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June 19, 2023

Internal Revenue Service  
Attn: CC:PA:LPD:PR (Notice 2023-27)  
Room 5203  
P.O. Box 7604  
Ben Franklin Station  
Washington, D.C. 20044

RE: Notice 2023-27 (Treatment of certain nonfungible tokens as collectibles)

ASA is pleased to share its views on the above-captioned guidance regarding how to tax nonfungible tokens (NFTs) when purchased using funds from an individual retirement account, and specifically the correct rate of taxation. ASA recognizes the challenge facing IRS as it develops guidance about NFTs using the existing regulatory framework while also developing its own understanding of the assets themselves. However, the proposed “look-through analysis” contained in the Notice raises valuation-related questions that, while not immediately germane here, are important to consider as this process will inform subsequent thinking on NFTs going forward.

The “look-through analysis” proposed by IRS assumes that each NFT carries with it an underlying asset<sup>1</sup>. At a basic level, this analysis risks conflating the value of underlying assets with the value of the NFT itself. While the NFT’s value *may* be pegged to the value of underlying assets, NFTs transact in their own unique markets with distinct features affecting NFT values separate from underlying assets. It needs to be clear that when valuing NFTs it is not enough merely to value underlying assets as a proxy for NFT value, and that when valuing an NFT the appraiser be qualified<sup>2</sup> and competent to value NFTs and not just the underlying asset<sup>3</sup>.

A second question stemming from the proposed guidance is whether an NFT is a “work of art” and therefore falls under the Section 408(m) definition of a collectible. This speaks to those NFTs that are affiliated with a digital file (image, audio, or video) and that are routinely created and sold by an individual or group. We see two distinct issues surrounding NFTs as “works of art”:

- First, from whose perspective is the question of whether an NFT is a “work of art” determined? Is it from the maker’s perspective as they create the NFT and related digital file? Or does the determination come from the perspective of the buyer of an NFT? Clarifying the question of perspective when making this determination will be helpful.

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<sup>1</sup> For the purposes of this letter, “underlying assets” are any right or interest (either whole or in part) in property, whether they are tangible or digital, that convey alongside the NFT and are typically considered “collectibles” under Section 408(m).

<sup>2</sup> In this context, we use “qualified” in reference to “qualified appraiser” as defined by IRS Publication 561.

<sup>3</sup> IRS can provide helpful guidance here about accepted public markets where NFTs transact and accessibility and accuracy of comparable sales data.

- Second, there are some NFTs being created using generative artificial intelligence (AI). This involves someone providing prompts to an AI tool, which then creates a digital file based on the prompts and subsequent revisions. Does the level of human intervention in the expression of the idea affect whether AI-generated NFTs should be “works of art”? Does the ability or lack thereof of the created content to be copyrighted affect this consideration? (This sets aside the effect of copyright protection or its absence on NFT values.)

Answering these questions regarding “works of art” with clarity would be helpful not only from a tax treatment perspective, but in framing how NFTs are viewed by IRS.

As these questions begin spilling over into more valuation-centric areas – such as noncash charitable contributions – it will be vital to issue clear guidance and expectations of valuation professionals so they do not inadvertently place themselves in jeopardy of a valuation misstatement or professional practice sanction. ASA looks forward to working with IRS on these emerging issues. If you have any questions or wish to discuss our views further, please contact John D. Russell, JD, Strategic Partnership Officer for ASA at [jrussell@appraisers.org](mailto:jrussell@appraisers.org), or by phone at 703-733-2103.

Sincerely,  
ASA