese (or other foreign) pension arrangements misusing tax treaties
3. Puerto Rican and other foreign captive insurance companies
4. Monetized installment sales
5. COVID-19 related scams
  - Economic Impact Payment and tax refund scams
  - Unemployment fraud leading to inaccurate taxpayer 1099-Gs
  - Fake employment offers posted on social media
  - Fake charities
6. Unscrupulous tax professionals
  - “OIC mills”
  - Ghost preparers
  - Inflated refunds

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## 2022 “Dirty Dozen” List

7. Text message, email phishing and phone scams targeted at taxpayers
8. Spear phishing attacks that attempt to steal return preparer log-in credentials
9. Concealing assets in offshore accounts and improper reporting of digital assets
10. High-income individuals who don't file tax returns
  - Individuals earning more than \$100,000 a year
11. Abusive syndicated conservation easements
12. Abusive micro-captive insurance arrangements

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## LB&I Campaigns

- Launched in January 2017 with 13 initial campaigns
- Currently 54 active campaigns
  - Only two added in 2022:

### ⊖ Distribution in Excess of Partner's Basis Campaign

Practice Area: Pass Through Entities

Executive Lead: Monique Gabel, Deputy Director, Pass-Through Exam Strategy and Promoter Programs

Partners that report distributions from partnerships must have adequate outside basis, as determined pursuant to IRC § 731(a), in order to receive liquidating or non-liquidating distributions not subject to gain recognition.

### ⊖ Partnership Losses in Excess of Partner's Basis Campaign

Practice Area: Pass-Through Entities

Lead Executive: Monique Gabel, Acting Deputy Director, Pass-Through Exam Strategy & Promoter Program

Campaign Point of Contact: Elisa Wong, Team Manager, Pass-Through Entities Practice Network

Partners that report flow-through losses from partnerships must have adequate outside basis as determined pursuant to IRC § 705 to deduct the losses or else the losses are suspended per § 704(d) to the extent they exceed the partner's basis in the partnership interest.

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## LB&I Campaigns

- 22 retired campaigns, including one recently retired:

### Forms 3520/3520-A Non-Compliance and Campus Assessed Penalties

Practice Area: Withholding & International Individual Compliance

Lead Executive: Deborah Palacheck

Campaign Point of Contact: Ursula Gee

This campaign will take a multifaceted approach to improving compliance with respect to the timely and accurate filing of information returns reporting ownership of and transactions with foreign trusts. The Service will address noncompliance through a variety of [treatment streams](#) [PDF](#) including, but not limited to, examinations and penalties assessed by the campus when the forms are received late or are incomplete.

- Not clear what it means to be “retired”
  - “...campaigns that may have been fully implemented or operationalized. The results and feedback from these campaigns have been used to improve future identification of noncompliance and to develop tools to support future examinations.”

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## LB&I Campaigns

### Perennial favorites still on the list...

#### Micro-Captive Insurance Campaign

Practice Area: Enterprise Activities

Lead Executive: Lisa Rupert

Campaign Point of Contact: Deborah Inganamorte

This campaign addresses transactions described in Transactions of Interest Notice 2016-66, in which a taxpayer attempts to reduce aggregate taxable income using contracts treated as insurance contracts and a related company that the parties treat as a captive insurance company. Each entity that the parties treat as an insured entity under the contracts claims deductions for insurance premiums. The manner in which the contracts are interpreted, administered, and applied is inconsistent with arm's length transactions and sound business practices. LB&I has developed a training strategy for this campaign. The treatment stream for this campaign will be issue-based examinations.

#### Syndicated Conservation Easement Transactions

Practice Areas: Eastern Compliance and Enterprise Activities

Lead Executives: Lavena Williams and Scott Ballint

Campaign Point of Contact: Diane Flouro and Cathy Brooks

The IRS issued Notice 2017-10, designating specific syndicated conservation easement transactions as listed transactions, requiring disclosure statements by both investors and material advisors.

This campaign is intended to encourage taxpayer compliance and ensure consistent treatment of similarly situated taxpayers by ensuring the easement contributions meet the legal requirements for a deduction, and the fair market values are accurate.

The initial treatment stream is issue-based examinations. Other treatment streams will be considered as the campaign progresses.

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## Thank You!

Thank you to:

- Sandra R. Brown
- Melissa Wiley
- Aaron M. Esman

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