U.S. GOVERNMENT ACCOUNTABILITY OFFICE
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Washington, DC 20548

B-331445

October 4, 2019

The Honorable Mike Crapo
Chairman
The Honorable Sherrod Brown
Ranking Member
Committee on Banking, Housing, and Urban Affairs
United States Senate

The Honorable Maxine Waters
Chairwoman
The Honorable Patrick McHenry
Ranking Member
Committee on Financial Services
House of Representatives

Subject: *Department of the Treasury, Internal Revenue Service: Additional First Year Depreciation Deduction*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of the Treasury, Internal Revenue Service (IRS) entitled "Additional First Year Depreciation Deduction" (RIN: 1545-BO74). We received the rule on September 19, 2019. It was published in the *Federal Register* as final regulations on September 24, 2019. 84 Fed. Reg. 50108. The effective date of the rule is September 24, 2019.

The final rule provides guidance regarding the additional first year depreciation deduction under section 168(k) of the Internal Revenue Code. The rule reflects and clarifies the increase of the benefit and expansion of the universe of qualifying property, particularly to certain classes of used property. The rule affects taxpayers who deduct depreciation for qualified property acquired and placed in service after September 27, 2017.

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The 60-day delay in effective can be waived however, if the agencies find for good cause that delay is impracticable, unnecessary, or contrary to the public interest, and the agencies incorporate a statement of the findings and their reasons in the rule issued. 5 U.S.C. § 808(2). IRS found good cause to issue this regulation effective upon publication in the *Federal Register*. IRS stated the substantive statutory provisions are already in force, and the final rule provides crucial guidance for taxpayers on how to apply those provisions, compute their tax liability, and accurately file their federal income tax returns. According to IRS, a delay would place certain taxpayers in the unusual position of having to determine whether to file tax returns during the pre-effective date period based on final regulations not yet effective. If taxpayers chose not to follow the final regulations and did not amend their returns after the regulations became effective, it would place significant strain on IRS to ensure that taxpayers correctly calculated their tax liabilities. Therefore, IRS determined that it is not required to delay the effective date for 60 days from the date of publication and that this rule is effective upon publication in the *Federal Register*.

Enclosed is our assessment of IRS's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Janet Temko-Blinder, Assistant General Counsel, at (202) 512-7104.

signed

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Martin V. Franks
Chief, Publications and Regulations Branch
Internal Revenue Service
Department of the Treasury

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF THE TREASURY,
INTERNAL REVENUE SERVICE
ENTITLED
"ADDITIONAL FIRST YEAR DEPRECIATION DEDUCTION"
(RIN: 1545-BO74)

(i) Cost-benefit analysis

The Department of the Treasury, Internal Revenue Service (IRS) highlighted the expected economic impacts of the main provisions of the final rule. First, the final rule provides an option for taxpayers who own live theatrical performances to elect between two possible in service dates. According to IRS, this choice has two potential offsetting economic alternatives. The choice potentially delays the date in which the taxpayer could claim bonus depreciations for the performance, which could slightly reduce the incentive to invest in such a performance. Also, this choice increases the length of time over which a potential buyer could acquire the performance and remain eligible to claim bonus depreciation; this could slightly increase the incentive to invest in such productions by increasing the resale opportunities. IRS projected that these offsetting effects will have only small net effects on investment in live theatrical performances.

Second, IRS stated that in general, property that is required to be depreciated under the Alternative Depreciations System under section 168 of the Internal Revenue Code is not eligible for bonus depreciation. According to IRS, the final rule clarifies that requirements to use the Alternative Depreciation System outside of the section 168 context do not cause a property to be ineligible for bonus depreciation. IRS projected this provision will have modest economic effects because most taxpayers would have come to this conclusion without the final rule.

Third, the final regulations permit transfers under section 743(b) of the Internal Revenue Code to qualify for bonus depreciation. IRS concluded that this change would reduce the lock-in problem that such transfers experienced. IRS projected reducing the lock-in effect for these transfers will improve the efficiency of capital allocations throughout the economy. Because of increased efficiency, IRS estimated a total economy-wide gain to output would be less than $5 million per year and increased investment of no more than $20 million in any year.

Fourth, the final rule clarifies that when a tax-exempt entity is in a partnership with a non-tax exempt entity, only the interest of the tax-exempt entity in qualified property is ineligible for bonus depreciation. The non-tax exempt entity may take bonus depreciation. IRS projected this provision will generally have the effect of increasing the amount of property eligible for bonus depreciation, which will slightly increase the incentive for such partnerships to invest in physical capital.

Fifth, IRS stated clarification was needed regarding the determination of whether qualified property was "used by the taxpayer … prior to such acquisition." IRS further stated that the final rule follows the intent of Congress and clarifies that the term "used" means that the taxpayer previously held a depreciable interest in the property. IRS concluded the provision should help provide clarity to taxpayers and potentially encourage more firms to take advantage of the investment incentives created by section 168(k).

Finally, the final rule provides that third-party constructed property is considered self-constructed property and qualifies for bonus depreciation if substantial construction began after September 27, 2017. IRS projected this provision only impacts investment that had already been made; the provision will have virtually no effect on economic growth or efficiency going forward.

<u>(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603-605, 607, and 609</u>

IRS certified the final rule will not have a significant economic impact on a substantial number of small entities.

<u>(iii) Agency actions relevant to sections 202-205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532-1535</u>

IRS determined the final rule does not include any federal mandate that may result in expenditures by state, local, or tribal governments, or by the private sector in excess of the Act's threshold.

<u>(iv) Other relevant information or requirements under acts and executive orders</u>

Administrative Procedure Act, 5 U.S.C. §§ 551*et seq.*

On August 8, 2018, IRS published a proposed rule in the *Federal Register*. 83 Fed. Reg. 39292. IRS received comments from approximately 20 commenters in response to the proposed rule. IRS addressed the comments in the final rule.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501-3520

IRS determined this final rule contains no new information collection requirements under the Act. IRS stated taxpayers wishing to make or cancel an election under the rule will have to file using existing tax returns which do have OMB control numbers. According to IRS, no new burden estimates specific to the forms affected by the rule are currently available.

Statutory authorization for the rule

IRS promulgated the rule pursuant to section 7805 of title 26, United States Code.

Executive Order No. 12,866 (Regulatory Planning and Review)

IRS stated the rule was found to be economically significant and reviewed by the Office of Management and Budget.

Executive Order No. 13,132 (Federalism)

IRS determined that this final rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law within the meaning of the Order.