



# MANAGING TAX AUDITS AND APPEALS

Thursday, September 12, 2019

Washington, DC

**8:30 am**      **Breakfast and Registration**

**9:00 am**      **Welcome and Introductory Remarks**  
Overview of Audit Lifecycle

*David Blair*

**9:15 am**      **Audits Part One: Selection to Resolution**

*David Blair*  
*Carina Federico*

- Audit selection, including the Compliance Assurance Process, issue campaigns, and the use of data analytics;
- LB&I's new Large Corporate Compliance program;
- Responding to IDR requests, opening letters, conferences, interviews, and visits;
- Expanding role of the Acknowledgement of Facts IDR;
- Composition of audit teams and the specialist's role;
- Competing audit teams; and
- Special considerations – the first filing season under the new partnership rules.

**10:00 am**      **Audits Part Two: Recent Developments in LB&I**  
Guest Speakers:

*David Blair*  
*Carina Federico*

Nikole Flax  
Deputy Commissioner, LB&I

Elizabeth Askey  
Deputy Division Counsel (International), LB&I

**10:45 am**      **Break**



**11:00 am**

**Advance Pricing Agreements and Competent Authority Cases**

*Brad Anwyll*

Guest Speaker:

John Hughes  
Director, APMA

- Best practices for filing APAs and competent authority submissions;
- How APMA develops and resolves APAs and competent authority cases;
- Developments within APMA – the new functional cost diagnostic model and APA template;
- OECD developments and their impacts on APMA;
- Need for and use of arbitration to resolve competent authority disputes; and
- Tax Cuts and Jobs Act developments.

**Noon**

**Update from the IRS Office of Chief Counsel**

*David Blair*

Guest Speaker:

Michael Desmond  
Chief Counsel, Internal Revenue Service

- Overview of published and pending Tax Cuts and Jobs Act guidance;
- Impact of the Taxpayer First Act; and
- Current enforcement initiatives.

**1:45 pm**

**Current Issues Regarding Taxation of Independent Contractors**

*David McFarlane  
Glenn Grant  
Sam Krause*

- Under the Internal Revenue Code;
- Under state tax codes; and
- Intersection with state labor and employment laws.



2:30 pm

### Recent Developments on Capitol Hill

Guest Speaker:

Richard Grafmeyer  
Partner, Capitol Tax Partners

3:30 pm

### Break

3:45 pm

### Specific Audit Issues: Income Tax Accounting

*Dwight Mersereau*

- How and when an examining agent, appeals officer, or counsel for the government can impose a change in method of accounting; and
- Strategic considerations to resolve change in method issues.

4:30 pm

### Specific Audits Issues: Penalties

*Teresa Abney  
Carina Federico*

- Penalties that the IRS may assert during an audit and defenses to those penalties; and
- Recent developments in the IRS's enforcement of penalties.

5:00 pm

### The US-China Trade War And Impact on China Tax Policy and Practice

*Jackson Pai*

Guest Speaker:

Dr. Ye Zhou  
Director of China Tax Affairs, C&M International-Shanghai

- Overview of China Tax Regime – Carrots and Sticks;
- Trends in Chinese Tax Audits and Practical Strategies;
- China Tax Flashpoints: Royalties & Transfer Pricing;
- Balance with Foreign Investment: Export VAT Rebate Strategy.

5:30 pm

### Cocktail Reception



# MANAGING TAX AUDITS AND APPEALS

Friday, September 13, 2019

Washington, DC

<b>8:30 am</b>	<b>Breakfast</b>	
<b>9:00 am</b>	<b>Appeals Part One: Overview of the Appeals Process</b>	<i>David Fischer Eleanor Moran</i>
	<ul style="list-style-type: none"> <li>• The new Independent Office of Appeals;</li> <li>• Right to Appeals;</li> <li>• Tips for writing a persuasive protest; and</li> <li>• Conducting an effective Appeals conference.</li> </ul>	
<b>9:30 am</b>	<b>Appeals Part Two: Recent Developments at Appeals</b>	<i>David Fischer</i>
	<u>Guest Speaker:</u>	
	Andrew Keyso Deputy Chief, Independent Office of Appeals	
	<ul style="list-style-type: none"> <li>• Effect of Taxpayer First Act on Appeals;</li> <li>• Appeals Team Case Leader Conferencing Pilot Program;</li> <li>• Appeals mediation; and</li> <li>• Appeals hiring.</li> </ul>	
<b>10:30 am</b>	<b>Break</b>	
<b>10:45 am</b>	<b>Political Update: 2020 Election</b>	<i>Scott Douglas Jim Flood</i>
<b>11:15 am</b>	<b>Specific Audit Issues: Privileges</b>	<i>Robert Willmore Teresa Abney</i>
	<ul style="list-style-type: none"> <li>• Overview of privileges and how to avoid waiver; and</li> <li>• Recent developments regarding attorney-client privilege, federally authorized tax practitioner privilege, and the work product doctrine.</li> </ul>	
<b>Noon</b>	<b>Concluding Remarks</b>	<i>David Blair</i>



## Managing Tax Audits & Appeals Seminar Speakers

### Crowell & Moring



**Teresa Abney**

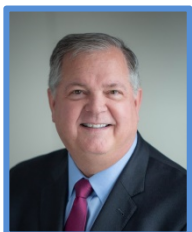
*Counsel*

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**Teresa Abney** practices in the areas of federal tax controversy and litigation. Teresa has handled matters involving research and development credits, domestic production deductions, business expense deductions, and excise taxes. She has handled cases in every stage of litigation, including discovery, motions for summary judgment, settlement negotiations, and trial. Teresa has litigated cases in U.S. District Courts, U.S. Bankruptcy Courts, the U.S. Court of Federal Claims, and the U.S. Tax Court. Before joining Crowell & Moring, Teresa was a trial attorney at the U.S. Department of Justice, Tax Division. In recognition of her work, Teresa was awarded the Tax Division's Outstanding Attorney Award in 2015 and Special Commendation in 2016. Teresa also served as a law clerk for the Hon. Juan F. Vasquez of the U.S. Tax Court.



**J. Bradford Anwyll**

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**J. Bradford Anwyll** represents clients in tax controversy and litigation matters involving federal and international issues, with a particular focus on transfer pricing and other cross-border disputes. A seasoned tax litigator with more than 35 years of experience, Brad has litigated more than 30 cases before the U.S. Tax Court, the U.S. Court of Federal Claims, federal district courts, and U.S. Courts of Appeals on behalf of corporations and partnerships. He has also represented clients in more than 275 administrative proceedings before the Internal Revenue Service's Examination Division, Appeals Office, and Advance Pricing & Mutual Agreement Program.



**David B. Blair**

*Partner*

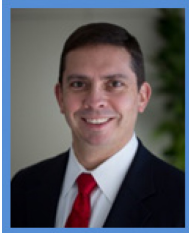
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**David B. Blair** is a partner and chair of Crowell & Moring's Tax Group. David's practice is in the area of federal tax litigation and controversy. With over 25 years of tax controversy, litigation and trial experience; He has handled large tax controversies before IRS Exam Appeals, the Tax Court, and various district courts and courts of appeals in the areas of research credits, Section 45Q credits, transfer pricing, foreign tax credits, partnerships, tax-exempt bonds, consolidated returns, excise taxes, employment taxes, and tax accounting issues. David began his career as a trial attorney for the Tax Division of the U.S. Department of Justice, where he litigated tax issues before the U.S. district and bankruptcy courts. He clerked for the Hon. Frank Minis Johnson Jr. of the U.S. Court of Appeals for the Eleventh Circuit.





**W. Scott Douglas**

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**W. Scott Douglas** is a senior policy director in the firm's Government Affairs and Health Care groups. His practice focuses on assisting clients with legislative and regulatory issues. Scott uses his significant health care public policy experience to assist health care companies, managed care, long-term care, long-term care pharmacy facilities, trade associations, and others with legislation before the U.S. Congress. Scott has experience working in highly diverse settings, including Fortune 500 companies and a contract lobbying firm. He ran multi-state lobbying operations, working directly with decision makers and overseeing external lobbyists.



**Carina Federico**

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**Carina Federico** focuses her practice on federal tax controversy and tax litigation matters before the IRS and in trial and appellate courts across the United States. Her experience includes serving as first chair at trial, taking and defending depositions, briefing a wide range of tax issues, negotiating settlements, and representing clients in IRS Appeals conferences. Before joining Crowell & Moring, Carina was seconded to Ernst & Young as a legal consultant to the general counsel's office, where she advised EY engagement teams on tax controversy issues. Carina was a trial attorney at the U.S. Department of Justice, Tax Division (DOJ), where she represented the IRS as lead counsel before the U.S. District and Bankruptcy Courts. At DOJ, Carina was awarded the Tax Division's Outstanding Attorney Award in 2014 and a Special Commendation in 2013. She also served as deputy associate counsel for the White House, where she was the tax counsel for presidential nominations and appointments.



**David J. Fischer**

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**David J. Fischer** represents Fortune 500 companies, corporations, partnerships, and high net worth individuals in high-stakes tax disputes with federal and state tax authorities. David has handled tax cases in the Tax Court, Court of Federal Claims, and District Courts, before the IRS Appeals office and U.S. Competent Authority, and on IRS examination. He has extensive IRS alternative dispute resolution experience, including the rapid appeals process, fast track, and the industry issue resolution program. David has supervised the litigation of coordinated industry issues, partnership-level proceedings, and IRS project cases, test cases, and cases designated for litigation.



**Jim Flood**

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**Jim Flood** assists health care, energy, and financial services clients with legal, legislative, and regulatory issues. He is also chair of the firm's Government Affairs Group. A former federal prosecutor and counsel to Senator Charles E. Schumer (D-NY), Jim has more than 20 years of experience assisting clients facing issues before the White House, Congress, the U.S. Department of Health and Human Services (HHS), the Centers for Medicare & Medicaid Services (CMS), the U.S. Department of Justice (DOJ), the U.S. Drug Enforcement Administration (DEA), the U.S. Food and Drug Administration (FDA), and other federal agencies. In 2018, Jim was named a "Top Lobbyist" by The Hill.



**Glenn D. Grant**

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**Glenn D. Grant** is a senior counsel in the firm's Labor & Employment group, and works out of the firm's D.C. office, where he counsels and represents clients on the full range of employment law matters. He regularly advises clients on issues involving the FLSA, Title VII, the ADA, ADEA, FMLA, the WARN Act and their state law analogues. Glenn has extensive trial experience in both class actions and single plaintiff cases. He also counsels and represents employers with respect to collective bargaining negotiations, union representation elections and other matters arising under the National Labor Relations Act.



**Harold J. Heltzer**

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**Harold J. Heltzer** represents corporate, partnership, and individual clients in tax matters. He focuses on tax planning for acquisitions, partnership formation, divestitures, and other transactions. In addition, Hal represents clients in tax litigation and administrative practice before the Internal Revenue Service and state tax agencies. Hal was an adjunct professor in the LL.M. Tax Program at the Georgetown University Law Center for almost 30 years. He is the recipient of the Charles Fahy Distinguished Adjunct Faculty Award and the Vicennial Medal from Georgetown University Law Center. He lectures on tax issues for industry and professional organizations and is the author of the treatise "Coping with IRS Audits."



**Charles C. Hwang**

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**Charles C. Hwang**, an experienced transactional tax lawyer, has reviewed and assisted in the negotiation and drafting of numerous merger agreements, stock purchase agreements, asset purchase agreements, partnership, joint venture and limited liability company agreements, contribution agreements, and executive compensation agreements, and has provided tax advice in connection with many other transactions, including rollover transactions, loans, and start-ups. Representative transactions include acquisitions of publicly held corporations, restructuring and sale of distressed businesses, formation of consortia to trade financial derivatives, restructuring of international operations, and taxable and tax-free mergers and reorganizations.



**Samuel Krause**

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**Samuel W. Krause** has more than 20 years of experience writing, speaking, and advising on pensions, employee benefits, executive compensation, national and international corporate transactions, bankruptcy reorganizations, securities laws, corporate governance, deferred compensation, and structured finance matters related to the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code, and the Affordable Care Act (ACA). Prior to entering private practice, Sam was an investigator for the New York Regional Office of the arm of the U.S. Department of Labor that is responsible for ERISA.



**David McFarlane**

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**David McFarlane** has more than 20 years of experience in the U.S. and Canada advising on retirement plans, employee benefits, executive and deferred compensation plans and arrangement, national and international corporate transactions, bankruptcy reorganizations, corporate governance, and structured finance matters related to the Employee Retirement Income Security Act (ERISA), the Internal Revenue Code (IRC), and the Affordable Care Act (ACA). David is a frequent speaker and writer on employee benefit and executive compensation matters. He and his team have also developed a unique fixed-fee fiduciary compliance review of retirement, health and other employee benefit plans to ensure compliance with applicable laws in order to best protect plans sponsors and their Boards of Directors, officers and other employees from personal liability under ERISA.



**Dwight N. Mersereau**

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**Dwight Mersereau** represents large, multinational corporate clients in high-stakes policy, planning, and controversy matters. These projects typically involve complex, highly technical tax accounting issues involving billions of dollars. Dwight is involved in shaping tax policy through legislation, U.S. Department of the Treasury regulation projects, revenue rulings, and private letter rulings. He has represented individual clients, industry associations, and client coalitions before Congress, the Treasury, and the Internal Revenue Service (IRS). Over the years, Dwight has fostered close working relationships with officials at the IRS and Treasury. He is often consulted by policy makers grappling with difficult tax accounting issues. Dwight has been named a recognized practitioner in the tax field by Chambers USA.





**Eleanor Moran**

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**Eleanor Moran** practices in the areas of tax controversy, litigation, and planning. She represents clients involved in controversy with the IRS at all levels, including during examination, at appeals, and in litigation before the U.S. Tax Court, Court of Federal Claims, and U.S. District Court. Eleanor also advises clients on tax aspects of corporate and partnership transactions and tax planning matters. She has an active pro bono practice, primarily advising section 501(c)(3) organizations in connection with a number of issues, including obtaining tax-exempt status.



**Jackson Pai**

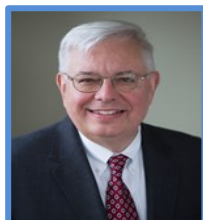
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**Jackson Pai** is a member of the International Trade Group. His practice covers a range of international and trade issues, including international corporate transactions, global mobility and employment, customs, anti-corruption and the Foreign Corrupt Practices Act, and the World Trade Organization. Jackson works with corporate entities and supply chains to help companies establish new investments into Asia. He also advises companies on continuing obligations in employment and corporate contexts. As part of his practice, Jackson trains local employees of multinational companies in China, Taiwan, and Hong Kong on compliance with the U.S. Foreign Corrupt Practices Act and corporate code of conduct in Mandarin Chinese and in English. Jackson served as the first legal advisor to the delegation of the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu to the WTO in Geneva from 2002 until 2006.



**Robert L. Willmore**

*Partner*

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**Robert Willmore** is a member in the Litigation and Trial Department and a member of the Tax Group. Robert has been handling tax litigation matters for almost 20 years. He has represented corporate taxpayers before many judicial tribunals, including the U.S. Supreme Court, the Virginia Supreme Court, the D.C. Court of Appeals, several U.S. Circuit Courts of Appeals, various U.S. District Courts, the U.S. Court of Federal Claims, and the U.S. Tax Court. Among the cases he has litigated, Robert tried in the Tax Court one of the most complex and significant IRC § 41 cases litigated to date regarding the availability of the research credit for manufacturing process research. He is currently representing clients in the Court of Federal Claims and the Tax Court with respect to matters involving the domestic production activities deduction under IRC § 199 and the treatment of financial relocation incentives under IRC § 118. Robert's prior government experience includes a senior position in the Civil Division of the U.S. Department of Justice, where he headed one of the Department's largest litigation sections.



## Managing Tax Audits & Appeals Seminar Speakers

### Crowell & Moring International – Shanghai



**Dr. Ye Zhou** is the Director of China Tax Affairs at C&M International-Shanghai. He has more than twenty years of experience in resolving tax issues in the People's Republic of China. He focuses on transfer pricing, mergers and acquisitions restructuring, direct China tax matters, and negotiating with the China tax authorities. He spent twelve years working as an official with the Jiangsu Administration of Taxation. He also was formerly a China tax consultant for a leading Singapore law firm.

**Ye Zhou**

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## Managing Tax Audits & Appeals Seminar Speakers

### Invited Guest Speakers

#### **ELIZABETH ASKEY**

*Deputy Division Counsel (International)*

**Large Business & International Division, Internal Revenue Service**

Elizabeth (“Liz”) Askey is the Deputy Division Counsel (International) of the Large Business & International (LB&I) Division of the IRS. As Deputy Division Counsel, Ms. Askey works with the Division Counsel to manage the more than 300 LB&I attorneys and paralegals located throughout the country. Ms. Askey provides advisory services on all international program matters under LB&I’s jurisdiction, including issues related to the application, development, and litigation of tax regulations, policies, and services relevant to subchapter C corporations, subchapter S corporations, and partnerships with assets greater than \$10 million.

Ms. Askey previously served in government as Associate Tax Legislative Counsel in the U.S. Department of Treasury.

Prior to becoming Deputy Division Counsel, Ms. Askey was the National IRS Practice and Procedure Leader at Grant Thornton.

#### **MICHAEL J. DESMOND**

*Chief Counsel*

**Office of Chief Counsel, Internal Revenue Service**

Michael Desmond is Chief Counsel of the IRS and also the Assistant General Counsel of the U.S. Department of Treasury. He is the chief legal advisor to the IRS Commissioner and provides legal advice to the IRS, the Treasury, and taxpayers. The Office of IRS Chief Counsel supervises approximately 1,400 attorneys in the IRS National Office and the major operational divisions of the IRS.

Mr. Desmond previously served in the government as Tax Legislative Counsel in the U.S. Treasury Department and as a trial attorney in the U.S. Department of Justice.

Prior to becoming Chief Counsel, Mr. Desmond headed up his own law firm in Santa Barbara, California, specializing in tax controversy and litigation.



## NIKOLE C. FLAX

*Deputy Commissioner*

**Large Business & International Division, Internal Revenue Service**

Nikole Flax is the Deputy Commissioner of the Large Business & International (LB&I) Division of the IRS. She assists the LB&I Commissioner in leading a workforce of over 4,000 employees and shares responsibility for overseeing tax administration activities for subchapter C corporations, subchapter S corporations, and partnerships with assets greater than \$10 million and for administering the tax laws that affect individuals with international activities.

Ms. Flax began her career with the IRS in 2008, serving in a number of roles including Deputy Chief of IRS Appeals and Assistant Deputy Commissioner, Services and Enforcement among others.

Before joining the IRS, she was legislation counsel for the Joint Committee on Taxation in Washington, D.C.

## RICK GRAFMEYER

*Partner*

**Capitol Tax Partners, LLP**

Mr. Grafmeyer formerly served as the deputy chief of staff for the Joint Committee on Taxation (JCT) from 1998 through 2000. He was responsible for legislation and technical studies and recommendations JCT published in his tenure, including a study of corporate tax shelters, a comprehensive study of the penalty and interest system, and two studies on disclosures impacting tax-exempt organizations. He also was one of the leaders for the last major tax simplification study, a JCT three-volume tax simplification set of proposals covering all areas of the tax code. After serving at JCT, Mr. Grafmeyer handled tax and business issues for the presidential campaign of Sen. John McCain. In addition, Mr. Grafmeyer was nominated by President Clinton to the Social Security Administration's Oversight Board.

Most recently, Mr. Grafmeyer was part of a small group of former and current senior Hill staff that were responsible for all floor and official proceedings activities at the 2016 Republican National Convention.

Earlier during the late 1990s, Mr. Grafmeyer was the deputy staff director for the Senate Finance Committee responsible for tax and health care legislation before the Committee. Mr. Grafmeyer directed the committee and floor process for the GOP tax legislative agenda through the U.S. Senate after the Republicans regained the majority. Prior to that time, Mr. Grafmeyer was for almost six years the senior tax counsel for the Committee, responsible for general business issues, tax-exempt organizations, employee benefits, tax accounting, depreciation, and IRS compliance.

Other than his government service, Mr. Grafmeyer has been a partner in Arthur Andersen's National Office of Federal Tax Services as well as a partner and the National Director for Washington Tax Services for Ernst & Young in their National Tax Office. Since 2003, Mr. Grafmeyer has been a partner at Capitol Tax Partners, LLP, a tax legislative and regulatory law firm in D.C.



Mr. Grafmeyer comments frequently in the press and television on tax and budget matters and is widely known as an expert on Senate parliamentary procedural rules as well as budget process rules.

Mr. Grafmeyer has a B.A. degree in accounting from Walsh College in Ohio, a J.D. degree from the University of Akron School of Law, and a LL.M. degree from Georgetown University Law Center.

## **JOHN C.C. HUGHES**

### *Director*

#### **Advance Pricing and Mutual Agreement Program (APMA), Internal Revenue Service**

John Hughes is the Director of the Advance Pricing and Mutual Agreement Program (APMA) Division of the IRS. APMA negotiates transfer pricing agreements with taxpayers and foreign governments and works to resolve transfer pricing cases under the mutual agreement procedures of the U.S. bilateral income tax treaties.

Mr. Hughes began his service with the IRS in 2011. Prior to becoming Director of APMA, he was the Senior International Advisor to the Director of Treaty and Transfer Pricing Operations and before that a Senior Manager at APMA.

Before joining the IRS, Mr. Hughes worked in the transfer pricing controversy group of Mayer Brown LLP.

## **ANDY KEYSO**

### *Deputy Chief*

#### **IRS Independent Office of Appeals**

Andy Keyso currently serves as the Deputy Chief in the IRS Independent Office of Appeals. In this role, he works with the Chief of Appeals to fulfill the organization's mission of resolving tax controversies without litigation on a basis which is fair and impartial to both the government and the taxpayer.

Immediately prior to joining Appeals, Andy served as IRS Chief of Staff under Commissioner John Koskinen. He previously held various positions in the IRS Office of Chief Counsel, including Associate Chief Counsel of the Income Tax and Accounting Division, where he led the organization responsible for interpreting the tax accounting and general income tax provisions of the Internal Revenue Code.

Andy is a member of the Pennsylvania Bar and a Certified Public Accountant. He has served as an Adjunct Professor in the Georgetown University Law Center's graduate tax program.







## 33<sup>rd</sup> Annual Managing Tax Audits and Appeals Seminar

September 12-13, 2019



## Audits Part One: Selection to Resolution

David Blair  
Carina Federico

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## Before an Audit Begins

### Self-evaluation during return preparation

- Identify risk areas
- If significant risk areas are identified, collect and/or create documents to support those positions
- Retain relevant transactional documents and research

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## Notification of Selection for Audit

### Recommended First Steps for Taxpayers

- After receiving first communication from IRS by mail, determine who at the company will be on exam support team
  - Identify a single point of contact (POC) to handle all communications and documents between the IRS and the company
  - Can be a company employee or outside representative
- Alert other individuals in the company that an audit is being conducted
  - Notify employees that they may need to provide information to POC
  - No conversations or meetings without approval of, and attendance by, POC
- Determine documents in taxpayer's possession that may be relevant to examination
- Hypothesize potential IRS questions and company's answers

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## LB&I Campaigns

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- LB&I moving towards issue-based examinations and compliance campaign process
- Identified through data analysis, suggestions from IRS employees, and feedback from tax community
- Goal is to improve return selection, identify issues representing a risk of non-compliance, and make the greatest use of limited resources
- Currently, there are 52 active campaigns; six campaigns have been retired
- Campaigns include issues such as micro-captive insurance, sale of partnership interest, and virtual currency, and includes a number of international issues, such as repatriation
- Campaigns are assigned a practice area and lead contact person at the IRS
- Information about each campaign is available on the IRS's website

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## Large Corporate Compliance Program

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- Use of data analytics to determine which large and complex corporate taxpayers to audit
- Use of pointing criteria factors to determine whether a case belongs in the LCC program:
  - Gross assets
  - Gross receipts
  - Operating entities
  - Multiple industry status
  - Total foreign assets
  - Total related transactions
  - Foreign tax
- If total point criteria for each factor is 15 or more points, case will qualify as LCC case

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## Overview of the LB&I Examination Process

### LB&I Examination Process

- Planning Phase
- Execution Phase
- Resolution Phase

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## Planning Phase

### Determine the Audit's Scope

- After return is selected for audit, LB&I:
  - Conducts preliminary risk analysis
  - Determines issues for examination
- Opening Conference
  - Taxpayers provided with copy of agenda and preliminary risk analysis prior to meeting
  - Taxpayers may add additional items to agenda
  - Share input on issues
  - Establish communication strategy
  - Identify key members of IRS audit team
- Develop examination plan
  - Issues identified
  - Audit steps
  - Timeline(s)
  - Communication agreements
  - Initial IDRs- Taxpayers should work to shape IDR requests

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## Planning Phase

### Sample Agenda Items for Opening Conference

- LB&I Examination Team and Responsibilities
- Taxpayer or Their Representatives Roles and Responsibilities
- Expectations with Respect to Claims
- Communication
- Issue Team Approach
- Examination Plan
- Issue Development Process
- Written Acknowledgment of the Facts for Unagreed Issues
- Information Document Request (IDR) Process
- Issue Resolution
- Exit Strategy

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## Planning Phase

### Potential Areas of Inquiry to Determine Scope of Audit

- Internal controls of company
- Taxpayer's financial and accounting policies
- Business activities and structure of operations
- How books and records are maintained
- Any foreign activities of taxpayer
- Review of certified and audited financial statements and other regulatory reviews
- Explanation of potential tax issues identified for examination including large, unusual or questionable items on the tax return
- Review of significant transactions

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## Planning Phase

### Roles and Responsibilities

- Case Manager
  - Responsible for overall management of the case
  - Collaborates with issue managers
  - May serve as issue manager for some or all issues
- Issue Manager
  - Responsible for planning, executing, and resolving assigned issues
  - Coordinates formation of issue team
  - Coordinates with Division Counsel, subject matter experts, Competent Authority, and/or Appeals when appropriate

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## Planning Phase

### Roles and Responsibilities (continued)

- Subject Matter Experts (SMEs)
  - Diverse team of agents, specialist, and counsel
  - Assist revenue agents and other personnel by providing relevant law and application of the law to the facts
  - Collaborate on responses to case specific technical questions submitted from the field
  - Provide technical assistance to industry and headquarters functions
  - Develop training, technical guidance, and audit tools
  - Assist in decision making and issue elevation
  - Examples include engineers, computer audit specialists, financial products specialists, economists, international specialists, foreign payments practice specialists, or employment tax specialists
- Practice Network
  - Team of technical specialists and subject matter experts in one or more issue areas
  - Provides assistance to agents

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## Execution Phase

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### Developing the Issues

- Discussions with the IRS
- IRS issue team may consult Counsel or subject matter experts
- Attempt to resolve factual differences

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## Execution Phase

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### Use of Information Document Request (IDR) process to develop facts

- IRS and Taxpayer will establish timeframes for responses
- Incomplete or late responses will result in initiation of standard enforcement procedures:
  - Delinquency Notice
  - Pre-Summons Letter
  - Summons
- Initial Transfer Pricing Documentation IDR

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## Execution Phase

### Tips for responding to IDRs

- Always ask for IDRs in draft form, review and provide feedback to Agent
- Limit response to questions posed in the IDR
- Be strategic about producing additional facts or documents; do not produce non-responsive documents on an ad hoc basis
- Produce copies instead of originals
- Responses should be consistent throughout audit, Appeals, and litigation
- When to push back on requests
  - Overly broad “any and all” document requests
  - Can request separate, issue specific IDRs

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## Execution Phase

### Tips for responding to IDRs (continued)

- Confirm that the audit team shares your interpretation of request, including resolving any ambiguities in terms
- Establish reasonable due dates
  - Consider year-end closing periods, availability of key personnel, and time required to locate and review voluminous records
- Keep organized records of communications with audit team
- Other Considerations
  - Privilege issues
  - Work Product Doctrine
  - Duty to Prevent Spoliation

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## Execution Phase

### Third-Party Contacts

- Stricter Procedural Requirements under the Taxpayer First Act
- Auditor can no longer send a generic notice at the beginning of the audit
- The auditor must:
  - Notify taxpayer of intent to contact third parties
  - Actually intend to contact the third parties
  - Notify taxpayer at least 45 day before contact
  - Tell taxpayer the time period in which he or she intends to make the contact
- IRS keeps a record of persons contacted and will provide the taxpayer with list upon request

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## Execution Phase

### Tips for Witness Interviews

- Prepare for testimony through mock examination
- If question is unclear, ask for IRS to rephrase question
- Give direct answers to questions asked
- Directly address bad facts
- Control the pace—take a pause before answering
- Don't guess, interrupt, or volunteer information

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## Execution Phase

### Facility Tours

- IRS may visit taxpayer's place of business to establish facts that can only be established by a direct visit
- Visit generally will take place during normal IRS hours
- Should not disrupt business operations
- Tips for the taxpayer:
  - Seek Agent's agreement on timing, topics and sites to cover, questions that will be asked, and who from company will answer
  - Consider preparing a briefing for Agent prior to tour
  - Representative should accompany the Agent; discuss whether someone from the company should also be present
  - No one on tour should volunteer unsolicited information
  - Do a dry run first

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## Execution Phase

### Written Acknowledgment of the Facts for Unagreed Issues

- Also known as AOF IDR
- Replaces long-standing existing process where LB&I agents would draft a Notice of Proposed Adjustment when adjustment was being considered
- For potentially unagreed issues, issue team managers are supposed to:
  - Seek taxpayer's acknowledgment on the facts
  - Resolve factual differences
  - Document factual disputes
- If case is closed to Appeals, and taxpayer then provides new information that requires investigation or additional analysis, Appeals will return to Exam for consideration

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## Execution Phase

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### Strategies for responding to Written Acknowledgment of the Facts (AOF) IDR

- Approach may depend of case strategy and tactics
  - Treat it like a request for admission?
  - Provide additional facts?
  - Agree with IRS's facts or write your own?
  - Decline to respond

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## Execution Phase

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### Notices of Proposed Adjustment

- May be provided throughout the execution phase
- Notice is prepared on, and is sometimes referred to as, a Form 5701
- Serves as building block for revenue agent's report (RAR)
- Can be used as a draft for discussion purposes to improve communication between agent and taxpayer

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## Execution Phase

### Continuous Risk Analysis

- IRS will determine which issues will continue to be examined or modified in scope
- New issues may be added to examination plan
- Timeline may be modified when appropriate
- Counsel and other technical experts should be consulted throughout
- IRS will risk-assess each issue on a continuous basis as new information is received (i.e. through responses to IDRs)
- Issue team will timely inform taxpayer when an issue is added, continued, expanded, narrowed, or dropped
- Mid-Cycle risk analysis provides opportunity for discussion with Exam about direction of audit

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## Resolution Phase

### Goal is to reach agreement on tax treatment of each issue

- Revenue agents do not have authority to settle legal issues based on a hazards of litigation assessment
- Revenue agents can raise or not raise issues depending on legal and factual interpretations, which in practice allows some room to “settle” issues
- Tools for issue resolution:
  - Technical Advice Memorandums (TAM)
  - Delegation Orders
  - Accelerated Issue Resolution (AIR)
  - Early Referral to Appeals
  - Fast Track Settlement (FTS)
  - Rapid Appeals Process
  - Industry Issue Resolution
  - Closing Agreements
- See I.R.M. 4.46.5

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## Resolution Phase

### Issuance of 30-Day Letter and Revenue Agent's Report (RAR)

- Agents will issue a 30-day letter, which transmits a Revenue Agent's Report (RAR) containing their proposed adjustments
- RAR contains:
  - All proposed adjustments (usually including Notices of Proposed Adjustments (NOPAs))
  - Recomputation of tax liability showing a proposed deficiency or overassessment
- Letter transmitting RAR called a 30-day letter because the taxpayer has 30 days to submit a protest
- Issuance of 30-day letter triggers (or notice of deficiency) triggers the running of "hot interest" on large corporate underpayments

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## Resolution Phase

### Issuance of Statutory Notice of Deficiency

- If IRS determines there is deficiency in tax, IRS is authorized to issue a statutory notice of deficiency
- This is also known as a statutory notice, stat notice, or 90-day letter
- IRS generally is prevented from making an assessment until after it has issued a statutory notice
- Not typically the end of examination process, but Exam may end exam by issuing a statutory notice if the taxpayer refuses to extend the statute of limitations on assessment

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## Compliance Assurance Process (CAP)

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- IRS agrees to examine taxpayer's transactions and material items prior to the filing of the tax return
- Material items can be resolved before return is filed
- If issues are agreed, memorialized in closing/issue resolution agreement
- Fast track settlement is available to resolve issues
- Three phases:
  - Pre-CAP audit of filed tax returns
  - CAP audit prior to filing the current return
  - Compliance and maintenance in accordance with a CAP Memorandum of Understanding (MOU)

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## Resources

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### **Taxpayers should consult IRS guidance and other resources**

- Relevant Revenue Rulings and Procedures
- Publication 5125 - Examination Process
- Audit Technique Guides
- LB&I Directives
- LB&I Issue Campaigns
- Internal Revenue Manual

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## Audits Part Two: Recent Developments in LB&I

Nikole Flax, Deputy Commissioner, LB&I  
Elizabeth Askey, Deputy Division Counsel  
(International), LB&I

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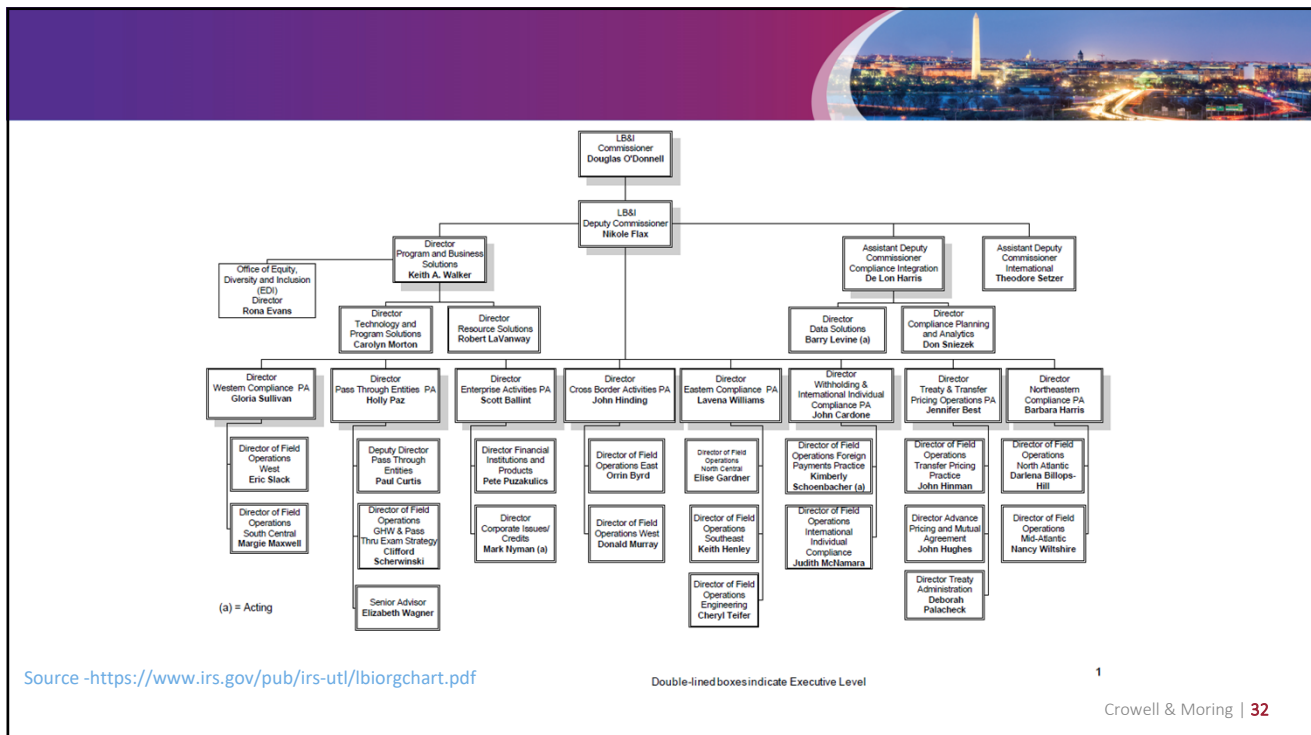
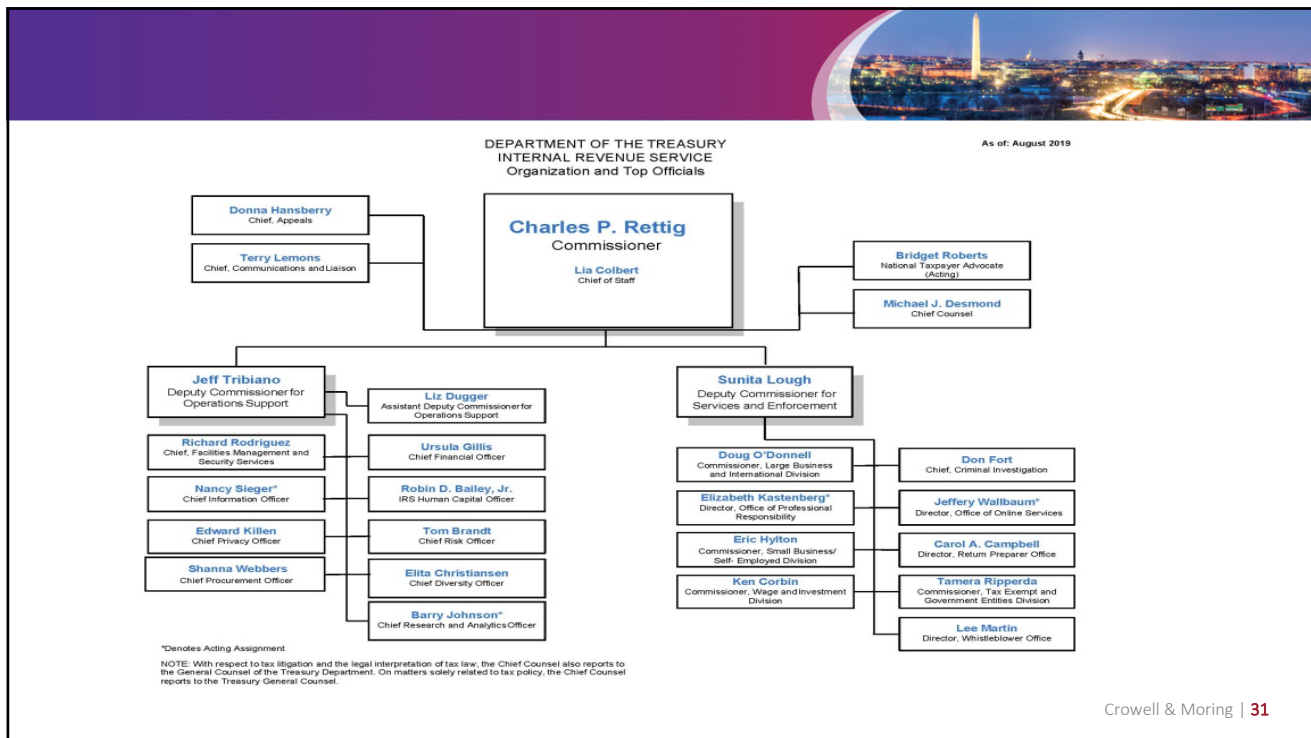


## Agenda

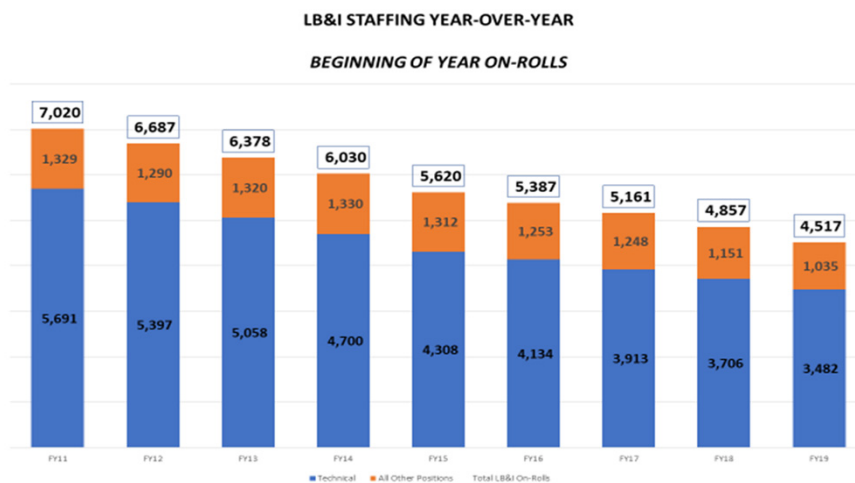
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- Current Workforce – staffing and hiring
- Compliance Programs – overall portfolio
- Implementation of Major Priorities
- Key Compliance Issues
- Tax Certainty and Risk Assessment
- Focus for FY 2020
- Role of LB&I Counsel

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## Current Workforce - Staffing and Hiring



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## Practice Areas and Knowledge Management

- Practice Network structure
- Knowledge management network is designed to provide exam teams with technical resources needed to manage their cases efficiently, consistently, and with a high degree of technical proficiency.

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## Compliance Programs – Overall Portfolio

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- Practice Areas and Knowledge Management
- Large Corporate Compliance Program (LCC)
- LB&I Campaigns
- Compliance Assurance Process (CAP)
- Global High Wealth and Flow-Throughs
- Other Workstreams

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## Large Corporate Compliance Program

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- Use of data analytics in audit decisions
  - Factors used to determine whether a return is selected for audit
  - Consideration not just of dollar amounts reported on return, but also surrounding context
- More efficient use of resources

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## Transition to Issue Focused Campaigns

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- Slowly transitioning to issue focused campaigns
- Percentage of audits based on campaign issues will continue to increase
- Will not completely replace “traditional audits”

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## Compliance Assurance Process (CAP)

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- CAP Recalibration Memo
  - Expected to accept new applications for 2020 CAP year
  - New applicants must be publicly held C-corps.
- CAP Frequently Asked Questions
- Tools used by the IRS
- Role of Industry Issue Resolution Program process (i.e., Research Credits)
- Deselection on certain issues
- Current limitations with the CAP program
- Additional information, guidance coming before next application period

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## Global High Wealth and Flow-through Work

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- The Global High-Wealth group was organized in 2009 to examine high net worth individuals
- Audits extend beyond the individual income tax return to include examining the entities that these taxpayers control
- LB&I aims to increase its presence in this area

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## Implementation Priorities for LB&I

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- Bipartisan Budget Act (2015, effective 2018)
  - Procedural guidance in place
  - Plans to increase audit coverage for large partnerships
- Tax Cuts and Jobs Act (2017)
  - Technical guidance continues
  - Identifying areas of potential non-compliance

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## Key Compliance Issues

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- Syndicated conservation easements
- Microcaptive insurance
- Virtual currency
- Fraud referrals

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## Tax certainty and risk assessment

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- ICAP
- Research Credit
- Transfer Pricing
- Other opportunities

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## Role of LB&I Division Counsel

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- Support of LB&I programs
- Field Advice
- Litigation
- Coordination with Associate Chief Counsel Offices

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## Role of Practice Networks

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- Obtain Feedback from Field on Campaigns, enforcement priorities
- Role of subject matter experts in Exam
- Subject matter Practice Networks
- Practice Network calls
- Role of Chief Counsel attorneys in Practice Networks

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## Options for Resolution of Issues at Exam

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- Exam does not have settlement authority
- Resolutions are often different depending upon the issue
- When to get Counsel involved
- Counsel's role in resolving issues
- Elevating issues within LB&I and Counsel

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## Focus for FY 2020

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- TCJA compliance
- Use data analytics and other tools to improve case selection
- Training
- Communication/Engagement
- Improved internal operations

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## Advance Pricing Agreements (APAs) and Mutual Agreement Procedure (MAP) cases

### Panel Members

John C. C. Hughes, Director, Advance Pricing and Mutual Agreement Program, IRS

Brad Anwyll, Senior Counsel, Crowell & Moring LLP, Washington, DC

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## Agenda

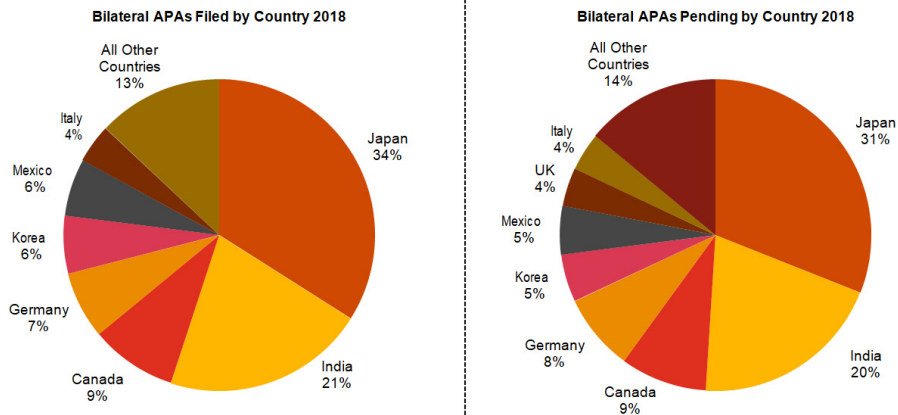
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1. Recently published APMA statistics for APAs and MAP cases
2. Best practices for APAs and MAP cases
3. How APMA develops and resolves APAs and MAP cases
4. APMA's Interaction with Exam
5. Recent Developments at APMA: Functional Cost Diagnostic Model, Internal Reorganization, Increased APA Fees, Reference Sets
6. External Influencers on APMA: BEPS, BEAT, Tariffs, Arbitration

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## Recently published APMA statistics for APAs and MAP cases

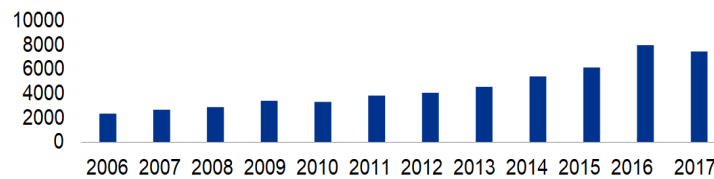
### IRS APA Annual Report for 2018



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## Recently published APMA statistics for APAs and MAP cases

### Global Inventories of MAP Cases



- MAP inventory has increased from 2,352 in 2006 to 7,500 in 2017 (The inventory was 8,002 cases reported for 2016. This decrease in the overall number of cases in MAP inventory is reportedly due to a different counting methodology used for cases received since 2016.)
- In 2017, Germany (1,241), the United States (983), France (882) and India (763) had the largest ending inventories of MAP cases.

Source: OECD Website, Dispute resolution, <http://www.oecd.org/tax/dispute/mutual-agreement-procedure-statistics.htm>

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## Best Practices for APAs and MAP Cases

- Know the Treaty Provisions
  - Filing requirements
  - Protective claims
- Be Prepared
  - Own the facts
  - Know the endgame
  - Respond to requests quickly and completely
- Rethink the presentation – not a documentation report
- Effective structuring of team
  - Connected advisors
  - Taxpayer's participation
- Contact with tax authorities – early and often
- Patience and perseverance are key
- Attitude adjustment
  - Common goal, not an audit
  - Be neutral
  - Be helpful
  - Be a good listener

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## How APMA Resolves Bilateral APAs and MAP Cases

- APMA will prepare a memorandum supporting its negotiating position
- APMA and the treaty country often will exchange position papers
- APMA and the treaty country will schedule the case for negotiations
- Negotiation discussions can be face-to-face, over the phone, or by email
- Once a case is agreed, the countries exchange letters confirming their agreement
- APMA has different working relationships with different countries: logistics, the way business is conducted, etc.
- OECD – MAP Forum

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## APMA's Interaction with Exam

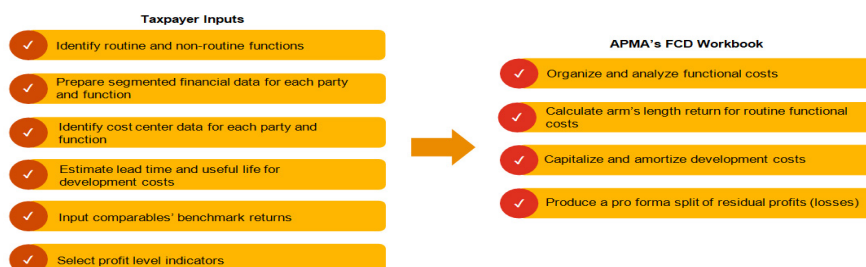
- On February 19, 2019, LB&I issued a memorandum requiring issue teams to consult with APMA on transfer pricing transactions that may generate adjustments for which a taxpayer may request competent authority assistance
  - Consultation must occur early in issue development so that risks may be properly assessed/further consultation may occur as needed as case development progresses
  - Will provide perspective on the history APMA may have with the type of case being pursued (and whether, in some similar situations, an adjustment has been withdrawn, in whole or in part, before or after negotiations have begun)
  - APMA also gives feedback on the country relationship, the types of arguments the other country is likely to make, and the types of data that are likely to be persuasive
  - Issue teams are ultimately responsible for the selection and development of all examination issues and an appropriate degree of independence is maintained from the competent authority process

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## Recent Developments at APMA

### Functional Cost Diagnostic Workbook

- In February 2019, APMA announced that it had developed a functional cost diagnostic (FCD) model
- The model is an Excel spreadsheet structured as a residual profit-split method analysis with empty cells for taxpayer costs. The model requires that taxpayers distinguish between routine costs and non-routine costs that could entitle a party to a share of residual profit



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## Recent Developments at APMA

### Functional Cost Diagnostic Workbook

- Purpose is to ensure that the U.S. is not going to be “pinched or squeezed” within a larger system given the various flows of intercompany pricing coming into the U.S.
- APMA may require taxpayers to complete the FCD workbook in certain cases, in which two or more controlled taxpayers may make material, non-benchmarkable contributions to their intercompany arrangement
- APMA is discussing the model and its intended use with U.S. treaty partners and is working on an updated version that may be released later this year
- Asking taxpayers to complete the model does not imply that APMA believes the profit-split method is the best method, but it does indicate that it has not been rejected
- APMA will use the FCD workbook only in especially complex cases
- The IRS may use the FCD model outside of APMA

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## Recent Developments at APMA

### Internal Reorganization

- In September 2018, APMA underwent a restructuring with the goal of improving the way it analyzes and develops its cases, as well as how it negotiates and resolves disputes (e.g., facilitating similar decisions in similar situations)
- Features of the reorganization:
  - The merging of economists and non-economists into the same groups. Economists were previously lumped together in separate groups from the non-economists. APMA believes this integration will foster collaboration among APMA team members and optimize economist involvement in case analysis, development, and negotiation
  - The creation of three groups, each led by an assistant director and each assigned cases for specific countries
  - Each group is then divided into two teams, each led by a team manager. The assistant director and the team managers of the group decide how to allocate the economists between the two teams

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## Recent Developments at APMA

### Increased APA Fees

- Before July 1, 2018, the filing fee for a new APA was \$60,000. Between July 1 – December 31, 2018, it was \$86,760. Beginning January 1, 2019, the filing fee is now \$113,500
- The number of APA applications more than doubled in 2018 to 203 from 101 in 2017
- Did increase in filing fee cause this surge? Other potential factors: tax reform, audit activities in other countries, uncertainty in the international environment
- How many APA applications are expected for 2019?

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## Recent Developments at APMA

### Reference Sets

- Reference sets are intended to be used as a starting point in certain types of common benchmarking cases, derived using very standard search and selection criteria, largely quantitatively based and with minimal qualitative/subjective filtering
- These reference sets are then modified, as needed, based on economically significant features specific to the tested party
- Reference sets are a tool designed to achieve efficiency and some degree of predictability in a given benchmarking case
- How and when does APMA use reference sets?

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## External Influencers on APMA: BEPS, BEAT, Tariffs, Arbitration

### BEPS

- OECD's BEPS initiatives, changes in regulatory requirements, and increased transparency lead to greater use of profit splits
- OECD's Consultation Document "Addressing The Tax Challenges of the Digitalization of the Economy" includes "user participation" and "marketing intangibles" proposals that prescribe profit split methods
- How do these initiatives/proposals intersect with APMA's FCD model?
- OECD Initiatives/Proposals v. OECD Guidelines

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## External Influencers on APMA: BEPS, BEAT, Tariffs, Arbitration

### BEAT

- The BEAT hits a company with a 10% tax when 3% of more of the company's deductible payments are considered base-erosion payments. The BEAT is designed to stop U.S. multinationals from moving profits offshore
- The BEAT could capture certain intercompany transactions for which companies are seeking APAs
- Will APMA address questions about the BEAT? What have taxpayers already requested?
- Companies should bring to APMA's attention any questions they have about intercompany transactions included in APA applications that might be captured by the BEAT – APMA will then coordinate with other parts of the IRS to address any concerns and give the companies confidence on their questions

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## External Influencers on APMA: BEPS, BEAT, Tariffs, Arbitration

### U.S. Tariffs

- Tariffs will result in additional revenue to the U.S. government
- Tax authorities in other countries might object to reduced tax revenues caused by the U.S. tariffs
- U.S. might have similar objections with respect to retaliatory tariffs
- Effect of tariffs may be subject to discussions in MAP negotiations or bilateral APA discussions
- What is APMA's position/thinking on tariffs in general?
- Will new tariffs trigger a violation of the critical assumption language used in APAs?

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## External Influencers on APMA: BEPS, BEAT, Tariffs, Arbitration

### Arbitration

- Certain U.S. income tax treaties, including recent treaties, provide for mandatory binding arbitration to resolve eligible cases in which the competent authorities have undergone but are unable to reach a complete agreement
- How many arbitration cases have there been to date?
- What is the purpose of the arbitration provisions?
- Is that purpose being achieved?
- Taxpayer interaction with APMA Team about arbitration

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## **Uber Me Where! Employee or Independent Contractor?**

- **Federal and State Tax Implications**
- **Different Strokes for Different Folks**

David McFarlane

Samuel Krause

Special Guest Appearance by Glenn Grant

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## **Employee or Independent Contractor?**

Whether or not a worker is an employee or independent contractor affects employer's tax, employee benefit and employment law obligations. Misclassifying workers as independent contractors can create significant exposure under state and federal tax and other laws.

We will cover:

- How to determine whether worker is an employee or independent contractor for tax withholding purposes
- Consequences of misclassification
- What to do upon determining that they have misclassified employees.

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## Classification Tests

- Common Law Test
- IRS Test
- “20-Factor” Test
- Other Relevant Factors
- State Tests
- Employment Related Tests

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## 1. Common Law Test – “Right to Control”

Generally an **employer-employee relationship** exists when the person for whom services are performed has the **right to control and direct the individual** who performs the services as to the 1) result to be accomplished, and 2) “means and methods” by which that result is accomplished.

In general, if an individual is subject to control or direction of another merely as to the result to be accomplished and not as to the “means and methods” for accomplishing the result, that person is an **independent contractor**.

Treas. Reg. §§ 31.3121(d)-1(c)(2).

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## 2. IRS Test

- Recent IRS guidance creates a test using three categories of factors that evidence degree of control and independence:
  - Behavioral: Does the business control or have the right to control what the worker does and how the worker does his or her job?
  - Financial: Are the business aspects of the worker's job controlled by the payer? (e.g., how worker is paid, whether expenses reimbursed, who provides tools/supplies, etc.)
  - Type of Relationship: Are there written contracts or employee benefits (e.g., 401(k), healthcare, vacation pay, etc.)? Will relationship continue and is the work a key aspect of the business?

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## 3. The "20-Factor" Test

Prior to current guidance, the IRS used the 20-factor test, established in Revenue Ruling 87-41. The 20-factor test is still a predominant method for determining a worker's status.

(Grab a ~~coffee~~ glass of wine, this could take a while....)

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## The “20-Factor” Test (Cont.)

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1. Level of Instructions
2. Mandatory training
3. Integration into business operations
4. Services rendered personally (or right to assign)
5. Hiring, supervising, and paying assistants
6. Continuing relationship
7. Flexibility of schedule

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## The “20-Factor” Test (Cont.)

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8. Full time required
9. Work on employer’s premises
10. Order or sequence of services
11. Oral or written report required
12. Method of Payment (hour, week, month)
13. Payment of business and/or traveling expenses
14. Furnishing tools and materials

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## The “20-Factor” Test (Cont.)

15. Investment in Facilities
16. Realization of profit or loss
17. Working for more than one business at a time
18. Making services available to the general public
19. Company’s right to discharge at will
20. Individual’s right to terminate at will

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## 4. Other Relevant Factors

The courts and the IRS have identified other relevant factors that do not clearly fall under the factors listed above. These include:

- Parties’ intent to create an employer-employee relationship and indicators of intent
- Whether the worker is required to comply with certain policies and procedures
- Special considerations for professionals (*Law Office of Gerard C. Vince LLC v. Board of Review, Department of Labor et al.*, case number A-5441-17T2, Superior Court of New Jersey, Appellate Division, September 3, 2019)

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## 5. State Tests

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- Majority of states reference the federal test or common law test for determining whether workers are employees or independent contractors for state tax purposes.
- Other states do not explicitly reference the federal tests but outline a similar test.
- Only a few states have substantially different tests, such as Ohio and Oregon.

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## 6. Employment-Related IC Tests

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Courts and state agencies tend to apply one of the following four independent contractor tests in the employment setting:

- The “Right to Control” Test
- The “Economic Realities” Test
- The “Hybrid” Test
- The ABC Test

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## The ABC Test

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- The ABC Test starts with a presumption that the worker is an employee!
- To establish independent contractor status, an employer must prove:
  - (A) The employee is free from control or direction over the performance of the work; and
  - (B) The work performed is outside the usual course of the employer's business; and
  - (C) The worker is customarily engaged in an independent trade, occupation, profession, or business.
- Each of the factors must be established; it is not a balancing test like the others.
- The ABC Test has now been adopted for wage and hour purposes in a handful of states.

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## Misclassification & What to Do

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- Risk Upon Misclassification
- Section 530 Safe Harbor
- IRS Voluntary Classification Settlement Program (VCSP)

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## Risk Upon Misclassification

### TAX/FINES

- Federal/state fines - up to 100% of employment tax due
- Federal/state income tax
- Withholdings – medicare, social security, unemployment & workers compensation
- IRS audits

### ERISA/WAGE & HOUR/OTHER

- Employee benefits – health insurance, paid leave, 401(k) (retirement plan may cover independent contractors), etc.
- Expense reimbursement
- Wage & hour claims – minimum wage, unpaid overtime, wage statement violations
- DOL audits
- Unemployment and workers compensation insurance

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## Section 530 Safe Harbor

- If a company mistakenly treated certain employees as independent contractors, relief from federal employment taxes may be available under s. 530 of the Revenue Act of 1978. Following criteria must be met:
- Taxpayer did not treat worker (or any other individual in substantially similar position) as an employee for any period.
- Taxpayer filed all federal tax returns for worker consistent with treating him/her as an independent contractor.
- Taxpayer had reasonable basis for treating worker as an independent contractor. This can be shown by reliance on:
  - Judicial precedent or published rulings
  - Past IRS audit of taxpayer
  - Long-standing industry practice of significant segment of industry in which worker was engaged
  - Contemporaneous reliance on prospective professional advice

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## Voluntary Classification Settlement Program

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Employers can also seek partial relief through the Voluntary Classification Settlement Program (VCSP). A taxpayer participating in the VCSP prospectively treats the workers as employees for future tax periods in exchange for paying 10% of employment tax liability that would have been due on compensation paid to the workers for most recent tax year. Employer is not liable for any interest or penalties on the amount and cannot be subject to an IRS employment tax audit with respect to the worker classification for prior years.

To qualify, an employer must:

1. Have been consistently treating workers as independent contractors,
2. Filed all required Forms 1099 over past three years, and
3. Not be under an IRS employment tax audit or any DOL/state audit concerning worker classification.

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## CONCLUSION

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### Best Practices

- Undertake review using appropriate test to determine if employee or independent contractor
- Review independent contractor agreements
- Avoid having independent contractors do exact same work as employees
- Require staffing agencies to provide proof of benefits/insurance
- Have independent contractors sign release stating that they are not entitled to employee benefits
- Avoid handing out job description, SPD, employee handbook etc.

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## Contacts


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David is an ERISA partner in the firm's Tax, Corporate, Health Care, Labor & Employment groups in our Los Angeles office. David has more than 25 years experience in the U.S. and Canada advising on retirement, healthcare, employee benefits, executive compensation, corporate transactions, deferred compensation, and other matters related to ERISA, IRC and the ACA. David and his team developed a unique *"Fixed-Fee ERISA Fiduciary Protection Program"* for plan sponsors of retirement, health, and other employee benefit plans in order to best protect Boards of Directors, officers, and other employees from personal liability under ERISA. David is the former President of the Canadian American Bar Association, served as judge *pro tem* of the Superior Court of California and Board Vice-Chair of Barlow Respiratory Hospital. He also served as President of the LGBT Bar Association of Los Angeles and was recently recognized as one of the "Most Influential Minority Lawyers in Los Angeles" by the L.A. Business Journal.

ERISA & Employee Benefits  
Executive Practice  
Corporate  
Health Care  
Tax  
Transactions & Corporate  
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Executive Practice  
Corporate  
Health Care  
Tax  
Transactions & Corporate  
Privacy & Cybersecurity  
ERISA & Employee Benefits

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Labor & Employment  
Wage & Hour  
Regulatory & Policy  
Transactions & Corporate

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# WASHINGTON OUTLOOK

Rick Grafmeyer  
Capitol Tax Partners©

## 2019 Legislative Outlook

### Unfinished Business

- Extenders
  - 26 items expired end of 2017'
  - Others expire at the end of 2018 and 2019 -- itemized medical deductions and black lung trust fund (2018); suspended ACA taxes reinstated (2019)
- Tax administration reforms
- Retirement Enhancement and Savings Act
- Technical corrections & other fixes to TCJA
  - Chairman Neal wants to hold hearings first
- Multiemployer pension plan relief
- Disaster relief
- Trump tax returns

### Other Possibilities

- Infrastructure
- EITC and middle income rate cuts





## Significant Calendar Events

- Final Treasury regulations – need to be issued by mid-June 2019 to be fully retroactive to enactment date of TCJA
- Govt. funding bills and Defense Auth. expire Sept. 30 / Overall spending caps – Agreed to / Reset for Oct. 1
- ACA taxes – reinstated Dec. 31, 2019
  - Medical device tax and the health insurance tax
  - The medical device tax and the health insurance tax repeal have bipartisan support
  - Cost is about \$20B per year to continue moratorium, potential PAYGO issue
- Black lung excise taxes on coal expired Dec. 31, 2018 (last renewed 10 years ago)
  - Trust fund already over \$4B in debt
- Treasury approves benefit cuts to multiemployer pension plan – summer or fall?

## Key technical and fixes to glitches to tax reform?

### **Technical fixes to errors in the 2017 tax law, including:**

- Increase in time for restaurants and retailers to write off renovations, other improvements
- Use of net operating loss carrybacks for certain corporations
- Inability of sexual harassment victims to deduct legal costs
- Taxation of parking benefits provided by tax exempt organizations (i.e., churches)
  - Why is it a big deal?
- Gold Star families benefits / lower income student room and board financial aid
- Countless other items – Democrats still examining....

## Regulatory Actions / Issues

- OMB review – is it slowing guidance or not?
  - Four to six weeks on average for reviews
- Effective dates – 7805(b)
  - (1) Retro only to period ending after Prop. Reg was been filed (BEAT)
  - (2) Retro if filed within 18 months of DOE (GILTI)
- March 5 Policy Statement limiting Notices and Temp. Regs
- Current regulation issues / Reg. plan



### Specific Audit Issue:

#### Income Tax Accounting

Dwight Mersereau

## Specific Audit Issue: Income Tax Accounting

### Agenda:

- What is “income tax accounting”?
- How are accounting methods adopted?
- What is a change in method of accounting?
- What authority does the IRS have to change a taxpayer’s accounting method?
  - What is Examination’s authority?
  - What is Appeals’ authority?
- What are some strategic considerations to resolve change in method issues?

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## Specific Audit Issue: Income Tax Accounting

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“The word ‘audit’ comes from ‘auditory’ which means ‘to hear bad news coming’.”

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## Specific Audit Issue: Income Tax Accounting

### What is “income tax accounting”?

- Tax accounting rules determine when a taxpayer takes into account an item of income or deduction.
  - Overall cash or accrual method of accounting.
  - Special methods of accounting for specific items (e.g., advance payments).
- It is not “accounting for income taxes.”
- It is not “bookkeeping.”

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## Specific Audit Issue: Income Tax Accounting

### How are accounting methods adopted?

- A taxpayer adopts a proper accounting method by using it on the first tax return that includes the method.
- A taxpayer adopts (or changes to) an improper accounting method by using it on two consecutive returns.

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## Specific Audit Issue: Income Tax Accounting

### What is a change in method of accounting?

- A change in method of accounting includes a change in the overall method of accounting or a change in treatment of a material item.
  - What is the item?
- The correction of an error is not a change in method of accounting, and does not require the consent of the Commissioner.
- A change in facts is not a change in method of accounting; the taxpayer simply applies the new facts to its existing method

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## Specific Audit Issue: Income Tax Accounting

### What authority does the IRS have to change a taxpayer's accounting method?

- The IRS can change a taxpayer's accounting method if, but only if, it does not clearly reflect income.
  - The IRS cannot change a taxpayer from one proper method to another proper method.
  - Is an accounting method improper simply because the taxpayer changed to it without consent?
- Once the IRS determines the taxpayer's accounting method does not clearly reflect income, the IRS can change a taxpayer to any accounting method that, in the IRS's opinion, does clearly reflect income.
  - Can the IRS can change the taxpayer to a method that the taxpayer could not have adopted?
  - What if the IRS changes the method for the year in which the taxpayer adopted the method?

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## Specific Audit Issue: Income Tax Accounting



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## Specific Audit Issue: Income Tax Accounting

### What is Examination's authority?

- If it determines a taxpayer's accounting method is improper, Examination:
  - Must change the taxpayer to a proper accounting method.
    - In the case of a prior improper change, change the taxpayer to its prior method.
  - Must change the taxpayer in the earliest year under examination (if possible).
  - Must impose a § 481(a) adjustment in the year of change (if possible).

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## Specific Audit Issue: Income Tax Accounting

### What is Appeal's authority?

- Appeals has much greater authority than Examination.
- Appeals may change the taxpayer's accounting method.
- Appeals may resolve the issue without changing the taxpayer's accounting method.
  - Alternative-Timing Resolution.
  - Time-Value-of-Money Resolution.
  - Any other appropriate resolution.

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## Specific Audit Issue: Income Tax Accounting

### What is Appeal's authority?

- If it changes the taxpayer's accounting method, Appeals:
  - Must change the taxpayer to a proper accounting method.
  - May defer the year of change.
    - Ordinarily not later than the most recent year under examination.
    - In no case, not later than the current taxable year.
  - May impose a § 481(a) adjustment or use a cut-off method.
    - May compromise the amount of the § 481(a) adjustment.
    - May spread the § 481(a) adjustment over any number of years.

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## Specific Audit Issue: Income Tax Accounting

### What is Appeal's authority?

- Alternative-Timing Resolution:
  - In lieu of changing taxpayer's accounting method.
  - Can apply to all of some of the items arising during, or prior to and during, the years before Appeals.
  - Does not affect any items not covered by the resolution.

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## Specific Audit Issue: Income Tax Accounting

### What is Appeal's authority?

- Time-Value-of-Money Resolution:
  - In lieu of changing taxpayer's accounting method.
  - Taxpayer pays amount that reflects the time-value-of-money benefit taxpayer received by using its method compared to method preferred by the IRS.
    - Amount can be reduced to reflect hazards of litigation.
    - Amount is not deductible, but the computation can be tax affected to approximate a deduction.
  - IRS provides a sample computation.

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## Specific Audit Issue: Income Tax Accounting

### What is Appeal's authority?

- If Appeals resolves the issue on a non-accounting-method-change basis:
  - A closing agreement is required.
  - The taxpayer is required to file amended returns to make adjustments to affected subsequent years.
  - The taxpayer must continue to use its current accounting method, unless the taxpayer receives consent to change it.
  - If the IRS imposes an accounting method change in a subsequent year, the § 481(a) adjustment is computed such that there is no duplicate adjustment.

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## Specific Audit Issue: Income Tax Accounting

### What are some strategic considerations to resolve change in method issues?

- While appeals has the authority to resolve accounting method issues using alternative resolutions, many appeals officers are reluctant to do so because they are unfamiliar with them, so persistence and patience are necessary.
- Alternative resolutions are often optimal because, if the IRS changes your method, you will need the consent of the IRS to change from that new, less favorable method.
  - Example: you are using a favorable method for an item. Another taxpayer is litigating the propriety of that method. IRS Examination proposes changing you from that method. It is optimal to resolve the issue using an alternative resolution because, if the other taxpayer later wins its case, the IRS likely will not consent to your request to change back to the favorable method.

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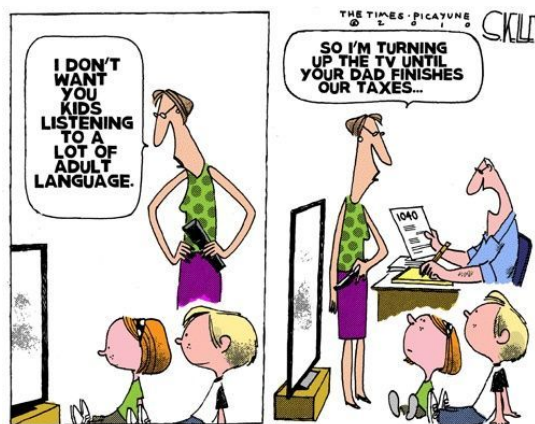
## Specific Audit Issue: Income Tax Accounting

### What are some strategic considerations to resolve change in method issues?

- Because Examination has limited authority to resolve accounting method issues, it may be necessary to go to Appeals to achieve an optimal resolution.
- If you must resolve an accounting method issue at Examination, press factual issues because Examination has the discretion to determine facts.
- Example: Examination proposes changing your inventory method to include numerous additional costs in inventory. Examination has authority to negotiate a resolution to not include some of the costs in inventory because Examination has discretion to determine which costs are incurred by reason of the production of inventory, a factual question.

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## Specific Audit Issue: Income Tax Accounting



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## Defenses to Penalties

Teresa Abney  
Carina Federico

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## Types of Penalties

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## Types of Penalties

- **Delinquency (§6651)**
  - Non-fraudulent failure to file: 5% of net tax due per month, up to 25%
  - Fraudulent failure to file: 15% of net tax due per month, up to 75%
  - Failure to pay: 0.5% of net tax due per month, up to 25%
- **Accuracy-Related (§6662): 20% of underpayment attributable to the following:**
  - Negligence or disregard of rules or regulations
  - Substantial understatement of income tax
  - Noneconomic substance transactions

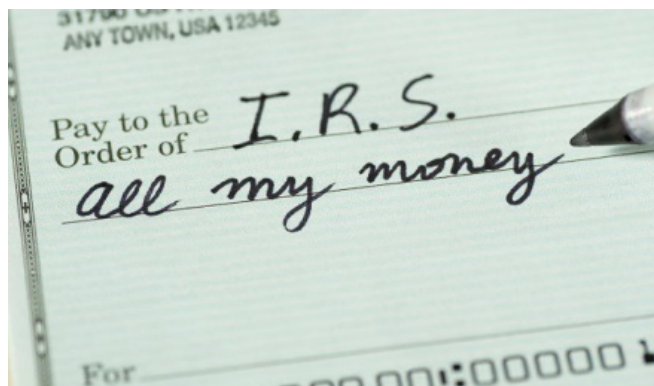
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## Types of Penalties

- **Reportable Transaction Understatement (§6662A): 30% of understatement of tax resulting from undisclosed reportable transaction**
- **Civil fraud (§6663): 75% of any portion of an underpayment attributable to fraud**
- **Foreign-related penalties**
  - FinCEN Form 114: Report of foreign bank and financial accounts
  - Form 5471: Information Return of U.S. Persons with Respect to Certain Foreign Corporations
  - Form 5472: Information Return of a 25% Foreign-Owned U.S. Corporation or a Foreign Corporation Engaged in a U.S. Trade or Business

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## Defenses to Penalties



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## Defenses to Penalties

- **Administrative waiver:** IRS may provide administrative relief from penalties, for example, in the event of delay by the IRS in preparing forms or publishing guidance
  - First Time Abatement: IRS may provide administrative relief the first time a taxpayer is subject to penalties for failure to file, failure to pay, and failure to deposit
- **Disclosure:** Certain accuracy penalties do not apply if the taxpayer's position contrary to a rule or regulation has a reasonable basis in law and is disclosed on the return

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## Defenses to Penalties

- **Statute of Limitations Defense**
- **Proper calculation of penalty amount**
- **Constitutional Defenses**
  - 8th Amendment
  - 5th Amendment
- **Strict liability penalties**
  - Failure to disclose reportable transactions (§6707A)
  - Noneconomic substance transaction penalty (§§6662(b)(6); 7701(o))

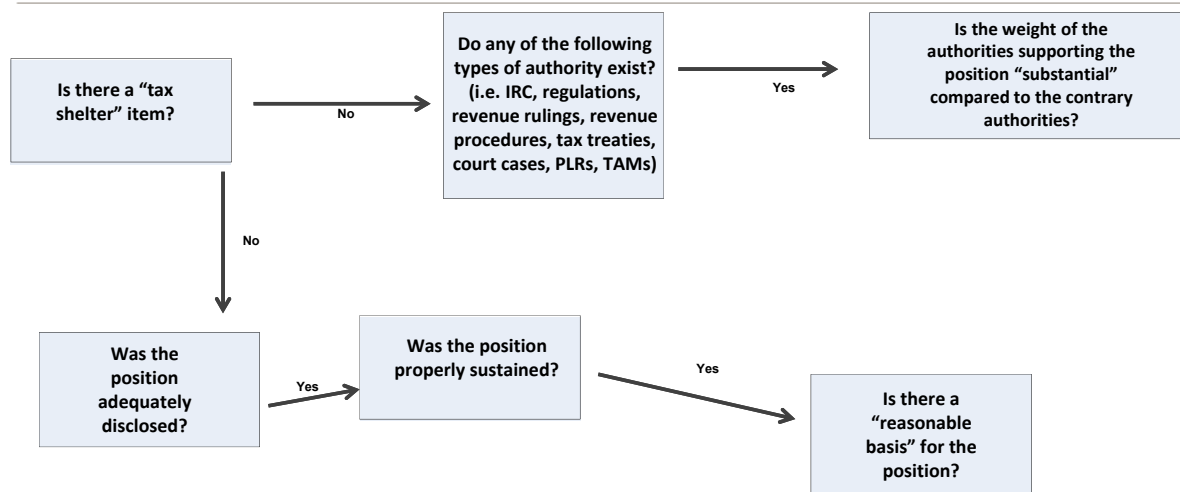
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## Defenses to Penalties

- **Qualified Amended Returns**
  - Disclosures can be made on a qualified amended return
  - Amounts of tax reported on a qualified amended return will be treated as if they had been reported on the original return for purposes of computing the amount of the tax “underpayment” unless the original return reported a fraudulent position
- **To be “qualified,” the amended return must be filed before:**
  - The date the taxpayer is first contacted concerning an IRS exam
  - In the case of a promoted transaction, the date the shelter promoter is first contacted concerning an IRS exam
  - In the case of a pass-through item, the date the pass-through entity is first contacted concerning an IRS exam
  - The date a John Doe summons is served on a third party with respect to an activity of the taxpayer for which the taxpayer claimed a tax benefit
  - The date on which the IRS announced a settlement initiative for a listed transaction

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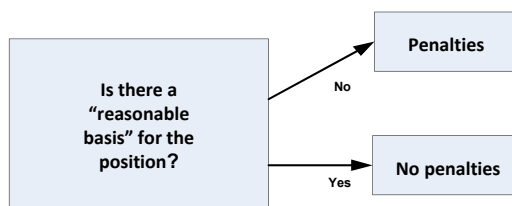
## Defenses to Substantial Understatement



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## Defense to Negligence

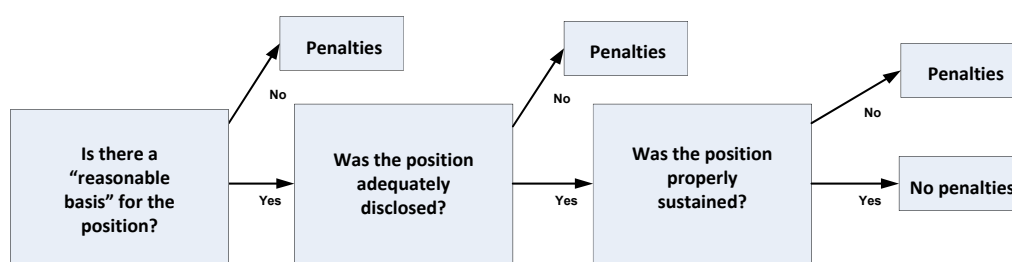
The 20% penalty for negligence can be avoided if there is a "reasonable basis" for the tax position



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## Defense to Disregard of Rules

The 20% penalty for the disregard of rules and regulations can be avoided if there is a “reasonable basis” for, and adequate disclosure of, the tax position



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## Reasonable Cause Defense

- The exercise of “reasonable cause and good faith” can be a complete defense to penalties (§6664)
- Factors considered include the extent of the taxpayer’s effort to assess the correct tax liability and taxpayer’s education, sophistication, and business experience (Reg. §1.6664-4)

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## Reasonable Cause Defense

- But relying on the advice of counsel will most likely result in a waiver of all advice on the same subject matter – no “sword and shield”

### *What Could Be Waived?*

- |                                     |   |
|-------------------------------------|---|
| • Opinions (including drafts)       | • Emails between lawyers and economists |
| • Emails between advisor and client | • In-house communications               |
| • Advisors’ internal emails         | • Communications with financial auditor |

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## Ways to Make a Reasonable Cause Defense

- Written requests
- Deficiency procedures/appeals
- Claim for refund

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## The US-China Trade War And Impacts on China Tax Policy and Practice

Dr. Zhou Ye, PRC Tax Consultant  
Jackson Pai, Counsel

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## Today's Topics

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- Overview of China Tax Regime – Carrots and Sticks
- Trends in Chinese Tax Audits and Practical Strategies
- China Tax Flashpoints: Royalties & Transfer Pricing
- Balance with Foreign Investment: Export VAT Rebate Strategy

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## Overview of China Tax Regime – Carrots and Sticks

- The primary categories of tax in China include:
  - Value-added tax 增值税
  - Enterprise income tax (“EIT”) 企业所得税
  - Individual income tax (“IIT”) 个人所得税等
- Other categories of tax in China include:
  - Stamp duty 印花税
  - Real estate property tax 房产税
  - Land use tax 土地使用税
  - Urban maintenance and construction tax 城市维护建设税

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## Overview of China Tax Regime – Carrots and Sticks

- VAT tax rebates and exemptions
  - For export of goods, a Chinese company can generally obtain an export tax rebate
  - For export of services, a Chinese company can generally obtain a tax exemption
- If a Chinese company pays royalties to a U.S. company, the Chinese company must pay VAT and withhold income tax on behalf of the U.S. company
  - Transfer pricing issues may come into play
- If a foreign enterprise assigns an expat employee to work at the Chinese company, beware of the application of the IIT and issues associated with permanent establishment/business nexus

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## Overview of China Tax Regime – Carrots and Sticks

- To counter the impacts of the trade war, China began reducing its taxes:
  - The VAT tax rate for goods was reduced;
  - The tax burden for small enterprises was reduced;
  - The deduction for R&D expenses was increased to reduce the EIT tax burden of high-tech companies;
  - The IIT tax rate was reduced as a part of the IIT reform.

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## Trends in Chinese Tax Audits and Practical Strategies

- Policy and enforcement adjustments in response to the trade war:
  - Tax authorities have been tasked to strictly implement the policy of tax reduction
  - On issues where tax laws may not be entirely clear and are subject to interpretation, such as transfer pricing, tax authorities tend to take a more conservative position
- Management of invoices (fapiao 发票) is a very important part of the strategy to manage China audits; China auditors rely heavily on invoice records
  - Many tax violation cases stem from fake invoices or real invoices that are incorrect or inaccurate

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## Trends in Chinese Tax Audits and Practical Strategies

- Chinese tax authorities are beginning to use data analytics to assist in its audits
  - Exchanging information with securities and stock registration agencies and real estate registration agencies
  - Requesting information from industry associations and statistical reporting organizations
  - Linking the various databases to create the necessary data analytics for comparison between companies of the same industry or other companies with similar risk profile

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## China Tax Flashpoints: Royalties & Transfer Pricing

- China's transfer pricing system which is part of the China corporate tax law is similar to those of the US
- US invested enterprises have faced a large amount of EIT as a result of transfer pricing adjustments
- Chinese companies' payment of royalties to overseas affiliates may be seen as diversion of profits overseas, which can result in adjustments in transfer pricing
  - Transfer pricing issues can result from related-party transactions in both tangible and intangible assets, including transactions involving sales of stock

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## China Tax Flashpoints: Royalties & Transfer Pricing

- The strategy to managing transfer pricing risks is to ensure arm-length transactions and to prepare accurate and complete documentation
- Royalties are paid based on use of patents or other non-patent technologies, trademark or copyright; the use of such rights must objectively exist
- Royalties and service fees are often connected; however, it may be more beneficial to keep them separate if possible, rather than confusing the two

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## Balance with Foreign Investment: Export VAT Rebate Strategy

- To manage China export rebates, it is important to keep good records of the VAT invoice, especially the input VAT invoice, as the basis of export rebate claims
- The use of special customs zones can allow for early tax rebate; movement of goods to a special customs zone is considered export, even though the goods have not physically left China
- To avoid the hassle of dealing with export rebates, a company can conduct its processing in bonded zones

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## Questions?

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## 33<sup>rd</sup> Annual Managing Tax Audits and Appeals Seminar

September 12-13, 2019



## IRS Appeals

David Fischer  
Eleanor Moran

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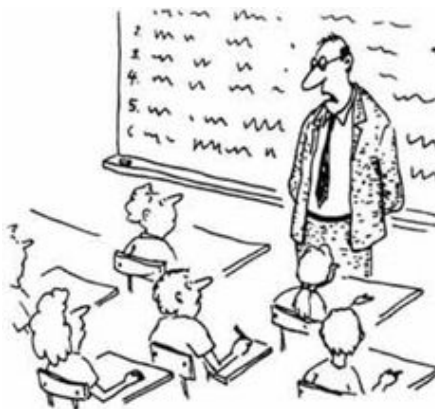
## Agenda

- IRS Appeals Part One: Overview of the Appeals Process
  - IRS Appeals Principles
  - 30-Day Letter
  - Protest
  - Rebuttal
  - Pre-Conference
  - Appeals Conference
- IRS Appeals Part Two: Recent Developments at Appeals
  - Andrew Keyso, Deputy Chief, Independent Office of Appeals

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## IRS Appeals

I expect you all to be independent, innovative, critical thinkers who will do exactly as I say!



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## IRS Appeals Principles

- IRS Office of Appeals was first formed in 1927 as an independent settlement forum
- The Taxpayer First Act (July 1, 2019) reaffirmed the mission of IRS Appeals, as the Independent Office of Appeals
- The sole purpose of IRS Appeals is “to resolve Federal tax controversies without litigation on a basis which:
  - is fair and impartial to both the Government and the taxpayer,
  - promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and
  - enhances public confidence in the integrity and efficiency of the Internal Revenue Service.”

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## IRS Appeals Principles

- IRS Appeals has a duty to determine the correct application of the law (Treas. Reg. § 601.106(f))
- IRS Appeals considers “hazards of litigation” in resolving cases
- IRS Appeals does not consider costs of litigation (no nuisance settlements)
- *Ex parte* rules apply, prohibiting IRS Appeals from discussing the case with Exam (outside of the presence of the taxpayer) “to the extent such communications appear to compromise the independence of appeals officers” (Rev. Proc. 2012-18)

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## Taxpayer's Right to an IRS Appeal

- The Taxpayer First Act provides that the right to IRS Appeals is “generally available to all taxpayers”
  - IRS Appeals may be denied in certain situations, such as if the case is designated for litigation. For denials, the IRS must:
    - provide a “detailed description of the facts involved, the basis for the decision to deny the request, and a detailed explanation of how the basis of such decision applies to such facts”;
    - tell the taxpayer how to contest the denial; and
    - submit an annual report to Congress regarding any such denials
- *Facebook, Inc. v. IRS*, (N.D. Cal. May 2018):
  - Court: “Facebook does not have an enforceable right to take its tax case to IRS Appeals or to compel the IRS to do so”
  - Lacking an enforceable right, Facebook lacked standing, and the court granted the IRS’s motion to dismiss the case with prejudice

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## Notice of Proposed Adjustment

- Exam will issue Form 5701 Notice of Proposed Adjustment and Form 886-A Explanation of Items for unagreed issues (referred to collectively as a NOPA)
- The NOPA should:
  - Provide the issue statement, adjustment table, facts (including AOF response), law, taxpayer’s position, government’s argument, and conclusion;
  - Clearly present the issue(s), the proposed adjustment amount(s), and the reasons for the adjustment(s);
  - Indicate agreed to facts or distinguish the government’s and the taxpayer’s factual positions;
  - Substantiate the IRS’s position based on the tax law;
  - Include the pertinent legal arguments and current legal citations; and
  - Address the taxpayer’s position objectively.

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## Acknowledgment of Facts (AOF) (IRM 4.46.4.9)

- IRS is required to prepare a statement of facts on Form 886-A as part of its consideration of each issue
- IRS is also expected to issue a pro-forma Information Document Request (IDR) to seek a written AOF from the taxpayer and to incorporate any additional facts in the write-up
- IRM provides instructions to Exam if the taxpayer:
  - Agrees with the facts,
  - Provides additional facts,
  - Identifies disputed facts, or
  - Does not respond to the AOF IDR.
- Taxpayer is not required to respond to AOF (Exam instructed not to issue summons)

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## Responding to NOPA and AOF

- The taxpayer is not required to respond to AOF
- The taxpayer may respond with acknowledgement, denial, or new facts
  - Taxpayers may claim that responses are provided pursuant to Federal Rules of Evidence 408, which excludes settlement materials from evidence in subsequent litigation
- Taxpayer may respond to NOPA with simple disagreement (check disagreed and sign)
  - Not required to provide position at this time
  - May decide strategically to provide additional facts, law, or analysis

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## 30-Day Letter

- If sufficient time remains on the statute of limitations, the IRS will issue a “Revenue Agent’s Report” (RAR), also known as a “30-Day Letter,” proposing adjustments reflected in the NOPAs from the examination (included with the 30-Day Letter)
  - IRS Appeals will accept the case only if 365 days remain on the statute of limitations. In practice, the statute of limitations is extended prior to issuance of the 30-Day Letter
  - Exam may issue 30-Day Letter if 240 days remain on the statute of limitations, to allow time to extend the statute of limitations per IRS Appeals’ requirements and to issue Notice of Deficiency if no Protest is filed
- 30-Day Letter is a compilation of unagreed NOPAs, with a calculation of the tax due based on the aggregate of all adjustments
  - Will state taxpayer’s rights to go to IRS Appeals and the 30-day requirement to file a Protest
- “Hot” interest, 2 points higher than normal, begins 30 days after 30-Day Letter for corporate underpayments over \$100,000

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## Responding to the 30-Day Letter

- The 30-Day Letter is the “ticket to IRS Appeals” – on receipt of a 30-Day Letter the taxpayer may, at the taxpayer’s election, request consideration by IRS Appeals
- Request for consideration by IRS Appeals normally is made by “Protest”
  - Under IRS Appeals Policy, IRS Appeals will not consider “new” facts; the Protest is the taxpayer’s last chance to present facts to be considered by Exam (in its rebuttal) before the case is submitted to IRS Appeals
- Prior 30-Day Letter forms stated response was due 30 days from date of letter, newer forms state a specific date for response, not always exactly 30 days
  - Extensions may be granted under reasonable circumstances. IRM 4.10.8.11.8. Practice is mixed
- If the taxpayer does not protest, Exam will issue a Notice of Deficiency (90-Day Letter)

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## Protest Requirements

- Protest may be comprehensive or skeletal, as long as it contains:
  - A statement that the taxpayer wants to appeal the examiner's findings to IRS Appeals;
  - The taxpayer's name, address, and daytime telephone number;
  - A copy of the 30-Day Letter;
  - The tax periods or years involved;
  - An itemized schedule of the adjustments with which the taxpayer does not agree;
  - A statement of facts supporting the taxpayer's position on any contested factual issue;
  - A statement outlining the law or other authority, if any, upon which the taxpayer is relying; and
  - A declaration under penalties of perjury of the truth of the facts in the Protest.
- See IRM 4.10.8.12.9; Publication 5: Your Appeal Rights. How to Prepare a Protest if You Do Not Agree.

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## Exam Rebuttal / Transfer to IRS Appeals

- Exam may prepare a rebuttal if Exam believes there is something in the formal written protest that does not change the determination, but requires further comment or explanation
  - Exam is not required to prepare a rebuttal, but if it does, the *ex parte* guidelines require Exam to provide a copy to the taxpayer
  - There is no set time period for completion of the rebuttal
- After the rebuttal, or if Exam does not prepare a rebuttal, the examiner will transfer jurisdiction and the case file to IRS Appeals (Exam refers to as "closing the case to IRS Appeals")
  - LB&I has announced intention to establish a policy concerning how long it should take to close a case to IRS Appeals after the 30-Day Letter date
  - Responds to GAO Report GAO-18-659: Opportunities Exist to Improve Monitoring and Transparency of Appeal Resolution Timeliness, September 21, 2018

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## Appeals Pre-Conference

- Cases closed to IRS Appeals are assigned to an Appeals Officer or Appeals Team Case Leader (ATCL)
- The ATCL will reach out to the taxpayer, introduce himself or herself, establish a schedule for the first conference, and may request other information
- The IRM suggests that the Appeals conference is to be held within 90 days of filing the Protest. In practice, first contact is made within 90 days and the Appeals conference is scheduled in the next 90 days
- For LB&I cases, the Appeals conference is preceded (usually on the same day) by a Pre-Conference with Exam
  - A Pre-Conference is required for cases assigned to an ATCL
  - Exam will present its defense of the adjustments and answer questions from IRS Appeals in the presence of the taxpayer (to avoid violation of the *ex parte* rules)

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## Appeals Conference

- The Appeals conference may proceed as the Appeals Officer and taxpayer choose
  - The conference is a discussion, Federal Rules of Evidence do not apply, taxpayers are not required to present witnesses
  - Taxpayers may bring witnesses if they choose
  - Taxpayers often open by presenting a summary of their position
  - Best practice is to respond directly and carefully to concerns raised by the Appeals Officer
- The Appeals Officer will ask questions and will ask for clarification of factual and legal positions
- The Appeals conference may extend over several days, and it is common to break for a few weeks to respond to questions, then reconvene in person or by telephone

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## Appeals Conference

- Historically, Exam participated in the Pre-Conference and did not participate in the Appeals conference
- Reflected *ex parte* rules, prohibiting communications with Exam outside of presence of taxpayer
- Pilot program:
  - ATCLs request representatives of Exam to participate in Appeals conference discussions until settlement discussions begin – Taxpayers may consent to Exam staying longer while IRS Appeals uses mediation techniques
  - Originally about 1/3 of ATCLs participate
  - Extended on voluntary basis through May 2020

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## Appeals Conference

- Almost all LB&I Appeals conferences are in-person conferences
- For other taxpayers, most Appeals conferences are via telephone
  - The taxpayer may request or the Appeals Officer may suggest an in-person conference
  - Factors considered include: the depth of the record, the weight of the taxpayer's credibility, a taxpayer's special needs, the inclusion of multiple participants, the use of Post Appeals Mediation or Rapid Appeals Process
  - Availability of in-person conferences has been subject of much public discussion
- Virtual conferences are an alternative to telephone conferences
  - Appeals Officers are to "[o]ffer a taxpayer requesting an in-person conference a virtual conference as an alternative when the technology for a virtual conference is available"

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## IRS Appeals Settlement Authority

- Generally, IRS Appeals has authority to fully or partially concede an issue based on litigation hazards, even if contrary to an IRS Ruling, TAM, or other guidance (IRM 8.6.3.3)
- Generally, IRS Appeals' settlement authority is vested in the Appeals Officer or ATCL
- In 2017, the requirement was added for the ATCL Manager to concur in settlements by an ATCL
- Like the IRS in general, IRS Appeals is centralizing some analysis and decision-making
  - IRS Appeals makes wide use of Technical Specialists and subject matter experts
  - The Appeals Settlement Guidelines are published on the IRS website (without the key analysis or recommendations): <https://www.irs.gov/compliance/appeals/appeals-settlement-guidelines-asg>
- There is some practitioner concern that Appeals Officer/ATCL settlement authority was eroding. This may be reversed by the Taxpayer First Act

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## IRS Appeals After Case Filed in Tax Court

- IRS Appeals is available for cases docketed in Tax Court
- IRS Appeals process occurs prior to trial
- Case is referred to IRS Appeals 30 days after Answer
- IRS Appeals has jurisdiction until the case is returned to District Counsel
- District Counsel can request to participate, at IRS Appeals' discretion
- Tax Court preparation can occur simultaneously, in practice depends on progress at IRS Appeals
- Returned to Tax Court if no progress made toward settlement, or if case appears on trial calendar (in practice, can keep off trial calendar while making progress)

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## Post-Appeals Mediation

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- Rev. Proc. 2009-44; Rev. Proc. 2014-63
- Non-binding mediation process following unsuccessful efforts at IRS Appeals settlement
  - Designed to be used where limited issues remain unresolved
- Available to all LB&I taxpayers
  - Unavailable if Fast Track used at Exam
- Appeals Officer as mediator, taxpayer may use non-IRS co-mediator at taxpayer expense

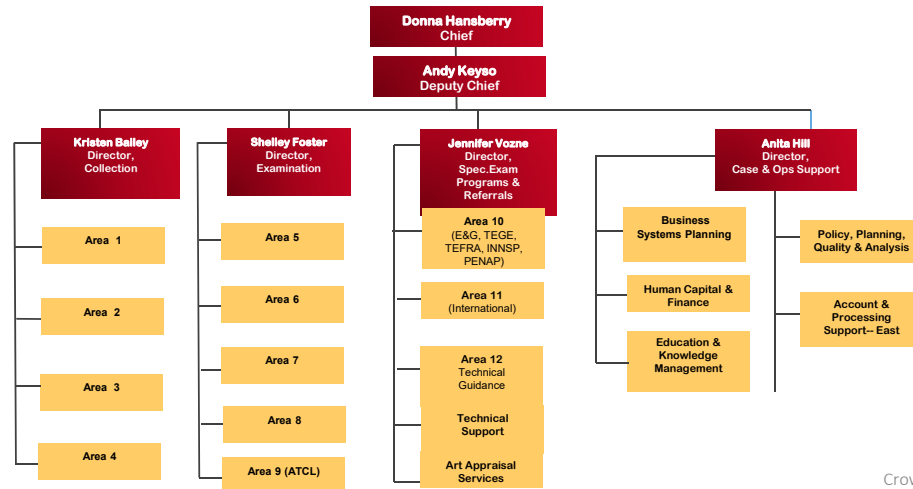
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**Andrew Keyso**  
**Deputy Chief,**  
**Independent Office of Appeals**

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## IRS Appeals' Organization



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## IRS Appeals Receipts by Type

WORKSTREAM	FY 2017	FY 2018	JUL FY 2019
Collection Due Process (CDP)	37,667	35,168	29,505
Offers in Compromise (OIC)	9,564	8,864	5,676
Innocent Spouse	3,407	2,657	1,378
Penalty Appeals	10,652	8,190	4,726
Coordinated Industry Cases	88	65	35
Industry Cases	955	885	657
Examination	30,657	27,290	20,203
Other	10,584	9,311	6,927
TOTAL	103,574	92,430	69,057

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## Taxpayer First Act of 2019

### *Appeals-related provisions:*

- Changed name to IRS Independent Office of Appeals
- Codified mission statement
- Codified right to an appeal of most IRS determinations
- Codified IRS Appeals' right to legal advice from Chief Counsel
- Guaranteed access to certain contents of administrative case file at least 10 days prior to conference for specified taxpayers
- Required reporting of cases designated for litigation by Chief Counsel

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## ATCL Conferencing Initiative – Pilot

- IRS Appeals developed a pilot to test Compliance attendance at conferences in large cases
- Participating ATCLs invite Compliance to participate in all of their conferences
  - Approximately 1/3rd of ATCLs are participating in pilot
  - Taxpayers cannot opt out
  - Compliance does not attend settlement negotiations
  - Pilot was extended for an additional year
- External participants will be surveyed by an outside contractor
- IRS Appeals to post an outline of practices used in the pilot to [www.irs.gov](http://www.irs.gov)

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## Human Capital Investments

- IRS Appeals experienced significant staff reductions over past 10 years
- Most extensive hiring effort in recent years is currently underway
- Training has been developed for new employees
- Tax Cuts & Jobs Act training is also being provided to current employees
- IRS Appeals remains dedicated to providing the highest level of customer service through a skilled workforce

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## Question – Answer session



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## Legislative & Political Update

### 116<sup>th</sup> Congress & 2020 Elections

September 13, 2019

Jim Flood, Partner

Scott Douglas, Senior Policy Director

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## Agenda

- Overview of 116<sup>th</sup> Congress (2019-2020)
- 116th Congress: Tax-Related Measures
  - Taxpayer First Act (IRS Reform)
  - Tax Extenders
  - IRS Funding
- Trump Administration: Capital Gains Tax Cut (depends on the week)
- The 2020 Election
  - Overview of the Presidential Election
  - The Candidates' Positions on Key Health Care Issues
  - Overview of Congressional Elections
- Questions/Answers
- Conclusion

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## Overview of 116<sup>th</sup> Congress

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## Overview of 116<sup>th</sup> Congress

### The House of Representatives (435 Members)

- 235 Democrats
- 199 Republicans
- 1 Independent
- 218 votes normally needed to pass bills (217 with current vacancies)—a simple majority of the total members in House
- Democrats currently have 18 more votes than needed to pass bills

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## Overview of 116<sup>th</sup> Congress

### The House of Representatives (435 Members)

- Key Democratic Caucuses
  - Congressional Progressive Caucus—the progressive faction
  - Medicare for All Caucus—progressives focused on health care
  - New Democrat Coalition—moderate centrist Democrats
  - Blue Dog Coalition—centrists focused on fiscal responsibility
  - Blue Collar Caucus—working class focus – flip Dems who voted Trump
- Key Republican Caucuses
  - The Freedom Caucus—conservative caucus, counterpart to Tea Party
  - The Tuesday Group—moderate Republicans
  - Republican Main Street Partnership—moderate Republicans
  - Republican Study Committee—conservative Republicans

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## Overview of 116<sup>th</sup> Congress

### The U.S. Senate (100 Members)

- 53 Republicans
- 45 Democrats
- 2 Independents that caucus with Democrats
- 51 votes needed to confirm Trump Administration nominees
- 60 votes needed to beat filibuster
- 60 votes = 53 Rs + 7 Ds
- Republicans cannot pass most legislation without Democrats

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## 116<sup>th</sup> Congress: Tax-Related Measures

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## Tax Legislation in the 116<sup>th</sup> Congress

### Taxpayer First Act (IRS Reform)

- Passed Congress – June 14, 2019
- Signed into Law – July 1, 2019
- Establishes an “Independent Office of Appeals” at IRS
- Requires the IRS to create a comprehensive strategy around customer service
- Directs IRS to create an internet platform for filing Form 1099
- Requires electronic filing for certain filers and lowers threshold for requiring electronic returns
- Increases the minimum failure to file penalty

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## Tax Legislation in the 116<sup>th</sup> Congress

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### Tax Extenders

- Passed House on June 20, 2019
- Senate Passage expected in the fall & Final passage by year-end
- Includes:
  - Renewable energy credits
  - Employer credit for paid family leave
  - Relief for taxpayers impacted by natural disasters (retroactive to 1/1/18)

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## Tax Legislation in the 116<sup>th</sup> Congress

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### IRS Funding

- Bipartisan support for a “cap adjustment” to increase funding for enforcement
- President Trump and Congress reached a broad budget caps deal that passed Congress on August 1, 2019
- Budget deal paves the way for appropriations work in the fall
- Initial appropriations action will be short-term CR by 9/30.
- Increased IRS funding will be considered in longer-term appropriations bill that will follow.

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## The 2020 Elections

President  
US Senate  
US House

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## 2020 Presidential Election

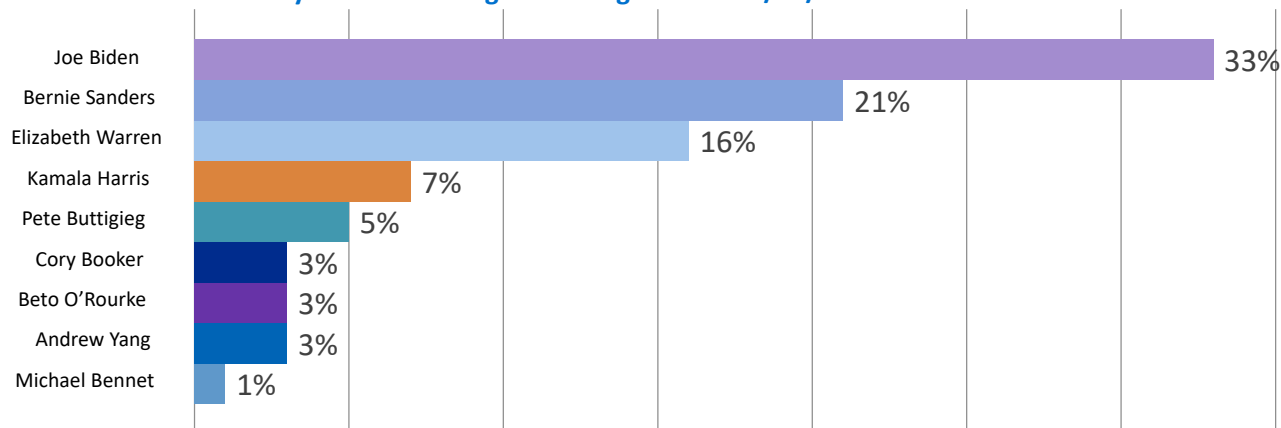
### The Democratic Field

1. Michael Bennet – Senator from CO
2. Joe Biden – Former VP and Senator from DE
3. Cory Booker – Senator from NJ
4. Steve Bullock – Governor of MT
5. Pete Buttigieg—Mayor of South Bend, IN
6. Julián Castro—Former HUD Secretary
7. Bill de Blasio – Mayor of NYC
8. John Delaney—Former Representative from MD
9. Tulsi Gabbard—Representative from HI
- ~~10. Kirsten Gillibrand—Senator from NY~~
11. Kamala Harris—Senator from CA
- ~~12. John Hickenlooper—Governor of CO~~
- ~~13. Jay Inslee—Governor of WA~~
14. Amy Klobuchar—Senator from MN
15. Wayne Messam – Mayor of Miramar, FL
- ~~16. Seth Moulton—Representative from MA~~
17. Beto O'Rourke – Former Representative from TX
18. Tim Ryan – Representative from OH
19. Bernie Sanders – Senator from VT
20. Joe Sestak – Former Representative from PA
21. Tom Steyer – Former Hedge Fund Exec
- ~~22. Eric Swalwell—Representative from CA~~
23. Elizabeth Warren—Senator from MA
24. Marianne Williamson—Spiritual Guru, Entrepreneur
25. Andrew Yang—Founder , Venture for America

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## 2020 Presidential Election

### Democratic Primary Voters – Polling – Morning Consult 08/26/2019



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## 2020 Presidential Election

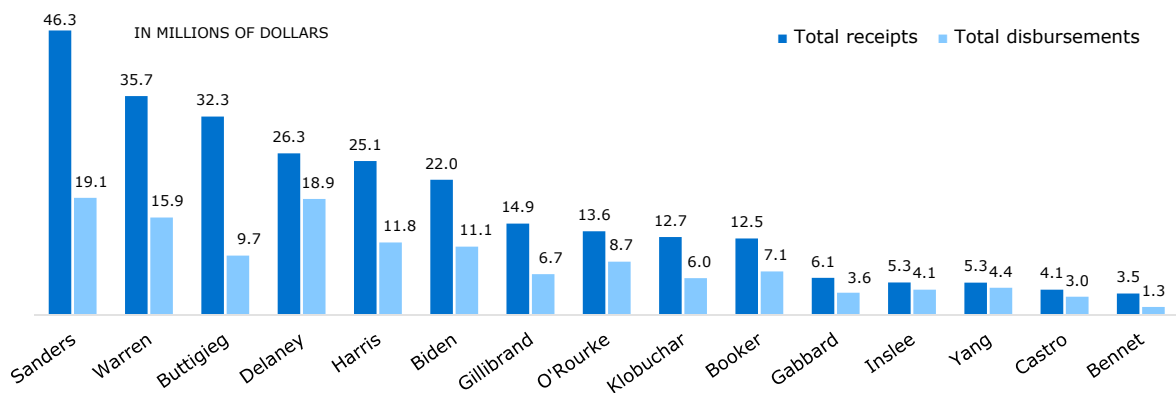
### Democratic Caucuses/Primaries

- Iowa Caucuses – 02/20/2020
- New Hampshire Primary – 02/11/2020
- Nevada Democratic Caucuses – 02/25/2020
- South Carolina Democratic Primary – 02/29/2020
- Super Tuesday – 03/03/2020
  - Alabama
  - Arkansas
  - California
  - Colorado
  - Massachusetts
  - Minnesota
  - North Carolina
  - Oklahoma
  - Tennessee
  - Texas
  - Utah
  - Vermont
  - Virginia
  - Maine

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## 2020 Democratic Fundraising

Total receipts at the end Q2 (June 30, 2019)



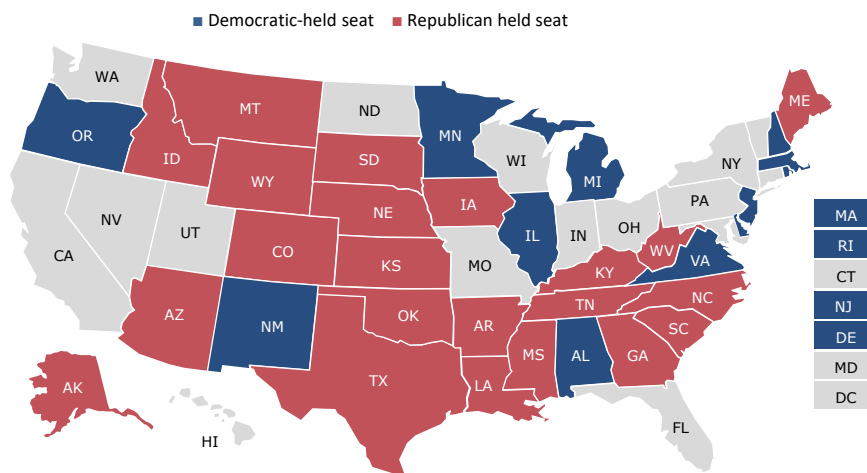
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## 2020 Senate Races

- The Current U.S. Senate
  - 53 Republicans, 47 Democrats (with 2 Independents)
- 35 Senate Seats Up for 2020 Re-election (incl. AZ, GA special)
  - 23 Republicans
  - 12 Democrats
- Key Presidential States with 2020 Senate Elections – Arizona (McSally-R), Iowa (Ernst-R), Texas (Cornyn-R), Virginia (Warner –D), North Carolina (Tillis-R) and Michigan (Peters-D)

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## 2020 Senate Election Map



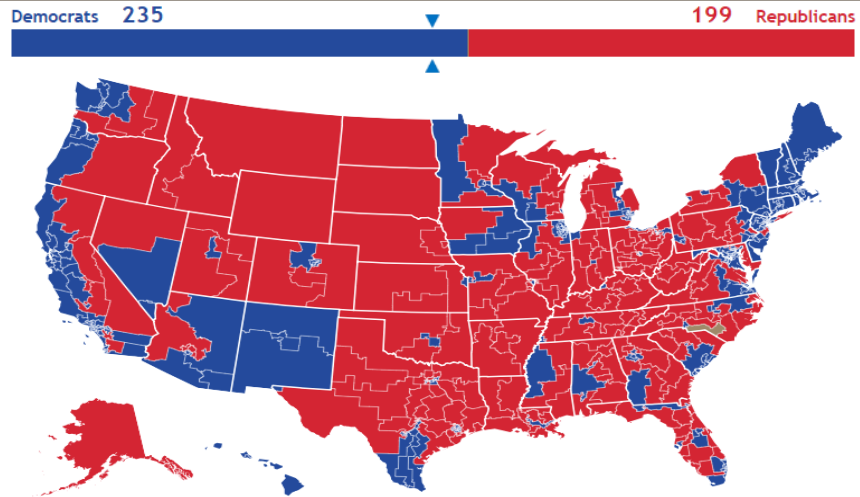
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## Update on 2020 House Races

- The Current U.S. House
  - 235 Democrats (218 Needed to Pass Bills)
  - 199 Republicans
  - 1 Independent
- All 435 House Seats Up for Re-election in 2020
- What to watch for in House 2020 Election – expansion of number of liberal House Democrats? More female and diverse members of Congress? Do Democrats overplay their hand and produce Republican backlash?

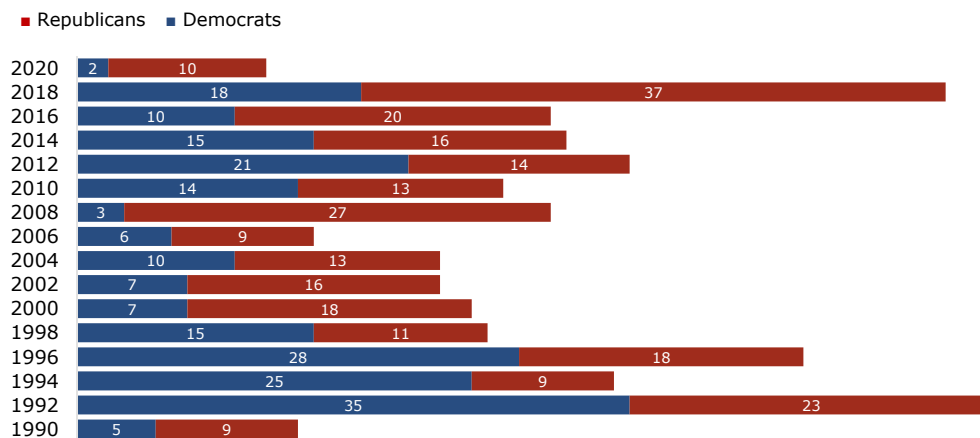
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## 2020 House Election Map



## House Retirements

### Retirements from Congress, by election cycle





## Final Thoughts on 2020 Elections

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- President Trump
- President Democrat
- Republican Senate
- Democratic Senate
- Republican House
- Democratic House
- Potential Implications for Tax in 2021 and Beyond

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## Questions?

Jim Flood, [jflood@crowell.com](mailto:jflood@crowell.com)

Scott Douglas, [sdouglas@crowell.com](mailto:sdouglas@crowell.com)

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## Privilege Issues in IRS audits

Robert Willmore

Teresa Abney

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## Types of Privilege

### Privilege issues commonly encountered in IRS audits

- Attorney-Client Privilege
- Work Product Doctrine
- Federally Authorized Tax Practitioner Privilege (IRC § 7525)

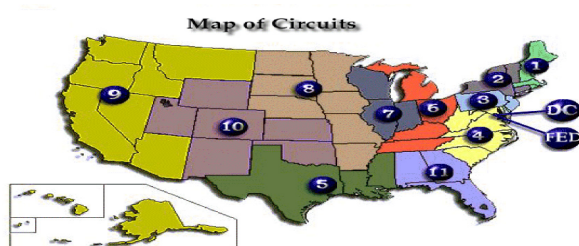


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# Privilege

## Overview

- Privilege issues are highly fact intensive and must be analyzed on a case-by-case basis
- Applicable rules vary by jurisdiction



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# Privilege

## Why claim privilege?

- Encourages full analysis of issues in confidence
- Avoids unfair disclosures
  - Audit / Appeals / Litigation strategy
  - “Roadmap” to analysis of issues at stake
  - Other issues not under examination
- Avoid “he said, she said” debates about preliminary discussions
  - Privileged documents often examine and assess contrary positions
- IRS often claims deliberative process or other privileges when the “shoe is on the other foot”

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## Attorney-Client Privilege

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## Attorney-Client Privilege

### Elements

- A communication
- Between an attorney and his or her client
- Made and kept in confidence
- For the purpose of seeking, obtaining, or providing legal advice

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## Attorney-Client Privilege

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### What does it get you?

- Absolute protection against disclosure provided the privilege is properly claimed and protected
- Protects against disclosure of an attorney-client communication; it does not protect against disclosure of underlying facts

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## Attorney-Client Privilege

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### Waiver

- Attorney-client privilege can be easily waived
- Privilege can be waived even if you do not intend to waive
- Common ways to waive privilege:
  - Disclosure to third party (i.e., violating the “made and kept in confidence” element)
  - Subject matter waiver (i.e., putting the communication at issue)

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## Attorney-Client Privilege

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### Exceptions to “kept in confidence” requirement

- In limited circumstances, a disclosure to a third party may not waive the attorney-client privilege
- Exceptions:
  - Joint defense privilege
  - Common interest doctrine
  - *Kovel* doctrine

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## Attorney-Client Privilege

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### In-House Counsel

- Attorney-client privilege applies to legal communications with in-house counsel
- But just because the person is an attorney does not mean the communication is privileged
- Communications that are deemed business advice or tax preparation work are not privileged

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## Attorney-Client Privilege

### Employees

- The privilege belongs to the company, not its employees
- But the privilege typically will protect legal communications by outside and in-house attorneys with the employees
- In some circumstances where an employee's conduct is at issue it may be necessary for the attorney to provide an *Upjohn* warning (a/k/a the corporate *Miranda* warning)



"Again? I read you your Miranda rights last night."

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## Attorney-Client Privilege

### Tax return preparation work is not privileged

- Courts look closely at any communications regarding advice related to the preparation of tax returns
- This can include communications regarding what needs to be reported on tax returns
- The line between what is and is not privileged sometimes is very gray and judges do not always agree where to draw that line



"Found meat is income."

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## Federally Authorized Tax Practitioner Privilege (IRC § 7525)

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## Federally Authorized Tax Practitioner Privilege

### 26 U.S.C. § 7525

- Applies to confidential communications relating to tax advice between a federally authorized tax practitioner and his or her client
- Same waiver principles apply as apply to attorney-client communications; advice must be kept confidential
- Privilege applies only to non-criminal tax matters before the IRS and DOJ
  - Does not apply to other agencies (i.e., SEC), in private litigation, or to state tax exams
  - Does not apply to any written communications in connection with promotion of a tax shelter

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## Work Product Doctrine

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## Work Product Doctrine

### The Basics

- Work product doctrine protects
  - documents and tangible things
  - prepared in anticipation of litigation
  - by a party or that party's representative
- Work product doctrine also protects against the disclosure of attorney mental impressions, including communications that would reveal those impressions
- The doctrine does not protect against the disclosure of preexisting facts contained within the work product
- It is not an absolute protection like the attorney-client privilege, it can be pierced in limited circumstances
- Claiming work product protection may trigger the need to issue a litigation hold

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## Work Product Doctrine

### “In anticipation of litigation”

- U.S. Courts of Appeal split on meaning of “in anticipation of litigation” where document is created for both litigation and business purposes
  - “Primary motivation purpose” test (5th Circuit)
  - “Because of” test (D.C., 2d, 3d, 4th, 6th, 7th, 8th, 9th Circuits)
  - Textron’s variation on the “because of” test (1st Circuit)

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## Work Product Doctrine

### Waiver

- Waiver principles are more forgiving than for the attorney-client privilege or the federally authorized tax practitioner privilege
- Work product protection allows the work product to be shared with third parties if the disclosure is not inconsistent with the adversarial process
- However, if the work product is disclosed to an adversary or a possible conduit to an adversary, the protection likely is waived
- Waiver issues often arises in the context of disclosures of work product to a company’s independent auditor

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## Disclosure and Waiver Issues

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### Intentional Disclosure

**In limited circumstances, intentional disclosure does not operate as subject matter waiver**

- Under Federal Rule of Evidence 502(a), when a disclosure is made in a federal proceeding or to federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
  - (1) the waiver is intentional;
  - (2) the disclosed and undisclosed communications or information concern the same subject matter; and
  - (3) they ought in fairness to be considered together.

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## Unintentional Disclosure

### Inadvertent disclosure may not result in waiver

- Under Federal Rule of Evidence 502(b), if a disclosure is in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
  - the disclosure is inadvertent,
  - the holder of the privilege or protection took reasonable steps to prevent disclosure, and
  - holder promptly took reasonable steps to rectify the error

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## Implied Waiver

### Often a significant concern in penalty cases

- Two recent Tax Court decisions of concern:
  - *Ad Investment 2000 Fund LLC v. Comm'r*, 142 T.C. No. 13 (2014)
  - *Eaton Corp. v. Comm'r*, Dkt. No. 5576-2 (Tax Court, 2015)
- Second Circuit Court of Appeals overturned a broad privilege waiver decision:
  - *Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015)

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## Tips For Protecting Privilege

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## Tips for Protecting Privilege

### Some tips for avoiding waiver and protecting privilege

- If a position is likely to be disputed, have in-house or outside counsel perform the legal analysis and provide a litigation assessment
- E-mails
  - Keep e-mails to one topic
  - Mark the e-mail as privileged and confidential
  - Be careful about forwarding emails; if possible, avoid using large distribution lists
- Make sure privileged documents are properly marked and segregated
- If a privilege claim is contested, have an attorney review the relevant materials to confirm the privilege claim and prepare a privilege log; privilege claims unsupported by a privilege log are more likely to fail

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