



2024 WICPA ACCOUNTING & AUDITING CONFERENCE

YOUR SOURCE FOR KEY UPDATES & INSIGHTS ON TIMELY ISSUES

HIGHLIGHTED TOPICS:



ACCOUNTING & AUDITING UPDATE

Hear about the latest relevant current and upcoming changes in GAAP and GAAS as well as real-world practical examples and tips



NEW FEDERAL REQUIREMENT FOR BUSINESSES: BENEFICIAL OWNERSHIP REPORTING 101

Hear directly from a FinCEN representative about information on beneficial ownership reporting and how to comply with the law, including a walkthrough of how to fill out the form, as well as a period for questions



ECONOMIC & FINANCIAL MARKET OUTLOOK: POST-ELECTION PROSPECTS

Find out what the most reliable indicators point to about the economic and financial market outlook, and what that means for us all in 2025-2028

THURSDAY, NOV. 21 | WICPA OFFICE & WICPA CPE LIVESTREAM

MATERIALS AT A GLANCE

The following materials are from the afternoon sessions of the 2024 WICPA Accounting & Auditing Conference held on Thursday, Nov. 21, including:

- Accounting & Auditing Update
- Maintaining Ethical Objectivity & Independence
- New Federal Requirement for Businesses:
Beneficial Ownership Reporting 101
- Hot Tax Practice & Procedure & Ethics Issues

**VIEW THOUSANDS OF ADDITIONAL IN-PERSON AND
ONLINE CPE OPPORTUNITIES AT [WICPA.ORG/CPECATALOG](https://www.wicpa.org/cpecatalog)**



Commercial Bankers, Joel Benz and Avelina Poppoert, at the Wisconsin Institute of CPA's Conference.

Commercial banking means having a trusted partner right here in your neighborhood.

Whether you are getting your businesses off the ground or getting ready to expand, our commercial banking services are here to help you succeed.

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- Private Banking and Wealth Management Services
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- And More!



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TOGETHER,

we have the power to make a difference.

Contributions to the WICPA Political Action Committee (CPAC) and Legislative Involvement Fund (LIF) allows the WICPA to:



Educate lawmakers about the issues impacting Wisconsin CPAs.



Ensure a healthy business climate for CPAs and the clients you serve.



Strengthen the voice and visibility of the WICPA and its members.



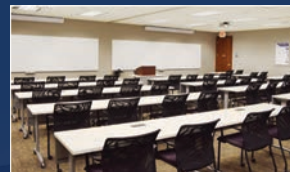
Support the election campaigns of candidates who support our issues.

Learn more and make a contribution at wicpa.org/cpaclif.

Meeting Space & Training Center Rentals Available

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- ▶ Free high-speed Wi-Fi
- ▶ Free parking
- ▶ Located in Waukesha, just off I-94
- ▶ Coordinated catering and refreshments

Training Center



Executive Boardroom



For more information, visit wicpa.org/MeetingSpaces, or to schedule a tour or reserve space, contact Rachella Fortier at rachella@wicpa.org or 262-785-0445 ext. 4505.



WICPA Educational FOUNDATION

YOU have the opportunity to impact thousands of students and educators in Wisconsin.



Through your contribution to the WICPA Educational Foundation, you can help us reach students and educators in high school and college to create awareness about the accounting profession.

As the end of 2024 draws near and you are thinking about tax planning, consider donating to the WICPA Educational Foundation.

Questions? Contact Tammy J. Hofstede, WICPA President and CEO at tammy@wicpa.org.

To contribute, visit wicpa.org/EF.

INSPIRE FUTURE ACCOUNTANTS

PROMOTE ACCOUNTING & YOUR ORGANIZATION!

Step up and shape tomorrow's accounting professionals by hosting high school students at your organization. The WICPA Educational Foundation's Accounting Awareness Grants provide funding for high school educators to bring students to you for a presentation or activity to learn more about accounting. By volunteering to host a class, your organization will:



Spark interest in the accounting profession



Strengthen the CPA pipeline with future talent



Showcase your internships & job shadow opportunities



WICPA Educational FOUNDATION

Don't miss the chance to inspire and recruit the next generation of accountants. Get noticed by high school educators now! Learn more at wicpa.org/HighSchoolActivityHost.



SAVE THE DATE!

UPCOMING WICPA CONFERENCES & SPECIAL EVENTS



CONFERENCES

WICPA conferences are your source for key updates and insights on timely issues. As a WICPA member, you can save up to \$150 on registration!

Accounting Technology Conference

Tuesday, Dec. 10

WICPA Office & WICPA CPE Livestream

Business & Industry Spring Conference

Thursday, March 20, 2025

Brookfield Conference Center & WICPA CPE Livestream

Financial Institutions Conference

Tuesday, May 13, 2025

WICPA Office & WICPA CPE Livestream

School District Audit Conference

Wednesday, May 21, 2025

WICPA Office & WICPA CPE Livestream

Business & Industry Fall Conference

Tuesday, Sept. 9, 2025

Brookfield Conference Center & WICPA CPE Livestream

Not-for-Profit Accounting Conference

Tuesday, Sept. 16, 2025

WICPA Office & WICPA CPE Livestream

Tax Conference

Monday, Nov. 3 - Tuesday, Nov. 4, 2025

Brookfield Conference Center & WICPA CPE Livestream

Accounting & Auditing Conference

Thursday, Nov. 20, 2025

WICPA Office & WICPA CPE Livestream

Technology Conference

Thursday, Dec. 4, 2025

WICPA Office & WICPA CPE Livestream

SPECIAL EVENTS

WICPA special events are unique opportunities to connect with fellow members and provide a great way to socialize and have fun!

Bowling Night

Thursday, April 24, 2025

New Berlin Ale House

Member Recognition Banquet & Annual Business Meeting

Friday, May 9, 2025

Brookfield Conference Center

New CPA Banquet

Friday, June 13, 2025

Brookfield Conference Center

Golf Outing

Friday, Sept. 19, 2025

Ironwood Golf Course

Virtual Member Orientation

Thursday, Dec. 12, 2024 | Open 8 a.m.

Tuesday, March 11, 2025 | Open 8 a.m.

Learn more and register at
wicpa.org/orientation.

Registration opens approximately eight weeks prior. For more details about each and to register, visit wicpa.org/conferences and wicpa.org/events.

2025
WICPA

Excellence

★ ★ ★

★ ★ A W A R D S



NOMINATE SOMEONE YOU KNOW FOR AN EXCELLENCE AWARD!

- ★ Accounting Educator
- ★ Accounting Student
- ★ Business & Management
- ★ CPA in Public Practice
- ★ Community Service
- ★ Distinguished Career
- ★ Diversity & Inclusion
- ★ Woman to Watch
- ★ Young Professional

Submit your nomination at wicpa.org/awards by Nov. 22, 2024.

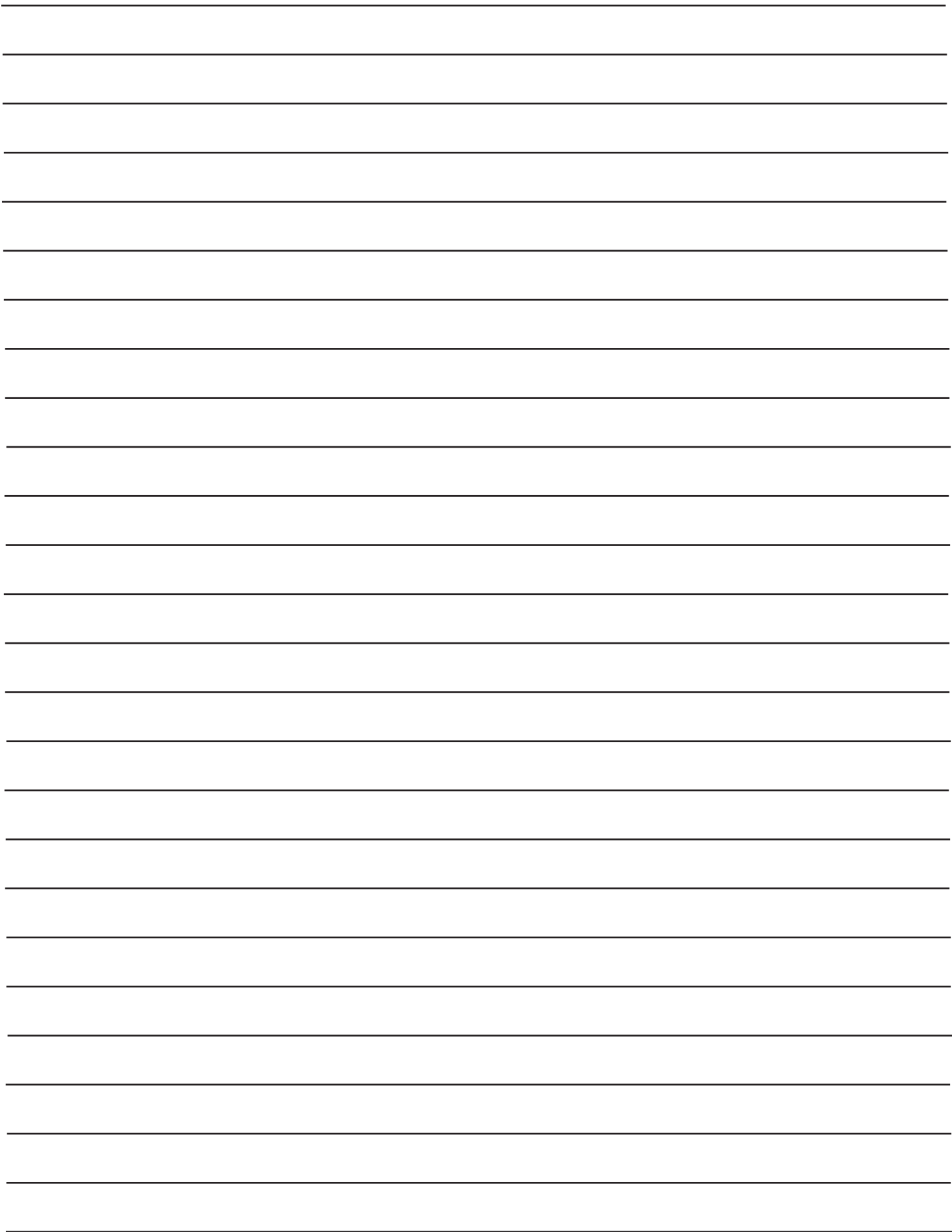
Recipients will be announced in January and honored at the Member Recognition Banquet & Annual Business Meeting on May 9, 2025.

The individual nominated must be a WICPA member.

12:05 – 12:55 p.m.

Accounting & Auditing Update

Brad Hermes, CPA, *Principal, Audit & Assurance, Sikich*



1:05 – 1:55 p.m.

Maintaining Ethical Objectivity & Independence

Kathy Enstrom, MBA, CFE, *Director of Investigations,*
Moore Tax Law Group LLC

Guinevere Moore, JD, *Managing Member, Moore Tax Law Group LLC*



Wisconsin Institute of
Certified Public Accountants

MAINTAINING ETHICAL OBJECTIVITY AND INDEPENDENCE

Moore Tax Law Group
A Tax Controversy and Tax Litigation Boutique

Dangers of Getting Too Close to
Clients

SPEAKERS

Guinevere Moore

Managing Partner

Guinevere.Moore@mooretaxlawgroup.com

Chambers, Tax Controversy 2023-2024

Best Law Firms in America



Moore Tax Law Group

A Tax Controversy and Tax Litigation Boutique

Phone: 312-549-9900

Locations: Chicago and New York

Kathy Enstrom

Director of Investigations

Kathy.Enstrom@mooretaxlawgroup.com

27 years as a Federal Law Enforcement
Special Agent

Retired Executive with IRS Criminal
Investigation





A CAUTIONARY TALE

THE BEGINNING
OF THE STORY...

Moore Tax Law Group

A Tax Controversy and Tax Litigation Boutique

LEARNING OBJECTIVES

Review of AICPA Code of Conduct as it pertains to objectivity and independence

Recognize when independence is waning or compromised.

Understand the ethical requirements for tax return preparation, including taking positions on tax returns, due diligence obligations, and advising the clients accordingly.

Techniques and reminders for saying no to clients and recognizing the importance of doing so.

Understand the proper way to respond to an IRS audit.

Learn the potential civil and criminal consequences preparers and their clients face for the failure to properly prepare and file income tax returns.

POP
QUIZ!

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WHAT WOULD YOU DO IF... YOUR PARENT OR CHILD CAME TO YOU AND TOLD YOU THAT THEY DO NOT REPORT CASH INCOME, BUT IT DOES NOT AFFECT THEIR TAX DUE?

Raise your hand with the number you identify with the most?

1. Report them to the IRS
2. Talk to them about the dangers of not reporting it
3. Ignore it and pretend you didn't hear it



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WHAT WOULD YOU DO IF... YOUR VERY BEST FRIEND CAME TO YOU AND TOLD YOU THAT THEY DO NOT REPORT CASH INCOME OF \$2,000?

Raise your hand with the number you identify with the most?

1. Report them to the IRS
2. Talk to them about the dangers of not reporting it
3. Ignore it and pretend you didn't hear it

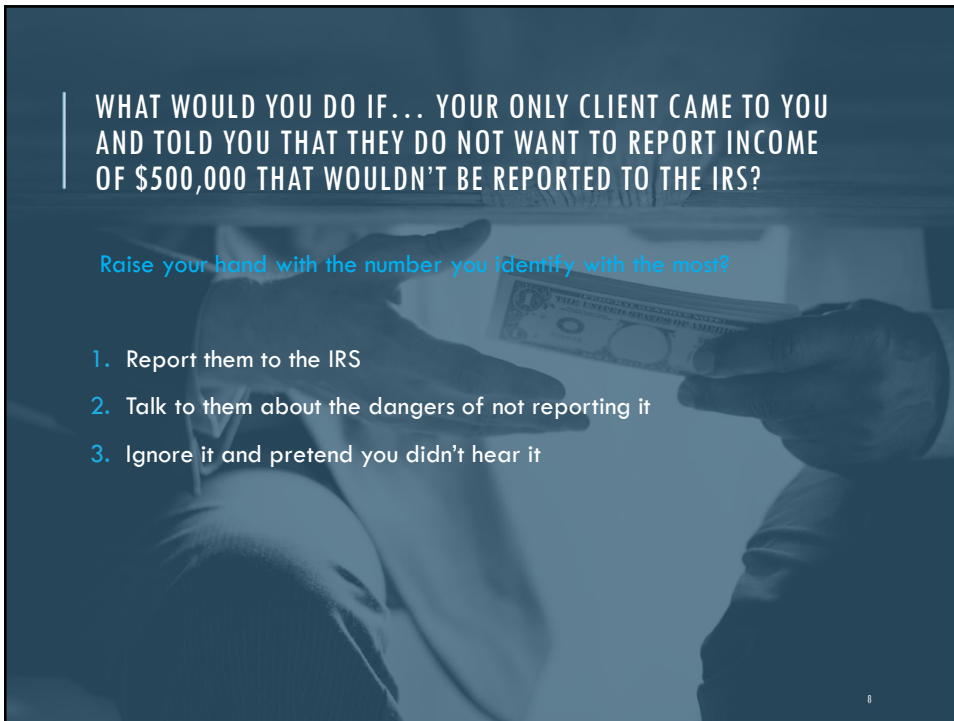


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WHAT WOULD YOU DO IF... YOUR ONLY CLIENT CAME TO YOU AND TOLD YOU THAT THEY DO NOT WANT TO REPORT INCOME OF \$500,000 THAT WOULDN'T BE REPORTED TO THE IRS?

Raise your hand with the number you identify with the most?

1. Report them to the IRS
2. Talk to them about the dangers of not reporting it
3. Ignore it and pretend you didn't hear it



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WHAT WOULD YOU DO IF... YOUR CLIENT ASKED YOU TO CREATE A DOCUMENT SUPPORTING EXPENSES WHICH ASSISTS THEM DURING AN IRS AUDIT?

Raise your hand with the number you identify with the most?

1. Tell them no
2. If the document is accurate, why not?



AICPA CODE OF CONDUCT



AICPA Code of Professional Conduct applies to all CPAs, in public practice, in business or otherwise (0.100.01)



AICPA bylaws require that members follow the Code (0.100.010.02)



"Each of these Principles should be considered by members in determining whether or not to provide specific services in individual circumstances." (0.300.070.03)



Integrity principle: "members should perform all professional responsibilities with the highest sense of integrity." (0.300.040.01)

AICPA CODE OF CONDUCT



Objectivity and Independence Principle:

- "A member should maintain objectivity and be free of conflicts of interest in discharging professional responsibilities." (0.300.050.01)
- "Regardless of service or capacity, members should protect the integrity of their work, maintain objectivity, and avoid any subordination of their judgment." (0.300.050.03)

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CIRCULAR 230 - INDEPENDENCE

"Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice, includ[ing] ... acting fairly and with integrity in practice before the Internal Revenue Service." (10.33(a))

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Independence means that the CPA is not unduly influenced by his or her client

An independent CPA does not subordinate his or her judgment to the client's judgment

INDEPENDENCE

CHALLENGES OF INDEPENDENCE

- Client has an aggressive or dominant personality
- Client has knowledge of IRC and ideas about how to report things
- CPA relies extensively on revenue from a single client
- CPA has long-standing, close relationship with client, making CPA overly sympathetic to client's interests



OBJECTIVITY & INDEPENDENCE

Important to understand situations that compromise your relationship with the client:

Becoming an "insider" to client and/or the business

Holding a corporate title and being introduced inside and outside the organization as staff (example: CFO or Controller)

Having a client email address with your name and using that email

Participating in client events as if you are staff or traveling for the client as staff

Investing in client's business or ventures

Making your client's favorite charities your charities

THREATS TO INDEPENDENCE

"Threats" are "relationships or circumstances that could compromise a member's compliance with the rules." (1.100.010.06-.08)

Many threats fall into one or more of these categories:

- adverse interest,
- advocacy,
- familiarity,
- management participation,
- self-interest,
- self-review,
- and undue influence.



RUTH HANDLER



"I am Mattel," Handler, played by Rhea Perlman in the movie, says. "At least, until the IRS got to me."

RUTH HANDLER
Exec. VP, VP, Controller and
Supervisor

SEC Charges, false reports
indicating \$10 million more in
sales than actual.

TYPES OF THREATS

Adverse interest threat (member in business): The threat that a member will not act with objectivity because the member's interests are opposed to the interests of the employing organization, such as when the member has or will charge the employer with violations of law. (2.000.010.09)

Familiarity threat: The threat that, due to a long or close relationship with a client, a member will become too sympathetic to the client's interests, such as when senior personnel have a long association with a client. (1.100.010.12; 2.000.010.11)

Self-interest threat: The threat that a member could benefit, financially or otherwise, from a relationship with a client, such as when a member relies excessively on revenue from a single client. (1.100.010.14; 2.000.010.12 (member in business eligible for performance bonus))

Undue influence threat: The threat that a member will subordinate her judgment to the client or a third party because of that individual's reputation, aggressive or dominant personality, or attempts to coerce the member. (1.100.010.16; 2.000.010.14; 2.170.010.02, .04 (pressure from superiors to breach the rules, approve expenditures that are not legitimate business expenses))

DOCUMENTATION

Protect yourself:

- All documents must come from client or their organization
- Get all direction and information in writing
- Notify the client in writing if you encounter errors that the client is making in entries or documentation.
- Never create a document even if pressured by client or an advisor to the client, such as lawyer or staff
- Never alter (for example, back date) documents
- Do not assume that you know the law and prepare legal documents for the client



TIME FOR AN ENGAGEMENT CHECKUP

CPAS OFTEN HAVE LONG-TERM CLIENTS...

Benefit to Continuity

- CPA knowing the client & client's business keeps costs low for the client.
- Streamline workflow
- Less time wasted importing new data, depreciation schedules, etc.
- CPA able to easily and cost effectively respond to IRS requests for information from prior years

Detriment to Continuity

- Overly familiar relationship with client
- Does not ask why often enough
- Makes assumptions



CONTROLLERSHIP SERVICES

Never provide controllership services and tax services to the same client

Controllership services cross the independence line

Refer controllership clients to other professionals for tax and audit services

REPRESENTATION RULES TO PRACTICE BY

Do not let the client make you the "front person" for them during critical meetings.

Never infer that you know what the client wants.

Never lie or make misleading statements during any audit, but especially a tax audit.

Resist the urge to "help" the client with potential criminal tax issues, you are not a lawyer or a criminal specialist.

RISKS FOR SOLE PRACTITIONERS

A sole practitioner does not have a structure or organization in place to identify risks

Sole practitioners are always trying to expand services with existing clients

Be honest with yourself as to what services you are qualified to perform

Keep a list of trusted advisors for yourself to consult with in questionable situations

Keep a list of professional referral specialists

LAPSE IN JUDGMENT - *U.S. V. BERNARD TURK*

Bernard Turk, 73-year-old CPA from the San Fernando Valley, CA.

In February 2021, Turk helped a long-time client submit a false application for a PPP loan on behalf of the client's company.

Prepared false federal corporate income tax returns claiming the business had 126 paid employees. The false return was provided to the bank to obtain the loan. To hide his involvement, he marked the return self-prepared.

He admitted the business had no employees, paid no wages and filed no return with the IRS.

Sentenced to a year and a day with a \$50,000 fine.

(Central District of California, Nov. 2022)

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DUE DILIGENCE

A practitioner "must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete." (Cir. 230, § 10.34(d))



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LAPSE IN JUDGMENT - *U.S. V. MARC BERGER*

Marc Berger, CPA, had a 45-year career and was chairman of the board at the mid-size accounting firm of Burr Pilger Mayer.

Berger sentenced to 8 months in prison after guilty verdict in a 3-week jury trial for aiding and assisting in filing false tax returns in violation of I.R.C. § 7206(2).

Government Sentencing Memo asked for a significant jail term, arguing *"it is likely that CPAs across the United States are committing similar crimes for their clients because they know the IRS has very limited resources."*

(Northern District of California, December 2018)



CIRCULAR 230 CONFLICTING INTERESTS

A practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if—

- The representation of one client will be directly adverse to another client, or
- There is a significant risk that the representation of one client will be materially limited by the practitioner's responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner." (10.29(a))



CONFLICT CHECKS

Best practices (and most malpractice insurance policies) require conflicts checks to be done at the beginning of every engagement.

What about after the engagement has been active? Active for many years?

Over the life of an engagement, CPA should perform conflicts checks to ensure that no conflicts of interest have arisen.



Dual representation of married spouses or former spouses

- Level of culpability for adjustments or same defenses

Partnerships and partners

- TEFRA or BBA?
- Partners may have different implications for adjustments.
- What does the partnership agreement say?

Practitioner and client

- Dual role of practitioner as planner and representative in subsequent audit or exam
- Practitioner as advocating different positions for different clients
- Reliance defense

Client and non-related clients

- Does one client want you to take a position that is contrary to other clients?

TYPES OF CONFLICTS THAT CAN ARISE

Form **1040** Department of the Treasury • Internal Revenue Service
U.S. Individual Income Tax Return 990 Use Only Do not write or staple in this space

Label (See instructions.) Your first name **John** SSN **0** Last name **Americian** Your social security number **04-15-1964**

Use the IRS label. If a joint return, spouse's first name **John** SSN **0** Last name **Americian** Spouse's social security number **04-15-1964**

Checkboxes: Married, please print (P) or (S) Single Married, please print (P) or (S) Divorced Widowed Head of household Qualifying widow(er) with dependent child (see instructions)

Residential Election Campaign: Yes No

Filing Status: 1 Single 2 Married filing jointly (see instructions) 3 Married filing separately (see instructions) 4 Qualifying widow(er) with dependent child (see instructions)

Exemptions: a Yourself, if someone else is claiming you as a dependent, do not check box (a) b Spouse c Dependent d Total number of exemptions claimed **2**

Income: **7** Wages, salaries, tips, etc. (Attach Form(s) W-2) **55,000.**
8a Taxable interest. Attach Schedule B if required **923.**
8b Tax-exempt interest. Do not include on line 8a **0.**
8c Ordinary dividends. Attach Schedule B if required **0.**
8d Qualified dividends (see instructions) **94.**
8e Total income **55,923.**

SELECTED FOR AUDIT



COMMUNICATING WITH CLIENTS DURING AN IRS EXAM

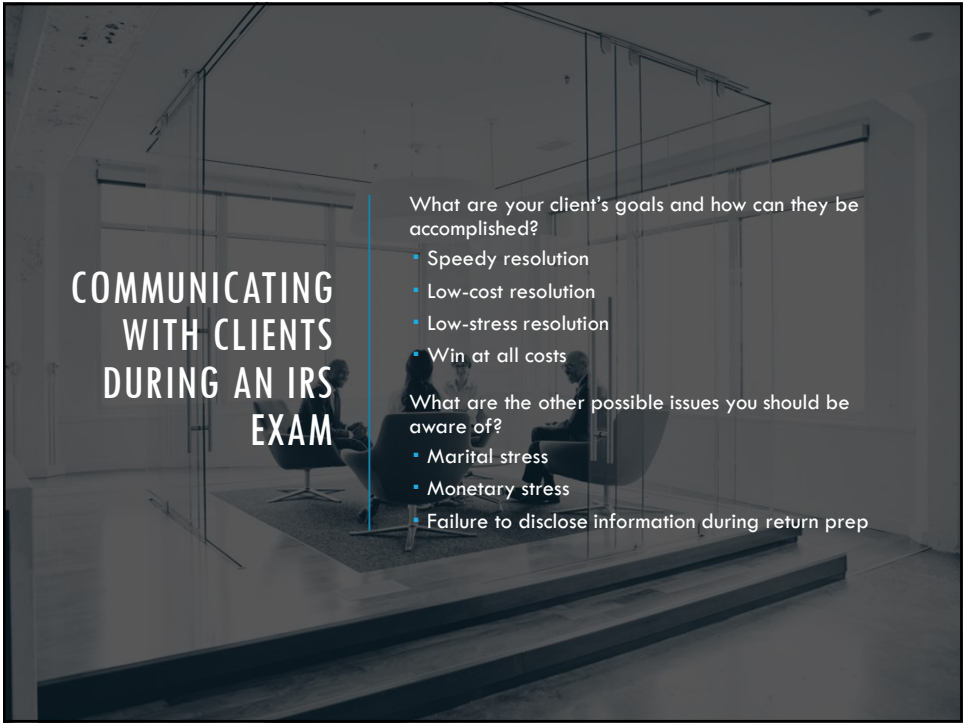
When a client receives notification of an IRS Exam, it is often one of the most terrifying moments they have experienced.

- Am I going to jail?
- How much money will this cost me?
- Will I get divorced?

Your response should be:

- Immediate
- Measured
- Realistic





BEST PRACTICES FOR CLIENT COMMUNICATIONS

Do not guaranty

- Do not guaranty results, either in tax return prep or in exam.

Avoid

- Avoid accepting responsibility for the tax due or at issue.
- The tax is the tax and we must take care not to pretend like a preparer's job or duty is to reduce or eliminate tax.

Assess

- Honestly assess whether penalties are at stake and if so, what the implications are.

DILIGENCE AS TO ACCURACY – IN PRACTICE

Gather facts from the IRS

1. Request and Review IRS documents to understand what IRS position is
2. Account transcripts for year at issue & 5 years prior
3. Wage & Income information for year at issue



DILIGENCE AS TO ACCURACY – IN PRACTICE

Compare the results to spot and resolve any inconsistencies with the client.

Testing is key.

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PRACTITIONER'S DUTIES IN EXAM SUBMISSION OF DOCUMENTS

§ 10.34 – Standards with respect to tax returns and documents, affidavits & other papers

(b) *Documents, affidavits and other papers* —

- (1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.
- (2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —
 - (i) The purpose of which is to delay or impede the administration of the Federal tax laws;
 - (ii) That is frivolous; or
 - (iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

KNOWLEDGE OF CLIENT'S ERROR OR OMISSION

If you know of or discover an error or omission from any return or other tax-related document submitted to the IRS, you:

- Must advise the client of the nature of the error or omission
- Must advise the client of the potential consequences of the error or omission under Code or Regulations

Consider whether an attorney needs to take over to provide attorney-client privilege.

Determine all possible consequences for client under scenarios that include disclosure, no disclosure and “get caught”, no disclosure and “don't get caught”. Include civil and, if applicable, criminal penalties.

Are you able to continue the representation if the client does not want to disclose? Make sure your client understands.

THINKING PROACTIVELY ABOUT RISK



Consider

Consider statute of limitations and impact of adequate disclosure



Evaluate

Evaluate merits of uncertain positions considering current law and knowledge of relevant facts

- Quantify tax exposure attributable to each item



Assess

Assess additional exposures

- Identify any conduct that the IRS may uncover that could expose the client to criminal liability, significant civil liability, or personal strife
- Estimate penalties & interest

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ASSESS PROBABLE AUDIT APPROACH

Likelihood that uncertain items will be discovered

Litigating and audit position of IRS

Previous Experience with IRS examiner

Consider what information IRS already has

- prior filings
- information returns from others
- treaty information from foreign countries

IDR RESPONSES

Demonstrate compliance.

Mirror the IDR and respond to each item.

Bates number or create exhibits for each item (or both).

Offering for the IRS exam agent to come look at documents does not create a good record for the trial attorney.

Do not create documents that do not already exist unless there is a VERY good reason to do so.

Consider what objections your client has and whether they are worth making.

TAXPAYER INTERVIEW

Does the taxpayer have a Fifth Amendment concern with being interviewed?

Will the taxpayer help or hurt themselves?

Possible to get a list of questions ahead of time?

Is the taxpayer prepared?

Consider recording the interview under IRC § 7521 or, at a minimum, take very careful notes. If you take notes, one person must listen to protect taxpayer rights while the other person takes notes.

SCOPE OF SUMMONS AUTHORITY

If you do not produce documents or your client for an interview, the IRS may summons the information.

Consider scope of summons authority

- *United States v. Powell*, 379 U.S. 48 (1964)
 1. The investigation is conducted pursuant to a legitimate purpose
 2. The inquiry is relevant to that purpose;
 3. The information sought is not already within the IRS's possession
 4. The administrative steps required by the I.R.C. have been followed.
- *United States v. Clarke*, 573 U.S. __ (2014)

In summons dispute, taxpayer is entitled to examine an IRS agent when he can point to specific facts and circumstances plausibly raising an inference of bad faith.

Taxpayers need not produce documents that are not within their possession or control



BENEFITS OF COOPERATION IN EXAM

Shifting the Burden of Proof – IRC § 7491

IDR responses and completed taxpayer interviews are key for allowing the taxpayer a chance to shift the burden of proof to the IRS in litigation.

To shift the burden of proof, the taxpayer must:

- Comply with requirements to substantiate any item,
- Maintain all records required and cooperate with reasonable requests by the Secretary for witnesses, information, documents, meetings, and interviews; and
- In the case of a partnership, corporation, or trust, have a net worth that does not exceed \$7 million.

Practical implications of moving to shift the burden of proof at trial are rarely that the court will agree to shift the burden, but instead we can introduce evidence showing the flawed nature of the exam.

PROS VS. CONS OF DEMONSTRATING COOPERATION

Risk of Fifth Amendment waiver

- OK to allow the IRS to summons information from third parties if your client has Fifth Amendment implications, because they will get the info anyway, but your client won't be waiving Fifth Amendment rights.

If you are even thinking about the Fifth Amendment, **get a lawyer involved.**

Some clients are their own worst enemy / witness for reasons that have nothing to do with the actual tax due or problems with a tax return.

EGGSHELL AUDITS

If your initial review of the facts revealed potential criminal exposure or other significant liability

or

If the auditor's questions raise red flags

or

If the client reveals bad facts at any point,

then

You are in an "eggshell" audit and must practice the art of fulfilling your professional and ethical obligations while minimizing your client's exposure.



YOUR CLIENT WANTS TO SETTLE, BUT....

You can't get the examiner to agree. Now what?

There are realistic options for achieving settlement with the IRS if you cannot convince the examiner to see your client's point of view.

Escalating the Issue to a Manager or Above

Protest to Appeals

Alternative Dispute Resolution

Appeals Conference after Filing in Tax Court

Settlement with IRS Counsel after Filing in Tax Court

Settlement with DOJ Tax after Filing in District Court or Court of Claims



FRAUD REFERRAL PROGRAM

IRS Civil can refer a case for Criminal Investigation review and consideration.

All leads must go through a Fraud Enforcement Advisor (the wall between civil and criminal to avoid Tweel issues)

Badges of Fraud must be present in the referral:

- Altered documents submitted
- Second set of records
- False statements
- Destruction of records
- Concealment of income sources
- Any other conduct to conceal or mislead

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TIMELINE OF CRIMINAL INVESTIGATION

Receive Fraud Referral – accept or decline

Open Criminal Investigation – administrative or grand jury

Special Agents gather evidence (subpoena/summons)

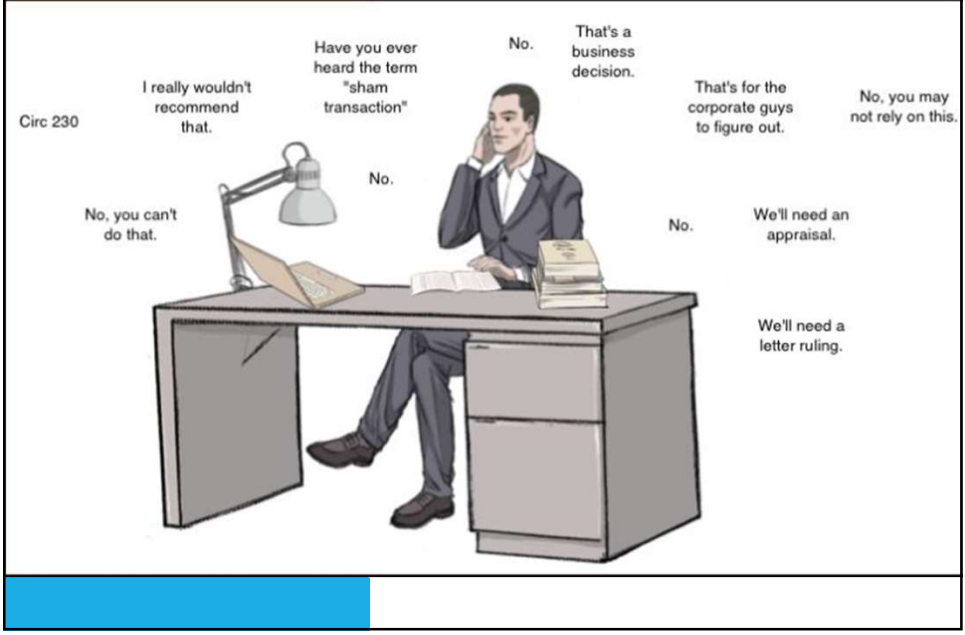
Interview subject, return preparer and other witnesses

Prosecution report - reviewed by many levels, including Department of Justice Tax Division

Sent to the U.S. Attorney's Office for charging

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Things a Tax Attorney Says



2:05 – 3:05 p.m.

New Federal Requirement for Businesses: Beneficial Ownership Reporting 101

Channing Mavrellis, *Guidance and Outreach Advisor,
Beneficial Ownership and Transparency Unit, Financial
Crimes Enforcement Network*



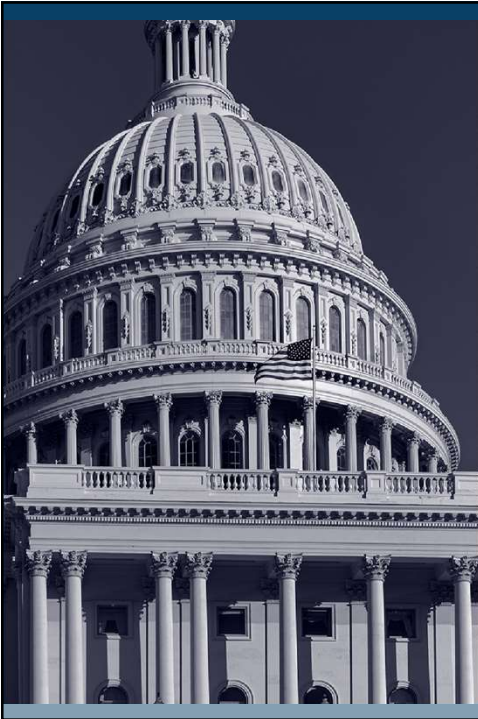
BOI
Beneficial Ownership
Information

The Corporate Transparency Act

Beneficial Ownership Information Reporting Requirements for Companies

The reporting requirements for certain individuals and entities have been affected by a federal court ruling. More information is available at www.fincen.gov/boi.

U.S. Department of The Treasury | Financial Crimes Enforcement Network



What is the Corporate Transparency Act, or CTA?

- The bipartisan CTA, enacted by Congress in 2021, requires many companies doing business in the United States to securely report their beneficial ownership information—basic information about who really owns or controls them—to the U.S. government.
- Many companies are required to report their beneficial ownership information to the Financial Crimes Enforcement Network, or FinCEN, a bureau within the U.S. Department of the Treasury.
- This framework is an important step in stopping the flow of illicit funds that hurt law-abiding small businesses, as well as protecting our economic and national security from bad actors.

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Beneficial Ownership Reporting Resources

- Effective **January 1, 2024**, many companies in the United States have to begin reporting information about their beneficial owners, i.e., the individuals who ultimately own or control the company, and their company applicants.
- You can find resources—including a comprehensive compliance guide, FAQs, multimedia content, and more—at www.fincen.gov/boi.



Small Entity Compliance Guide

Available at www.fincen.gov/boi



01	Does my company have to report its beneficial owners?.....	5
02	Who is a beneficial owner of my company?	6
03	Does my company have to report its company applicants?	7
04	What specific information does my company need to report?.....	8
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06	What if there are changes to or inaccuracies in reported information?.....	13

01: Does my company have to report its beneficial owners?

Domestic Reporting Company: a corporation, limited liability company (LLC), or any other entity created by the filing of a document with a secretary of state or similar office.

Foreign Reporting Company: a corporation, LLC, or other entity formed under the law of a foreign country that is registered to do business in the United States by the filing of a document with a secretary of state or similar office.

Non-Reporting Companies include entities that are not created by filing with a secretary of state, e.g., sole proprietorships and certain trusts.

Exempt Companies include banks, credit unions, tax-exempt entities, public utilities, and certain large companies. The Small Entity Compliance Guide includes a full list of exemptions.



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02: Who is a beneficial owner of my company?

- If your company is a reporting company, your next step is to identify its beneficial owners. A beneficial owner is **any** individual who, directly or indirectly:
 - » owns or controls at least 25 percent of the **ownership interests** of a reporting company;
 - OR**
 - » exercises substantial control over a reporting company.
- An individual might be a beneficial owner by virtue of their substantial control, ownership interests, or both.
- **Ownership Interests** – Reporting companies are required to identify **all** individuals who own or control at least 25% of the **ownership interests** of a company.
- Ownership interests include equity, stock, or voting rights; a capital or profit interest; convertible instruments; options or privileges; and any other instrument, contract, or other mechanism used to establish ownership.
- There are several exceptions to the definition of beneficial owner, including a minor child, a nominee, intermediary, custodian, or agent, an employee, an inheritor and a creditor.

The Small Entity Compliance Guide has detailed graphics, checklists, and examples to assist in reporting companies in identifying their beneficial owners.

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02: Who is a beneficial owner of my company?

- **Substantial Control** - Reporting companies are required to identify all individuals who exercise *substantial control* over the company.
- An individual exercises **substantial control** over a reporting company if the individual meets **any** of four general criteria:
 1. The individual is a senior officer;
 2. the individual has authority to appoint or remove certain officers or a majority of directors of the reporting company;
 3. the individual is an important decision-maker; or
 4. the individual has any other form of substantial control over the reporting company.

The Small Entity Compliance Guide provides more information about these criteria.

03: Does my company have to report its company applicants?



IF

Domestic/Foreign Reporting Company Created or Registered on or after Jan. 01, 2024.

THEN

Required to Report Company Applicants



IF

Domestic/Foreign Reporting Company Created or Registered before Jan. 01, 2024.

THEN

Not Required to Report Company Applicants

Company Applicants are:

- » The individual who directly filed the documents that created or first registered a domestic or foreign reporting company.
- » The individual who was primarily responsible for directing or controlling the filing of the creation or first registration document.



04: What specific information does my company need to report?

- Your reporting company must provide information about **itself**:
 - » legal name
 - » any trade name or any “doing business as” (d/b/a)
 - » complete U.S. address
 - » State, Tribal, or foreign jurisdiction of formation
 - » for a foreign reporting company: State or Tribal jurisdiction of first registration
 - » Taxpayer Identification Number (TIN) or foreign tax ID



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04: What specific information does my company need to report?

- A reporting company must provide information about its **beneficial owners** and **company applicants**:
 - » name
 - » date of birth
 - » address
 - » identifying number and issuing jurisdiction from a non-expired driver’s license, U.S. passport, or an identification document issued by a State, local government, or Indian tribe, or a foreign passport (if none of the other document exist); an image of the document must also be provided



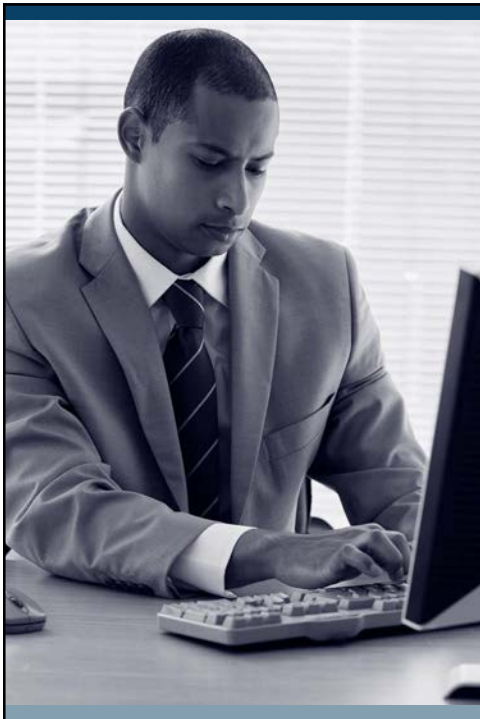
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04: What specific information does my company need to report?

- A “FinCEN identifier” is a unique identifying number that FinCEN will issue to an individual or reporting company upon request after the individual or reporting company provides certain required information to FinCEN.
- An individual or reporting company may only receive one FinCEN identifier.
- FinCEN identifiers may be reported instead of certain required information about beneficial owners or company applicants.



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05: When and how should my company file its initial report?



The reporting requirement went into effect on January 1, 2024. FinCEN began accepting beneficial ownership information reports on this date.

Initial reports are required for all companies that meet the definition of reporting company and are not exempt from that definition.

Existing Reporting Companies



Reporting companies created or registered to do business in the United States before January 1, 2024 must file by **January 1, 2025**.

Newly Created or Registered Companies



Reporting companies created or registered to do business in the United States in 2024 have **90 calendar days** to file after receiving actual or public notice that their company's creation or registration is effective. **Starting January 1, 2025 new reporting companies will have 30 calendar days to file.**

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05: When and how should my company file its initial report?

- If your company is required to file a beneficial ownership information report, you must do so electronically through a secure filing system. FinCEN began accepting beneficial ownership information reports on January 1, 2024.
- FinCEN has published instructions on how to complete the report.
- Sign up for FinCEN Updates or periodically check our website at www.fincen.gov/boi.

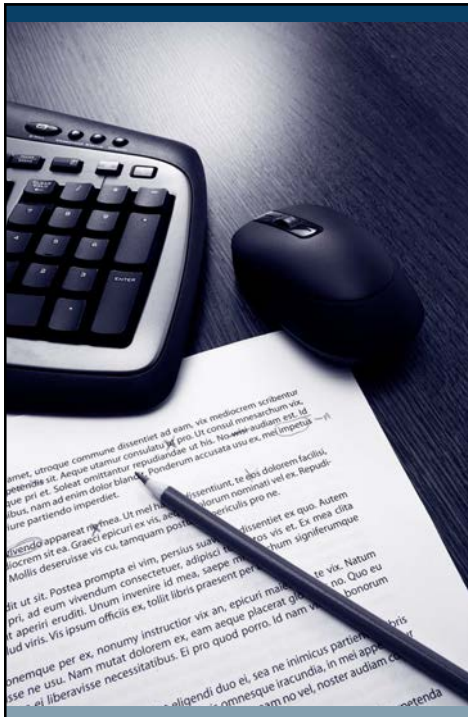


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06: What if there are changes to or inaccuracies in reported information?

Updated Reports

- Required when there is a change to previously reported information about the reporting company itself or its beneficial owners.
- Updated reports are due within **30 calendar days** after a change occurs.

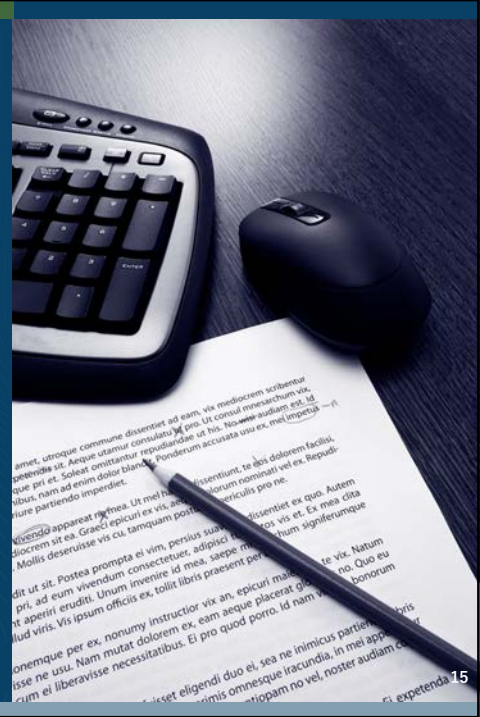


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06: What if there are changes to or inaccuracies in reported information?

Corrected Reports

- Required when previously reported information was inaccurate when filed and remains inaccurate.
- Corrected reports due within **30 calendar days** after the reporting company becomes aware or has reason to know of an inaccuracy.



What happens if my company does not report BOI in the required time frame?

FinCEN is working hard to ensure that reporting companies are aware of their obligations to report, update, and correct beneficial ownership information. FinCEN understands this is a new requirement. If you correct a mistake or omission within 90 days of the deadline for the original report, you may avoid being penalized. However, you could face civil and criminal penalties if you disregard your beneficial ownership information reporting obligations.



Additional Resources

Visit www.fincen.gov/boi to learn more about beneficial ownership information reporting requirements.

Sign up for FinCEN Updates to be immediately notified of beneficial ownership updates via email at www.fincen.gov/boi



3:15 – 4:15 p.m.

Hot Tax Practice & Procedure & Ethics Issues

Michael Goller, JD, *Shareholder & Tax Department Chair,*
Reinhart Boerner Van Deuren s.c.

HOT TAX PRACTICE AND PROCEDURE ISSUES

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52720160

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- IRS Update
- Loper Bright – What do IRS Regulations mean?
- Other Issues
 - High “Net Worth” Audits
 - Airplane Cases
 - Family Office - Planning
 - Real Estate Professional Status
 - Research Credit Audits
 - Interest Free Adjustments in Form 941 Cases
 - Valuation Issues
 - Tax Ethics Update



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IRS – Chief Counsel Update

- Effective October 6, 2024 IRS Counsel Attorneys in LB&I SB/SE merged into – Division Counsel Litigation and Advisory (L&A).
- 14 Attorneys are in the group headed in Milwaukee (not all in Milwaukee)

Loper Bright – How important is an IRS regulation?

- Loper Bright Enterprises et al. v. Raimondo et al. and Relentless, Inc. v. Dept. of Commerce, 603 U.S. ___, 144 S.Ct. 2244 (2024)
- Corner Post v. Board of Governors of the Federal Reserve System, 603 U.S. ___, 144 S.Ct. 2440 (2024)

Background

- Loper overruled Chevron U.S.A. v. NAT. Resources Defense Counsel, Inc. 467 U.S. 837 (1984)
- Administrative Procedures Act
- Section 706 – Courts will decide “all relevant questions of law.”
- Section 553 – Contains a detailed notice and comment period for government regulations.

Background (cont.)

- Section 533(b) – APA Section 553 procedures apply to “legislative” regulations. Do not apply to “interpretive” regulations.
- Malbury v. Madison 5 U.S. 137 (1803)
- I.R.C. §§ 7805(a) “. . . the Secretary shall prescribe all needful rules and regulations for enforcement of this title [26 of the U.S.C.], . . .”

Background (cont.)

- Loper
- The Administrative Procedures Act (5 U.S.C. §§ 551 et seq.) requires courts to exercise independent judgment when deciding whether an Agency has acted within its statutory authority; courts may not defer to the Agency interpretation of the law simply because the statute is ambiguous.
- Corner Post
- Statute of limitations to challenge regulations starts when there is a harm suffered by virtue of the Reg.

Background (cont.)

- Relevant Cases
- Skidmore v. Swift Co., 323 U.S. 134 (1944) Skidmore Deference - courts will defer to an agency depending on the thoroughness of its consideration, validity of its reasoning, consistency with other pronouncements and all those factors which give it a power to persuade.
- The doctrine survives after Loper. Courts may defer to the agency if the agency's interpretation has the "power to persuade." The "best read of a statute is that the agency may well be authorized to exercise a degree of discretion." Loper, Slip. Op. at 17

Background (cont.)

- Chevron USA Inc. v. National Reserve Defense Counsel, 467 U.S. 837 (1984) – two famous factors used to make a Reg. legally binding
 - Regulation must be consistent with the plain meaning of the statute
 - Regulation is not an unreasonable interpretation of the statute.

Background (cont.)

- *Stare Decisis* - Loper
- Mayo Foundation for Medical Education and Research v. U.S., 562 U.S. 44 (2011) FICA Reg. upheld under Section 7805(a)
- Varian Medical Systems v. Comm’r, 163 T.C. No. 4 (Aug. 26, 2024)
 - Section 254A v. Section 78 effective dates
 - Treas. Reg. 1.78-1 clarifies dates. Reg. was issued under Sections 245A and 7805. The court noted a “change in unambiguous provisions of the statute” is not allowed. Id.

Background (cont.)

- There is a basic difference between filling a gap left by Congress and rewriting rules Congress enacted. *Id.* (Citing *Loper* at 2263).
- When, however, Congress has delegated authority to an agency, the court's role is to fix the boundaries of that delegated authority. *Id.*

A Walk-through – Regulations That May Be At Issue

- Facts
- Section 6501(a) and a Section 481 adjustment
- § 446(a) – “Taxable income is computed under the method of accounting on the basis of which the taxpayer regularly computes his income . . .”
- § 446(c) – Lists permissible methods - cash, accrual, any other method permitted by Chapter 1 of the Code and “any combination of the foregoing methods permitted under regulations prescribed by the Secretary.”
- A change in accounting method occurs when, under the lifetime income test, income changes. Does the change result in more or less income over the taxpayer's lifetime? If so, it is not a CIAM. Hyatt Hotels Corp & Subsidiaries, 2023-122 (2023) (citing *Peoples Band & Tire Co. v. Comm'r*, 412 F.2d. 1341, 1344 (7th Cir. 1969)).

A Walk-through – Regulations That May Be At Issue

- Treas. Reg. 1.446-1(e)(ii)(d)(2)(i) – A change in the “depreciation or amortization period of recovery, or convention of a depreciable or amortizable asset” is a CIAM. (Reg. was issued under 7805)
- IRS view is that the statute and this reg. cover a change from depreciable to non depreciable classification (i.e., depreciable property to land).
- The argument will be that an allocation to land increases basis. Basis reduces gain and thus Gross Income and (after deductions) Taxable Income. Depreciation does not reduce Gross Income but is deducted from Gross Income to arrive at Taxable Income. So, assuming the property is sold, life time Taxable Income is the same.
 - Comment: What about 1031 exchanges and step-up-at-death? Or, what if land is sold and the increased basis will reduce the Section 1231 gain, and possibly reduce future 199A deductions, which is a new deduction for years 2018, forward. Some of the properties at issue were depreciated pre 2018. So the change results in less life than Taxable Income than if no change occurred??

Qualified Appraisal and Form 8283 Issues Appraisal Issues for In Kind Donations

- Facts
- Section 170(f)(11)(A)(i) provides that no charitable contribution deduction is allowed unless the taxpayer meets certain requirements.
- (B) requires the taxpayer to “include with the return . . . a description of such property and such other information as the Secretary may require . . .”
- (C) requires that for donations over \$500,000 the taxpayer must “attached to the return a qualified appraisal of [the donated] . . . property.”
- Section 170(f)(11)(H) – IRS can issue regulations
- Reg. 1.170A-13(c)(2)(A) must attach a qualified appraisal to the return; and (2)(B) must attach the appraisal summary.
- Reg. 1.170A-13(c)(4)(iv)(H) – Reasonable Cause

Qualified Appraisal and Form 8283 Issues Appraisal Issues for In Kind Donations (cont.)

- Arguments
 - Qualified Appraisal
 - Taxpayer must provide sufficient information to permit the IRS to evaluate the reported contributions, as intended by Congress. See *Mohamed v. Comm'r* T.C. Memo 2012-152, quoting the *Estate of Clause v. Comm'r* 122 T.C. 115, 122 (2009). The qualified appraisal and Form 8283 that was attached to the 1040 meet this test.
 - Form 8283
 - Note: *RERI Holding I, LLC et al v. Comm'r*, 149 T.C. No. 1 No. 17-1266 (5/24/19) Aff'd USCA DC (2019) case disallowed a \$33 Million charitable contribution deduction because basis was missing on the Form 8283. Does not indicate if the taxpayer attempted to "fix" the Form 8283.

Qualified Appraisal and Form 8283 Issues Appraisal Issues for In Kind Donations (cont.)

- Strategy
- "While the Service has never requested that the defects on the Form 8283 alleged in the Revised Lead Sheets at issue be corrected, a new Form 8283 is being faxed to you. The Taxpayer is providing the IRS with a new Form 8283 that is signed by the appraiser and donee. Also, the basis of the donation at issue is included on this form.

As noted in the instructions to Form 8283, failure to attach a correct Form 8283 to a tax return will not result in a contribution deduction being disallowed if the failure is due to reasonable cause and not willful neglect. See instructions to Form 8283 at 8 (Rev. December 2021).

Qualified Appraisal and Form 8283 Issues Appraisal Issues for In Kind Donations (cont.)

Further, Treasury Regulation Section 1.170A-13(c)(4) and (c)(4)(iv)(H) note that a taxpayer is allowed to explain if he or she has reasonable cause for an inadequate Form 8283. The same regulation allows the IRS to request that a taxpayer provide a correct Form 8283 within 90 days. If this request is complied with the charitable deduction will not be disallowed as long as the taxpayer's error was in good faith. See Treas. Reg. § 170A-13(c)(4)(iv)(H).

In the instant case the Service has not requested that the alleged defects noted in the Revised Lead Sheets on the Form 8283 be corrected."

Case To Watch

- Tribune Media Co. v. Comm’r, T.C. Memo. 2021-122
Appeal Pending Dkts. 23-1135, 23-1136, 23, 1243 (7th
Cir.)
 - At issue is the partnership anti abuse rule under §1.701-2(a)(1). Is this a Reg. authorized under 7805(a) and the mere summary of anti abuse law traceable to Gregory v. Helvering or, should the Reg. be afforded nothing more than Skidmore deference.

Accuracy Related Penalty

- Section 6662(a) & (b)(1)
 - Statute that imposes a 20% penalty for disregard of the rules and regulations
 - Now that a regulation is entitled to for less deference, does this do to the statute? Especially with a Section 6664 Reasonable Cause Defense.

Disregard of Rules or Regulations

- Is defined as any "careless, reckless, or intentional disregard"
 - Section 6662(c)



Reasonable Cause

- Defined as Ordinary Business Care and Prudence
- Section 6662 Penalty can be avoided by showing reasonable cause (in most-cases)
- Proof of Reasonable Cause, when arguing reliance on a professional – 3 part test
 - Advisor was competent and had significant expertise to justify reliance
 - Taxpayer gave advisor adequate and necessary information
 - Taxpayer relied in good faith upon the advisor

Raising Reasonable Cause Can Waive a Privilege

- CAUTION:
- Raising the assertion of reliance on professional advice constitutes reasonable cause probably waives the attorney/client privilege and the Section 7525 privilege.



Raising Reasonable Cause Can Waive a Privilege (cont.)

- IRM 20.1.5.6.4 (January 24, 2013)
(If the taxpayer claims a tax memorandum or advice is privileged, the IRS will not abate the penalty)
- Comment: Would the IRS assert a penalty to force a privilege waiver?

SALT Ramifications

- WI – Tetra Tech EC, Inc. v. W. WDOR, 382 Wis.2d 496 (2018)
 - Not bound by agency but will give “due weight” to the agencies experience, technical competence, and specialized knowledge under Section 227.57(10), Wis. Stats.
 - Very disjointed opinion.
- IL – Hartney Fuel Oil v. Hamer, 998 N.E. 2d 1227 (Ill. 2013)
 - Illinois Department of Revenue regulations are entitled to substantial weight and deference. Regulations enjoy a presumption of validity
- FL – Amendment 6 to Florida’s Constitution now requires courts to interpret statutes de novo. FLA. CONT. art. V §21(11/6/2018)

Other “Hot Issues”

- High Net Worth Audits
- Real Estate Professional Status
- Airplane Cases
- Family Office Planning
- The Research Credit – IRS & WDOR
- Interest in Form 941 Cases

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- IRS Announces New Pass-Through Unit to Scrutinize Wealthy
By David van den Berg
- Law360 (September 20, 2023, 6:33 PM EDT) – The Internal Revenue Service will launch a new group focused on scrutinizing pass-through organizations as part of its broader plan for beefing up enforcement work against the wealthy, according to an agency statement. . . [A] new unit scrutinizing pass-through organizations is part of a previously announced plan. . . to ramp up enforcement work against high-income earners, corporations and partnerships.
- The agency said the initiative will drill down on large or complex pass-throughs. . . to ramp up enforcement work against high-income earners, corporations and partnerships. . .
- The pass-through group will be housed in the IRS' Large Business & International Division, according to the agency. The pass-through entity's workforce will eventually also include current employees in both Large Business & International and the Small-Business & Self-Employed divisions, the agency said. The IRS statement also said the pass-through group will include the more than 3,700 revenue agents it plans to hire for expanded enforcement work geared toward large corporations and complex partnerships. . .

IRS Announces New Pass-Through Unit to Scrutinize Wealthy (cont.)

- The IRS' strategic plan for the funding increase provided by the Inflation Reduction Act called for expanded enforcement work against large partnerships and said the agency would hire specialized compliance workers and train others to help ensure pass-through entities comply with the law. . .
- Greater resources are needed to evaluate the compliance of pass-through entities, especially large and complex ones, and pass-through audit rates dropped because of funding cuts, the agency said. . . [its] the strategic plan. The agency audited 4.4% of pass-throughs in 2010, and the rate dropped to 0.1% in 2017, the most recent year with nearly all audits closed, according to the plan, which was released in April.

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High Net Worth Issues

- Responding to Information Document Requests can be very burdensome, with a number of practical and ethical concerns
- IRS Counsel is often involved through the audit
- Often if information is not produced by the IDR deadline the IRS will issue a pre-summons letter and then an IRS summons

High Net Worth Issues

- Some examples of the broad scope of high net worth audits include
 - Estate and Gift Tax Issues
 - **Valuation Issues**
 - Executive Compensation
 - C corporation and S corporation Issues
 - **Noncash Charitable Contributions**
 - **Partnership and LLC Issues**
 - Passive Activity Loss
 - Foreign Trusts
 - Foreign Bank Account Reporting
 - Basis and At-Risk Issues
 - Transfer Pricing Issues
 - **Private Airplane Issues**

Airplane Cases

- Use a Partnership or Corporate structure
- SIFL or §274-10(e)
- Personal Entertainment v. Non-Personal Entertainment
- SIFL is much more favorable than §274-10(e)
- Avoid Schedule C Structure – CCA 202117012 (4/30/21)
 - IRS: Can not pay a fringe benefit to a sole proprietor so income is not SIFL income. Simply disallow all personal expenses. Unclear how to measure expenses.

Airplane Cases (cont.)

- Section 280F
 - Leasing Trap
 - Here's a new one – a single member LLC is not a single member LLC

Airplane Cases (cont.)

- Depreciation and the Section 280F trap
- Need 51% business use to take accelerated depreciation. The first 25% of business use cannot be a rental to a related party.
- Entertainment Facility trap
 - No deduction is allowed for an entertainment facility. §274(a)(1)(B). Transportation entertainment facilities are deductible if the facility is used in pursuit of a trade or business. §1.274-2(b)(1)(iii)(1); TAM9608004. If a partnership or corporation use SIFL or §274-10(e). If a Schedule C, see CCA 202117012. Need to document the business purpose for the airplane.

Airplane Cases (cont.)

- Section 183 – Hobby Loss
 - Business Plan
 - Factors §1.183-2(b)

Airplane Cases (cont.)

- IRS Activity
 - IRS Notice – IR – 2024-46 (2/21/24)
 - LB&I “Campaign” Issue

Passive Losses and the Real Estate Professional

- Section 469
- Rental Real Estate
- Real Estate Professional
- Proving Material Participation
- Make a Grouping Election – watch limited partnership trap

Passive Losses and the Real Estate Professional

- My Worst Nightmare
 - 280F – Airplane Leasing Trap and/or
 - 469 – Passive Loss Argument
- Rental is Per Se Passive
 - Need a “Dry Lease” for FAA reasons

Passive Loss Rules

- Limit a taxpayer from deducting losses and excess credits from a passive activity against income from nonpassive activities. I.R.C. § 469(a).
- A passive activity is one that:
 - Involves the conduct of a trade or business in which the taxpayer does not materially participate. I.R.C. § 469(c)(1).
 - Is a rental activity. I.R.C. § 469(c)(2).

Passive Loss Rules (cont.)

- Establishing Material Participation.
 - A taxpayer materially participates in an activity if, and only if, the taxpayer meets one of the following seven tests:
 - Work done in a taxpayer's capacity as an investor does not count toward the 500 Hour test, unless the taxpayer is directly involved in the day-to-day management or operations of the activity. Treas. Reg. § 1.469-5T(f)(2)(ii).
 - Investor activities include studying and reviewing financial statements or reports on an activity, preparing studies or analyses of the activity's finances or operations for the taxpayer's own use, and monitoring the activity's finances or operations in a nonmanagerial capacity

Passive Loss Rules (cont.)

- Facts and circumstances. Treas. Reg. § 1.469-5T(a)(7).
 - Taxpayer can establish material participation by regular, continuous and substantial involvement in an activity based on all the facts and circumstances
 - Must participate in activity for more than 100 hours. Treas. Reg. § 1.469-5T(b)(2)(iii).
 - Caution! Services performed in the management of an activity are disregarded unless:
 - No other individual is compensated for performing management services in connection with such activity; and
 - No other individual performs management services that exceed the hours spent by the taxpayer. Treas. Reg. § 1.469-5T(b)(2)(ii).

Passive Loss Rules (cont.)

- A taxpayer must establish hours of participation under the seven tests.
 - Any reasonable means of proof is sufficient to establish hours of participation. Treas. Reg. § 1.469-5T(f)(4).
 - Courts and the IRS are skeptical when a taxpayer makes extravagant claims on the number of hours of participation.
 - Courts generally do not accept "post-event ballpark guesstimate" of hours unless supported by credible testimony and other objective evidence
 - Taxpayers are recommended to keep careful records of participation
 - Practice Tip
 - Use an affidavit
 - A client interview

Passive Loss Rules (cont.)

- Special Rules for Real Estate Rental Activities.
 - Taxpayers who qualify as "real estate operators" may treat their real estate rental activities as nonpassive upon a showing of material participation. I.R.C. § 469(c)(7).
 - To qualify as a "real estate operator":
 - For CHCs:
 - More than 50% of the corporation's gross receipts for the year must be derived from real property trades or businesses in which the corporation materially participates. I.R.C. § 469(c)(7)(D)(i).

Passive Loss Rules (cont.)

- For individuals:
 - The taxpayer must satisfy the two following requirements:
 - More than one half of all personal services performed in trades or businesses must be performed in the real property trades or businesses; and
 - More than 750 hours of services must be performed in real property trades or businesses in which the taxpayer materially participates. I.R.C. § 469(c)(7)(B).
 - Personal services include any work performed by the individual in the connection with a trade or business, except for:
 - Worked performed by an individual in the individual's capacity as an investor. Treas. Reg. § 1.469-9(d)(4).

Passive Loss Rules (cont.)

- Services performed as an employee, unless the employee is a 5% owner of the employer. I.R.C. § 469(c)(7)(D)(ii).
 - Practice Tip: When looking to purchase Real Estate (e.g., Apartment Buildings), document that the activity is not investment activity
- Services of the taxpayer's spouse cannot be combined to satisfy either of the two requirements. Treas. Reg. § 1.469-9(c)(4).
- Caution! Rental activities held through a passthrough entity constitute a single interest if the entity grouped its real estate as a single activity. Treas. Reg. § 1.469-9(h). However, if a taxpayer owns directly or indirectly a 50% or greater interest in the passthrough entity, each interest in rental real estate is treated as a separate interest unless the taxpayer makes his or her own election to treat all interests in real estate as a single activity.

Family Office Planning

- Lender Mgmt LLC V. Comm'r, T.C. Memo 2017-25
- Family office takes a profits interests in investments and is treated as a trade or business.
- Has to be a real trade or business

The Taxpayer Has Two Business Argument

- Example – Real Estate
- - 1.469 – 9(e)(3)(i) – Trap
 - May net group rental real estate with any other activity (i.e., group rental real estate with development to determine material participation in the rental real estate.
- Comment: Are they really separate activities or is development and rental “one activity.”

Section 41 Research Credit

- Four Tests
- Funded Research

Interest Free Adjustments in Form 941 Cases

- Employee v. I.C. Issue
- ERC Audits

Interest-Free Adjustments

- Generally, for employment tax (i.e., Form 941 obligations), if the adjustment to the Form 941 (i.e., the tax deficiency) is
 - paid on or before the due date of the 941 for the period in which the error is "ascertained,"
 - the amount of the underpayment shall be paid without interest being charged.
- An error is ascertained when resolved at examination or with appeals.

Interest-Free Adjustments (cont.)

- If, however, the case is not resolved at Appeals and the taxpayer receives a notice and demand for payment from the IRS, the adjustment will not be interest free.
- In addition, the taxpayer will not be allowed an interest free adjustment where a prior audit found that additional tax was due with respect to the same issue.

Valuation Checklist

- The Cover Letter – Summary
- Who is the retaining party and other intended users?
- Use the Correct Definition of Fair Market Value ("FMV"), FMV for a gift, Treas. Reg. Section 25.2512-1 defines fair market value as
 - [T]he price at which property would change hands between a willing buyer and a willing seller, Neither being under any compulsion to buy or sell and both having reasonable knowledge of the Relevant facts

Valuation Checklist (cont.)

- The "as of" or date
- Purpose of the valuation and intended use (e.g. estate and gift tax purposes)
- Type of asset and interest being valued (i.e. a minority interest . . .)
- Control Rights - in any
- Access to Liquidity
- The Scope of Work
- Information Considered
- Methodologies Utilized
- Fair Market Value Conclusion

Valuation Checklist (cont.)

- The Report- Body
- Standard of value – Define FMV again
- Purpose of the valuation
- What is being valued?
- Prior transactions if any
- Rights, preferences, and privileges of interest being valued
- Economic overview / market conditions
- Company specific information
- Methodologies used to determine FMV (Holding Company v. Active Business).

Valuation Checklist (cont.)

- Discounts. Do not rely only on case law. Berg Estate v. Comm'r, T.C. Memo 1991-279
- Explain the weight given to each methodology used. Otherwise if one methodology is rejected, the whole report may fail. True Estate v. Comm'r T.C.Memo 2001-167 aff'd., 390 F.3d 1210 (10th Cir 2004)
- Tax Affecting Earnings if an S Corp. or Partnership. Calculation both ways. Recent Cases, Kress, Estate of Jones. If do not tax affect, can the marketability discount be increased.
- Do I need a good Form 8283?

Valuation Checklist (cont.)

- Justify the discount rate being used in the calculation
- Statement of qualifications that meets Tax Court Rule 143
- Exhibits showing calculations
- What is the FMV of the interest being valued?
- Signed certification

Ethics Hypothetical

- We are preparing a tax return for a new client's parents. The parents are planning on donating land, which has been previously used a quarry, to the local municipality and taking a deduction for the donation. There is an easement on the land that mirrors local law.
- We select the appraiser, who we have used in the past to value a service business (i.e., an insurance agency). The appraisal comes back, after numerous revisions and drafts from our out of state appraisal firm. The firm values the property at much higher than the client expected. We rely on the appraisal. The number seems great! We send an e mail to the family saying that we like the appraised value for deduction purposes. Ultimately, with our help, the parents long time CPA prepares and signs the parent tax return.
- Do you prepare the tax return, claiming the charitable deduction for the amount of the appraised value. What are the ethical issues?
- If there is a tax audit a few years later, what are the additional ethical issues? Note, the audit could go very well, the IRS does not have the budget approval to obtain an appraisal.

Michael Goller Thoughts

- Who is my client. Define. Is there a conflict?
- Circular 230 Section 10.29 (and AICPA -Conflict of Interest ("COI"))
- Scope of services in the engagement letter
- Circular 230 Section 10.22 – Diligence
- AICPA – Code of Prof Conduct Art. V - Due Care
- Circular 230 Section 10.35 Competence
- Circular 230 Section 10.34 – Talk about disclosure (see chart on slide 78)
- Who is the return preparer – AICPA rules make it clear

Michael Goller Thoughts (cont.)

- Circuit 230 Section 10.37(b)– Reliance on Written Advice and our written advice must be reasonable.
- Frivolous Return - Circuit 230, AICPA Due Care and Section 6694– Frivolous Return
- What is privileged Section 7525, A/C, Spousal
- Kovel Letter – how to get an appraisal.
- Does the appraiser know local law? All appraisals are local.
- Section 170(f) and 1.170A-13 – Qualified Appraisal
- Need a good Form 8283

Michael Goller Thoughts (cont.)

- New AICAP rules – nonsigning is still a return preparer.
- Circular 230 Section 10.3 Practice before the IRS who signs the POA.
- Circuit 230 – COI – Practitioners' own interest
- Circular 203 10.36 Department management
- Circuit 230 10.20 to 10.23 –Cooperation with IRS
- Burden of Proof Section 7491 - Cooperation