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Exam

Effective Use of Alternative Dispute Resolution Programs in IRS Examinations

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I. Introduction

On July 7, 2023, the Internal Revenue Service ("IRS") issued IR-2023-136, where the agency requested public input as to the effectiveness of alternative dispute resolution ("ADR") programs available to taxpayers.[1] ADR is often utilized as a mechanism to quickly resolve issues identified during the audit and examination phases, allowing for reduced costs and timely issue resolution. This initiative is part of a larger plan to decide how to best utilize funds granted to the agency through the Inflation Reduction Act ("IRA"), where the IRS aims to innovate four target categories: business system modernization, enforcement, operations support, and taxpayer services.[2] As part of their Strategic Operating Plan flowing from the IRA, the agency plans to implement "improvements to tax certainty programs that help resolve compliance issues quickly and with finality."[3] The July Notice focused on four particular post-filing ADR programs. For purposes of this column, we will focus on the ADR options available while an IRS Exam team ("IRS Exam team" or "Exam") has jurisdiction over the matter, which includes Fast-Track Settlement ("FTS" or "Fast Track," which was included in the July Notice) as well as Early Referral, Accelerated Issue Resolution ("AIR"), Pre-Filing Agreements ("PFAs"), and Industry Issue Resolution ("IIR").[4]

II. ADR Options Available During IRS Examinations

The authority of an examining agent to resolve disputes is constrained—unlike the IRS Independent Office of Appeals ("Appeals"), Exam agents are not permitted to take into account the hazards of litigation in resolving a dispute with the taxpayer. Exam is asked to be the fact finder and to apply the law to come to a yes or no conclusion. The taxpayer's position is either sustained or denied. An item is either income or it is not. Another item is either deductible or it is not. In certain circumstances, a taxpayer and an IRS Exam team can come to a mutual understanding of the facts that may represent a compromise position by one side or the other. However, when it comes to legal disputes, there is no room for Exam to compromise. Many tax issues reflect both factual and legal hazards. At Appeals,

an Appeals Officer is directed to weigh the relative merits of the two positions in order to reach a compromise.

The first three ADR programs discussed below (Fast Track, Early Referral, and AIR) enable Appeals' authority to use the hazards of litigation while Exam still has jurisdiction over the issue. The latter two ADR programs discussed below are not so much about the hazards of litigation but instead are a means to get a common understanding of the facts and applicable law for issues that are expected to prompt disputes either on a case-specific basis (PFA) or industry wide (IIR).

A. Fast-Track Settlement

Depending on the type of taxpayer, Fast Track Settlement can take several forms. This section will discuss the LB&I (Large Business and International) process as an example.[5] FTS allows taxpayers and IRS exam personnel to bring a particular, developed issue in dispute to a mediation where an Appeals Officer will act as a mediator and may propose a settlement, with IRS Exam also present to discuss hazards of litigation.[6] To achieve this, the typical *ex parte* rules do not apply.[7] Where Fast Track works well, the key part of the program is the first word in the name—Fast. Not fast in the sense that the time spent assessing the issue is shortened; rather, fast in the sense that the issue is brought to resolution significantly sooner than it otherwise would be in a traditional audit/appeals process. Rather than waiting for the entire audit to be completed, the case transferred to Appeals, and a traditional Appeals process to take place, FTS enables a disputed issue to be sent to Appeals for its own consideration before the conclusion of the overall audit. Exam remains active in the discussions, and Appeals acts more as a mediator than a decider. The IRS describes FTS as "a way [for taxpayers] to resolve audit issues during the examination process in 120 days or less," by leveraging "the settlement authority and mediation skills of Appeals."

Any disputed issue is eligible to be addressed in a FTS proceeding, except issues:

1. "Designated for litigation,
2. For which the taxpayer has submitted a request for Competent Authority (or simultaneous Appeals/Competent Authority) assistance,
3. That are "whipsaw" issues[,]
4. Not consistent with sound tax administration, or
5. Excluded from the Fast Track process by a Chief Counsel Notice, or equivalent publication."[8]

If the issue is found to be appropriate for the program, the LB&I team and the taxpayer must agree on the facts and circumstances and exhaust all options available through LB&I resolution authority.[9] Next, the IRS will issue a Form 5701 with an accompanying Form 886-A to explain the basis for its position. The taxpayer is required to put its position in writing—a document that is essentially equivalent to a protest for a completed examination report.[10] Following these steps, the taxpayer and IRS must both agree to engage in the Fast-Track program.[11] The parties must submit an application, which includes the respective written legal positions, to the Fast-Track Program Manager, who then determines if it is appropriate for the program.[12] If successful, Fast Track results in a "FTS Session Report," which the IRS will then use as the basis for settlement procedures.[13] However, either party may withdraw from the program at any time and continue with Exam.[14]

In addition to an accelerated timeline for resolution and the invocation of authority to consider the hazards of litigation, FTS provides taxpayers with other meaningful advantages. For one, the so-called "hot interest" rule in Code Sec. 6621(c), an additional two-percent interest from the time of the issuance of a final revenue agent's report, is inapplicable since the Fast-Track proceeding by definition will occur before the issuance of the final revenue agent's report. In addition, all of the traditional Appeals rights remain, so if the Fast-Track proceeding does not result in the resolution of the issue, the taxpayer can still file a protest upon issuance of the final revenue agent's report and pursue a traditional Appeals proceeding. However, Post-Appeals Mediation is not available for issues that were not successfully resolved in both a Fast-Track proceeding and a traditional Appeals proceeding.[15] Occasionally, an IRS audit has one hotly contested issue and other less material issues, in which case resolving the hotly contested issue in a Fast-Track proceeding may lead to parties reaching an understanding on the other issues so that the Fast-Track proceeding effectively breaks the logjam and the whole case can be resolved in exam.

The Fast-Track process has its drawbacks as well. First and foremost, the Exam team will remain involved throughout and must be on board with any agreed resolution. If an Exam team is dug in and unwilling to recognize the hazards of litigation, then the Fast-Track process may end up futile. Furthermore, while it is true that there is a second bite at the apple if an issue is not resolved in Fast Track, the taxpayer will ordinarily play all of its cards in whatever response to the Exam team's written position. Thus, the Exam team (and any specialist or counsel attorney involved) will be educated on the taxpayer's position and could conceivably revise accordingly the Exam team's write up of its position. A taxpayer could hold back one or more of its cards in the Fast-Track proceeding but would have to weigh whether doing so limits the prospect of a

successful resolution at the Fast Track. Also, what is good for the goose is also good for the gander—while a taxpayer can withdraw from a Fast-Track proceeding if it is not going well, so too can Exam.

B. Early Referral

Early Referral is another program that allows taxpayers under audit to take specific, developed issues directly to Appeals.[16] Like FTS, both the taxpayer and the Exam team prepare a full write-up of their respective positions. Unlike FTS, however, Appeals, not Exam, is the decision maker on whether or not to come to an agreement with the taxpayer. Exam may have some input beyond its written submission, as it does in a traditional Appeals proceeding. But at some point, Appeals will interact exclusively with the taxpayer to see if a resolution can be reached. Importantly, and in contrast to Fast Track, the *ex parte* rules remain in full force in an Early Referral proceeding.

To properly submit an Early Referral request, the taxpayer must affirmatively request the program in writing and respond to a Form 5701 within 30 days of receipt from the IRS.[17] Once accepted into Early Referral, Appeals takes jurisdiction of the particular issue while all other issues in the audit remain in the jurisdiction of Exam. If successful, the Early Referral process will result in a binding Closing Agreement; however, if unresolved, the taxpayer can request mediation.[18] Otherwise, the matter will be returned to Exam, without the ability for reconsideration on protest, absent a "substantial change in the circumstances."[19]

Rev. Proc. 99-28 requires that Early Referral only be used for "appropriate issues," limiting a taxpayer's options to those disputes that:

1. "If resolved, can reasonably be expected to result in a quicker resolution of the entire case,
2. Both the taxpayer and the District agree should be referred to Appeals early,
3. Are fully developed, and
4. Are part of a case where the remaining issues are not expected to be completed before Appeals could resolve the early referral issue."[20]

Examples of issues that are excluded from Early Referral include those that (1) have had a 30-day letter issues, (2) are not fully developed, and (3) are close to resolution.[21] Like Fast Track, Early Referral is designed, among other things, to shorten the overall timeline for a matter. If one issue is ripe for Appeals while others require more work from Exam, do not wait to invoke the authority of Appeals while the exam continues. Issues that are particularly suited to Early Referral include changes in methods of accounting, employment tax, collections, employee plans, and exempt organizations.[22]

C. Accelerated Issue Resolution Agreements

Often, disputed issues in an IRS exam are present in multiple years. If an issue is brought to a successful resolution in Appeals for one year based on the hazards of litigation, what happens to the subsequent years? In more contentious examinations, an Exam team will want to continue to fight the good fight and raise the issue again in the subsequent year with the hope that a different Appeals Officer will come to a different conclusion. On the other hand, if Exam is comfortable with the Appeals settlement, it does not have the authority by itself to resolve the issue in the subsequent years under similar terms.

Here is where the Accelerated Issue Reoslution program steps in. The AIR program is available to corporate taxpayers under audit that "would like assurance that resolved issues in the current audit cycle will be extended to all years for which returns have been filed."[23] Although the original announcement of the AIR program referenced that it was only available for taxpayers in the Continues Examination Program, the IRS website refers to the program as available to taxpayers in the Large Corporate Compliance program, which, as the name suggests, is the largest of our country's corporate taxpayers based on a multi-factor formula.[24]

Although the IRS exam does not have the authority to settle issues based on hazards of litigation, the AIR process allows the Exam team to resolve issues based on past outcomes. An accepted AIR leads to either a binding Closing Agreement or utilization of other standard deficiency resolution procedures.[25] The obvious benefit for taxpayers is the ability to achieve the same agreed resolution of a recurring issue without the expense and effort to pursue an Appeals proceeding for every impacted year. However, a taxpayer cannot unilaterally invoke an AIR agreement. The Exam team must agree. As noted, some Exam teams are agreeable. Some are not.

D. Pre-Filing Agreements

Pivoting from ADR programs for disputed issues that are fully developed by both Exam and the taxpayer, we now consider the Pre-Filing Agreeent Program as an ADR program designed to reach an agreement before any dispute arises (or at least until one or the other side gets entrenched). The PFA program is available to LB&I taxpayers.[26] The IRS describes the objective of the PFA program as being "to resolve, before returns are filed, issues

that are likely to be disputed in post-filing audits."[27] A principal advantage of the PFA program (for taxpayers and the IRS alike) is that if facts and issues are discussed in a pre-filing context, then access to documents, information, and people in real time is likely to be more efficient and thus require fewer resources than a post-filing review.

The PFA program, though, is much more restrictive in terms of the issues to be considered. To be eligible for a PFA, the taxpayer must present issues on completed transactions that are based on "factual issues and well-established law," "issues that involve a methodology," or "issues under the jurisdiction of other [IRS] divisions."[28] Exam, as the finder of fact, views addressing factual issues as in its wheelhouse, but it also does not want to address novel factual issues since it has no authority to resolve legal issues. Exam takes its direction on legal issues from its counsel attorneys.

Issues that are excluded from PFA include the following[29]:

1. Transfer pricing issues,
2. Certain changes in accounting methods,
3. "Issues of reasonable cause, due diligence, good faith, clear and convincing evidence, or any other similar standard[,]"
4. The applicability of any penalty or criminal section,
5. "Issues that are, or will be, subject of a pending or proposed request for a determination letter, technical advice memorandum, or letter ruling issued to, or regarding, the taxpayer,"
6. "Issues for which the taxpayer proposes a resolution that is contrary to" past IRS guidance or requests for guidance withdrawn by the taxpayer,
7. Issues subject to pending litigation in a prior tax year,
8. Issues designated for litigation by the IRS,
9. Tax shelters, and
10. Issues related to transactions that have not yet occurred.

On the flip side, the scope in terms of tax years is somewhat generous. The tax years in which a taxpayer may request a PFA include (1) the current taxable year, (2) any taxable year in which the return is due and not yet filed, and (3) future taxable years up to four years from the taxable year in which the PFA is filed.[30]

In their January 2023 PFA Fact Sheet, the IRS highlighted several topics that were either received as applications or accepted into the program between 2019 and 2022, including (1) Losses on liquidation of a foreign subsidiary, (2) Sale/leaseback transactions, (3) Worthless stock (4) Research Credits, (5) Real estate trust investment, (6) Sale leaseback transactions, and (7) Passthrough elections.[31]

To request a PFA, the taxpayer must submit an application that includes, among other things, specific information regarding their business, a description of the nature of the transaction, and an agreement for inspection of records.[32] Once the application is received, the LB&I Practice Area Director and Associate IRS Chief Counsel will review and inform the taxpayer within 15 days as to whether or not the request is selected.[33]

The criteria for selection to participate in a PFA include the following[34]:

1. Whether the specific issue presented by the taxpayer's facts is suitable for the PFA program;
2. The impact of a PFA on other taxable years, issues, taxpayers, or related cases;
3. Whether sufficient resources are available;
4. Whether it has sufficient resources to support a PFA;
5. Whether the PFA is likely to result a whipsaw issue;
6. The time remaining until the return due date and expected filing date; and
7. The probability of completing a PFA prior to the relevant return deadline.

If a PFA project is selected, the IRS may execute an agreement if:

1. "Entering into the PFA is consistent with the goals of the PFA program,
2. The resolution of issues in the PFA reflects well-settled legal principles and correctly applies those principles to the facts established by the examination team,
3. The issues determined by the PFA are eligible issues[,]
4. Any methodology approved for use by a taxpayer to determine the appropriate amount of an item of income, allowance, deduction, or credit has a documented factual basis; and
5. There is an advantage in having the issues permanently and conclusively resolved for the taxable years covered by the PFA, or the taxpayer shows good and sufficient reasons for desiring a PFA and the United States will suffer no disadvantage if the agreement is executed."[35]

Additionally, at any time (even through execution of the PFA), the taxpayer or IRS may withdraw from "all or part" of the PFA.[36] Additionally, if a party withdraws or no agreement is made, the taxpayer may submit an Early Referral appeal or appeal the proposed deficiency using traditional means.[37] However, there is no right to appeal the rejection of a PFA.

Unlike Fast Track, Early Referral, and AIR, none of which requires a user fee, the PFA program has a substantial user fee. Generally, the user fee to participate in a PFA is $218,600 but is assessed on a case-by-case basis.[38]

ADR is often utilized as a mechanism to quickly resolve issues identified during the audit and examination phases, allowing for reduced costs and timely issue resolution.

A PFA provides taxpayers with an opportunity to resolve potential concerns prior to submitting their returns. This allows for more certainty in tax planning, as the results of a successful PFA can extend up to four years from the tax year when the request is submitted. Additionally, this process can help avoid audits, as the intention of the agreements is to settle issues that may come up through the audit process. The ability for taxpayers to retain the right to an Early Referral and traditional appeal are also notable benefits. However, not all transactions qualify, and there is a significant up-front cost to participate in the program that may not lead to an executed agreement.

E. Industry Issue Resolution

While the PFA program enables a taxpayer to bring its specific issue or issues to the IRS on a pre-filing basis (*i.e.*, pre-dispute), the Industry Issue Resolution program allows a group of taxpayers to do the same thing with issues that are "frequently disputed or burdensome" and "are common to a significant number of entities."[39] In Rev. Proc. 2016-19, the IRS noted that "resolving issues through pre-filing guidance rather than post-filing examination is a goal of the IRS and the Office of Chief Counsel."[40] Persons that may participate in the IIR program are those taxpayers that fall within the LB&I, Small Business/Self Employed ("SB/SE"), or Tax Exempt and Government Entities ("TEGE"), as well as business taxpayers generally, industry associations, and other interested parties.[41]

Compared to other ADR options, IIR focuses on the type of issue, rather than the type of taxpayer. Within IIR, issues presented must exhibit at least two of the following characteristics:

1. "The proper tax treatment of a common factual situation is uncertain,
2. The uncertainty of the results in frequent, and often repetitive, examinations of the same issue,
3. Frequent, and often repetitive examinations require significant resources from both the IRS and impacted entities,
4. The issue is significant and impacts a large number of entities,
5. The issue requires extensive factual development,
6. Collaboration would facilitate proper resolution of the tax issues by promoting and understanding of entities' views and business practices."[42]

As part of this process, the IRS will publicly announce the projects received and selected, in an effort to ensure that all interested parties can participate.[43] Once selected, an IIR project will include a team of individuals, often to include specialists within the IRS exam and IRS Appeals, members of various Operating Divisions, the Office of Chief Counsel, and the Treasury Department.[44] Once the project is underway, all submissions from the various parties will be made public and should not include confidential or sensitive information.[45] The IRS provides that "the annual burden per representative varies from 4 hours to 200 hours … with an estimated average of 40 hours … [and 50 respondents.]"[46] If the process is completed, the results may be published in administrative guidance or a regulation, Revenue Ruling, Revenue Procedure, or IRS notice.[47]

The IIR process differs from other forms of ADR within the IRS, as it is geared to resolve issues that are up-and-coming (for example, with the Corporate Alternative Minimum Tax) or are ongoing (for example, a group of large companies that identify an industry-wide practice that could be subject to multiple individual audits). Although IIR provides a way to get ahead of issues and resolve them on behalf of the industry, it will likely take the concerted effort of many taxpayers to complete. Further, the documents provided are public, and there is no guarantee that the IRS will move forward with a project. Taxpayers that are in a complex, ongoing audit will also likely not benefit from this program, as it will not resolve issues quickly.

III. Conclusion

The IRS' recent interest in revitalizing their ADR process bodes well for taxpayers hoping to participate in these

programs. The wide variety of programs available suits the needs of many taxpayers and can lead to favorable results. This piece discussed five common ADR programs, ranging from pre-filing options to industry-wide resolution. Taxpayers should weigh the costs and risks associated with participating in an ADR program when determining which program is appropriate for their individual situation. However, on the whole, ADR serves as a valuable tool for both tax planning and controversy resolution.

ENDNOTES

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1 *See* IR-2023-136, *IRS Invites Public Input on Ways to Improve Dispute Resolution Programs; Suggestions Wanted* (Jul. 27, 2023).

2 *See Inflation Reduction Act of 2022*, P.L. 117-169, 136 STAT 1818 (2020).

3 *See* IR-2023-136, July 27, 2023; *See also* IRS, *Internal Revenue Service Inflation Reduction Act Strategic Operating Plan, FY2023-2031* (Apr. 5, 2023) (the ADR improvements are supported by initiative 2.4).

4 While we take a very broad view of what constitutes an ADR program, a discussion of all possible programs is beyond the scope of this column. Examples of programs that could be considered ADR program that are not discussed in this column include Advance Pricing Agreements (*see* Rev. Proc. 2015-41 (Aug. 12, 2015)), the Compliance Assurance Process Program (*see* IRM 4.51.8 *et. seq.* (Sep. 7. 2023)), and Private Letter Rulings (*see* Rev. Proc. 2023-1 (Jan. 3, 2023)).

5 *See* Rev. Proc. 2003-40, 2003-1 CB 1044, IRS Pub. 4539 (May 2012). For taxpayers other than LB&I, s*ee* Rev. Proc. 2017-25 (Mar. 20, 2017), IRS Pub. 5022 (Sep. 2021) (discussing Small Business and Self Employment); Rev. Proc. 2016-57 (Nov. 18, 2016), IRS Pub. 3605 (Mar. 2022) (discussing Fast Track Mediation—Collection in Small Business and Self Employment); IRS Ann. 2012-24 (Jun. 11, 2012), IRS Pub. 5092 (Sep. 2017) (discussing Tax Exempt and Government Entities).

6 *See* Rev. Proc. 2003-40, 2003-1 CB 1044, at 2 (Jun. 3, 2003).

7 *See* IRS Pub. 4539 at 1 (May 2012).

8 *Id.* at 2.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *See* Rev. Proc. 2014-63 (Dec. 29, 2014). For additional information on the development of Post-Appeals Mediation, *see* Rev. Proc. 2009-44 (Sep. 11, 2009) (expanding the types of issues eligible for PAM) and Rev. Proc. 2002-44 (Jun. 7, 2002) (establishing the PAM program).

16 *See* Rev. Proc. 99-29, 1999-2 CB 109 (Jul. 1, 1999).

17 *Id.* at 5.

18 *Id.* at 6 and 7.

19 *Id.* at 6 and 7. Generally, a taxpayer will have two bites at the apple. If a taxpayer pursues Fast Track, the second bite is traditional Appeals. If a taxpayer pursues Early Referral, the second bite is Post Appeals Mediation. If a taxpayer bypasses both Fast Track and Early Referral to pursue traditional Appeals first, the second bite is Post Appeals Mediation.

20 *Id.* at 3.

21 *Id.* at 4.

22 *Id.* at 1 and 2.

23 *See* IRS, *Dispute Prevention and Resolution for Large Business and International Taxpayers, Accelerated Issue Resolution (AIR Agreement)*, *IRS.GOV* (Jul. 7, 2023), *www.irs.gov/businesses/dispute-resolution*; *See also* Rev. Proc. 94-67, IRB 1994-44 and Rev. Proc. 68-16, 1968-1 CB 770 (discussing the AIRA procedures).

24 The IRS established the Coordinated Examination Program ("CEP") in 1966 to audit the largest and most complex corporations filing U.S. tax returns. The IRS identified corporations to audit under the CEP based on objective factors—such as gross assets and gross receipts—and generally subjected these corporations to continuous audit, *i.e.*, the IRS examined the corporation's tax return for every year. The Coordinated Industry Case (CIC) Program replaced the CEP in the early 2000s but retained the CEP's approach of using objective factors to identify corporations for continuous audit. Specifically, the CIC Program considered the following seven factors: (1) gross assets, (2) gross receipts, (3) operating entities, (4) total foreign assets, (5) total related transactions, (6) foreign tax, and (7) multiple industry status. *See* Former IRM 4.46.2.5(1) (Mar. 1, 2006). In 2019, the IRS replaced the CIC Program with the Large Corporate Compliance ("LCC") Program beginning with audits of tax returns for "the 2017 tax year." IRS Memorandum, Interim Guidance on Implementation of the Large Corporate Compliance (LCC) Program, LB&I-04-0419-004 (May 21, 2019); *see also* IRS News Release, LB&I Announces Large Corporate Compliance Program, IR 2019-95 (May 16, 2019). Under the LCC Program, the IRS uses data automation to score all filed IRS Forms 1120 within the jurisdiction of the IRS Large Business & International Division ("LB&I") (*i.e.*, corporations with at least $10 million of assets). *See* IRM 4.50.3.2.2 (Sep. 27, 2022).

25 *See* Internal Revenue Manual (IRM) 4.46.5.4.2.4, *Accelerated Issue Resolution (AIR)* (Dec. 13, 2018).

26 *See* Rev. Proc. 2016-30, at 1 (May 4, 2016).

27 *Id.* at 5.

28 *Id.* at 6.

29 *Id.* at 9.

30 *Id.* at 5.

31 *See* IRS, *Fact Sheet: Pre-Filing Agreement (PFA) Program—January 2023*, *IRS.GOV* (Aug. 15, 2023), *www.irs.gov/businesses/fact-sheet-pre-filing-agreement-pfa-program-january-2023*.

32 *Id.* at 1315.

33 *Id.* at 16 and 18.

34 *Id.* at 17.

35 *Id.* at 20 and 21.

36 *Id.* at 23.

37 *Id.* at 24.

38 *Id.* at 24.

39 *See* Rev. Proc. 2016-19 (Mar. 28, 2016).

40 *Id.* at 1.

41 *Id.* at 1 and 2.

42 *Id.* at 2 and 3 (additionally, parties engaged in accountable plans must follow the requirements set forth in IRS Not. 2005-69, 2006-2 CB 443 (Sep. 9, 2005)).

43 *Id.* at 4.

44 *Id.*

45 *Id.* at 5.

46 *Id.* at 7.

47 *Id.* at 4. Successful IIR initiatives are published on the IRS website and cover a wide variety of industries. Examples of successful outcomes include Rev. Rul. 2001-59, 2001-2 CB 585 (discussing the steps required for banks to classify loans as lost assets); Rev. Rul. 2001-60, 2001-2 CB 587 (discussing golf course land development depreciation); Rev. Proc. 2005-19, IRB 2005-14, 832 (discussing heavy truck excise taxes); LB&I Directive 04-0818-015 (issuing a no-challenge directive for certain reserves in the life insurance industry). *See* IRS, *IIR Guidance Issued*, *IRS.GOV* (Mar. 24, 2023), *www.irs.gov/businesses/iir-guidance-issued*.