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CPE NETWORK TAX REPORT

MAY 2022 VOLUME 35, ISSUE 4

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Note: During the current COVID-19 crisis, direct person-to-person contact can be reduced by forwarding this to participants and reminding others that the video is also available online through the CPL player. Additionally, video/discussion/Q&A may be shared via Teams, Zoom, or other conferencing-type software. Participants may submit the quiz for self-study credit, or Group Internet Based credit (similar to a webinar) is now available. Consult the user guide at the end of the newsletter for instructions on how to earn credit in this manner.

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Topics for future editions may include:

- Bankruptcy Issues Related to Tax
- Trust Fund Issues and Possible Criminal Exposure

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EXECUTIVE SUMMARY

PART 1. CURRENT DEVELOPMENTS

The field of taxation is dynamic, and practitioners are constantly being confronted by changes through the Courts, the IRS, and Congress. This segment covers some of those recent changes.

Learning Objective: Upon completion of this segment, the user should be able to analyze current issues in taxation, including assessing the application of penalties in relation to Notice 2007-83, listed, and reportable transactions, analyzing the use of a durable power of attorney, and determining the tax treatment of funds raised through crowdsourcing. [*Running time 32:54*]

PART 2. INDIVIDUAL TAXATION

The SECURE Act significantly changed the rules relative to retirement planning. Proposed regulations clarify many unresolved issues after the adoption of the SECURE Act. In addition, the House of Representatives passed SECURE 2.0 that will further change and enhance retirement planning.

Learning Objective: Upon completion of this segment, the user should be able to analyze issues related to proposed SECURE Act regulations and SECURE 2.0, including analyzing the general RMD rules for beneficiaries, applying the RMD rules for eligible designated beneficiaries, and determining the RBD under the SECURE 2.0 proposed legislation. [*Running time 37:47*]

PART 3. BUSINESS TAXATION

Under the Centralized Partnership Audit Regime (CPAR), all adjustments to items of income, gain, loss, deduction, credit of a partnership, and partners' distributive shares (partnership adjustments) will be determined at the partnership level. Any additional tax and/or penalties (imputed underpayment) will be determined, assessed, and collected at the partnership level. "Eligible" partnerships may elect to "opt out" of the CPAR. The audits of partnerships under former TEFRA rules created lengthy and sometimes duplicate audits, costing time and money for both the government and taxpayers. These rules also apply to amending information from a prior return.

Learning Objective: Upon completion of this segment, the user should be able to analyze issues related to the new centralized partnership audit regime, including determining the impact on the partnership and partners of applying or opting out of the new regime, analyzing the push-out option, and applying the reporting requirements. [*Running time 39:43*]

ABOUT THE SPEAKERS

Ian J. Redpath, JD, LLM, is a nationally recognized tax attorney and consultant from Buffalo, New York and is a principal in the Redpath Law Offices. Mr. Redpath has published numerous articles on contemporary tax issues and co-authored several books on tax topics. He has extensive national and international experience in developing, writing, and presenting professional CPE programs. In addition to his active tax practice, he serves as Chairman of the Department of Accounting and Director of Graduate Accounting Programs as well as Professor of Taxation and Forensic Accounting at Canisius College in Buffalo.

Lawrence Pon is a Certified Public Accountant, Personal Financial Specialist, Certified Financial Planner, Enrolled Agent, United States Tax Court Practitioner, and Accredited Estate Planner in Redwood Shores, California. Mr. Pon has been in practice since 1986 and enjoys helping his clients reach their financial goals. He frequently speaks nationally on tax and financial planning topics to tax professionals, financial advisors, and the general public. Mr. Pon received his BS in Business Administration with emphasis in Accounting and Finance from the University of California, Berkeley and an MS in Taxation from Golden Gate University in San Francisco.

Robert C. Lickwar, CPA is a tax partner with the accounting firm of UHY LLP in Farmington, Connecticut. Mr. Lickwar has more than 30 years' experience in public practice and has worked exclusively with privately held businesses and owners to provide compliance services and sophisticated tax planning strategies, including like-kind exchanges, tax-efficient workouts and restructurings, reorganizations, and estate planning services. He is also a nationally recognized presenter on many federal, state, and local issues.

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Program Level	Update
Prerequisites (Circle One)	Basic Accounting and Auditing professional experience
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PART 1. CURRENT DEVELOPMENTS

Experts' Forum

This month, we join Ian Redpath for Experts' Forum, a popular feature in which we review recent developments in taxation. We begin with a discussion about IRS Announcement 2022-6. This announcement provides that, effective March 14, 2022, the Internal Revenue Service will not accept applications for opinion letters on prototype IRAs, SEPs, and SIMPLE IRA plans. The temporary suspension in accepting applications will allow the IRS to update the prototype IRA opinion letter program and issue revised model forms.

Let's join Ian.

A. IRS Announcement 2022-6

Retirement Plan Opinion Letters

Mr. Redpath

Hi, everybody. Welcome to the program. I'm Ian Redpath. This is our segment where we go over a number of updates to things that have happened since the last time we spoke. And now we're out of tax season, or at least the main part of tax season, so let's dig right in to what's been going on with the Internal Revenue Service, the courts, and a little bit about the legislature also.

So we have to start right off, and this may affect a lot of you who are planning on doing any type of pension plans, IRAs, SEP IRAs, SARSEPs, SIMPLE IRAs. And as you know, there are in fact prototype types of language. Well, in Announcement 2022-6, the IRS said that effective March 14th of 2022, and until further notice—so who knows when that's going to be—that they will no longer accept applications for opinion letters on prototype IRAs, which are the traditional, Roth, SIMPLE IRAs, or on SEPs, including salary reduction SEPs, the SARSEPs, or SIMPLE IRA plans. And basically, they want to update all of the prototype opinion letters, the whole opinion program and the prototype language, and the model forms. They're all going to be revised.

So while you can still apply through the normal process for a determination letter, you cannot use the opinion letters on prototype language. And so, this is until further notice. Again, you can rely on the previous favorable opinion letters and sponsors can amend the documents to reflect recent legislation. And this is being all brought about because of some recent changes, and the prototype languages have not caught up to that. So again, if you're considering retirement plans, again, IRA, SEP, SIMPLE IRAs, looking for opinion letters, please read Announcement 2022-6.

B. H.R. 6806

House Bill Aimed at Tax Subsidy for Sport Stadium Construction

Now, the next one is something that was introduced by three Democrats; they introduced this to the House. It's H.R. 6806. And you might wonder, well, okay, we have a bill in the House. Well, this is an interesting one. I happen to live in Buffalo and a major discussion, a new stadium for the Buffalo Bills. Well, new stadiums. Hmm. What does that mean? Well, these representatives have introduced a bill, H.R. 6806, which is entitled, *No Tax Subsidies for Stadiums Act of 2022*. And what they have done is want to change the language of 103(b) to disallow any exclusion for interest on bonds used to fund a stadium.

And what they indicated is that they believe that since 2000, subsidizing sports franchises in professional sports stadiums has cost the government $4.3 billion and yet profits NFL, NHL, NBA, Major League Baseball, obviously, is profiting other sports. So the legislation is to take immediate effect. One of its main targets at the time, one of its main targets is the

Washington Commanders, the new name for the Washington football club. And so again, this is targeted, and what it will do is simply say bonds for professional sports franchises are taxable.

And what they pointed out is that there's a loophole; and private activity bonds are going to be exempt, but there's that 10%. 10% is used to fund a private activity. And that gets brought back in for AMT, still exempt for regular tax. And what they've said is that what's happening is that with some very unique structuring, they've been constructing stadiums using a workaround. And the Brookings Institute did an economic study and explained that the sports stadiums' tax-exempt bonds, they structure it so that no more than 10% of the debt service is secured by property that is directly used or indirectly by the franchise itself. So, that way they're able to circumvent it. again, a state or local government must be willing to finance at least 90% of the debt service for the bonds' so-called 10% loophole.

As we know, in many situations, state and local governments are more than happy to jump in with bond funding to keep sports franchises in their area. They don't want them leaving, as we know many sports franchises have. LA Rams, LA, St. Louis, back to LA. San Diego to LA. And the Chargers, right? Oakland, LA, Oakland, Las Vegas. And so, this is going to be very interesting to see where this goes. There appears to be some support for this in Congress right now. So, you might want to track that bill. It certainly is very interesting for anyone who's living in an area where you actually have a situation where they're looking for funding for a stadium.

C. Clary Hood, Inc. v. Commissioner

TC Memo 2022-15

Okay. We have another case that came out of the tax court. It's a tax court memo case. It's called *Clary Hood, Inc. v. the Commissioner*. And this is a really good case dealing with a closely held corporation and compensation paid. And it applies the multi-factor test and says, essentially, that the tax holders, the taxpayers in this case, that they failed to adequately establish how the amount claimed for each year was both reasonable—number one, was it reasonable? But number two, that it was paid as compensation for services.

So it said they're allowed some of it; and they didn't fully agree with the taxpayers or fully agree with the IRS. But this is a really good case looking at compensation and, in a closely held corporation, the multi-factor test. So if you have a situation involving that, you might want to look at the *Clary Hood*. Very good discussion of the multi-factor test that is applied.

D. Mann Construction Inc. v. U.S.

CA6

We have another case now, the *Mann Construction*. This is a Sixth Circuit Court of Appeals case. This is an interesting case dealing with the APA. And there's been a lot of action brought up under APA recently where people have been challenging the IRS saying, "You did not follow the Administrative Procedures Act." The APA has certain requirements in order for regulations to go into effect. And you see many times the proposed regulations. The Sixth Circuit Court of Appeals, in this case, overturned a district court that had held that the IRS violated the APA notice and comment provisions by promulgating Notice 2007-83. Well, what did that notice do? That notice identified various listed and reportable transactions that triggered the reporting requirements that are tied to them, essentially tax shelters, and the reporting requirements that go into it.

The regulations under Section 6011 require that corporate taxpayers disclose their participation in reportable transactions. So the regs determine if a transaction is reportable if it is the same or similar to listed transactions identified by the IRS. Well, identified by the IRS would be Notice 2007-83. So, in this particular case, the IRS said, "Well, what you participated in is similar to, and therefore triggers, the reporting requirements." They then imposed penalties under 6707A on Mann Construction. They found that they failed to report their participation in trust arrangements involving cash value life insurance policies connected to their employee benefit plans. They said, "Well, it's not identical. It is substantially similar to transactions identified in 2007-83." So, the district court rejected Mann's APA argument. They said that this is not subject to the APA, but the Sixth Circuit reversed that.

And the appeals court said that before an agency can promulgate a regulation that has the force and effect of law, the APA usually requires the agency to publish notice about the proposed rule, public comment. We're all familiar with those types of things with proposed regulations. Consider the comments, etc. So the Sixth Circuit said that the agency, if they didn't follow the APA, they would have to set aside the regulation. Well, the question is, what is Notice 2007-83? Does it require notice and comment? It's not a legislative rule. And even if it is a legislative rule, the IRS said it's exempted from the APA's requirements for notice and comment. Well, the appeals court rejected the IRS's first argument and said, in fact, it is a legislative rule because it defines a set of transactions and puts an obligation on the taxpayer to comply.

And so that has the characteristics of a legislative rule; and failure to comply has civil and criminal penalties. Boy, it sounds like a law, right? And so the Sixth Circuit Court of Appeals rejected that argument. And they rejected the second argument because they said the IRS didn't show Congress exempted this. So they said, "It's subject to the APA." This is only in the Sixth Circuit; we have to remember that. But this is another example of where they've come in on an APA argument. We discussed the *Hewitt* case where the Eleventh Circuit set aside the rules related to syndicated conservation easements on the 'in perpetuity' with those rights and said, "Well, they didn't follow the APA." And we're going to talk about that in a minute.

E. FTC Complaint Regarding TurboTax Free Filing Ads

Complaint for Temporary Restraining Order and Preliminary Injunctive Relief – No. 5:22-cv-1973

Well, there's a complaint filed by the Federal Trade Commission against TurboTax. Interestingly enough, as practitioners, you may be interested as you maybe have questions from your clients as to well, how does TurboTax do these things for nothing? Well, the FTC says Intuit, the owner of TurboTax, is mischaracterizing its free tax filing service. I mean, basically you've got to have a W-2 only. And so they said this is deceptive advertising. They've called for an injunction. Intuit says, "Well, if you go on our website, we properly define it. And we say it's only a simple return." Well, how do you define a simple return? It's very misleading, according to the FTC; and they have brought an action in the court for an injunction against them.

F. Jeremy E. Porter v. Commissioner

TC Memo 2022-25

We now have another case in the tax court, a tax court memo case *Jeremy… Porter… v. the Commissioner*. And this was an interesting case because, in the *Porter* [case], the taxpayers delay; they don't provide the information the IRS is requesting on a timely basis. The case goes to court. They agree to continual postponements of the case. And then, when they lose and there is interest and penalties, they want abatement. Well, the IRS says, "No, because you delayed. You were delaying this thing. You didn't properly cooperate. You agreed to the delays in the tax court." And the tax court agreed. They said, "You delayed the exam. You didn't provide the appropriate records. You didn't object to continuances at trial. So, you can't now come in and try to abate on any equitable grounds. There is no equitable grounds here for abatement."

G. Debra Jean Blum v. Commissioner

CA9

And then we have Blum; it's a Ninth Circuit Court of Appeals case. Interesting case out of the Ninth Circuit. So what happens is this individual gets injured. They hire a law firm. It's not clear exactly what happened, but they filed a negligent suit. The court dismissed it. So they sued their attorneys. And there was a settlement. There was a malpractice settlement, but they… tried to exclude the malpractice settlement saying, "This was for my personal injury in the case that the malpractice related to, so my attorneys did something wrong. I sued them in malpractice because I wasn't able to get a recovery for my underlying injuries, the suit I hired them to handle." Well, the court said, "No, that is not the exclusion under 104. It's a separate lawsuit for malpractice. That's not personal injury. And yes, they may have screwed up your personal injury case, but unfortunately you… did collect something from them, but you can't exclude it under 104. It's a tort type action, yes, but not based upon personal injury. So again, your original lawsuit was personal injury; but this was a lawsuit on malpractice. That doesn't qualify." So interesting approach taken by the court. Now, the tax court, the tax court held the same thing that this is a malpractice settlement. So the Court of Appeals just upheld the tax court.

H. Durable Power of Attorney

Now the IRS came out with a notice, and it's an alert, March 23rd alert, from the Office of Professional Responsibility. But this is something to pay attention to because you may have clients who have durable powers of attorney. Either way, they may have given it to someone else, or they may have a durable power of attorney from someone. What the IRS has said is that, if someone is representing another person under a durable power of attorney, they may be able to use the 2848 for representation before the IRS, if... And they list the items that have to be there. So it has to name an address of the taxpayer, identification—the social security number or employer ID—and then a number of other items that have to be identified, which would normally be identified on a 2848, but a clear expression of the taxpayer's intent concerning the authority granted.

So at issue is, what really is a durable power of attorney? And a durable power of attorney normally does not contain all of the items that are listed in this. And so therefore, it may not be valid for purposes of tax. It says that, and the Office of Professional Responsibility notes, that most durable power of attorneys don't include tax. And it says it should; it should expressly authorize handling federal, and perhaps state and local, tax matters. The other alternative it says is, "Well, go ahead and get a fiduciary appointed and then file Form 56, *Notice Concerning Fiduciary Relationship*, and do that from that perspective." But that's an awful lot of work and an awful lot of cost.

Again, it says that you should try to make sure that durable powers of attorney for clients have that specific language. If it doesn't and you're representing someone, you have to make sure that they actually have the authority. So, if they're saying they have a durable power of attorney and they're representing someone under that power of attorney, make sure that power of attorney allows them to deal with tax matters. Again, a caution and something you should look at for all of your clients.

I. Budget Proposal Includes Potential New Reporting Rules for Foreign Digital Assets

Well, we have some provisions in the budget that was proposed by President Biden. One of them is an enhanced reporting on digital assets. We know they've been going after this. We know that the Infrastructure Bill, beginning in 2023, has increased reporting requirements. Well, this is going to attempt... this is a proposal to even further enhance reporting requirements. And it would amend the regs so that if you have a stake in a foreign financial account, and that holds cryptocurrency or digital assets, that has to be disclosed to the IRS. And that will apply to any U.S. taxpayer who has more than $50,000 in cryptocurrency or digital assets in financial accounts held abroad. Again, kind of extending this thing.

And by the way, this is to be for tax returns filed in 2023. So 2022 returns, if it goes through. And there's also some additional reporting requirements that would apply to the balances held in institutions in the U.S. for foreigners. But that would apply primarily if you're representing an institution that's holding these assets for foreigners. But where you'll see it is on the other side, is that they'll be reporting about having assets being held offshore that are in cryptocurrency.

J. Budget Proposal Includes Billionaire Tax

Now we know that Senator Manchin has already pretty much said that this is a no go, but there's a proposal for a billionaires' minimum tax of 20%. But that minimum tax proposal—and this is the second time President Biden has proposed this idea—would include unrealized appreciation of assets. So a 20% minimum tax, including a tax on the unrealized appreciation in assets. There's also a proposal to raise the corporate tax rates to 28%, as well as a number of other provisions. There is, though, a significant amount of money, $14.1 billion and then $2.2 billion above the 2021 enacted levels, to go to the IRS for additional improving taxpayer experience and customer service, $310 million for digital modernization of the IRS.

K. IRS v. Howard D. Juntoff

BAP6

Now, in the *IRS versus Juntoff*, it's a bankruptcy court decision; but the bankruptcy court dealt with what was that shared responsibility? And so, bankruptcy is filed; is the shared responsibility obligation a priority tax or not? And the court applied what it called the functional examination test to determine if the shared responsibility payment is an income tax or just a penalty. If it's a penalty, then it doesn't get priority. Well, the court looked at previous precedent and said, "No, it's based upon income. It relates to income. Therefore, it is a tax, and it's related to income; and so, it is subject to the priority of the IRS for those income taxes in bankruptcy."

L. Oakbrook Land Holdings, LLC v. Commissioner

CA6

Now, here's an interesting case. We talked in another segment about the *Hewitt* case. And the *Hewitt* case, the Eleventh Circuit said that the extinguishment regs under the perpetuity rules for charitable conservation easements, that those rules are invalid because they violated the APA. Well, the Sixth Circuit in *Oakbrook Land Holdings v. the Commissioner* did not agree with the Eleventh Circuit and said, in fact, the regulations are valid. So the extinguishment regs under the in perpetuity rules, the Sixth Circuit says they're valid. The Eleventh Circuit says they are invalid because they violate the APA, Administrative Procedures Act. So now we have a split in the circuits. Well, the split in the circuits, and this being such an important thing, because this is one of the big areas that they look at going after conservation contributions and certainly conservation easements. Conservation easements, the IRS has said they're in the dirty dozen as tax schemes.

They're going after these, especially the syndicated conservation easements. They're actively going after those. They look at those as tax avoidance schemes, if not totally fraudulent. And so therefore, one of the things they always look at in any type of conservation easement, is the in perpetuity requirement and the extinguishment regs. So, we have a split in the circuits. I'm assuming this case will end up in the Supreme Court, if not the *Hewitt* case; but we're going to have to have something happen because now we have a total split in the circuits. Eleventh Circuit says they're invalid. The Sixth Circuit says they're valid.

M. Pickens Decorative Stone LLC v. Commissioner

TC Memo 2022-22

All right, we have another interesting case out of the tax court, *Pickens Decorative Stone*. And the tax court rejected the argument that public notice advising the participants of syndicated easement transactions, that they risk penalties, was the first formal communication of the penalties. Why is that important? Because under 6751, they have to get, before the first formal communication of penalties to a taxpayer, it requires that you get approval from the supervisor of the auditor. So supervisory approval of the penalty assessment has to be obtained before "The first formal communication of the penalty assessment to the taxpayer."

So is a notice in and of itself a communication? Notice 2017-10, the IRS said that these are areas that will be subject to penalty, specifically looking at syndicated conservation easements. The court said a notice to the general public is not the first communication of a penalty to a particular taxpayer. And so therefore, they didn't need to get supervisory approval before that notice was issued. Now, if they're going to go directly, if they're going to issue a penalty before the first communication to the taxpayer of a penalty, there needs to be that supervisory approval.

N. IRS Fact Sheet 2022-20

All right. Now the IRS has issued Fact Sheet 2022-20 dealing with crowdsourcing—how to tax and what is the reporting from crowdsourcing. And crowdsourcing, a good example is GoFundMe or Kickstarter, for example. It can be used to fund business ideas or help pay bills or raise money for charities. And so basically, crowdfunding reporting, either the website or the processor has to report money raised through the crowdfunding on Form 1099-K, *Payment Card and Third Party Network Transactions*. So there's a certain threshold. Before 2021, that threshold was $20,000 or more than raised from more than 200 donations.

But the American Rescue Plan Act changed the reporting threshold to $600 beginning January 1 of 2022. Well, for transactions after March 11th of 2021, the American Rescue Plan also clarified that the 1099-K applies only to transactions for the provision of goods or services settled through a third-party payment processor. It doesn't apply to uncompensated contributions for crowdfunding.

So the 1099-K box one will show the gross amount raised by the crowdfunding campaign. The amount on Form 1099-K isn't automatically taxable. So now you have to determine if that amount that was reported to the IRS is taxable or not. Keep in mind that the IRS is getting this. If you're not reporting that anywhere, the IRS says, "You're probably going to hear from us as to why you haven't reported this amount." And so you better disclose why you're not reporting that, or you're going to hear from the IRS, "Why haven't you reported the amount on the 1099-K box one?"

O. Revenue Ruling 2022-7

And then we have an interesting one if you're ever involved with disclosure issues, Revenue Ruling 2022-7. The IRS queried whether federal, state, and local government officials or employees are subject to the disclosure restrictions of 6103(a) with regard to returns or information from the return. And the question was, are they subject to these rules when, under 6103(c), it was the consent of the taxpayer, a person with a material interest relating to disclosures, or for investigative purposes, there was a disclosure? And the IRS ruled that governmental employees who receive returns or return information to disclosures under 6103(c), any designee who receives return information pursuant to a taxpayer consent, they're subject to the disclosure restrictions under 6103(a).

Therefore, they're kind of expanding here who is subject to those restrictions. So if you have a situation involving that, look at Revenue Ruling 2022-7 or a concern about how information will be disclosed if it goes to other governmental officials.

Thank you for being here today. I appreciate it. And be safe.

Current Material: Experts' Forum

By Ian J. Redpath, JD, LLM

A. IRS Announcement 2022-6

Retirement Plan Opinion Letters

The IRS announced that, effective March 14, 2022, it will not accept applications for opinion letters on prototype IRAs (traditional, Roth, and SIMPLE IRAs), SEPs [including salary reduction SEPs (SARSEPs)], and SIMPLE IRA plans. This applies until further notice. The IRS intends to update the prototype IRA opinion letter program, issue revised model forms and listings of required modifications, and issue related published guidance to reflect recently enacted legislation. Note that adopters of prototype IRAs, SEPs, and SIMPLE IRA plans may continue to rely on previously received favorable opinion letters, and sponsors are permitted to amend their documents to reflect recent legislation without affecting that reliance.

B. H.R. 6806

House Bill Aimed at Tax Subsidy for Sport Stadium Construction

Three House Democrats proposed legislation that would eliminate the tax-exempt status of bonds for new stadium construction. Research has found that such bonds are costly and nonbeneficial to taxpayers. The bill would amend §103(b) making interest on "professional stadium bonds" taxable.

As currently written, a professional stadium bond is defined as "any bond issued as part of an issue any proceeds of which are used to finance or refinance capital expenditures allocable to a facility (or appurtenant real property) which, during at least 5 days during any calendar year, is used as a stadium or arena for professional sports exhibitions, games, or training."

"Since 2000, subsidies for financing professional sports stadiums have cost taxpayers $4.3 billion despite the billions of dollars in profits that NFL clubs and other professional sports team owners reap each year," it was reported in a joint press release by the sponsors. The legislation would immediately be in effect for any future stadium bonds. If passed, the legislation would put to an end a longstanding federal subsidy for new sport stadium construction. Interest payments on municipal bonds have been exempt from federal income tax since 1913, allowing state and local governments to borrow at a lower rate. Historically, this has been appealing to professional team owners. "Private activity bonds," can be issued for limited purposes to private entities. Conversely, governmental bonds are issued to finance public-use projects such as airports, highways, and sewer and water facilities. Several private activities are subject to a statewide volume cap on how much in private activity bond amounts can be issued in a year. Notably, stadium bonds are not subject to a volume cap. A bond is a private activity bond if it meets two tests: (1) more than 10% of the bond proceeds were to be used by a nongovernmental entity (the private business use test), and (2) more than 10% of the debt service was secured by property used directly or indirectly in a private business (the private payment test). These bonds are taxable for alternative minimum tax. However, if no more than 10% of the debt service is secured by the property used directly or indirectly by the sports franchise and the state or local government finances at least 90% of the debt service for the bonds, then it will not be taxable—the "10% loophole."

C. Clary Hood, Inc. v. Commissioner

TC Memo 2022-15

The Tax Court redetermined the deductible amount of compensation in a case of reasonable compensation in a closely held construction company for payments to the CEO/Founder. The court applied the multifactor test and found that the company failed to adequately establish how the amount it claimed for each year was both reasonable and paid solely as compensation for services during the stated time. The company was still entitled to deduct some amounts as reasonable; however, it was less than claimed but more than the IRS determined. It noted that factors addressing comparable pay by comparable concerns, taxpayer's shareholder distribution history, how founder's compensation was set in years at issue, and his involvement in taxpayer's business were the most relevant and persuasive factors in reaching its conclusion. The Court also looked to an expert who included compensation for surety bond guaranties in his analysis and provided well-reasoned salary comparisons against industry standards. The company's arguments regarding using the independent investor test vs. the multifactor test were rejected.

D. Mann Construction Inc. v. U.S.

CA6

The Sixth Circuit Court of Appeals overturned a district court in holding that the IRS violated the Administrative Procedures Act's (APA) notice-and-comment provisions when it promulgated Notice 2007-83. That notice identified various "listed" and "reportable" transactions which triggered reporting requirements for them. The Court refused to enforce the reportable transaction penalties assessed.

In 2004, Congress added §6707(a), which allows the IRS to penalize a taxpayer's failure to provide information concerning "reportable" and "listed" transactions. Since 2004, the IRS has identified various "listed" and "reportable" transactions using notices such as the one in question. According to the IRS, a notice is a public pronouncement that may contain guidance that involves substantive interpretations of the Code or other provisions of the law.

In this case, the IRS imposed penalties under this section and found that the transaction the taxpayer entered into was "substantially similar" to listed transactions identified in Notice 2007-83, 2007-2 CB 960. Mann disputed the penalties and alleged the Notice violated the APA because there was no notice and comment on the Notice.

The district rejected Mann's argument holding that the text, structure, and history clearly indicated that Congress did not intend for the IRS to be required to follow the APA's notice and comment procedures in the context of the listed transaction regime. A federal district court in Montana came to the opposite conclusion in a dispute over an IRS issued revenue procedure. It held the IRS should have followed the notice-and-comment procedures of the APA when providing reporting relief in Rev. Proc. 2018-38. [*Bullock,* (DC MT 7/30/2019) 124 AFTR 2d 2019-5354] A district court in Tennessee enjoined the IRS from enforcing Notice 2016-66, 2016-47 IRB 745, after finding that CIC was likely to succeed on its claim that the notice was invalid because the IRS failed to comply with the notice-and-comment procedures under the APA. [CIC Services, LLC, (DC TN 9/21/2021) 128 AFTR 2d 2021-5234]

The appeals court noted that before an agency may promulgate a regulation that has the force of law, the APA usually requires the agency to publish a notice about the proposed rule, allow the public to comment on the rule, and after considering the comments, make appropriate changes, and include in the final rule a "concise general statement" of its contents. According to the Court, courts must "set aside" agency actions that fail to follow these requirements. The court rejected the IRS's argument finding that the Notice is not a legislative rule. The court found that the Notice defines a set of transactions that taxpayers have a duty to report and that duty did not exist before the IRS issued the notice. Moreover, these new reporting duties can involve significant time and expense, and failure to comply comes with the risk of civil and criminal sanctions, which are characteristics of legislative rules. It also rejected the IRS's argument that it was exempt from the APA because the IRS did not show that Congress expressly exempted it from the APA's notice-and-comment process.

E. FTC Complaint Regarding TurboTax Free Filing Ads

Complaint for Temporary Restraining Order and Preliminary Injunctive Relief – No. 5:22-cv-1973

The Federal Trade Commission (FTC) filed a complaint with the U.S. District Court for the Northern District of California seeking to bar Intuit from continuing its "deceptive advertising" campaign suggesting that any return can be filed with TurboTax free of charge. The FTC also filed an administrative complaint alongside the suit following a 3-1 commission decision. "Absent such provisional relief, [Intuit] would be free to continue disseminating the deceptive claim that consumers can file their taxes for free using TurboTax when in truth, in numerous instances [Intuit] does not permit consumers to file their taxes for free using TurboTax," the complaint stated. The company disagrees that there is confusion among its customers and that false advertising allegations are unwarranted.

The FTC took issue with TurboTax ads, which the complaint argues repeatedly use the word "free" in a "misleading" way that does not adequately differentiate between free and paid versions. On many television and online commercials, the "fine print disclaimer" is "disproportionately small," appears "for just a few seconds," and is difficult to read, the complaint said, concluding that a "reasonable" consumer may assume that "free" applies to their return when it may in fact not.

F. Jeremy E. Porter v. Commissioner

TC Memo 2022-25

IRS's determination to deny taxpayer's interest abatement request in respect to his stipulated liabilities was upheld. There was no abuse of discretion as the taxpayer delayed the exam by failing to provide requested records; requested and/or didn't object to multiple trial continuances; and conceded that IRS resolved the case “in short order” after the years-long period during which litigation was ongoing. Arguments that the revenue agent delayed processing taxpayer's abatement claim and a request for abatement on equitable grounds were rejected.

G. Debra Jean Blum v. Commissioner

CA9

The Ninth Circuit affirmed the Tax Court’s holding that the proceeds from a legal malpractice settlement were not excludible from income under §104. The settlement was for malpractice, not the underlying claim of personal injury for which the attorney was hired to represent Blum.

To exclude damages from gross income, a taxpayer must show that (1) the underlying cause of action giving rise to the recovery is based upon tort or tort-type rights, and (2) the damages were received on account of personal physical injuries or physical sickness. This second requirement can only be satisfied if there is a "direct causal link" between the damages and the personal injury suffered. When the damages are paid under a settlement agreement, a taxpayer can establish a direct causal link through the express terms of the agreement or, if the terms of the agreement are unclear, by the intent of the payors.

The taxpayer, Debra Jean Blum, was injured after being directed by a hospital employee to sit in a broken wheelchair. She retained a law firm and filed a complaint alleging that the hospital was negligent in its care, causing her to fall and sustain severe injuries. The trial court granted summary judgment to the hospital. She then brought a malpractice suit against her attorneys. Blum received $125,000 when she settled the malpractice lawsuit. The settlement agreement stated she did not sustain any physical injuries due to the alleged negligence of her attorneys.

The Appeals Court agreed that settlement did not compensate Blum for her physical injuries; rather, the settlement compensated her for the harm caused by her lawyers' legal malpractice. Therefore, it is taxable.

H. Durable Power of Attorney

Usually, a taxpayer signs a Form 2848 to authorize an individual to represent them in federal tax matters. There is confusion when a durable power of attorney can be accepted in lieu of Form 2848. A durable power of attorney is appointment of an attorney-in-fact that remains in effect when a taxpayer is physically or mentally incapacitated in accordance with state law.

In this alert, the IRS said it "depends in each case" if requirements in procedural regulations are met. Generally, practitioners should refer to Publication 216, which contains Reg. §601.501 through Reg. §601.509. A durable power of attorney must satisfy Reg. §601.503(a), which provides that a power of attorney needs to include:

- the name and mailing address of taxpayer;
- the identification number of the taxpayer (social security number and/or employer identification number);
- an employer plan number (if applicable);
- the name and mailing address of the recognized representatives;
- a description of the matters for which representation is authorized which, if applicable, must include:
  - the type of tax involved,
  - the federal tax form number,
  - the specific years/periods involved, and
  - in estate matters, decedent's date of death; and
  - a clear expression of the taxpayer's intention concerning the scope of authority granted to the recognized representatives.

Unfortunately, a durable power of attorney may not include all the above elements. An attorney-in-fact can fill in the gaps by submitting a Form 2848 themselves with the missing pieces, so long as the durable power of attorney has specific language giving the attorney-in-fact authority in federal tax matters. The attorney-in-fact must also attach a signed statement to the Form 2848 confirming that the durable power of attorney is valid under the original jurisdiction where it was signed.

If an attorney-in-fact was not expressly authorized to handle federal tax matters, consideration should be given to the appointment of a fiduciary, who would need to file a Form 56, *Notice Concerning Fiduciary Relationship*, in addition to a Form 2848. Practitioners who "regularly represent" taxpayers before the IRS are advised to ensure that such language is included in durable powers of attorney.

I. Budget Proposal Includes Potential New Reporting Rules for Foreign Digital Assets

The Treasury Department's so-called Green Book, an explanation of revenue estimates that were included in the federal budget for fiscal 2023 as proposed by President Joe Biden, includes a proposal requiring that stakes in certain foreign financial accounts that hold cryptocurrencies and other digital assets be disclosed to the IRS. The reporting requirement would apply to U.S. taxpayers who have over $50,000 in cryptocurrency, financial accounts, and other assets abroad, according to the proposal's text. A "foreign digital asset account would be defined based on where the exchange or service provider is organized or established." The secretary may prescribe regulations to expand the scope of foreign digital asset accounts for purposes of this section, it added. The secretary would also have authority to prescribe regulations to coordinate the amendment with other requirements to mitigate duplication or minimize burden with respect to other reporting requirements. The proposal would take effect for tax returns that are required to be filed after December 31, 2022.

J. Budget Proposal Includes Billionaire Tax

The Treasury Department's so-called Green Book, an explanation of revenue estimates that were included in the federal budget for fiscal 2023 as proposed by President Joe Biden, includes a proposal for the Billionaire Minimum Income Tax to tax the wealthiest Americans at a tax rate of at least 20% on their full income, including unrealized appreciation.

K. IRS v. Howard D. Juntoff

BAP6

A Bankruptcy Court decision that IRS's claims for taxpayers' pre-2019 §5000A shared responsibility payment obligations did not qualify as priority income tax under 11 USC 507(a)(8) was reversed and remanded. Under the "functional examination" test and following Supreme Court precedent, shared responsibility payment was considered a tax rather than penalty for bankruptcy purposes. And that tax was *measured by* income within the meaning of 11 USC 507(a)(8)(A). Even though some taxpayers were exempt from payment, those who were not had their liability calculated at least in part by reference to income.

L. Oakbrook Land Holdings, LLC v. Commissioner

CA6

The Appeals Court for the Sixth Circuit upheld the validity of the extinguishment regulations related to conservation easements. [Reg. §1.170A-14(g)(6)] The LLC argued that the regulation was invalid because the IRS violated the APA. The Court held that the Treasury Department's concise statement of the regulation's basis and purpose was sufficient to satisfy the APA and, even though the Treasury Department did not respond to a number of comments, it did not invalidate the regulation. The Court noted they found the stated comments were misguided, unexplained, or too cursory to require response. This is contrary to the Eleventh Circuit holding in *Hewitt*.

M. Pickens Decorative Stone LLC v. Commissioner

TC Memo 2022-22

The Tax Court rejected the argument that a public notice, Notice 2017-10, advising participants in syndicated conservation easement transactions of the risk of certain penalties was the "first formal communication" of penalties to a specific taxpayer for purposes of the supervisory approval requirement in §6751.

The taxpayer agreed that the auditor had obtained supervisory approval to assess the penalties before the IRS issued the FPAA, but argued that this penalty approval came too late because it was obtained *after* the IRS first communicated its intent to assess penalties in all syndicated conservation easement transactions in Notice 2017-10, 2017-4 IRB 544, which identified syndicated conservation easements as reportable transactions. The Court believed that an announcement directed to the public at large cannot constitute the first formal communication to the taxpayer of penalties.

N. IRS Fact Sheet 2022-20

The IRS released a fact sheet on the tax implications of crowdfunding. The document defines crowdfunding, addresses whether the money raised is taxable, and describes reporting requirements. Examples of crowdfunding are the websites GoFundMe and Kickstarter. Crowdfunding may be used to fund business ideas, help individuals pay bills, or raise money for charity.

A person organizing a crowdfunding campaign may not have to include the money raised by the campaign in their gross income if all the money raised is distributed to the campaign's beneficiary or beneficiaries—i.e., the person or people for whom the campaign was organized. If contributors make crowdfunding contributions with "detached and disinterested generosity," then the campaign's beneficiaries can exclude, as gifts, the crowdsourced amounts from gross income. However, when contributions to crowdfunding campaigns are made because the contributor is receiving something of value in return (for example, the opportunity to buy a new product at a discount), the money raised by campaign is taxable to the campaign organizer.

Either the crowdfunding website or its payment processor may be required to report money raised through a crowdfunding campaign on Form 1099-K, *Payment Card and Third-Party Network Transactions*. The amount raised must be reported if it exceeds the reporting threshold. The American Rescue Plan Act (ARPA, ARP Act; PL 117-2) changed the reporting threshold to $600 beginning January 1, 2022. For transactions made after March 11, 2021, ARPA clarifies that Form 1099-K reporting applies only for transactions for the provision of goods or services settled through a third-party payment processor. Thus, it does not apply to uncompensated contributions to a crowdfunding campaign.

O. Revenue Ruling 2022-7

In Revenue Ruling 2022-7, the IRS discussed the tax return disclosure restrictions as they apply to government employees. The IRS ruled that government employees who receive returns or return information pursuant to disclosures under §6103(c), like all designees who receive returns or return information pursuant to taxpayer consent, are subject to the disclosure restrictions of §6103(a). Government employees who receive returns or return information pursuant to disclosures under §§6103(k)(6) or (e) are not subject to the disclosure restrictions.

GROUP STUDY MATERIALS

A. Discussion Problems

1. James is a new client who has come to you because the IRS has assessed penalties for failing to report certain transactions that are identified in Notice 2007-83 as “listed” and “reportable” transactions.

2. Your client, Carmela, was recently diagnosed as being mentally incapacitated under state law. Her son, Pedro, has come in to discuss some tax issues related to his mother for which he believes she needs you to represent her before the IRS. He presents you with a durable power of attorney, signed by his mother, granting him power of attorney over her financial affairs.

3. Your client, Felicia, is planning on raising funds to help her cousin offset her medical costs associated with her cousin’s young child. She asks about the tax implications to her in raising the funds through crowdsourcing.

Required:

Discuss the issues fairly raised in each of the above independent situations.

B. Suggested Answers to Discussion Problems

1. An argument can be made, based on the Sixth Circuit decision in *Mann*, that the Notice 2007-83 is invalid as it violates the APA. As a result, the penalties for not following the reporting triggered by this Notice would be abated. This is a winning argument for those taxpayers in the Sixth Circuit. For others, it is a valid argument to make.

2. The first thing you must do is review the Durable Power of Attorney. The IRS Office of Professional Responsibility has indicated that a Durable Power of Attorney may not be acceptable for the IRS if it does not indicate that the power includes representation in federal tax matters, which generally is not specifically set out. Reference should be made to Publication 216 and the March 23rd OPR alert.

3. Crowdsourcing has many issues that can arise without the understanding of the person raising the funds, who is often doing it with good intentions. In general, a person organizing a crowdfunding campaign may not have to include the money raised by the campaign in their gross income if all the money raised is distributed to the campaign's beneficiary or beneficiaries—i.e., the person or people for whom the campaign was organized. If contributors make crowdfunding contributions with "detached and disinterested generosity," then the campaign's beneficiaries can exclude as gifts the crowdsourced amounts from gross income. However, when contributions to crowdfunding campaigns are made because the contributor is receiving something of value in return (for example, the opportunity to buy a new product at a discount), the money raised by the campaign is taxable to the campaign organizer.

PART 2. INDIVIDUAL TAXATION

Proposed SECURE Act Regulations

Although the SECURE Act was passed in December 2019, the IRS and Treasury released proposed regulations in February 2022 that would update existing rules for required minimum distributions from qualified retirement plans and annuity contracts and related matters. In addition, if the SECURE Act 2.0 becomes law in its current state, it has the potential to get people to save more, improve retirement rules, and lower the costs for employers to set up retirement plans. Ian Redpath and Larry Pon discuss the proposed regulations regarding the SECURE Act and the potential impact of the SECURE Act 2.0.

Let's join Ian Redpath and Larry Pon as they discuss these topics.

Mr. Redpath

Larry, welcome to the program.

Mr. Pon

Hi, Ian.

Mr. Redpath

So we have an interesting topic here, because we've been hearing for years, or at least two years now, that we're going to have some changes. So we had a major change with the SECURE Act, and we know that we've got a lot going on, bipartisan support in Congress for a SECURE 2.0. And now, in the interim, we get these proposed regs on the original SECURE Act. So, that's what we're going to try to focus on today is that SECURE Act. I guess I'm going to ask you, SECURE Act, really, what is the SECURE Act?

Mr. Pon

Right. The SECURE Act was passed in December of 2019. I know that seems like a long time ago; but that was the first major change in the retirement planning rules in many years. So SECURE stands for Setting Every Community Up for Retirement Enhancement. So that's what SECURE stands for. It made a number of changes, but the two most notable ones is that it raised the required minimum distribution age to 72, from 70½ to 72, and also created a 10-year distribution period for most designated beneficiaries. So, it took away what we call the stretch IRA. When you inherit an IRA, you can stretch it over your life expectancy. So the SECURE Act made a number of changes there. On February 23rd, the IRS issued proposed regulations, and it's 275 pages. So there's a lot in there. Today we'll just talk about the highlights of some of the major changes that they're proposing.

Mr. Redpath

So the SECURE Act, as you said, basically, for retirement purposes…. Let's start off with, and just kind of do a potpourri of the proposed topics as we go through. We have this so-called 10-year rule, so really changes made to non-spousal IRAs. What is that, and exactly how is that applying to our clients? What should we be talking to our clients about?

Mr. Pon

Right. So when a client calls me up and says, "We inherited an IRA," or something like that… First of all, we take a step back; and we have to take a look at what type of beneficiary we're talking about. Each type of beneficiary has its own set of rules. So, especially when you have a death in 2020 and later.

There's three types of beneficiaries. There's the first kind called the eligible designated beneficiary, the EDBs; and those beneficiaries still get to enjoy the stretch or life expectancy distributions from the retirement account. That's the eligible designated beneficiary, five groups of people who qualify for that. We'll talk about that in a little more detail. Then we have the non-eligible designated beneficiaries, or also known as designated beneficiaries. So those beneficiaries have to take the retirement account by the end of 10 years, 10 years. The third kind of beneficiary is what's called the non-designated beneficiaries. This is not new, this has been around for a long time, and those beneficiaries will have to take it either under the five-year rule, which is the old five-year rule, or what's also known as the ghost rule, and we'll talk about that a little bit more, too.

Mr. Redpath

What do the proposed regs do in relation to this?

Mr. Pon

Well, the proposed regs made some changes to the 10-year rule, because there's some confusion about that; and most of us in the tax world assumed the 10-year rule, when the SECURE Act was passed, was similar to the five-year rule. What that meant was no distributions for years one through nine as long as you empty out the IRA by year 10. That was our initial understanding. So the change in the proposed regulations is it depends on the owner of the account. Were they subject to required minimum distributions or not? What the proposed regulations do is that if you inherit an IRA for someone who's over age 72, they're subject to required minimum distributions, which means you need to take a distribution in year one through nine, as long as you empty it by year 10. So that's a change. However, if decedent was younger than 72, then you don't have to take distributions during years one through nine, empty it in year 10. So, that's what the proposed regulations change. It's going to be a good question, will that be in the final regulations? That's a major change.

Mr. Redpath

Well, doesn't it seem like what they're really trying to do is to get the tax on that as quickly as possible?

Mr. Pon

Try to get earlier, right?

Mr. Redpath

It's hard to believe that the government's not going to try to accelerate that.

Just to make sure I'm clear on it—because I know that previous discussions in previous programs, we've talked about the idea that you can do nothing, and then 10 years from now, take it all out. That was highly controversial, but that's kind of what it read. So you're saying the proposed regs are trying to address that and say, no, you have to take out distributions?

Mr. Pon

Right. As you recall, in 2021, the IRS issued or updated IRS Publication 590-B, which is the IRS publication about distributions from IRAs. There was a mistake in the publication last year; and that's what the publication said—you have to take distributions every year. And then in the tax community, we said, whoa, you didn't say that in the SECURE Act. So they corrected that subsequently in 590-B. And so, we'll see what happens with these regulations. Now, let me point something out here. These regulations are supposed to take effect retroactive to January 1st, 2022.

I was talking to a client yesterday about this. His dad passed away in 2020; and he was one of my first clients to die of COVID, literally, my first client to die of COVID. He died in February of 2020. His son inherited his IRA account. He took his RMD already, too, so he didn't have to take a distribution in 2020; and it was also suspended in 2020. But for 2021, I told him, you do not need to take an RMD based on our reading of the SECURE Act.

From my understanding, since he died before these regulations go into effect, I think it's okay for him not to take distributions. I said, "You've got until 2030," because he died in 2020. He's planning on retiring anyway. I said, "Yes, we're going to take your IRA distribution after you retire, when your income drops, so you'll pay a lower tax." So, that's our plan with him.

Mr. Redpath

I think that's a good point that you're making here, is that these are retroactive regulations. And so, in any discussions we're having with our clients, we certainly have to consider the implications. Now, I think what timeframe, we're looking at the end of May for public comment. So it's not clear exactly when, but I'm assuming early summer, June, July; at some point, these regulations are going to be finalized, it would appear. I believe you're right; I think the retroactivity is not going to be taken out. They're not going to say prospectively; they're going to say we told you before when we issued them that these were going to be retroactive, so you've known about this. So the-ten year [rule]—we have an example here.

Could you go over this example with Frank? Explain what we're talking about.

Mr. Pon

Okay. So, we've got Frank here. Now, Frank dies in 2022. So, that means whatever the proposed regulations put forth, we need to follow those rules. So he dies in 2022; he's got a million-dollar IRA account. Well, sadly, his wife also dies in 2022. Frank is age 75; Mary is age 68. So, Frank is subject to required minimum distributions; Mary is not. They have one son, Jamie; he's 40 years old. Since [Frank] dies in 2022, Jamie is not an eligible designated beneficiary, so he's subject to the 10-year rule. Well, since Frank is subject to RMDs, Jamie's going to have to take distributions in years one through nine; and it's based on Jamie's life expectancy. We look at the table and figure out what those payments are. So, he's got it to some distributions in year one through nine, he's going to empty it by year 10.

Mr. Redpath

Okay. And so distributions then are going to be calculated as normal RMDs, or is there any special calculation?

Mr. Pon

If you want to go to the minimum, if you want to go to the minimum payment, you look at the life expectancy tables for Jamie and take it over his life expectancy for years one through nine. Now, for his mom's IRA, since she's 68 before the required minimum distribution, he doesn't have to take any distributions in years one through nine; he just needs to empty it by year 10. So, this is an opportunity for some tax planning for Jamie here. We've got to figure out what his income looks like. Should we take some now? Should we take some later? It depends on his tax bracket. It depends on his tax situation.

A lot of times, we need to be careful with our client's tax planning, because what if he's got a child in college? Well, if you take a distribution from the IRA, that's considered income, and that might jeopardize the amount of financial aid this child might qualify for. So, there's some careful planning to do. Or sometimes I tell the client, let's not touch your IRA until your son's done with college; then we don't need to worry about the financial aid calculation.

Mr. Redpath

That's a great point, Larry. Financial aid, which is a whole world unto itself with financial aid. But yes, I've seen that many times, where people have done things, and then they come in and talk to you and you go, wait a second, this is real. All of a sudden, it's impacted.… I had a client that said, "Well, I don't understand, because the school says my daughter no longer qualifies for work study." Well, okay. Well, what did you do? The same type of thing that suddenly they didn't qualify. So, that's a great point. That's something we don't always think of. We look at the tax rates and things like that, but there's certainly other implications in there. So, you mentioned eligible designated beneficiaries earlier. What does that mean?

Mr. Pon

Right. So, those are five classes of people here. We have the surviving spouse; that's the first eligible designated beneficiary. The second is a child under the age of majority. The third is a disabled beneficiary, the [fourth] is a chronically ill beneficiary, and the last one is the individual no more than 10 years younger than the decedent. So, those are the five categories of eligible designated beneficiaries. There was a question when the SECURE Act passed, because when it came to a child under the age of majority, what did that mean? And so we looked to state law, and states have different definitions of the age of majority. The proposed regulation just said it's 21, so as the child reached their 21st birthday. Now, that's for IRA accounts and all that. Now, there could be some differences with employer-sponsored plans, like a defined benefit plan. They can have rules that override that.

Also, looks like exception for children—children who are still students can go up to age 26.

Mr. Redpath

It's greater than the rules for a dependency. The dependency rule is under the age of 24, so this does change, something to keep in mind.

Mr. Pon

Right. So what happens after the age of majority? Then, the 10-year rule kicks in. So, let's say it goes up to age 21. What that means is by the age of 31, the child needs to distribute the retirement account. Now, another confusion that people run into is that, oh, it's a kid, it's a minor. Well, no, it's a child of the decedent. So it could be a nephew, a niece, a grandchild. They'll still be subject to the 10-year rule. So it's only for children of the decedent.

Mr. Redpath

Okay. We've got a good example of this with Jay. Can you go over that for us, Larry?

Mr. Pon

Yes. So, Jay is 75, he's got a wife, 45, and they both die in 2022, sadly. But they do have Joe, their five-year-old son, who's the beneficiary. So Joe is a minor child of both the decedents, so he's an eligible designated beneficiary until age 21. After 21, he's subject to the 10-year rule. So he's got two sets of rules to follow here, because for Gloria's IRA, his mom, she's only 45, so she's not subject to required minimum distributions. So Joe can use his life expectancy until he's 21, and then after that, he's got to distribute it by the time he's 31.

For Jay's IRA, he's got RMDs, required minimum distributions from 22 to 30, and then he needs to distribute it by the time he's 31. For his mom's IRA, do some tax planning, he probably we won't take any distributions until he's 31. It depends on his planning, but none there. But for his dad's IRA, he's got to do some minimum distributions.

Mr. Redpath

This is certainly taxpayer-friendly. There's no question about it, that these are taxpayer-friendly, and as you said, they do require a significant amount of planning. It's not just, okay, it's time, let's take it. Let's take it, but from where? Right? Where do we take it from? So what is disabled?

Mr. Pon

The regulations give us some more details on that. I find that very helpful, because again, when the SECURE Act passed, we weren't really clear about what's a disabled beneficiary. So the proposed regs adds a new set of rules there. So, it depends on the age of the beneficiary, if you're under the age of 18 or over the age of 18. It kind of makes sense. Because if you're over the age 18, you assume the individual's supposed to be able to work. So, that's why the designations are different. If you're under 18, you must have a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or be of long-continued and indefinite duration. So, you'll need a letter from a licensed healthcare professional to document that.

If you're over 18 at the time of the owner's death, then it's under Section 72(m)(7), so it's based on an inability to engage in substantial gainful activity. So, there's a safe harbor here. If you are determined to be disabled under the social security rules, then you are automatically considered to be disabled because the social security rules are pretty strict.

Mr. Redpath

What about individuals that are 10 years younger, or less than 10 years younger? How do we deal with this age?

Mr. Pon

For the individuals no more than 10 years younger than the decedent, there was a question about when the SECURE Act passed, was how do we do that calculation? Is it based on the calendar year they were born in? Well, the proposed regulations give us some guidance that it's the actual age. So you look at the actual birthdays to see if they are 10 years or younger. Let's go over an example of that.

Mr. Pon

For example, we've got Mitchell, he was born on July 1st of 1970, and he dies in 2022. His sister, Claire, her birthday is March 1st, 1980. And his other beneficiary is his brother-in-law, Phil; his date of birth is August 1st of 1980. So Claire is nine years, eight months younger than Mitchell, so she is an eligible designated beneficiary. She can stretch out the IRA over her life expectancy. However, Phil is 10 years and one month younger than Mitchell, so then he needs to distribute his portion of the IRA within 10 years. Since he died in 2022, he needs to distribute the IRA by the end of 2032.

Mr. Redpath

What about a surviving spouse? The proposed regs put some clarity here. What do the proposed regs say about the surviving spouse?

Mr. Pon

Yes. So surviving spouse, that's an interesting topic. Because there's been some guidance we got from estate planning lawyers. As cynical as they are, right? Because a lot of lawyers are telling us don't name the spouse as the beneficiary, because what if you remarry or whatever? So your beneficiary designation should be "my spouse at the time of my death" because we've seen enough cases where there's lawsuits and court cases about the new wife not getting the IRA because the old wife's name was still there. So that gets pretty confusing.

Mr. Redpath

Larry, I had one where it was a very large estate. It was a farmer who had a very large farm, family farm, and he passes away. And this woman shows up and said, "I was his common law wife way back when." Nobody even knows who this person is, and she came in and said, "Oh, I was the common law wife. I'm his spouse. I get to inherit. I'm claiming my spousal…" Of course, everything is talking in his tax planning, as you said. All of his trust, everything says, "my spouse," "my spouse." She says, "Well, I'm the spouse, because that… the marriage was illegal." So, it actually can happen. I've had that exact situation come up.

Mr. Pon

Yes. We see that in real life, and we see that in many, many, many court cases, and the Supreme Court, too, so it just goes on. The proposed regulations have given some clarifications about what happens if the surviving spouse inherits a retirement account. Before the SECURE Act, a surviving spouse remained the beneficiary. The beneficiary of the deceased spouse's retirement account is not required to take an RMD until the deceased's spouse would have turned 70½. If the surviving spouse died before that date, then the spouse's beneficiaries were treated as though they had inherited directly from the original owner. So there was some clarification that… The proposed regulations say that surviving spouses remaining as beneficiaries of these accounts will not be required to take RMDs until the year the decedent would have turned 72. So we update that to 72 if the decedent was born on or after July 1st, 1949. That's some clarification there.

Mr. Redpath

What if they're the sole beneficiary?

Mr. Pon

If the surviving spouse is the employee's sole beneficiary and dies after the employee but before the distributions commence, then either the five-year or 10-year rule applies. Then the date of death of the surviving spouse is used to determine when the IRA must be fully distributed, so you have to look to when that happens. If the surviving spouse remarries and then dies before receiving distributions, then the distributions cannot be further delayed. Getting remarried really muddies the waters there.

Mr. Redpath

Right. Yes, it does. But if they don't remarry, it's the date of death of the surviving spouse that determines when you have to have the full distribution. So that's an interesting differentiation there. Again, you mentioned names. Do you mention names or do you mention what are they? We get into all sorts of problems when people don't use specific language, children, grandchildren, future grandchildren, grandchildren at my death. How is the wording? What I can really say about that is state laws vary on how you apply a language. Does it mean my grandchildren when I die or when I created the instrument, or does it include future grandchildren that were not anticipated? So, there's all sorts of things.

I have literally seen where people have actually mentioned my spouse, but by name, and they have divorced, remarried, and they never changed the beneficiaries. The beneficiary is still that person by name, not by designation. So those are all things you really need to be careful of when you're writing the plan or with your client. I really think you need to make sure with a client, that you at least have them aware of it to look at, okay, so who are your beneficiaries? Let's make sure your beneficiaries relate to who you want to have at your beneficiary today, because people tend to forget about that part of it.

Mr. Pon

Well, here's a suggestion, too. I've run into this a number of times, is you have a client who's divorced, and they have a retirement account, a 401(k) plan or whatever, but they never updated the beneficiary designation. And then they remarry. Well, I tell them, before you remarry, make sure you have the beneficiary the way you want. Like, it's your daughter. Because if you remarry, if you want to name your daughter as the beneficiary, you need a spousal consent. I ran into a case where this client remarried, but her husband refused to sign the spousal consent. He goes, "Oh no, I married you, so I'm the primary beneficiary," because he's got a daughter, too. She's got a daughter; but he already has his daughter named as his beneficiary. So, very tough situation.

Mr. Redpath

What is your view of naming the estate as the beneficiary?

Mr. Pon

Ah, that's a whole, very large topic. So that brings us to our next type of beneficiary, a non-designated beneficiary. Non-designated beneficiaries are generally beneficiaries who are not people. They could be charities, they could be trusts, they could be corporations. If you do name a trust or your estate as a beneficiary, that gets a whole bit more complicated, because that could be a non-designated beneficiary. Now, within trusts, this is where you have to be really careful about drafting your trust. Because if you want to have what's called a designated beneficiary trust, there's some special rules you need to follow to have that trust be deemed to be what's called a see-through trust.

For example, like you're talking about here, let's say I have a disabled child or a chronically ill individual as a dependent, but I can't give it to them outright, but I need to put it through a trust. We need to draft the trust carefully to have it be treated as a see-through trust, so you see through the trust to the actual beneficiary.

Mr. Redpath

Right. Are the spouse or the children, are they the beneficiaries, so we apply those rules? Or is it a non-designated beneficiary? Is the trust the actual beneficiary? And boy, there's been a lot of litigation on that. There's been a lot of litigation. I have to say the courts have tended to be taxpayer-friendly on that. They've tried to look at what was really the intent of the parties in doing that, because they understand for other reasons, you may have set up a trust, but it's something really to watch out for. So what does that mean? If you have a non-designated beneficiary, what is that going to mean as far as the SECURE Act rules?

Mr. Pon

Actually, the rule's very similar to the pre-SECURE Act rules for non-designated beneficiaries; and so it depends on when the decedent died. Again, same set of rules. If they die before the required beginning date, before they're taking required minimum distributions, then that's when the five-year rule kicks in. You've got to distribute it within five years. So, if you have a very large IRA, that could be a significant amount of taxes. Now, for the post-required minimum distribution beneficiaries, then you can use what's called the ghost rule, because it's a weird calculation. You calculate it based upon the life expectancy of the decedent. I know that doesn't sound like it makes sense; that's why it's called the ghost rule. So, we look at the table. He's 75 years old, so we look at the 75-year life expectancy; and for the non-designated beneficiary, we can take that distribution.

Mr. Redpath

Now, one thing. I just want to go back to one thing. When you mentioned the five-year rule, there was COVID relief for 2020, so I believe that year is not included in your five years.

Mr. Pon

Yes. So five years means six years if 2020 was one of the years, because required minimum distributions were suspended. Because they were suspended, that adds an extra year to the five-year rule. So, if you have a pre-2020 death, a pre-2020 death.

Mr. Redpath

So we have a lot of different types of trusts; and I think that's a whole program in and of itself. In fact, we actually did a program on that not too long ago. Our friend, Ed Renn, presented on that. I know you know Ed, and you've done programs with Ed. We talked about just that whole trust. So we'll go past that, because we addressed that. But what about multiple beneficiaries?

Mr. Pon

That's a good question. Should you have one big IRA account and split it to multiple beneficiaries? Or do you chop them up into each IRA for each beneficiary and just name one beneficiary? It's always a question with our clients. It's like, well, it's easier to invest if I have one big IRA account and have multiple beneficiaries. But then each beneficiary is treated differently, because they have different sets of rules. Or, do you chop it up, one for each beneficiary, and then that way, it just goes one way for each IRA account?

Mr. Redpath

Now, I want to go back to something you said, Larry, because I think it's important not to go past this. If you have multiple beneficiaries, each beneficiary is under their set of rules that apply to that beneficiary? Correct?

Mr. Pon

Right. So, it can't be treated the same way. But in the practical world, a lot of times most of the trustees ignore that, and they just do one thing. Or most of the time, they just do the easiest thing possible, which is distribute the whole IRA account; and it's usually at the very end of the year, like on December 28th. It's like, boom, we get this big surprise, and you get a surprise 1099 or a surprise K-1. It's what are these big numbers here? So, it's always nice to be involved. It's nice to be involved with the trustee.

Mr. Redpath

I think you've reached a point that I've had some personal involvement with more than one time. I always tell clients, it may sound good to have a corporate trustee or a corporate personal representative in your estate; however, remember, they are there to make money. They're not there to take care of your spouse, your children, your grandchildren, whatever. They're there to make money. I've seen many trusts that have made decisions that… Unfortunately, there were provisions in the trust, giving them the power, the absolute discretion to do things. While legally they had the right to do them, they, in essence, were to the detriment of the family. The power is there; you gave them the power. I think it's something when you have a corporate trustee or corporate personal representative, you need to provide a family member, so a co-trustee, something where the family has input. Because you always have to remember, at the end of the day, they don't care about your family, your grandchildren. It's, how long can we do? Should we sell these assets? Should we not sell these assets? What should we do?

I had one where they asked for an in-kind distribution out of the trust. So what was the last act the trustee did? Sold everything, collected all their commissions, and then transferred the cash to them. So, that was totally opposite of what the family had asked for, but they had the discretion in the trust. And now you get are we getting into litigation? So corporate trustees—and I'm not saying they're doing a bad job; but I just think the family, it's something to always to talk to a client about.

Mr. Pon

Yes. Trustee selection is a big deal. It's a big deal. We've run into that so many times where the inappropriate trustee's been selected.

Mr. Redpath

Right. What does the 50% penalty apply to?

Mr. Pon

Ah, 50%!

Mr. Redpath

There is a big penalty.

Mr. Pon

Yes. The 50% penalty is one of the most expensive penalties in the tax code. It's actually not a penalty; it's an excise tax. So, if you do not take your required minimum distribution, it's the penalty, or the excise tax is 50% of that amount. That can get confusing. Because if you have a decedent, and a lot of times, we don't know. Did they take their RMD that year or not? Sometimes we don't know that. Or, they die very close to the end of the year; and so we didn't have time to discover if they took their RMD or not, or to even do the RMD. And so the family will need to take the required minimum distribution, so they'll have to pay tax on that distribution. So, that's where it gets some confusion.

Now the proposed regs has given us a automatic waiver. Basically, you're required to take the required minimum distribution in the year of death; that's always been the rule, but sometimes we don't know that. So, the regulations give us some relief by giving an automatic waiver of the 50% penalty if you miss the RMD, but you've just got to take it by the tax filing deadline, including extension. For example, let's say you have someone who died in 2022 and they didn't take the RMD. Well, as long as the beneficiaries take it by October 15th of 2023, then we get the automatic waiver from the penalty. We don't have to ask for forgiveness. This is a very confusing area, so I'm really glad they clarified that for us.

Mr. Redpath

Now, on top of this, we've got SECURE 2.0, which is a bill that has bipartisan support. Although we've been hearing about it for a long time, at least it looks like we're going to have something on 2.0. Can you give us kind of the 35,000-foot view of this?

Mr. Pon

Yes, this does have bipartisan support. It passed the Ways and Means Committee, and it just recently passed the House of Representatives, and now it's on its way to the Senate to see how the Senate's going to make their changes or their version, so we'll see what it says here. But the SECURE 2.0, the name of the bill is called Securing a Strong Retirement Act of [2022]; it's HR 2954, but we call it SECURE 2.0 as a follow up. Some highlights of what this bill does is that number one, it's going to expand automatic enrollment in retirement plans—you opt out versus opting in. So, it's expanding automatic enrollment, which I think is great, because you get more people to be enrolled. And it starts at 3%; it can go up to 10%.

The second change it's going to be making is indexing the IRA catch-up limit. Right now, it's an extra $1,000 over age 50. It's been $1,000 for many, many, many years. So, that $1,000 is going to be indexed for inflation; and that's going to start in 2023. Inflation's been high, so we should see a pretty good bump up to that $1,000 for 2023. The other thing is the catch-up provision is going to be a higher amount at age 62, 63, and 64. Right now, the catch-up only applies to your 50 and older; and for employer-sponsored plans, like a 401(k) or 403(B) or 457, it's $6,500. So, that's the catch-up. But at 62, 63, and 64, it will be increased. The legislation says they'll increase it to up to $10,000.

Mr. Redpath

Yes. Up to 10. The other thing is that—I think this is going to be a major—is the bill provides for the employer matching contributions can now be made to a Roth. It's going to be taxable, but it can go into, you can designate it to a Roth.

Mr. Pon

Right, right. Because right now, the present law is, employer matches only goes to the pre-tax portion of retirement accounts. That's a big change. And then, there's some other changes, too.

Mr. Redpath

The mandatory distribution rules—there's some big changes there, depending on the year.

Mr. Pon

Yes, exactly. So SECURE 1.0 brought it up to 72; but starting in 2023, bringing up to 73; 74 in [2030], and 75 in [2033]. So, push it out more. Right now, if you are a small business, you can have a simple IRA or a SEP IRA. Right now, you can only have a traditional SIMPLE or SEP, and now expand it to include a Roth option, a Roth SEP, or Roth SIMPLE. No deduction when you put the money in, but it'll grow tax-free. So that's some changes.

Mr. Redpath

One thing I think that's interesting is they're looking to allow for greater lifetime annuity options. There's a lot of push towards lifetime annuity because they're similar to a pension type of plan. We've got the student loan matching issue. I don't think there's huge changes; but there's a lot of tweaking here.

Mr. Pon

That's something we need to be aware of.

Mr. Redpath

Absolutely. Larry, thank you very much. A lot of material we covered today. I want to tell you, I really appreciate your input; and we'll have you on the program again soon. So, Larry Pon, thank you very much.

Mr. Pon

All right. Thank you, Ian.

Proposed Regulations for SECURE Act

By Ian J. Redpath, JD, LLM

A. Introduction

On February 23, 2022, the IRS released long-awaited guidance on the changes under the SECURE Act (Act) when it issued a set of comprehensive proposed regulations [REG-105954-20]. The proposals revise the existing required minimum distribution (RMD) and related regulations. In general, the Act was effective January 1, 2020; however, these proposed regulations are to become effective on January 1, 2022. The preamble provides that for prior applications, following the proposed regulations will be considered applying the existing regulations *and* exercising a "reasonable, good faith interpretation" of the Act. The proposed regulations are 275 pages long and not easy reading. They are expected to be finalized by early 2023.

B. Background

The Act made major changes to the prior rules on IRA and retirement plans. Significantly, the beginning age for RMDs was raised from 70½ to 72. It also changed the five-year beneficiary payout rule to 10 years for most beneficiaries and limited the beneficiaries that can take retirement distributions over their lifetimes. The Act provided some additional complexity as the rules applicable to account holders dying before January 1, 2020 and after are very different and, as a result, the application to beneficiaries and their payouts can be significantly varied, even for the same beneficiary relationships. The Act eliminated "stretch" IRAs or plan distributions by requiring distributions to nonspousal beneficiaries, other than eligible designated beneficiaries, to be completed within 10 years following a plan participant or IRA owner's death rather than, as before, over the beneficiary's life or life expectancy. This is referred to as the 10-year rule. Eligible designated beneficiaries for this purpose are the employee's surviving spouse, the employee's child under the age of majority, a disabled designated beneficiary, a chronically ill individual, or other individual no more than 10 years younger than the employee/owner. [§401(a)(9)(E)(i)]

The proposed regulations standardize the "age of majority" for the child of an employee rather than relying on state law definitions or the plans themselves. The proposed regulations would establish it as the child's 21st birthday. Existing plans would be allowed to continue with a prior definition contained in the plan. The proposed regulations change a provision which allowed minor children who were still in school to extend the age of majority to as late as age 26. The "still-in-school" exception is eliminated.

"Disability" for this purpose would depend on the beneficiary's age. If a beneficiary is under 18 at the time of the employee's death, the individual must have a "medically determinable physical or mental impairment that results in marked and severe functional limitations, and that can be expected to result in death or be of "long-continued and indefinite duration" [Explanation of Provisions, page 25]. Older disabled beneficiaries are defined by reference to IRC §72(m)(7), based on an inability to engage in substantial gainful activity. The proposed regulations provide a safe harbor for determining disability based on a determination for Social Security benefit purposes. They also prescribe rules for documenting disabled or chronically ill status. Disabled or chronically ill beneficiaries must provide proper documentation of their condition by October 31 of the year following the account owner's death.

C. The 10-Year Rule

Prop. Reg. §1.401(a)(9)-1 provides the general rules for RMDs. If an employee dies before reaching 70½ but would have reached that age on or after January 1, 2020, the proposed regulations require the beneficiary to wait until the calendar year in which the employee would have reached age 72 to begin RMDs.

If death comes before the owner's RBD (required beginning date), generally April 1 after the year of the 72nd birthday, and there is a non-designated beneficiary such as an estate, the account must be emptied by the end of the fifth year after death. However, under the "ghost rule," if death occurs after the RBD with a non-designated beneficiary such as an estate, charity, or non-qualifying trust, then payments are made to the non-designated beneficiary over the remaining single life expectancy of the deceased account owner, had he lived. RMDs apply annually under the ghost rule. The payment schedule could be longer than the 10-year option.

If a beneficiary, who is an individual, does not qualify as an "eligible designated beneficiary," they are considered "designated beneficiaries" and, for deaths after January 1, 2020, are subject to the 10-year rule. Beneficiaries that are not individuals, such as an estate, charity, or non-qualifying trust are not considered designated beneficiaries and, as discussed above, are subject to the 5-year rule or ghost rule.

The former "stretch" provision was eliminated for most beneficiaries by the Act. In general, beneficiaries will no longer be able to take life expectancy payments unless they are "eligible designated beneficiaries" (EDBs). These beneficiaries generally are:

- Account owner's spouse
- Individual who is not more than 10 years younger than the account owner
- Disabled or chronically ill individual
- Account owner's minor child
- Beneficiary of account owner who died before January 1, 2020

The proposed regulations expand the definition to include beneficiaries of account owners who died before January 1, 2020. If an EDB dies on or after January 1, 2020, the successor beneficiary must distribute all assets by the end of the tenth calendar year following the year of the EBD's death. If the account owner has multiple eligible designated beneficiaries, then the assets will generally be distributed by the end of the tenth calendar year of the oldest eligible designated beneficiary's death if that eligible designated beneficiary is still alive on or after January 1, 2020. This same deadline applies to successor beneficiaries when both the account owner and the eligible designated beneficiary die on or after January 1, 2020.

Spouse beneficiaries retain the previous options of taking annual payments over their life expectancy or taking the assets as their own. Non-spouse beneficiaries who are not more than 10 years younger than the decedent may continue to exercise the lifetime payout option. However, non-spouse beneficiaries more than 10 years younger are generally subject to the 10-year rule.

Minor children may take annual payments based on their life expectancy but only until they reach the age of majority. Once reaching majority, they become subject to the 10-year rule.

IRC §401(a)(9)(B)(i) requires beneficiaries to take distributions "at least as rapidly" as the account owner if the account owner dies on or after the required beginning date (RBD). But the existing regulations allow younger beneficiaries to take annual distributions based on their own single life expectancy. The proposed regulations provide that those beneficiaries that are subject to the 10-year rule must not only deplete their account balance by the end of the year that contains the tenth anniversary of the original account owner's death, but they must also take annual distributions based on the normal single life expectancy calculation. It should be noted that this applies only when the account owner dies on or after the RBD. It does not apply to deaths before the RBD.

Example

- Frank, age 75, dies in 2022; IRA = $1,000,000
- His wife, Mary, age 68, dies in 2022; IRA = $1,000,000
- Their beneficiary is their 40-year-old son, Jamie.
- At the time of death, Frank was subject to the RMDs but Mary was not.
- For Frank's IRA, Jamie will be subject to both the 10-year rule and the annual stretch RMD rules. Since Mary dies before her RBD, Jamie must empty the IRA inherited from her by the end of 2032; distributions are not required each year.
    - **Distribution from Frank's IRA, Value = $1,000,000**
        - Year 1–9 – Calculate RMD; can take more than RMD
        - Year 10 – Distribute remaining balance.

- **Distribution from Mary's IRA:**
  - Years 1–9 – No required distributions
    - Review Jamie's tax planning – years of higher tax brackets, years of lower tax brackets, financial aid planning, and medical deductions
  - Year 10 – Remaining balance

Example

- Jay, age 75 and Gloria, age 45, both die in 2022. Their five-year old son, Joe, is their beneficiary. Joe is a minor child and thus an "eligible designated beneficiary" until age 21. Thereafter, he is subject to the 10-year rule.
- Joe must take RMDs until age 21 but is subject to different rules for Jay and Gloria.
  - Gloria's IRA – distribute by the time Joe is 31.
  - Jay's IRA – RMDs from 22 to 30; distribute the balance by the time Joe is 31.

The proposed regulations continue the separate accounting concept for beneficiaries. The status of a beneficiary would be determined as of September 30 of the year following the account owner's death. Each beneficiary is treated as the sole beneficiary of the separate account created and maintained by December 31 of the year following the account owner's death. This allows for different categories of beneficiaries and pay-out options for each separate account.

Example: Julia, an IRA owner, dies before her RBD. She named her spouse (Al), her brother (Jake), and her estate as equal beneficiaries of her IRA. Without the separate account approach, the pay-out would be determined using the beneficiary with the shortest life expectancy which is the estate because it has no life expectancy. The five-year rule would apply. However, by applying the separate accounting, each beneficiary may use the distribution options that would be available to them if they were the sole IRA beneficiary. That is, Al could take the assets as his own, and Jake could take life expectancy payments.

D. Trusts as Beneficiaries

The proposed regulations contain comprehensive guidance on the issues related to trusts as beneficiaries. The see-through trust concept allows the beneficiaries of such trusts to be treated as designated beneficiaries—or *eligible* designated beneficiaries. To qualify as a see-through trust,

- the trust must be valid under state law;
- the trust must be irrevocable, or become irrevocable upon the account owner's death;
- the trust must contain identifiable beneficiaries (even if they are not specifically named); and
- trust documentation must be provided to the account administrator.

E. Life Expectancy Limit for Older Eligible Designated Beneficiaries

Eligible designated beneficiaries are permitted to take RMDs based on their single life expectancies. If an account owner dies on or after the RBD, the beneficiary may use the longer of the decedent's remaining life expectancy based on the age *in* the year of death or the beneficiary's life expectancy based on the age *after* the year of death. Normally, once the life expectancy factor equals one year or less, the account balance must be fully distributed, even if using the life expectancy of the deceased owner.

Example: Ed died in 2022 at age 80. His sister, Sarah, is the sole beneficiary of his IRA. She turned 90 in 2023, the year following Ed's death. The RMD rules allow her to use Ed's life expectancy (11.2 years in the year of death, reduced by one each year) instead of her own (5.7 years in the year following Ed's death, reduced by one each year). However, under the proposed regulations, she must take the entire amount in the sixth year following death based on her life expectancy being less than one.

F. Miscellaneous

- The deadline for spousal election to treat IRA as own would be the later of the year following the IRA owner's death or the year in which the spouse beneficiary reaches age 72.

- The proposed regulations require the beneficiary to calculate a hypothetical RMD, the amount that would have been required to be distributed had the life expectancy rule applied to the spouse beneficiary, and exclude that amount from any rollover contribution.

- If an individual owns multiple IRAs and wants to roll over an IRA distribution in any year in which RMDs are required, RMDs from *all* of the individual's IRAs must be aggregated when determining what portion of a distribution is ineligible for rollover treatment. This means that the RMDs from *all* of the individual's IRAs must be distributed before a distribution from any IRA can be rolled over.

- If the account owner's death is before the required beginning date and an eligible designated beneficiary fails to take a life expectancy payment, the IRS will automatically waive the 50% penalty tax if 1) the beneficiary did not make an affirmative election to take life expectancy payments (e.g., a plan provision defaulted to that method), and 2) the beneficiary elects the 10-year rule by the end of the ninth calendar year following the account owner's death. The IRS will also waive the penalty tax if a beneficiary fails to take an RMD by the end of the year in which the account owner dies if the beneficiary takes the year-of-death RMD by the beneficiary's tax filing deadline, including extensions.

- The proposed regulations retain the general rule that DB and annuity contract payments must be nonincreasing. But the IRS added events that would allow payment increases following certain benefit suspensions, including those for 1) re-employment after commencing benefits, 2) plan insolvency, or 3) a plan in critical or declining status. This section also allows benefit increases for 1) a final death payment that is not greater than the excess of the contract's value over the payments made before death, 2) a short-term acceleration of payments made in advance for up to one year, and 3) any acceleration of payments to meet the SECURE Act RMD rules.

G. SECURE 2.0

The House of Representatives passed *Securing a Strong Retirement Act of 2022* (SECURE 2.0; HR 2954) on Tuesday, March 29, 2022, on a bipartisan basis (414-5). The bill is now in the Senate. This is an enhancement of the SECURE Act of 2019. SECURE 2.0 covers, among other things:

- Automatic enrollment in retirement plans

- Increase in required minimum distribution age beginning date

- Enhancements to the age 50+ catch-up provisions

- Online lost and found for long-forgotten pension benefits

- Modified rules to allow SIMPLE IRAs to accept Roth contributions

SECURE 2.0 would require §§401(k) and 403(b) plans to automatically enroll participants in the plans upon becoming eligible. Employees may opt out of coverage. The initial automatic enrollment amount is at least 3% but no more than 10%. Each subsequent year, that amount is increased by 1% until it reaches 10%. All current plans are grandfathered. There is an exception for small businesses with 10 or fewer employees, new businesses in business for less than three years, church plans, and governmental plans.

An employer would be allowed to make contributions under a §401(k) plan, §403(b) plan, or SIMPLE IRA with respect to "qualified student loan payments." Qualified student loan payment is broadly defined as any indebtedness incurred by the employee solely to pay qualified higher education expenses of the employee. Governmental employers would also be permitted to make matching contributions in a §457(b) plan or another plan with respect to such repayments.

SECURE 2.0 would make changes to the three-year small employer startup credit by:

- Increasing the startup credit from 50% to 100% for employers with up to 100 employees (up from previous 50-employee limit).

- The amount of the credit is increased by the applicable percentage of employer contributions on behalf of its employees, up to a per-employee cap of $1,000. This does not include employer contributions (i) as elective deferrals under Code Sec. 402(g)(3) or (ii) to a defined benefit plan under Code Sec. 414(j).

It would also fix an issue with the credit so that employers joining a multiple employer plan (MEPs, which includes pooled employer plans or PEPs) in existence for more than three years can take advantage of the credit.

The proposal would provide a credit to small employers having no more than 100 employees earning more than $5,000 per year. The credit would apply for each non-highly compensated employee married to a member of the military that becomes a participant in a defined contribution plan. The plan must provide for prompt plan eligibility for the military spouses and the benefits must be nonforfeitable and comparable to the benefits of other employees. The credit is for the three years and has two parts: $250 for the military spouse's participation and a dollar-for-dollar credit for the first $250 that the employer contributes to the plan for the employee up to a maximum credit of $1,500.

SECURE 2.0 would set the applicable percentage of the saver's credit at 50%, rather than having the percentage decline as income increases. It would also make the credit available to taxpayers with higher levels of adjusted gross income than under current law.

SECURE 2.0 would increase the RBD to age 73 starting on January 1, 2023 (for individuals who attain age 72 after December 31, 2022, and age 73 before January 1, 2030); to 74 starting on January 1, 2030 (for individuals who attain age 73 after December 31, 2029, and age 74 before January 1, 2033); and to 75 starting on January 1, 2033 (for individuals who attain age 74 after December 31, 2032).

The current $1,000 catch-up IRA contribution allowed for people aged 50 and over would be indexed for inflation. The current limit on catch-up contributions to a retirement plan would be increased to $10,000 ($5,000 for SIMPLE plans) and indexed for inflation. This applies to individuals who have attained ages 62, 63, and 64, but not age 65.

The SECURE Act requires employers to allow long-term, part-time workers to participate in their §401(k) plans. Except in the case of collectively bargained plans, employers maintaining a §401(k) plan must have a dual eligibility requirement under which an employee must complete either a one year of service requirement and the 1,000-hour rule or ***three*** consecutive years of service where the employee completes at least 500 hours of service. The proposal would reduce the three-year rule to two years. It also provides that pre-2021 service is disregarded for vesting purposes.

The proposal would create a national, online, lost and found for Americans' retirement plans. The Department of Labor, in consultation with Treasury, would issue regulations on what plan fiduciaries need to do to satisfy their duties to find missing participants.

It would also expand the Employee Plans Compliance Resolution System (EPCRS) to (1) allow more types of errors to be corrected internally through self-correction, (2) apply to inadvertent IRA errors, and (3) exempt certain failures to make required minimum distributions from the otherwise applicable excise tax. For example, the bill would allow for correction of many plan-loan errors through self-correction.

Additionally, SECURE 2.0 provides for:

- First responders to exclude from gross income service-connected disability pension payments after reaching retirement age.

- SIMPLE IRAs to accept Roth contributions. In addition, the provision would also allow employers to offer employees the ability to treat employee and employer SEP contributions as Roth (in whole or in part).

- Effective January 1, 2023, all catch-up contributions to qualified retirement plans would be subject to Roth tax treatment.

- Allow defined contribution plans to provide participants with the option of receiving matching contributions on a Roth basis.

H. Conclusion

The proposed regulations under the SECURE Act and the proposal under SECURE 2.0 have significant ramifications on taxpayers and retirement planning. Practitioners need to monitor both and review plans as necessary.

GROUP STUDY MATERIALS

A. Discussion Problems

You have the following client situations:

- Carl died in 2022 at age 76. His wife, Julia, also died in 2022 at the age of 69. Both had large IRAs. Their beneficiary is their 40-year old daughter, Megan.

- Peter, age 76, and his wife, Lindsay, age 45, both die in 2022. Their 10-year old son, Brad, is the beneficiary of their IRAs.

- Sarah, age 71, has asked you about some planning for her retirement accounts. She has a §401(k) and an IRA. She asks when she must start taking distributions.

Required:

Discuss the following issues raised by the above facts:

1. What are the RMD/distribution rules applicable in this situation for Carl, Julia, and their beneficiary, Megan?

2. What are the RMD/distribution rules applicable to this scenario for Peter, Lindsay, and their beneficiary, Brad?

3. What are the proposed changes to RBD under SECURE 2.0?

B. Suggested Answers to Discussion Problems

1. At the time of death, Carl was subject to the RMDs, but Julia was not. As a result, for Carl's IRA, Megan will be subject to both the 10-year rule and the annual stretch RMD rule. Since Julia dies before her RBD, Megan must empty the IRA inherited from Julia by the end of 2032. Distributions are not required each year.

   Distribution from Carl's IRA:

   - Year 1–9 – Calculate RMD (note that Megan can take more)

   - Year 10 – Distribute remaining balance.

   Distribution from Julia's IRA:

   - Years 1–9 – No required distributions

   - Year 10 – Distribute remaining balance

2. Since Brad is under age 21, he is a minor child and thus an "eligible designated beneficiary" until age 21. Thereafter, he is subject to the 10-year rule. In this situation, he will take RMDs until age 21 for both IRAs but is subject to different rules since his father is past the required beginning date for his required minimum distributions and his mother is not.

   - Peter's IRA – RMDs from 22 to 30 and distribute the balance by the time Brad is 31.

   - Lindsay's IRA – Distribute by the time Brad is 31 (10-year rule).

3. SECURE 2.0 proposes to increase the RBD to age 73 starting on January 1, 2023 (for individuals who attain age 72 after December 31, 2022, and age 73 before January 1, 2030); to age 74 starting on January 1, 2030 (for individuals who attain age 73 after December 31, 2029, and age 74 before January 1, 2033); and to age 75 starting on January 1, 2033 (for individuals who attain age 74 after December 31, 2032).

PART 3. BUSINESS TAXATION

Centralized Audit Procedures for Partnerships

The Bipartisan Budget Act centralized partnership audit regime replaced the TEFRA audit procedures and the electing large partnership rules. Under the BBA centralized partnership audit rules, the IRS generally assesses and collects any understatement of tax at the partnership level. An eligible partnership may make an annual election out of the centralized partnership audit regime on a timely filed Form 1065. If the partnership is not eligible to make the election or if the election is not filed on a timely basis, the partnership is subject to the centralized audit procedures. Ian Redpath and Bob Lickwar discuss some of the significant issues related to the Bipartisan Budget Act centralized partnership audit rules.

Let's join Ian Redpath and Bob Lickwar as they discuss this important topic.

Mr. Redpath

Bob, welcome to the program.

Mr. Lickwar

Thanks, Ian. Great to be here.

Mr. Redpath

It's always great to have you here and have your insights. And this is an area, you and I were talking the other day and you mentioned some really interesting issues that you've had with the centralized partnership audit rules and the pushout. So, we decided this would be a really good topic because we're kind of really starting to see these audits using these rules. They came into place effective in 2018. So, with the work of the IRS and the timeframes, they're really starting to get rolling on doing more and more of these audits under the new rules to those they apply to. I guess we can start right there and say, who do they apply to? I mean, who is actually under these? And what's the difference?

What are these new rules? I mean, what do they mean? Because many of our viewers, they really have never really been involved. Because as we know, Bob, I know you and I have been involved with a number of partnership audits. You're kind of the guru of partnership tax. And I know you get, not because you made a mistake, but you get a lot of work in the partnership audit area. So, a lot of people aren't familiar with it because I think for the most part, what do we see? They'll come in, the local office comes in and they go, you don't have enough basis to take those losses. And that wasn't even a partnership audit; that was auditing the individual. But that's how a partnership audit often started back in the old days. Can you kind of give us a 35,000-feet view of the difference between the old rules and the new rules?

Mr. Lickwar

Yes. And it's interesting, Ian. I started in this business back in 1985, a long, long time ago.

Mr. Redpath

But you were 12, right? Weren't you 12 when you started?

Mr. Lickwar

Oh gosh, I long for the days. Just hit 60. But in any event, I don't look a day over 63. Back in the old days, Ian, I had actually two partnerships that each owned a building in Hartford, Connecticut. And they were literally right across the street from each other. They were professional buildings, a lot of doctors in there. And two tax returns were prepared. One depreciated the building over the life of the leases, the other over the ACRS rules at that time, which were 19 years. And we had two agents, one handling each case, and one saying, "This is the way it should be depreciated." And the other disagreeing and that the life of the lease was fine. So that got me interested, Ian, and it got me thinking, how does the IRS collect tax when a partnership is involved? Well, under the old TEFRA rules, if you had more than 10 partners, the IRS was literally going to have to go after each and every partner in the partnership.

That, to me, does not seem very cost effective. And in fact, it was not cost effective. If you couldn't find a partner, you're not collecting any tax. So, after 30 years in the business, Ian, the BBA, the Bipartisan Budget Act of 2015, IRS asked Congress, "Can you help us out here, gang? We're having a tough time collecting from partnerships." And of course, Congress came back with something to simplify—and be very afraid of that word simplify because when they say simplify, it doesn't mean anything is going to be simplified. But in theory, I guess Ian, it did. It said, IRS, you can collect tax deficiencies related to partnership items from the partnership directly, using the highest statutory tax rate. So I file a tax return. I forget to capitalize inventory under 263A, or I don't know the rules. And the IRS comes in and says, "We think that you need to add $50,000 to your inventory SG&A; at 37%, you owe us $18,500. Here's some interest and some penalty. Write us a check."

Mr. Redpath

Bob, excuse me a second. Didn't it simplify it for the IRS?

Mr. Lickwar

The answer is theoretically, Ian, yes. But when you got the statute, you had all kinds of exceptions. Because people said, "Wait a minute, if I'm a passive investor, maybe I have passive losses. Shouldn't that become part of the consideration?" Or alternatively, "I'm in a lower tax rate, IRS. Shouldn't you consider that as well?" And so, many deviations were provided, Ian, even for partnerships who could qualify to opt out of this regime. And we'll talk about that in a minute. And there were things called push-out elections, which we'll talk about, where instead of paying the tax, the partnership could actually shift those adjustments to the individual partners. So, in theory, is it simple? Yes. But I have to tell you, Ian, if you're the partner in 2018 in the year being audited, and I bought your interest in 2021, and the IRS finishes up their audit in 2022, guess what? You're not going to be affected by the audit because you're not a partner anymore and I am. So I just bought into a hidden tax liability, which if I had known that you didn't know about Section 263A, I probably would have put a provision in our agreement that said, "Hey, wait a minute here. You have a tax item. Maybe I want to reduce my purchase price." So, that's really by way of background, and you raise a great point. And that point is, everybody will be confronted with this. And people are thinking, "Well, my clients are small clients; they're not going to deal with this." Well, the answer is, "Yes, they are." And here's why.

There's some data out there, Ian, that shows that roughly 95% of all partnerships are subject to the partnership-level audit regime. And many partnerships which had the ability to elect out of this regime, which means the IRS continues to go after individual partners, they have not made the election out. Now, maybe they don't know the rules. Maybe their partners are saying, "You know what? I don't want my individual tax return audited. Let's just keep it at the partnership level." Though, I don't know if that's a correct argument because in theory, if the partnership makes a push-out election, guess what? The IRS is going to see the return anyway. But in reality, 95% of partnerships, Ian, are going to be subject to these rules, including partnerships that could have made an election out of this regime.

Mr. Redpath

So, you said that we're going to see more, or we're going to see a lot more subject to it than what people think and that they don't know the rules. Who is automatically subject to it? And you mentioned the election out. So, who's automatically subject to it? And how do you elect out of the rules?

Mr. Lickwar

There's a couple of groups, Ian, a couple of partnerships that are automatically going to be subject to these rules. That would be partnerships with more than 100 partners. And it's really not more than a hundred partners; it's if you're issuing 100 or more K-1's. And that's important. That's an important distinction, because if you have an S corporation as a partner, you're not necessarily automatically subject to these rules. You can opt out. But you need to look through to the number of K-1's that the S corporation is issuing as well. For example, let's assume that we have 50 partners and two of them are S corporations, and each of the S corporations has 30 shareholders. In that case, there would be 111 K-1's issued, 60 and then of course to the S corporations themselves, and then you'd be subject to these new rules.

There are also certain types of partners that will disqualify you from the ability to opt out. That would be if you have a partnership as a partner, which is a very common structure to your partnerships. It could include disregarded entities, trusts, including grantor trusts, which are disregarded entities. All of those types of entities will not allow for an opt out of the partnership-level audit regime. We'll call it the BBA regime. So, if you want to elect out, Ian, and you're eligible to do so, you merely answer the question on Form 1065 and would attach Schedule B to your tax return. If you do not elect out or cannot elect out, you will check the question "no" and provide the IRS with someone called a partnership representative.

Mr. Redpath

Can I interrupt you here, Bob, for a second?

Mr. Lickwar

Go ahead, sure.

Mr. Redpath

I don't want to get to partnership representative until we've gone past this. So, if we have 100 partners or more, then we have no opt out, we're automatically in it. Or if we have an ineligible partner, we're in it. But I just want to make this one point clear and make sure I understand it myself. If we have less than 100, so I have a two-person partnership. Am I in it unless I opt out, or am I not in it? There's just two partners.

Mr. Lickwar

If one of the partners is a partnership, Ian, you are in it and you cannot opt out. If it's two individual partners, you are in it unless you opt out. And in a lot of cases, Ian, what we're finding, at least from the IRS empirical data, is that many people are not opting out. And I don't know whether that's intentionally or by mistake.

Mr. Redpath

And that was the point I was trying to get to is the fact that people don't always understand that.… They read the part about a large partnership, and they go, oh, the rules only apply to them without really understanding the rules really apply to every partnership, unless…. You just have that election to opt out, which is causing the problem as you mentioned. So, we make the election; we check the box. You mentioned Schedule B. What's the purpose of Schedule B?

Mr. Lickwar

Schedule [B-2], Ian, will provide the IRS with the list of partners in the partnership and their designation, whether they be individuals, S corps, C corps, all of those qualifying partners. Obviously, if one of the partners is a partnership or an LLC taxed as a partnership, or even a trust that's a grantor trust and a disregarded entity, unfortunately, that's going to disqualify you. It seems that it's a bit of redundant information, because obviously the K-1's that are issued have all of this information as well. But Schedule [B-2] is an affirmative election with the IRS. And also if there is an election out, the partner needs to be notified within 30 days of filing the return. Many statements are being attached on footnotes to Schedules K-1 to allow the partners to know that the partnership has opted out.

Mr. Redpath

So, we check the box that we're opting out and fill out Schedule [B-2]. And Part II, by the way, is that S corp you mentioned, which is important. You have to list all the shareholders of the S corp. When you're counting how many you have, you have to include those. And then the 30-day notice. What if you don't give the 30-day notice? Does that mean the election to opt out is invalid?

Mr. Lickwar

In theory, the opt out is invalid. In practice, I'm not sure what would theoretically happen or what we would do. But theoretically, what the IRS would say is that if the procedures are not followed, there's no substantial compliance here. And therefore, they can proceed with the audit at the partnership level, is my thinking of what they could probably do. You could probably argue there's been substantial compliance except for the note to the partner. But I don't know if the IRS will buy that, Ian.

Mr. Redpath

Yes. Well, I guess we haven't had enough in here to get to the point yet where we're going to see that type of an argument; but I'm sure there's going to be some litigation at some point on that. Because I could see where that might be missed, that 30-day notice.

Mr. Lickwar

There are actually, Ian, various parts of our country where the audits have started. The audits of the partnerships have started. I was in the Midwest recently; apparently, there's some activity there. And there's a brand new troop of IRS partnership auditors, Ian, while Congress mulls changes to Subchapter K at some point. So, they're going to be out there. I think you're going to see more and more of this as we go forward.

Mr. Redpath

Yes. Two things, I think. And we've been hearing for years and years that we're going to go after partnerships. IRS keeps telling us they're going to go after partnerships, and it never happens. And we've still got those partnerships where they go to the partner and say, "You didn't have enough basis." And they never really looked very closely at other things unless it was really absurd. But one of the things they constantly have said is they're going to train more people in partnerships. There's not enough. They don't know enough, I'm going to use that term for the IRS saying; and it's the IRS saying it, "We're just not trained enough." But as you said, they've been training people specifically in partnership tax areas so we're going to get, I think, we're going to see more qualified people coming in and auditing higher level on partnerships as part of what the IRS is going to do.

And the second comment I want to make, which I think is really important, is a lot of our viewers may not be aware of the fact that there is a major bill. It's not part of Build Back Better; but there's a major bill that was introduced in the Senate. It's in the Senate Finance Committee right now, to totally overhaul Subchapter K. And I mean, it is a major overhaul of Subchapter K. So it's something I think you need to kind of follow, is that legislation, because it does seem to have some bipartisan support. Not part of Build Back Better, a separate one standalone act that's been introduced and does seem to be gaining some support. It's got some really, I would say, not so good provisions in it in revising Subchapter K.

So you started to mention the partnership representative. Some of our viewers who are not doing partnership tax regularly may recall the tax matters partner. And that's traditionally what we had. But boy, there's a huge difference, isn't there, between tax matters partner under the old rules and the new partnership representative?

Mr. Lickwar

Yes, there certainly is, Ian. And under the BBA rules, this new regime, the concept of tax matters partner has basically been removed and replaced with the partnership representative. The partnership representative is going to be the sole go-between between the partnership and the IRS in an audit. Okay? So, you're going to want to be very diligent and careful as to who you pick to represent the partnership. In most cases, it's probably not a big deal. But in a lot of cases, Ian, where partnerships have a lot of partners, you could even be looking at appointing someone who is not a partner in the partnership; and that is perfectly fine as long as you designate them.

But here's the real takeaway here. If the goal is that the partnership upon audit will not pay the tax, but elections will be made to push the adjustments out to partners of the partnership, you want to make sure that the partnership representative knows that that's the intention of the partnership. If there are certain other actions that are to be taken—for example, I mentioned it earlier, I'll mention it again—if the IRS makes an adjustment and one of the partners or more have passive activity losses, you can actually petition the IRS to reduce the applicable understatement of tax by the amount of those passive activity losses.

Now, the IRS is not required to accept those. I don't know why they wouldn't. But the reality is, Ian, you're going to want somebody who really knows their ins and outs. Now, that doesn't mean there can't be somebody in the background, like the preparer coaching the partnership representative. But if the partnership goes sideways and that partnership representative is someone who you're trying to expel from the partnership, you could see where this could lead to all sorts of things. So you really want to be careful about who you designate. You want the agreement to designate it. The partnership or the LLC document itself is as good a place as any, or a separate document addendum to those. And I think that in a lot of cases, Ian, that has not happened because this is so new. That means the IRS can theoretically come in and designate someone for you. We'll see how they react to that when push comes to shove.

Mr. Redpath

I think you mentioned something that really is important here is the fact that it should be an agreement; because as a preparer, just because you've been dealing with this particular partner doesn't mean necessarily that everyone would agree that that person can, and you use the word, bind the partnership in the audit. They can bind the partnership, and you're stuck with it as a partner. Now you may, as you said, you might be able to request a change, but basically let's just say, to start with, you're going to be bound with what other decisions they make. As a preparer, I want to make sure that whoever I'm putting down as the personal representative is someone that the partnership has agreed to. Because it's a significant amount of power in that person who may not be, in a larger partnership, not all of the partners may have agreed to it. Maybe there's 10 partners. Especially if I'm not preparing the returns for all the partners, which is quite common. I want to know that the person I'm putting down there is really the person who has that power, because I can see that potentially they might come after me.

Mr. Lickwar

Absolutely.

Mr. Redpath

Okay, is this the person designated in your documents? That's a great, great suggestion to protect ourselves as preparers to make sure that that's done. So the partnership, you mentioned there's going to be a partnership-level audit, which I believe is going to be much broader than we used to see in most partnerships, which is almost always focused on the basis of the partner. So we're going to see a lot of really higher level audits, doing things as you mentioned, cost of goods sold, 263A, depreciation. We're going to see a lot of different types of audits. So, what happens? Okay. They get the audit notice. What happens from there? Where are the adjustments made? Kind of run me through what's going to happen now when we get this notice.

Mr. Lickwar

And I do want to let people know that the IRS has put up on their website how the procedure will work. It'll be a normal procedure, Ian. You'll get the notice, you'll set up the appointment, and the IRS will do their thing; but they will deal exclusively with the partnership representative. Let's say that the IRS finds that too much was deducted under one item, like meals and entertainment. The IRS will make an adjustment. And if the partnership has not elected out of the BBA regime, or they could not, the partnership will receive an assessment.

The partnership will then have a period of time where they can actually contest the assessment, generally 270 days; but there's a lot of different daily requirements going on here. If you agree to the adjustment, the tax will merely be paid by the partnership. Or alternatively, perhaps the partnership will elect to push the adjustments out to the partners. If that, in fact, is the case, there will be a form filed, the [Form 8986]; that will actually go to the partners in the year that the audit is closed, which is a very big distinction. We won't go back to, for example, 2018, which is the year under audit. If the audit is concluded and agreed to in 2022, you will file [Form 8986] or you will pay the tax in 2022. You won't have to go back and amend the 2018 return.

Mr. Redpath

Bob, if I can interject here, I just want our viewers to be aware that you're going to hear different years. You're going to hear something called the adjustment year. That's the year where the audit is concluded. So, for the depreciation method, cost of goods sold. You have the reviewed year. Well, we're reviewing your 2019 tax return for the partnership. And then, you have the intervening years, which we could be okay, well, what's happened between now and today because your cost of goods sold, we're saying it has to be adjusted; so that means going forward you have those, and those are called correction years. So, you're going to see these different terms. And as you mentioned, you're going to get a notice of proposed partnership adjustment. And then, the partnership personal representative can challenge it.

But I think the point that people have to be aware of, if you have a client who is a partner in a larger partnership, is the fact that you're not getting a notice of these adjustments. You're not involved in the audit. You don't know what. You don't really have the input. You may not even know they were audited, right? I mean, you don't necessarily know that. And you certainly, you don't get a copy of the notice of proposed adjustment, even though it affects you. I mean whether the partnership pays it or it gets pushed out, it is affecting you. Those are things that we have to keep in mind. So, you get this, the partnership, they pay it in what year? So, they get the adjustment. They're not amending returns. They're not doing anything. Here's your adjustment. Pay it, right?

Mr. Lickwar

Yep, in the year that the audit is concluded. For example, if the IRS starts an audit of my 2019 tax return in 2021, and that we conclude the audit in 2022, we'll merely pay the tax in 2022. If we push the adjustment out to the partners with [Form 8986], the partners will then complete another form with their individual return, Form 8978. That will be attached to their 1040. Additional taxes will be reported on Schedule 2. And if there's a refund, on Schedule 3. So there are actually specific lines for taxes calculated on Form 8978. And all the 8978 really is, Ian, is it shows a recalculation of tax for the adjustment year. In my example, again, 2019 was audited. The audit concluded in 2022; the adjustment that was made to T&E was pushed out to me as a partner on my 2022 tax return. I will recalculate what my tax is for 2019 and merely pay the difference with my 1040 as an additional tax. So, that's as simple as it works.

Mr. Redpath

So that's going to be paid. Now, with this, and as you mentioned, and I want to go back one step. Who's making the push-out election? Because let's say the IRS is going to come in essentially and say, "Okay, you had a corporate partner, 21%. You had individual partners, highest individual rates. Okay, that's what you're paying. You're paying the highest rate applicable to the partners. And we know what the partners are. So therefore, here's what your tax is." And as you mentioned earlier, well, wait a second, I'm not in the highest bracket. This partner. Those are determinations that you're not really involved in. Now it gets pushed out to you. So, what's getting pushed out to you? Your share of the tax, or your share of the adjustments?

Mr. Lickwar

It's actually a share of both, the tax and the adjustment. Because what happens is when you recalculate the tax, you can also be allowed a credit for the tax that's paid in that adjustment year when you do that recalculation. One of the examples I've seen in practice was a change in classification of income from non-QBI, 199A eligible, to QBI eligible based on regulations. The thing you need to know here, Ian, and it's very important and practical, is that if you have not elected out of this regime, you can't file amended returns anymore. You have to make administrative adjustment requests, or AAR's. And Ian, you haven't lived until you've done an AAR because it's four times more time consuming than it is to actually prepare the partnership return. But we got beyond that. We made the adjustment and we pushed out the classification of the income as 199A eligible to the partner.

And guess what? We came up with a refund, which is great. Yes, we're doing well. However, Ian, one little snafu on Form 6251, the line 10 of Form 6251 instructions, tell us that we need to reduce our AMT by the amount of any credit on Schedule 3, which is from the [8986]. So you're now thrust into the AMT. I think this is a snafu that the IRS eventually needs to correct. So, stay tuned. It's almost like the form is under construction. But your point is well taken that, yes, there can be… the potential tax and the adjustments passed out via the push-out election. And those will all flow through to [Form 8986].

Mr. Redpath

So you get the form. So you get the, you said 8978.

Mr. Lickwar

[8986], and then you fill out 8978 with your 1040.

Mr. Redpath

Okay. So the push-out is on the [Form 8986]?

Mr. Lickwar

Right.

Mr. Redpath

And then on the 1040, you'll be attaching an 8978 and Schedule A, showing what the adjustments are. Do I have that right?

Mr. Lickwar

You got that right, Ian.

Mr. Redpath

Okay. Again, and I want to make sure we're clear on this. We have the adjustment that's done and the proposed tax. So, we get the notice. And we elect to push it out. So, I'm only paying 20%. How am I going to do that? Am I just going to say, "Well, here's my adjustments." And put it on the 8978 and say, "This is what my tax would have been in 2019." And so, I'm going to pay that adjustment now. Or do I say, "Well, am I stuck with that highest tax rate?"

Mr. Lickwar

No, you are not stuck with the highest tax rate. You will actually plug in the adjustments and figure what your tax would have been, had the return been, I'll say, prepared correctly in the first place. Which is, I don't mean that the return was prepared incorrectly; it just means there was an IRS adjustment. And that figures in all kinds of other taxes, Ian, including the alternative minimum tax. Which is really curious as to why the IRS is telling us to reduce our tax for AMT purposes by the amount of the credit. Because it seems that the adjustment was already considered somewhere else. It doesn't make a lot of sense, quite frankly.

Mr. Redpath

Right. No, it doesn't. No, it doesn't at all. What if, I mean, so I get the notice of proposed. We're not going to push it out. The IRS is essentially going to say, "Hey, highest rate, right? Highest individual rate, highest corporate rate, depending on the partner. Here's what you owe. Here's your penalties and interest." How do I argue now? Or can I argue and say, "Well, wait a second. This partner had some passive losses." Am I able, as the representative, am I able to make arguments essentially on a partner-by-partner basis of saying, "Well, no, this partner would pay tax at this level. This partner would be paying tax at this level." Assuming I could even get that information. But if I could get that information, can I make that argument to the Service? Because the assumption is highest rate of tax.

Mr. Lickwar

Absolutely you can, Ian. You can press that maybe there's an exempt partner in there, like a charity. There's an individual who has capital losses, or passive losses, or other passive items, maybe even passive credits. Absolutely. You have 270 days, generally, from the time the IRS gives you the notice. And generally 45 days for other actions. So you can actually start the process, Ian, and get those tax returns, hopefully from your partners and say, "IRS, this is the deal. Look at these. You can reduce the taxes. Here's a tax-exempt entity. Here's a passive loss carryover. Here's a capital loss carryover if it's a capital item." The IRS is asked to consider, but they don't have to. Quite frankly, I don't know why they wouldn't do it. But the regulations are worded so loosely that it seems that the IRS is not automatically compelled to do so. I don't know why they would not.

Mr. Redpath

Bob, your hourly rate is significantly higher than mine. And so therefore, the partners are going to say, "Well, wait a second. We're not going to pay you, Lickwar, to do this. Let's just push it out." But this is that representative, right, who's saying, "Hey Lickwar, we're not paying your fees. Let's just push this out. Let's let them do it because… first, we have to get their returns for the reviewed years. Then we have to have you go and analyze them for the return years. And we've got to pay you for doing all of that. Isn't it easier just to push it out?" Am I wrong on that analysis that a representative might have to make?

Mr. Lickwar

You are not wrong. And I think in most cases, these adjustments are going to be pushed out. Last year in last tax filing season, Ian, one of my clients actually received a Form 8976 package from one of the large publicly traded partnerships. I can probably say who it was. I think it was Cheniere Energy Partners if I'm not speaking out of school. They apparently underwent an audit. They had an adjustment that was made. Ian, they pushed it out. They're a publicly traded partnership. I don't think there's any way they're going to gather how many 1040's. And I don't think it's completely impractical to push out the elections. If you know that your partners have passive losses and things, why bother? Push it out. Let them consider the tax on their 1040. I think that's what you're going to see in many, many cases.

Mr. Redpath

So, if I'm a partner in the partnership and I'm looking at it and I'm going, "Okay, I can have the partnership pay Bob Lickwar to go over everybody's returns. And boy, my return's not that difficult. I mean, seriously. Why should I be paying a portion of the fees for Bob to go over this other partner's very complicated return and figure out what's due? I'm going to pay to have my own preparer do it. But why should I pay for Lickwar to go over these very complicated returns that other people have?" Because again, I'm paying a portion of it as a partner, right? I mean, it's coming out of my partnership. I think realistically, a lot of people would say, "Yes, it makes more sense just to push it out and let the partner make that determination at the partner level." But that doesn't change the fact that the personal representative has bound you to certain things at the audit. You're only pushing out the adjustments and the tax; you're not pushing out the decisions. Those were already made. A partner can't go back and go, "I'm challenging this. I'm challenging this. I don't think that was correct." Can they do that? I mean, do they have any option in that, or are they just stuck?

Mr. Lickwar

The partners are not involved at all, Ian. That's why you want to make sure you have a good personal representative. I would say the only thing you're missing by not allowing me to negotiate with the IRS is my stunningly enchanting personality. But other than that, I would say I agree with you. I think you're going to make all the push-out elections. I also want to give just a little practical advice here. With the process of AARs if you have to amend a return being so difficult, and I think even the IRS acknowledges this. When you see various revenue rulings, for example, a ruling we received about how to treat PPP loan forgiveness, the IRS gave BBA partnerships a certain amount of time to forget about filing an AAR and actually using an amended return instead. So, the IRS knows how complicated this is.

A little trick of the trade, Ian. If you're going to file your client's partnership return by the March 15th deadline for a calendar year, maybe it makes sense to extend the return also. Because then if you find an error within six months, you can actually file what's called a superseding return. It's not an amended return, but you don't have to go through the AAR procedures. It's a return that you designate as a superseding return, and it will supplant the return that was originally filed without all of the AAR difficulty. So that's just a little practice hint. I don't know how many returns get filed where there's errors that are discovered in six months, but that's all I've got now, I guess.

Mr. Redpath

Right. Well Bob, this is an area that obviously is complicated. And by the way, you still have essentially the 90 days to go into tax court. I mean, you still have that option if you disagree with the IRS; I mean, essentially you're getting a 90-day letter of the assessment. So, that option is still on the table. But boy, this is going to be a whole new world for partnership tax, as they start unrolling more and more of these audits. And boy, you've provided us with a lot of interesting things to look at here, especially this AMT issue, which is something that many people may find that they get caught into. So Bob, I want to thank you for your insight here. It's been great. You've given us some great information as usual. Always great to have you on the program. So, thanks for being here.

Mr. Lickwar

Thanks, Ian. My pleasure.

Mr. Redpath

And thank you to our viewers. We always appreciate you coming on and watching our programs. Thank you and have a good day.

Centralized Partnership Audit Regime (CPAR)

By Ian J. Redpath, JD, LLM

A. Introduction

The CPAR was enacted as part of the Bipartisan Budget Act of 2015. Partnerships subject to these rules are called BBA partnerships. The Regime does not allow a BBA partnership to file an amended Form 1065, but rather reports changes on Form 8082, Administrative Adjustment Request (AAR). The Regime centralizes the audit to the partnership level. Unless an eligible partnership opts out, all adjustments to items of income, gain, loss, deduction, credit of a partnership, and partners' distributive shares (partnership adjustments) will be determined at the partnership level. If there is additional tax and or penalties (imputed underpayment), they will be determined, assessed, and collected at the partnership level. [IRC § Sec. 6221]

B. Regulations

The IRS issued comprehensive CPAR regulations. Eligible partnerships, required to furnish 100 or fewer Schedules K-1, are eligible to opt out. However, each partner in an eligible partnership must be an individual, corporation, including certain types of foreign entities that would be treated as a "C" corporation if domestic, or a decedent's estate. Corporations include both a regulated investment company (RIC) and a real estate investment trust (REIT). Additionally, an organization that is classified as a corporation and is exempt from tax under IRC §501(a) will be treated as a C corporation for this purpose. [Reg. § 301.6221(b)-1(b)]

The determination of whether the partnership has 100 or fewer partners is made by counting the number of statements required to be furnished under IRC §6031(b). A husband and wife are counted separately. [Reg. § 301.6221(b)-1(b)(2)(iii)] If there is an S corporation partner, each person that is required to be furnished a statement by the S corporation [IRC §6037(b)] for the tax year of the S corporation ending with or within the partnership's tax year is considered a separate partner for this test. [Reg. § 301.6221(b)-1(b)(2)(iii)]

The election is made on a timely filed partnership return, including extensions, for the tax year to which the election relates. It may only be revoked with the IRS's consent. [Reg. § 301.6221(b)-1(c)(1)] If the partnership is electing out, it must answer yes to Question 29 on Schedule B of Form 1065 and complete Schedule B-2. Schedule B-2 is used to provide the information to show that the partnership is eligible to opt out. Once elected, the partnership must notify its partners within 30 days of making the election. The notice may be in writing, electronic, or other form chosen by the partnership. [Reg. §301.6221(b)-1(c)(3)] The IRS may rely on the election for all purposes unless and until the IRS determines that the election is invalid. If the election is defective, the partnership may still rely upon it unless challenged by the IRS, and the IRS may also rely upon the election in determining whether a partnership is subject to the Regime. [Reg. §301.6221-1(e)]

Each partnership must designate as its partnership representative a person with a substantial presence in the U.S.; the partnership representative will have the sole authority to act on behalf of the partnership. [IRC §6223(a) and Reg. § 301.6223-1] If none is designated, the IRS may select any person as the partnership representative. [IRC §6223(a) and Reg. §301.6223-1(f)(1)] There can be only one designated partnership representative for a partnership tax year at any time. [Reg. §301.6223-1(a)] A partnership and all partners of such partnership are bound by the actions of the partnership representative for actions taken under this audit Regime or by any final decision in a proceeding brought under this audit Regime. [IRC §6223(b)] A person has substantial presence in the U.S. if: (1) the person is able to meet in person with the IRS in the U.S. at a reasonable time and place as was necessary and appropriate as determined by the IRS; (2) the partnership representative has a street address in the U.S. and a telephone number with a U.S. area code where the partnership representative can be reached by U.S. mail and telephone during normal business hours; and (3) the person has a U.S. taxpayer identification number. [Reg §301.6223-

1(b)(2)] The partnership representative designation is made each year on the partnership tax return. A designation, even if defective, remains in effect until the partnership, the representative, or the IRS takes affirmative action to terminate it. [Reg. §§§301.6223-1(d); (e) & (f)] A designation cannot be changed by resignation or revocation until the IRS issues a notice of administrative proceeding to the partnership or the partnership has filed a valid AAR. [Reg. §301.6227-1] A revocation or resignation is effective 30 days after the IRS is sent notice of it. A disregarded entity may serve as the partnership representative; but it has to meet the same Regime as when other entities serve as partnership representatives, and thus the partnership is required to appoint a designated individual to act on behalf of the disregarded entity under Reg. §301.6223-1(b)(3), and both the disregarded entity and the designated individual must have a substantial presence in the United States. Additionally, a partnership may designate itself as its representative if it believes it is the most appropriate person to serve in that capacity. In that case, it must designate an individual to act on its behalf, and both it and the individual must have a substantial presence in the United States.

If a partnership has not designated anyone or when the partnership has made multiple designations and revocations in a short time period, the IRS must notify a partnership within 90 days that it does not have a valid partnership representative designation.

The CPAR applies to all items required to be shown or reflected on the partnership's return and information in the partnership's books and records related to a determination of items of income, gain, loss, deduction, or credit. Any resulting tax, penalties, or additional amounts relating to an adjustment are determined, assessed, and collected at the partnership level. [Reg. §301.6221(a)-1] The "reviewed year" is the year that is under audit. The 'adjustment year" is the year that the audit is concluded and the adjustments are made. If the adjustments affect intervening years, such as a depreciation method or cost of goods, those are referred to as "correction years." The amount owed is the "imputed underpayment." The fact that the tax is being paid in a year other than the year under review could result in one or more different partners bearing the burden of the additional amounts due. This should be addressed in the partnership agreement.

Reg. §301.6222-1(a)(1) provides that a partner's treatment of each item of income, gain, loss, deduction, or credit attributable to a partnership must be consistent with the treatment of those items on the partnership return. This includes the amount, timing, and characterization of those items. The determination of whether a partner treats an item consistently with the partnership return is determined with reference to the treatment of that item on the partnership return, not any schedule or other information provided or furnished by the partnership to the partner such as a schedule K-1 furnished to the partner unless the election under Reg. § 301.6222-1(d) applies.

If the IRS identifies an inconsistency, it may conduct both a proceeding with respect to the partner in which the partnership is not involved and a proceeding with respect to the partnership. [Reg. §301.6222-1(c)(4)(i)] Any final decision with respect to an inconsistent position identified in a notice to the IRS under IRC §6222 in a proceeding to which the partnership was not a party is not binding on the partnership. The IRS is not required to conform items on the partner's return to make those items consistent with the treatment of the items on the partnership return provided it is adjusted to reflect proper treatment under the law. [Reg. §301.6222-1(c)(4)(ii)] A partner provides notice of an inconsistency if the partner treats an item consistently with incorrect information that the partnership furnished to the partner and makes an election to allow such treatment. The partner must demonstrate that the treatment of the item on the partner's return is consistent with the treatment of that item on the incorrect schedule or information furnished to the partner by the partnership. The election must be made within 60 days from the date of the notice informing the partner of the inconsistent treatment and must be clearly identified as an election under IRC §6222(c)(2)(B). It must be signed by the partner making the election and accompanied by copies of the schedule or other information furnished to the partner by the partnership as well as the notice from the IRS informing the partner of the conforming adjustment. It may also require an explanation if the inconsistency is not clear. [Reg. §301.6222-1(d)(2)]

IRC §6222 provides that when a partner fails to treat items attributable to a partnership consistently with the treatment of those items on the partnership return, the IRS may assess and collect any underpayment of tax that results from that inconsistency as if it were on account of a mathematical or clerical error appearing on the partner's return; however, the ability to request an abatement of the assessment under IRC §6213 does not apply. [Reg. §301.6222-1(b)] IRC §6213 allows the IRS to immediately assess and collect tax that arises on account of a mathematical or clerical error appearing on a taxpayer's return, notwithstanding the general restrictions on assessment and collection of deficiencies. Under IRC §6213(b), the taxpayer has 60 days to request an abatement of that assessment. The exception applies only to inconsistent positions that are specifically identified to the IRS in a proper notification. [Reg. §301.6222-1(c)(3)]

If the BBA partnership wishes to amend any partnership item under IRC §6227, it generally uses the AAR Form 8082. The current version of the form is not designed to accommodate the reporting of multiple imputed underpayments. A partnership may file multiple AARs to allocate adjustments into separate imputed underpayments. For example, the partnership may file one AAR reporting an imputed underpayment that the partnership pays, while filing another AAR reporting an imputed underpayment for which the partnership elects to push out the adjustments. The process is similar to the results in an audit. The amount of an imputed underpayment of tax as a result of an audit is generally equal to the sum of all net positive adjustments resulting from the audit multiplied by the highest rate of tax applicable to individuals or corporations in effect for the reviewed year, plus interest and applicable penalties. The grouping and netting Regime may cause such an underpayment to exceed what the tax would have been to the reviewed year partners had those partners reported their incomes consistently with the results of the audit. For example, if an item is reallocated among the partners, the increase to one is not offset by the decrease to another partner. As a result, the reallocation may give rise only to a net positive adjustment and an underpayment of tax. The imputed underpayment may be reduced in certain circumstances such as (i) a partner has amended its return to take into account its share of items resulting from the adjustment, (ii) the partnership is able to demonstrate that some of its partners in the reviewed year were tax exempt and that the income would not be taxable to such partner, or (iii) the partnership is able to demonstrate that a lower rate of tax should apply to an item. The adjustments not resulting in an underpayment of tax are generally taken into account as adjustments to the partnership items allocated to the current-year partners. The rules for how interest and penalties will be computed on an imputed underpayment are provided in IRC §6233.

A partnership may avoid paying the imputed underpayment in the adjustment year by electing to “push out” the adjustment to its reviewed-year partners. To make this election, the partnership must report a U.S. taxpayer identification number for each partner, including foreign partners. If the partnership pushes out the adjustment to its reviewed-year partners, each affected partner is obligated to take the adjustment into account in the reviewed year by either (1) calculating the increase in the partner’s tax owed in the reviewed year and in all intervening years as a result of the adjustment, or (2) paying a safe harbor amount that is calculated by the partnership. [Reg. §301.6226-1(a)] If a partnership makes a valid election, then the partnership is no longer liable for the imputed underpayment. A partnership may make an election with respect to one or more imputed underpayments identified in a final partnership adjustment (FPA). For example, where the FPA includes a general imputed underpayment and one or more specific imputed underpayments, the partnership may make an election under this section with respect to any or all of the imputed underpayments. The underpayment rate used to calculate the reviewed-year partners’ liability for interest will generally be higher than that which would apply if the partnership itself pays the underpayment. The proposed regulations do not permit a “push out” adjustment to be made through tiered partnerships. The election must be made within 45 days of the date the FPA was mailed by the IRS. It must be signed by the partnership representative, include all required information, including a copy of the FPA to which the election relates, and be properly filed with the IRS. [Reg. §301.6226-1(c)(3)] The partnership also must furnish statements to the reviewed-year partners with respect to the partner's share of the adjustments within 60 days after the date the adjustments become finally determined and file such statements with the IRS. [Reg. §301.6226-2(a)] All reviewed-year partners are bound by the election and required to take the adjustments on the statement into account and pay any additional tax.

A reviewed-year partner's share of the adjustments that the partner has to take into account are reported in the same manner as originally reported on the return filed by the partnership for the reviewed year. [Reg. §301.6226-2(f)] If the adjusted item was not reflected in the partnership's reviewed-year return, the adjustment is reported in accordance with the Regime that apply to the item. However, if the adjustments, as finally determined, are allocated to a specific partner or in a specific manner, the partner's share of the adjustment would have to follow how the adjustment is allocated in that final determination. [Reg. §301.6226-2(f)] If items are not of a specific nature, they are allocated in accordance to how such items are normally reported and shared by the partners. The reviewed-year partner must also pay the partner's share of any penalties, additions to tax, or additional amounts reflected in the statement, and any interest on such amounts.

The aggregate of the adjustment amounts is the aggregate of the relevant “correction amounts” determined under Reg. §301.6226-3(d), which includes the year under review and any intervening years. These correction amounts cannot be less than zero, and any amount below zero after applying the Regime in Reg. §301.6226-3(b) would not reduce any correction amount, any tax in the reporting year, or any other amount. The correction amount for the first affected year would be the amount by which the reviewed year partner's income tax would increase for the first affected year by taking into account the adjustments reflected in the statement provided to the reviewed-year partner under Reg. §301.6226-2. The aggregate correction amount for all intervening years would be the sum of the correction amounts for each intervening year. [Reg. §301.6226-3(b)(3)]

A partner that is furnished a statement may elect, on the partners' return for the reporting year, to pay the safe harbor amount, or the interest safe harbor amount, in the case of certain individuals shown on the statement in lieu of the additional reporting year tax. [Reg. §301.6226-3(c)] The safe harbor amount is generally the partner’s share of the imputed underpayment, penalties, and interest determined at the partnership level. This amount is provided by the partnership.

A partnership may proactively seek to correct an error on a previously filed return by filing an administrative adjustment request (AAR). [Reg. §301.6227-1(a)] The request may be with respect to one or more items of income, gain, loss, deduction, or credit of the partnership and any partner's distributive share thereof for any partnership tax year as determined under IRC §6221 and the regulations. The partnership has three years from the date of filing the return to make an AAR for that year, but will not be able to make an AAR for a partnership tax year after the IRS has mailed a notice of an administrative proceeding with respect to the tax year.

The IRS will send a notice of administrative proceeding at the partnership level. After a determination, the IRS will send a notice of proposed partnership adjustments. The final notice of partnership adjustments cannot be mailed earlier than 270 days after the date on which the notice of the proposed partnership adjustments is mailed. This rule also applies where a partnership filed an administrative adjustment request. These notices will be sufficient if mailed to the last known address of the partnership representative or the partnership, even if it is no longer in existence.

Under IRC §6234(a), a partnership may petition for readjustment within 90 days of the date the FPA is mailed. The regulations coordinate the Regime under IRC §6234 so that an election can be made during the timeframe provided under IRC §6226, within 45 days of the date the FPA is mailed, without cutting off the partnership's right to challenge the adjustments in court within the timeframe provided for in IRC §6234. While the election under IRC §6226 must be filed within 45 days of the date the FPA is mailed, the filing and furnishing of the statements is not required until 60 days after the adjustments are finally determined. [Reg. §301.6226-2(b)] The partnership adjustments would become finally determined upon the later of the expiration of the time to file a petition under IRC §6234 or, if a petition is filed, the date when the court's decision becomes final [Reg. §301.6226-2(b)] The IRS must wait 90 days after the FPA before assessing.

C. Reporting

File Form 1065-X, *Amended Return or Administrative Adjustment Request (AAR)*, if you are not filing electronically, to correct items on a previously filed Form 1065, Form 1065-B, or Form 1066, make an AAR for a previously filed Form 1065, Form 1065-B, or Form 1066, or file an amended return by a partnership-partner of a BBA partnership as part of the modification process of a BBA proceeding with respect to that BBA partnership; otherwise, use the AAR Form 8082. Partnerships do not use amended K-1s.

Form 8985 is used to summarize and transmit Forms 8986, *Partner's Share of Adjustment(s) to Partnership-Related Item(s)*, by an audited partnership, administrative adjustment request (AAR) partnership, or pass-through partner. Form 8985 is also used to report payment made and related calculations by a pass-through partner. Additionally, Form 8985-V is used by a pass-through partner to submit a tax payment related to a BBA audit or BBA AAR.

D. Conclusion

The CPAR dramatically changes how partnership and partner related audits are conducted and changes in partnership tax items. Additionally, there are numerous issues that may need to be addressed in the partnership agreement. Practitioners need to be cognizant of these rules.

A. Discussion Problems

Your new clients, Carlie and Frank, have interests (Carlie 40%, Frank 49%) in Smith LLC, taxed as a partnership. Carlie and Frank are not related to each other. Smith has received a notice of examination of its 2020 tax return. In reviewing the partnership return as well as Carlie's and Frank's individual returns, you discover the following:

- Carlie took an inconsistent position concerning an item of income. She disclosed the position.
- In 2020, Rick was a partner. Rick left the partnership in 2021. In 2020, Rick received a special allocation of an item that you now believe is suspect.
- Frank has had to pay only nominal taxes since 2019, when his other business sustained a large net operating loss. This is expected to continue for several more years. Carlie is in the highest tax bracket.

Required:

1. What is the result of using the CPAR?
2. What concerns are raised by the inconsistent treatment of items?
3. If they elect to use the new Regime, are there any elections available?

B. Suggested Answers to Discussion Problems

1. This partnership appears to be an eligible partnership that could "opt out" of the CPAR. It would do so on its annual Form 1065, Question 29, and complete Schedule B-2. The adjustment would then effectively follow the old TEFRA rules with partner-level audits. If they do not opt out, adjustments to items of income, gain, loss, deduction, credit of a partnership, and partners' distributive shares (partnership adjustments) will be determined at the partnership level. If there is additional tax and/or penalties (imputed underpayment), they will be determined, assessed, and collected at the partnership level. [IRC §6221] If they do not opt out, the partnership will have to appoint a partnership representative, and that should be either Carlie or Frank if you will be handling the audit. They will have authority to make decisions and bind the partnership and, as a result, the partners.

   Consideration should be given to the partner's tax brackets. The assessment to the partnership will be at the highest individual rate. Based upon the facts, Frank may not be taxed at that rate. Consideration should be given to pushing out any adjustments to the partners.

2. If it is determined that Carlie's position is incorrect, the IRS may immediately assess and collect tax that arises on account of a mathematical or clerical error appearing on a taxpayer's return, notwithstanding the general restrictions on assessment and collection of deficiencies. Reg. §301.6222-1(a)(1) provides that a partner's treatment of each item of income, gain, loss, deduction, or credit attributable to a partnership must be consistent with the treatment of those items on the partnership return. The determination of whether a partner treats an item consistently with the partnership return is determined with reference to the treatment of that item on the partnership return, not any schedule or other information provided or furnished by the partnership to the partner such as a Schedule K-1 furnished to the partner unless the election under Reg. §301.6222-1(d) applies. Under IRC §6213(b), the taxpayer has 60 days to request an abatement of that assessment. The exception applies only to inconsistent positions that are specifically identified to the IRS in a proper notification, which this was [Reg. §301.6222-1(c)(3)].

3. Form 8985 is used to summarize and transmit Forms 8986, *Partner's Share of Adjustment(s) to Partnership-Related Item(s)*, by an audited partnership, administrative adjustment request (AAR) partnership, or pass-through partner. Form 8985 is also used to report payments made and related calculations by a pass-through partner. Additionally, Form 8985-V is used by a pass-through partner to submit a tax payment related to a BBA audit or BBA AAR.

GLOSSARY OF KEY TERMS

Coronavirus Aid, Relief, and Economic Security Act (CARES Act)—H.R. 748, also known as the CARES Act, is the third coronavirus relief package and was signed into law on March 27, 2020. This bill had bipartisan support in both the Senate and House and contains both tax and non-tax provisions applicable to individuals and businesses.

Infrastructure Investment and Jobs Act—Public Law No. 117-58, also known as the Bipartisan Infrastructure Framework, was signed into law by President Biden on November 15, 2021 and includes approximately $1.2 trillion in spending to include funding for broadband access, clean water, electric grid renewal, and transportation and road provisions, along with tax-related provisions.

Qualified Student Loan Payment—For purposes of SECURE 2.0, qualified student loan payment is broadly defined as any indebtedness incurred by the employee solely to pay qualified higher education expenses of the employee.

Reporting Year—Reporting year is the partner's tax year(s) that includes the date the audited partnership furnished the Forms 8986, *Partner's Share of Adjustment(s) to Partnership-Related Item(s)*, to the partners.

Reviewed Year—Reviewed year is the audited partnership's tax year to which the partnership adjustment(s) relates.

SECURE 2.0—H.R. 2954, Securing a Strong Retirement Act of 2022, was passed by the House of Representatives on March 29, 2022.

Setting Every Community Up for Retirement Enhancement (SECURE Act)—Part of the Further Consolidated Appropriations Act, 2020 (H.R. 1865, P.L. 116-94, the SECURE Act was enacted on December 20, 2019. It provides expanded opportunities for individuals for retirement savings and makes a number of administrative simplifications. It also includes a change to the kiddie tax.

Tax Cuts and Jobs Act (TCJA)—Public Law No. 115-97, an act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, was signed into law by President Trump on December 22, 2017. Although not the official name for the new legislation, it is most commonly referred to as the Tax Cuts and Jobs Act (TCJA).

CUMULATIVE INDEX 2022

BY TOPIC

BY CITATION

BY SPEAKER

Choose the best response and record your answer in the space provided on the answer sheet.

1. According to Ian Redpath, in which of the following cases was the multi-factor test regarding reasonable compensation applied?

   A. *Clary Hood, Inc. v. Commissioner*
   B. *Debra Jean Blum v. Commissioner*
   C. *Jeremy E. Porter v. Commissioner*
   D. *Mann Construction Inc. v. U.S.*

2. According to Ian Redpath, which of the following cases relates to whether the IRS violated the Administrative Procedures Act notice and comment provisions?

   A. *Clary Hood, Inc. v. Commissioner*
   B. *Debra Jean Blum v. Commissioner*
   C. *Jeremy E. Porter v. Commissioner*
   D. *Mann Construction Inc. v. U.S.*

3. According to Ian Redpath, in which of the following cases did the Court of Appeals uphold the Tax Court in determining that the lawsuit resulted in a malpractice settlement rather than a personal injury settlement?

   A. *Clary Hood, Inc. v. Commissioner*
   B. *Debra Jean Blum v. Commissioner*
   C. *Jeremy E. Porter v. Commissioner*
   D. *Mann Construction Inc. v. U.S.*

4. According to Ian Redpath, in which of the following did the Sixth Circuit Court of Appeals rule that the extinguishment regulations regarding the in perpetuity rules for charitable conservation easements are valid?

   A. *Clary Hood, Inc. v. Commissioner*
   B. *Debra Jean Blum v. Commissioner*
   C. *Oakbrook Land Holdings, LLC. v. Commissioner*
   D. *Pickens Decorative Stone LLC v. Commissioner*

5. According to Ian Redpath, in which of the following did the Tax Court reject the argument that public notice advising the participants of syndicated easement transactions was the first formal communication regarding penalties?

   A. *Clary Hood, Inc. v. Commissioner*
   B. *Debra Jean Blum v. Commissioner*
   C. *Oakbrook Land Holdings, LLC v. Commissioner*
   D. *Pickens Decorative Stone LLC v. U.S*

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6. According to Ian Redpath and Larry Pon, which of the following is also known as the ghost rule?

   A. 5-year rule
   B. 10-year rule
   C. RBD rule
   D. RMD rule

7. According to Ian Redpath and Larry Pon, which of the following is ***not*** one of the five categories of eligible designated beneficiaries?

   A. Child over the age of majority
   B. Chronically ill beneficiary
   C. Disabled beneficiary
   D. Surviving spouse

8. According to Ian Redpath and Larry Pon, which of the following dates is used to determine if an individual beneficiary is no more than 10 years younger than the decedent?

   A. December 31 of the year in which each individual was born
   B. December 31 of the year before each individual was born
   C. January 1 of the year in which each individual was born
   D. Actual birthday of each individual

9. According to Ian Redpath and Larry Pon, if the five-year rule is applicable and 2020 is one of the years involved, the distribution must be made within how many years?

   A. Six years
   B. Five years
   C. Four years
   D. One year

10. According to Ian Redpath and Larry Pon, if SECURE 2.0 becomes law as passed by the House of Representatives, the required minimum distribution age would eventually increase to what level?

    A. Age 72
    B. Age 75
    C. Age 76
    D. Age 80

Continued on next page

11. According to Ian Redpath and Bob Lickwar, recent data indicates that approximately what percentage of partnerships are subject to the partnership-level audit regime?

    A. 45%
    B. 75%
    C. 95%
    D. 100%

12. According to Ian Redpath and Bob Lickwar, which of the following is eligible to opt out of the partnership-level audit regime?

    A. Two-partner partnership with one individual partner and one partnership partner
    B. Ten-partner partnership with ten individual partners
    C. 50-partner partnership with 50 partnership partners
    D. 150-partner partnership with 150 individual partners

13. According to Ian Redpath and Bob Lickwar, on which of the following forms must a question be answered affirmatively in order to opt out of the partnership-level audit regime?

    A. Form 1065
    B. Form 8978
    C. Form 8985
    D. Form 8986

14. According to Ian Redpath and Bob Lickwar, which of the following is required if a partnership is subject to the partnership-level audit regime?

    A. Attorney
    B. CPA
    C. Partnership representative
    D. Tax matters partner

15. According to Ian Redpath and Bob Lickwar, which of the following forms should an individual attach to his/her Form 1040 if adjustments are pushed out to the partners?

    A. Form 1065
    B. Form 8978
    C. Form 8985
    D. Form 8986

CPE Network®
Tax Report
Volume 35, Issue 4 **May 2022**

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Centralized Audit Procedures for Partnerships	|______|	|______|	|______|	|______|	|______|	|______|

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Lawrence Pon	|______|	|______|	|______|
Robert Lickwar	|______|	|______|	|______|

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Total CPE Credit:	3.0
Instructions:	During the webinar, the moderator must verify student presence a minimum of 3 times per CPE hour. This is achieved via polling questions. Sponsors must have a report which documents the responses from each student. The timing of the polling questions should be random and not made known to students prior to delivery of the course. Record the polling question responses below. Refer to the CPL Network User Guide for more instructions. Partial credit will not be issued for students who do not respond to at least 3 polling questions per CPE hour.
Brief Description of Method of Polling	Example: Zoom: During this webinar, moderator asked students to raise their hands 3 times per CPE hour. The instructor then noted the hands that were raised in the columns below.

			First CPE Hour			CPE Hour 2			CPE Hour 3			FOR TR USE ONLY
First Name	**Last Name**	**Student Email**	**Poll 1**	**Poll 2**	**Poll 3**	**Poll 1**	**Poll 2**	**Poll 3**	**Poll 1**	**Poll 2**	**Poll 3**	**Certificate Issued?**

CHECKPOINT LEARNING NETWORK

CPE NETWORK®
USER GUIDE

REVISED SEPTEMBER 3, 2021

Welcome to CPE Network!

CPE Network programs enable you to deliver training programs to those in your firm in a manageable way. You can choose how you want to deliver the training in a way that suits your firm's needs: in the classroom, virtual, or self-study. You must review and understand the requirements of each of these delivery methods before conducting your training to ensure you meet (and document) all the requirements.

This User Guide has the following sections:

- **"Group Live" Format:** The instructor and all the participants are gathered into a common area, such as a conference room or training room at a location of your choice.
- **"Group Internet Based" Format:** Deliver your training over the internet via Zoom, Teams, Webex, or other application that allows the instructor to present materials that all the participants can view at the same time.
- **"Self-Study" Format:** Each participant can take the self-study version of the CPE Network program on their own computers at a time and place of their convenience. No instructor is required for self-study.
- **What Does It Mean to Be a CPE Sponsor?:** Should you decide to vary from any of the requirements in the 3 methods noted above (for example, provide less than 3 full CPE credits, alter subject areas, offer hybrid or variations to the methods described above), Checkpoint Learning Network will not be the sponsor and will not issue certificates. In this scenario, your firm will become the sponsor and must issue its own certificates of completion. This section outlines the sponsor's responsibilities that you must adhere to if you choose not to follow the requirements for the delivery methods.
- **Getting Help:** Refer to this section to get your questions answered.

IMPORTANT: This User Guide outlines in detail what is required for each of the 3 formats above. Additionally, because you will be delivering the training within your firm, you should review the Sponsor Responsibilities section as well. To get certificates of completion for your participants following your training, you must submit all the required documentation. (This is noted at the end of each section.) Checkpoint Learning Network will review your training documentation for completeness and adherence to all requirements. If all your materials are received and complete, certificates of completion will be issued for the participants attending your training. Failure to submit the required completed documentation will result in delays and/or denial of certificates.

IMPORTANT: If you vary from the instructions noted above, your firm will become the sponsor of the training event and you will have to create your own certificates of completions for your participants. In this case, you do not need to submit any documentation back to Thomson Reuters.

If you have any questions on this documentation or requirements, refer to the "Getting Help" section at the end of this User Guide **BEFORE** you conduct your training.

We are happy that you chose CPE Network for your training solutions. Thank you for your business and HAPPY LEARNING!

Copyrighted Materials

“Group Live” Format

CPE Credit

All CPE Network products are developed and intended to be delivered as 3 CPE credits. You should allocate sufficient time in your delivery so that there is no less than 2.5 clock hours:

50 minutes per CPE credit TIMES 3 credits = 150 minutes = 2.5 clock hours

If you wish to have a break during your training session, you should increase the length of the training beyond 2.5 hours as necessary. For example, you may wish to schedule your training from 9 AM to 12 PM and provide a ½ hour break from 10:15 to 10:45.

***Effective November 1, 2018:** Checkpoint Learning CPE Network products ‘group live’ sessions must be delivered as 3 CPE credits and accredited to the field(s) of study as designated by Checkpoint Learning Network. Checkpoint Learning Network will not issue certificates for “group live” deliveries of less than 3 CPE credits (unless the course was delivered as 3 credits and there are partial credit exceptions (such as late arrivals and early departures). Therefore, if you decide to deliver the “group live” session with less than 3 CPE credits, your firm will be the sponsor as Checkpoint Learning Network will not issue certificates to your participants.

Advertising / Promotional Page

Create a promotion page (use the template after the executive summary of the transcript). You should circulate (e.g., email) to potential participants prior to training day. You will need to submit a copy of this page when you request certificates.

Monitoring Attendance

You must monitor individual participant attendance at “group live” programs to assign the correct number of CPE credits. A participant’s self-certification of attendance alone is not sufficient.

Use the **attendance sheet.** This lists the instructor(s) name and credentials, as well as the first and last name of each participant attending the seminar. The participant is expected to initial the sheet for their morning attendance and provide their signature for their afternoon attendance. If a participant arrives late, leaves early, or is a “no show,” the actual hours they attended should be documented on the sign-in sheet and will be reflected on the participant's CPE certificate.

Real Time Instructor During Program Presentation

"Group live" programs must have a **qualified, real time instructor while the program is being presented.** Program participants must be able to interact with the instructor while the course is in progress (including the opportunity to ask questions and receive answers during the presentation).

Elements of Engagement

A "group live" program must include at least one element of engagement related to course content during each credit of CPE (for example, group discussion, polling questions, instructor-posed question with time for participant reflection, or use of a case study with different engagement elements throughout the program).

Make-Up Sessions

Individuals who are unable to attend the group study session may use the program materials for self-study either in print or online.

- If the print materials are used, the user should read the materials, watch the video, and answer the quizzer questions on the CPE Quizzer Answer Sheet. Send the answer sheet and course evaluation to the address listed on the answer sheet and the CPE certificate will be mailed or emailed to the user. Detailed instructions are provided on Network Program Self-Study Options.
- If the online materials are used, the user should log on to her/his individual Checkpoint Learning account to read the materials, watch the interviews, and answer the quizzer questions. The user will be able to print her/his/their CPE certificate upon completion of the quizzer. (If you need help setting up individual user accounts, please contact your firm administrator or customer service.)

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded by Checkpoint Learning Network after the "group live" documentation is received (and providing the course is delivered as 3 CPE credits). The certificate of completion will reflect the credit hours earned by the individual, with special calculation of credits for those who arrived late or left early.

Subscriber Survey Evaluation Forms

Use the evaluation form. You must include a means for evaluating quality. At the conclusion of the "group live" session, evaluations should be distributed and any that are completed are collected from participants. Those evaluations that are completed by participants should be returned to Checkpoint Learning Network along with the other course materials. While it is required that you circulate the evaluation form to all participants, it is NOT required that the participants fill it out. A preprinted evaluation form is included in the transcript each month for your convenience.

Retention of Records

Regardless of whether Checkpoint Learning Network is the sponsor for the "group live" session, it is required that the firm hosting the "group live" session retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (Group Study Attendance sheets; indicating any late arrivals and/or early departures)
- Copy of the program materials
- Timed agenda with topics covered and elements of engagement used
- Date and location of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name and credentials
- Results of program evaluations.

Finding the Transcript

When the DVD is inserted into a DVD drive, the video will immediately begin to play and the menu screen will pop up, taking the entire screen. Hitting the Esc key should minimize it to a smaller window. To locate the pdf file of the transcript either to save or email to others, go to the start button on the computer. In My Computer, open the drive with the DVD. The Adobe Acrobat files are the transcript files. If you do not currently have Adobe Acrobat Reader (Mac versions of the reader are also available), a free version of the reader may be downloaded at:

- https://get.adobe.com/reader/

Requesting Participant CPE Certificates

When delivered as 3 CPE credits, documentation of your "group live" session should be sent to Checkpoint Learning Network by one of the following means:

Mail: Thomson Reuters
PO Box 115008
Carrollton, TX 75011-5008

Email: **CPLgrading@tr.com**

Fax: 888.286.9070

When sending your package to Thomson Reuters, you must include ALL of the following items:

Form Name	Included?	Notes
Advertising / Promotional Page		Complete this form and circulate to your audience before the training event.
Attendance Sheet		Use this form to track attendance during your training session.
Subscriber Survey Evaluation Form		Circulate the evaluation form at the end of your training session so that participants can review and comment on the training. Return to Thomson Reuters any evaluations that were completed. You do not have to return an evaluation for every participant.

Incomplete submissions will be returned to you.

“Group Internet Based” Format

CPE Credit

All CPE Network products are developed and intended to be delivered as 3 CPE credits. You should allocate sufficient time in your delivery so that there is no less than 2.5 clock hours:

50 minutes per CPE credit TIMES 3 credits = 150 minutes = 2.5 clock hours

If you wish to have a break during your training session, you should increase the length of the training beyond 2.5 hours as necessary. For example, you may wish to schedule your training from 9 AM to 12 PM and provide a ½ hour break from 10:15 to 10:45.

***Effective November 1, 2018:** Checkpoint Learning CPE Network products ‘group live’ sessions must be delivered as 3 CPE credits and accredited to the field(s) of study as designated by Checkpoint Learning Network. Checkpoint Learning Network will not issue certificates for “group live” deliveries of less than 3 CPE credits (unless the course was delivered as 3 credits and there are partial credit exceptions (such as late arrivals and early departures). Therefore, if you decide to deliver the “group live” session with less than 3 CPE credits, your firm will be the sponsor as Checkpoint Learning Network will not issue certificates to your participants.

Advertising / Promotional Page

Create a promotion page (use the template following the executive summary in the transcript). You should circulate (e.g., email) to potential participants prior to training day. You will need to submit a copy of this page when you request certificates.

Monitoring Attendance in a Webinar

You must monitor individual participant attendance at “group internet based” programs to assign the correct number of CPE credits. A participant’s self-certification of attendance alone is not sufficient.

Use the **Webinar Delivery Tracking Report.** This form lists the moderator(s) name and credentials, as well as the first and last name of each participant attending the seminar. During a webinar you must set up a monitoring mechanism (or polling mechanism) to periodically check the participants’ engagement throughout the delivery of the program.

In order for CPE credit to be granted, you must confirm the presence of each participant **3 times per CPE hour and the participant must reply to the polling question**. Participants that respond to less than 3 polling questions in a CPE hour will not be granted CPE credit. For example, if a participant only replies to 2 of the 3 polling questions in the first CPE hour, credit for the first CPE hour will not be granted. (Refer to the Webinar Delivery Tracking Report for examples.)

Examples of polling questions:

1. You are using **Zoom** for your webinar. The moderator pauses approximately every 15 minutes and ask that participants confirm their attendance by using the “raise hands” feature. Once the participants raise their hands, the moderator records the participants who have their hands up in the **webinar delivery tracking report** by putting a YES in the webinar delivery tracking report. After documenting in the spreadsheet, the instructor (or moderator) drops everyone’s hands and continues the training.
2. You are using **Teams** for your webinar. The moderator will pause approximately every 15 minutes and ask that participants confirm their attendance by typing “Present” into the Teams chat box. The moderator records the participants who have entered “Present” into the chat box into the **webinar delivery tracking report**. After documenting in the spreadsheet, the instructor (or moderator) continues the training.
3. If you are using an application that has a way to automatically send out polling questions to the participants, you can use that application/mechanism. However, following the event, you should create a **webinar delivery tracking report** from your app’s report.

Additional Notes on Monitoring Mechanisms:

1. The monitoring mechanism does not have to be “content specific.” Rather, the intention is to ensure that the remote participants are present and paying attention to the training.
2. You should only give a minute or so for each participant to reply to the prompt. If, after a minute, a participant does not reply to the prompt, you should put a NO in the webinar delivery tracking report.
3. While this process may seem unwieldy at first, it is a required element that sponsors must adhere to. And after some practice, it should not cause any significant disruption to the training session.
4. **You must include the Webinar Delivery Tracking report with your course submission if you are requesting certificates of completion for a “group internet based” delivery format.**

Real Time Moderator During Program Presentation

“Group internet based” programs must have a **qualified, real time moderator while the program is being presented.** Program participants must be able to interact with the moderator while the course is in progress (including the opportunity to ask questions and receive answers during the presentation). This can be achieved via the webinar chat box, and/or by unmuting participants and allowing them to speak directly to the moderator.

Make-Up Sessions

Individuals who are unable to attend the "group internet based" session may use the program materials for self-study either in print or online.

- If print materials are used, the user should read the materials, watch the video, and answer the quizzer questions on the CPE Quizzer Answer Sheet. Send the answer sheet and course evaluation to the address listed on the answer sheet and the CPE certificate will be mailed or emailed to the user. Detailed instructions are provided on Network Program Self-Study Options.
- If the online materials are used, the user should log on to her/his individual Checkpoint Learning account to read the materials, watch the interviews, and answer the quizzer questions. The user will be able to print her/his CPE certificate upon completion of the quizzer. (If you need help setting up individual user accounts, please contact your firm administrator or customer service.)

Awarding CPE Certificates

The CPE certificate is the participant's record of attendance and is awarded by Checkpoint Learning Network after the "group internet based" documentation is received (and providing the course is delivered as 3 CPE credits). The certificate of completion will reflect the credit hours earned by the individual, with special calculation of credits for those who may not have answered the required amount of polling questions.

Subscriber Survey Evaluation Forms

Use the evaluation form. You must include a means for evaluating quality. At the conclusion of the "group live" session, evaluations should be distributed and any that are completed are collected from participants. Those evaluations that are completed by participants should be returned to Checkpoint Learning Network along with the other course materials. While it is required that you circulate the evaluation form to all participants, it is NOT required that the participants fill it out. A preprinted evaluation form is included in the transcript each month for your convenience.

Retention of Records

Regardless of whether Checkpoint Learning Network is the sponsor for the "group internet based" session, it is required that the firm hosting the session retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (Webinar Delivery Tracking Report)
- Copy of the program materials
- Timed agenda with topics covered
- Date and location (which would be "virtual") of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name and credentials
- Results of program evaluations

Finding the Transcript

When the DVD is inserted into a DVD drive, the video will immediately begin to play and the menu screen will pop up, taking the entire screen. Hitting the Esc key should minimize it to a smaller window. To locate the pdf file of the transcript either to save or email to others, go to the start button on the computer. In My Computer, open the drive with the DVD. It should look something like the screenshot below. The Adobe Acrobat files are the transcript files. If you do not currently have Adobe Acrobat Reader (Mac versions of the reader are also available), a free version of the reader may be downloaded at:

- https://get.adobe.com/reader/

Alternatively, for those without a DVD drive, the email sent to administrators each month has a link to the pdf for the newsletter. The email may be forwarded to participants who may download the materials or print them as needed.

Requesting Participant CPE Certificates

When delivered as 3 CPE credits, documentation of your "group internet based" session should be sent to Checkpoint Learning Network by one of the following means:

Mail: Thomson Reuters
PO Box 115008
Carrollton, TX 75011-5008

Email: **CPLgrading@tr.com**

Fax: 888.286.9070

When sending your package to Thomson Reuters, you must include ALL the following items:

Form Name	**Included?**	**Notes**
Advertising / Promotional Page		Complete this form and circulate to your audience before the training event.
Webinar Delivery Tracking Report		Use this form to track the attendance (i.e., polling questions) during your training webinar.
Evaluation Form		Circulate the evaluation form at the end of your training session so that participants can review and comment on the training. Return to Thomson Reuters any evaluations that were completed. You do not have to return an evaluation for every participant.

Incomplete submissions will be returned to you.

“Self-Study” Format

If you are unable to attend the live group study session, we offer two options for you to complete your Network Report program.

Self-Study—Print

Follow these simple steps to use the printed transcript and DVD:

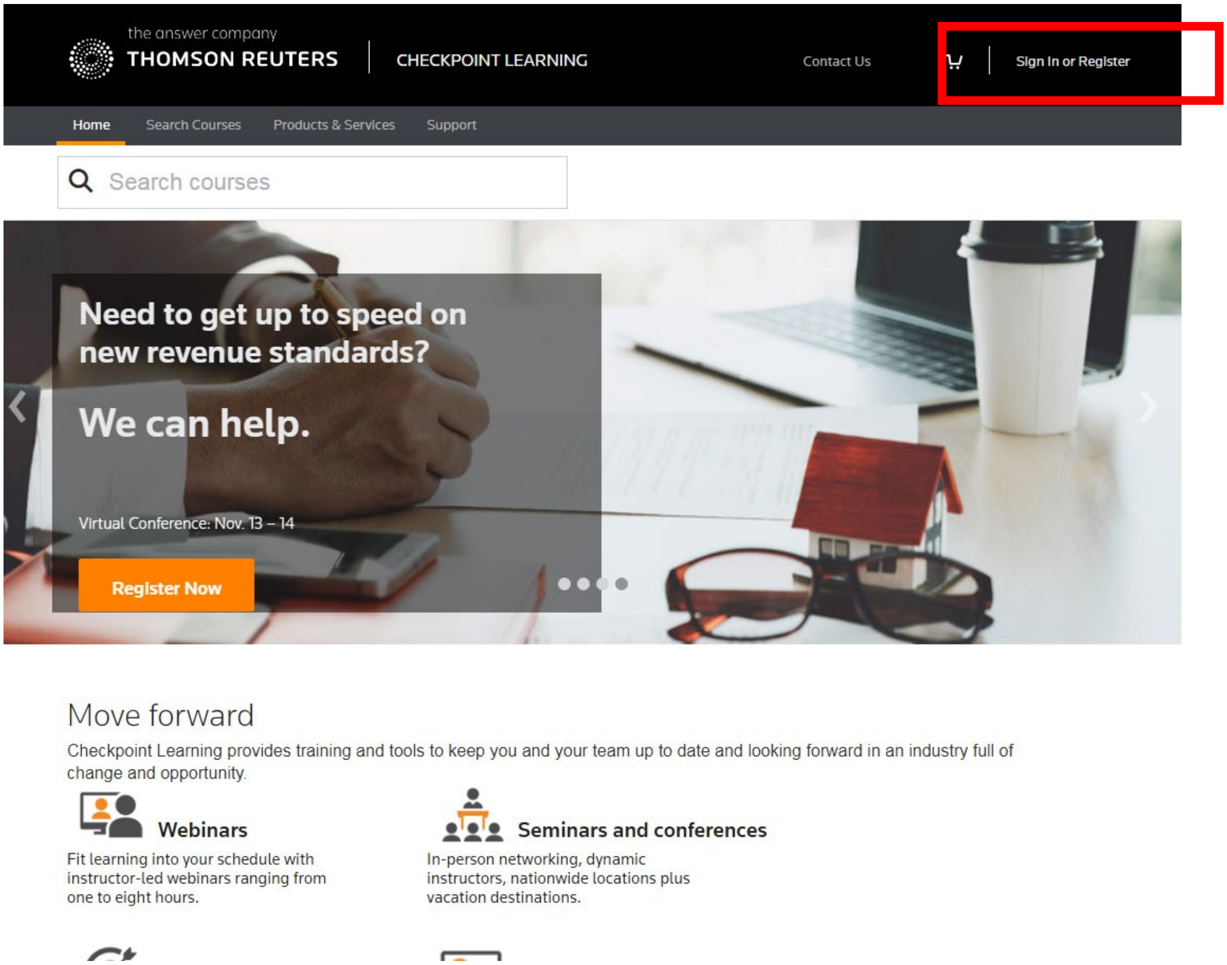
- Watch the DVD.
- Review the supplemental materials.
- Read the discussion problems and the suggested answers.
- Complete the quizzer by filling out the bubble sheet enclosed with the transcript package.
- Complete the survey. We welcome your feedback and suggestions for topics of interest to you.
- Mail your completed quizzer and survey to:

  Thomson Reuters
  PO Box 115008
  Carrollton, TX 75011-5008

Self-Study—Online

Follow these simple steps to use the online program:

- Go to www.checkpointlearning.thomsonreuters.com .
- Log in using your username and password assigned by your firm’s administrator in the upper right-hand margin (“Sign In or Register”).



the answer company
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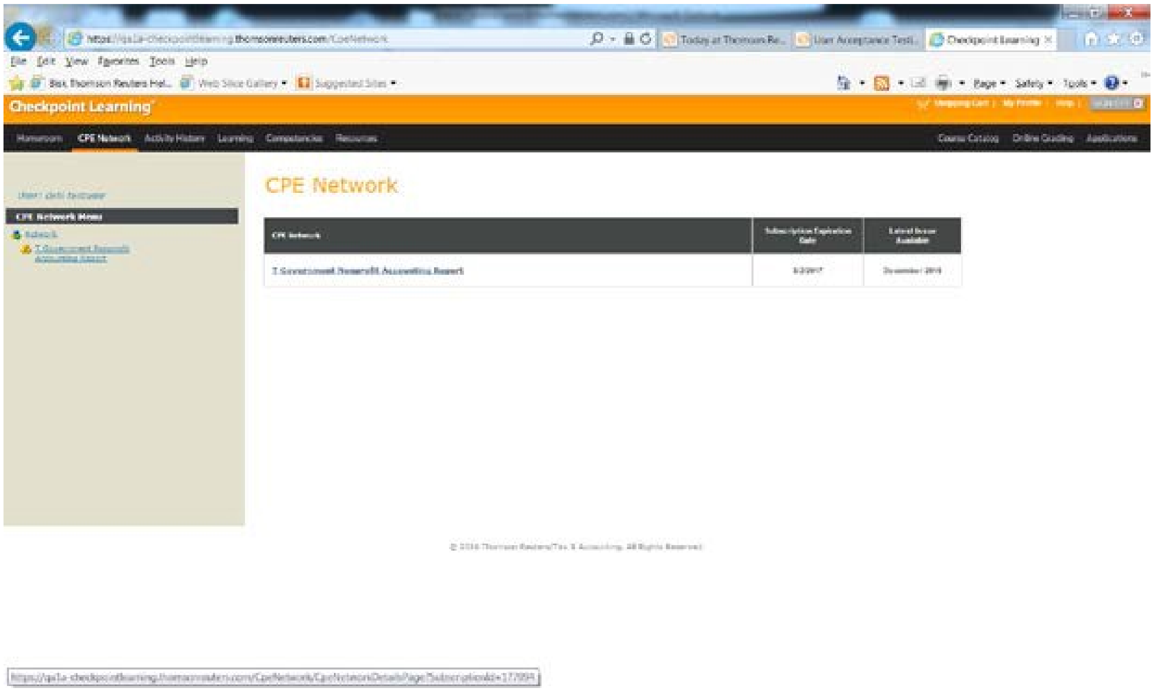
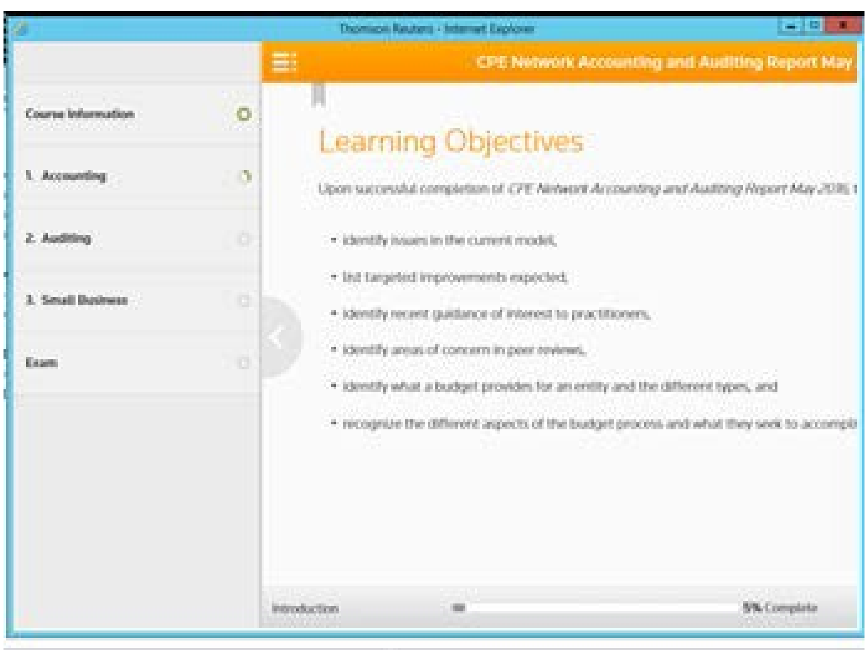
Contact Us
Sign In or Register
Home
Search Courses
Products & Services
Support
Search courses
Need to get up to speed on new revenue standards?
We can help.
Virtual Conference: Nov. 13 – 14
Register Now
Move forward
Checkpoint Learning provides training and tools to keep you and your team up to date and looking forward in an industry full of change and opportunity.
Webinars
Fit learning into your schedule with instructor-led webinars ranging from one to eight hours.
Seminars and conferences
In-person networking, dynamic instructors, nationwide locations plus vacation destinations.

- In the **Network** tab, select the Network Report for the month desired.

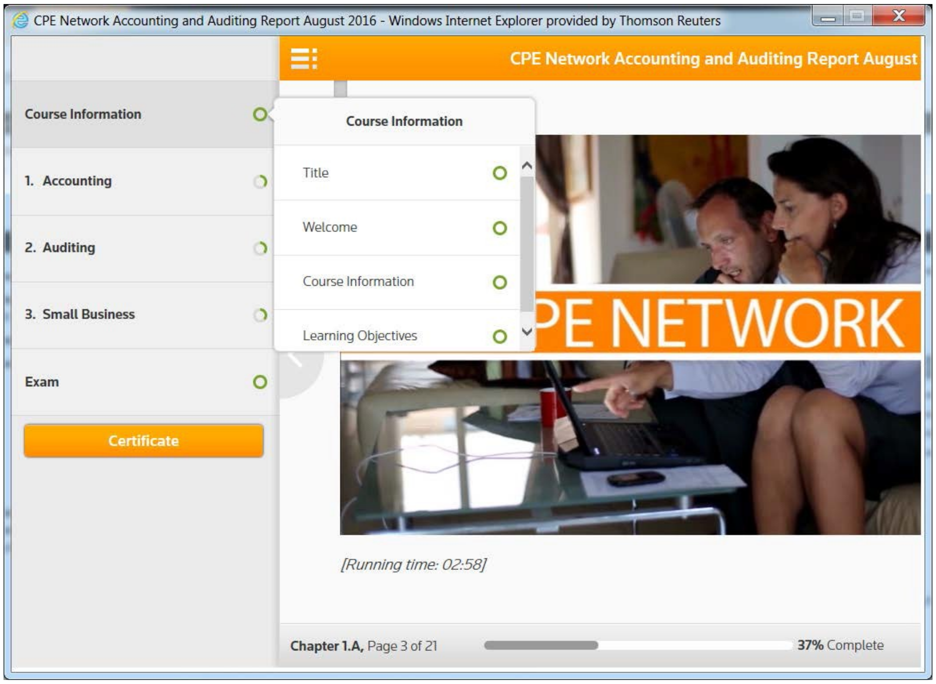


The Chapter Menu is in the gray bar at the left of your screen:

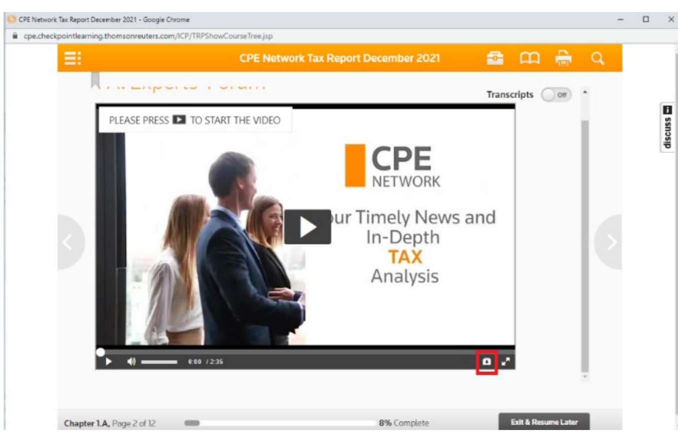


Click down to access the dropdown menu and move between the program Chapters.

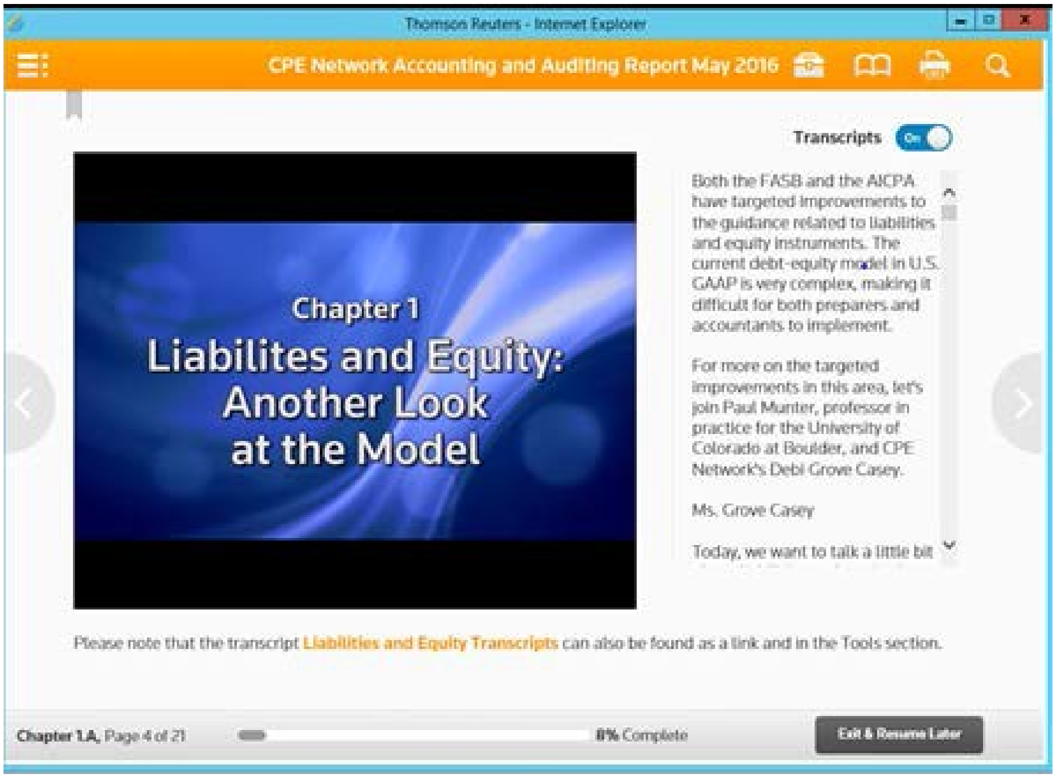
- **Course Information** is the course Overview, including information about the authors and the program learning objectives



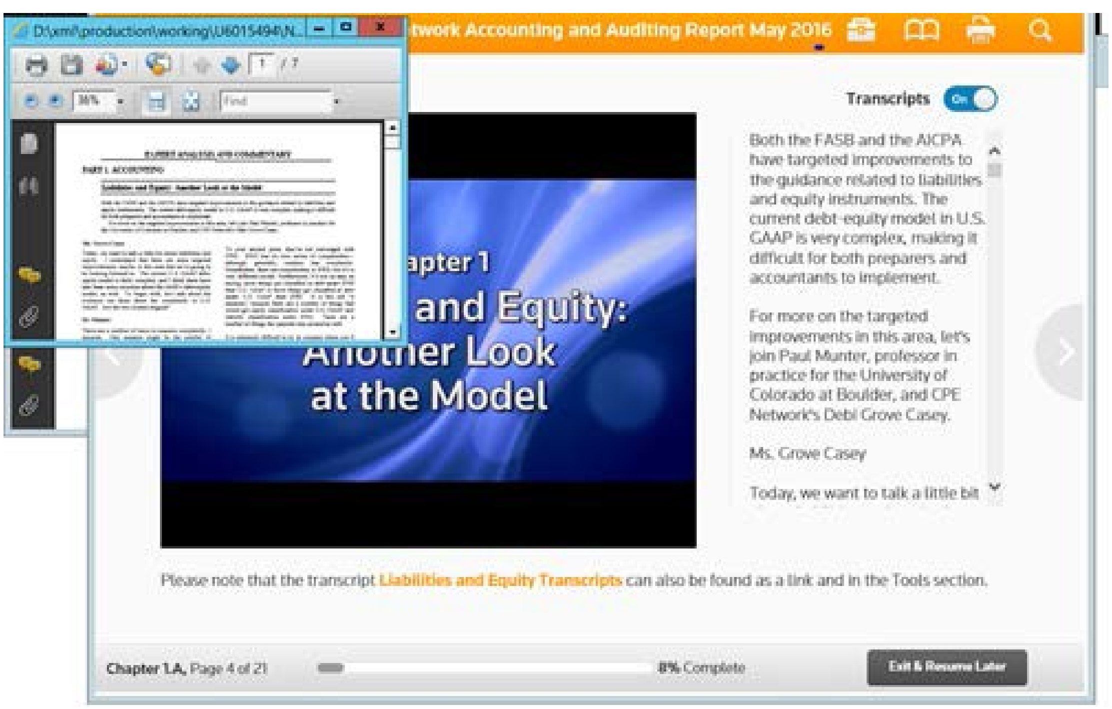
- **Each Chapter is now self-contained.** Years ago, when on the CPEasy site, the interview segments were all together, then all the supplemental materials, etc. Today, each chapter contains the executive summary and learning objectives for that segment, followed by the interview, the related supplemental materials, and then the discussion questions. This more streamlined approach allows administrators and users to more easily access the related materials.



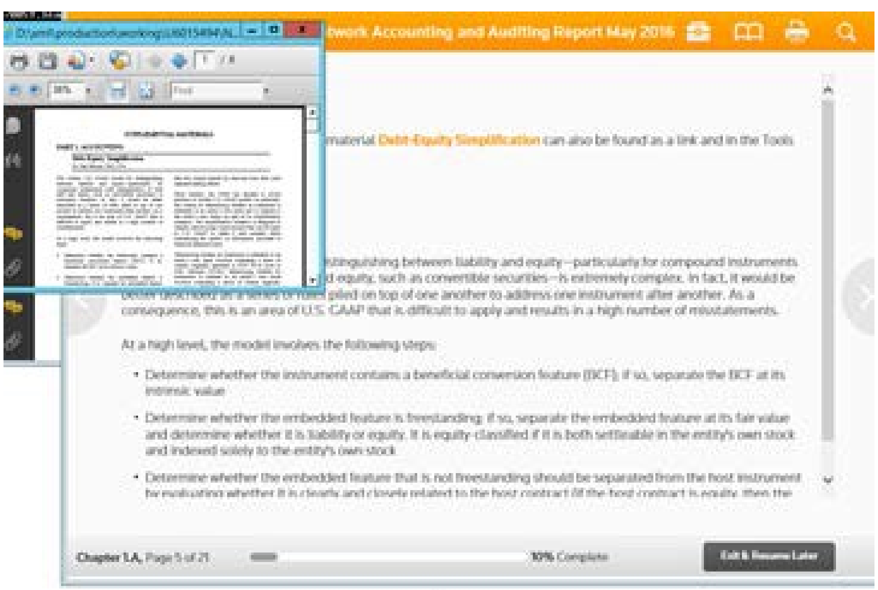
Video segments may be downloaded from the CPL player by clicking on the download button.



Transcripts for the interview segments can be viewed at the right side of the screen via a toggle button at the top labeled **Transcripts** or via the link to the pdf below the video (also available in the toolbox in the resources section). The pdf will appear in a separate pop-up window.

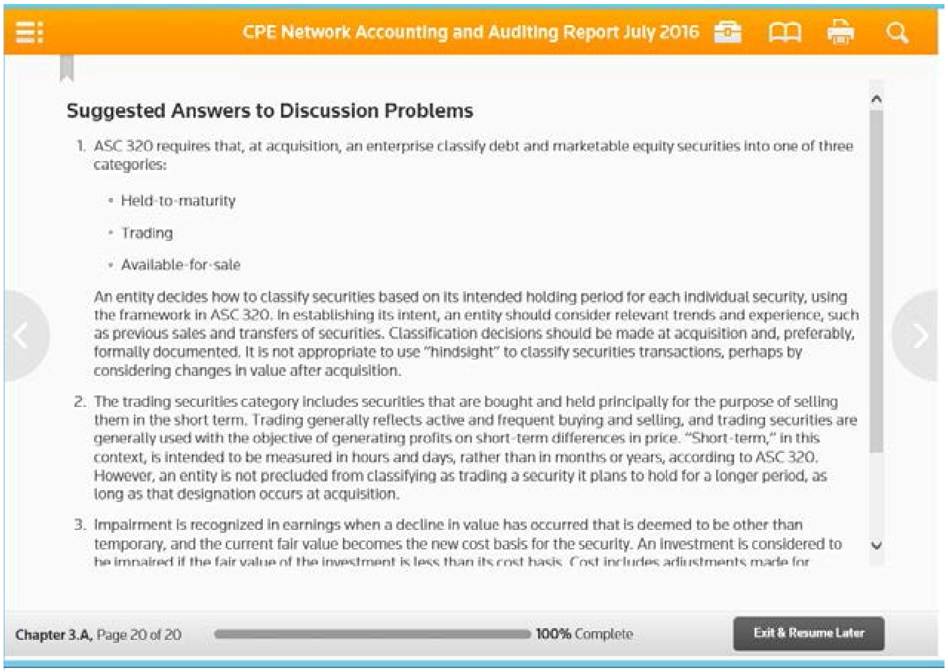


Click the arrow at the bottom of the video to play it, or click the arrow to the right side of the screen to advance to the supplemental material. As with the transcripts, the supplemental materials are also available via the toolbox and the link will pop up the pdf version in a separate window.



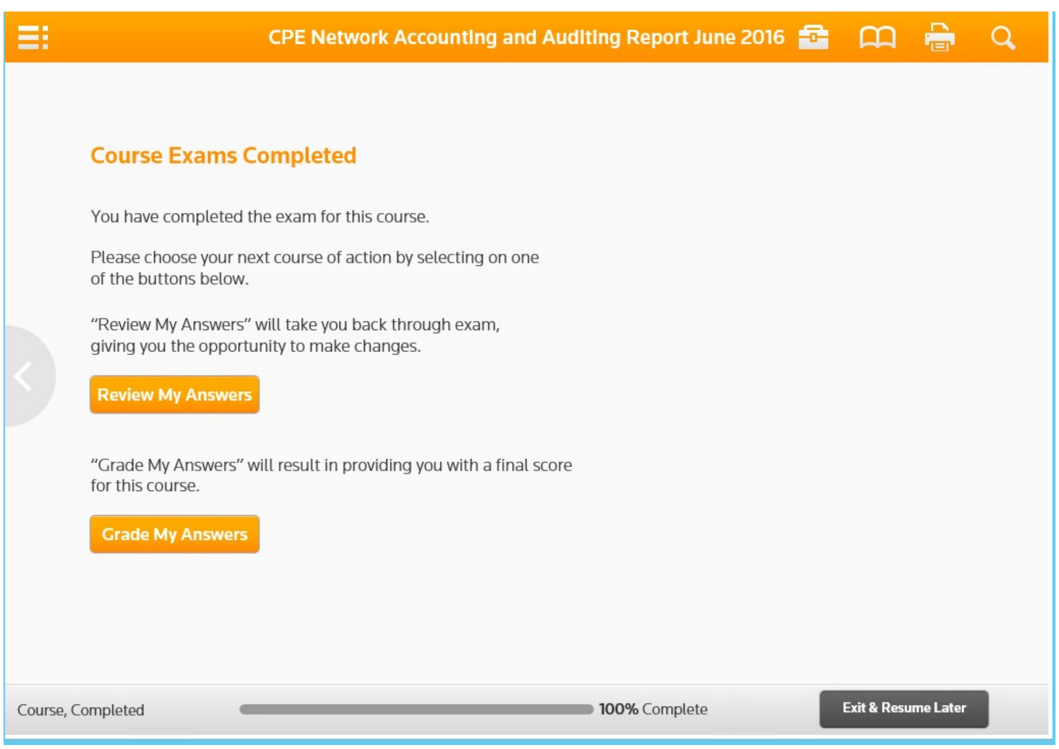
Continuing to click the arrow to the right side of the screen will bring the user to the Discussion p roblems related to the segment.

The Suggested Answers to the Discussion Problems follow the Discussion Problems.



The **Exam** is accessed by clicking the last gray bar on the menu at the left of the screen or clicking through to it. Click the orange button to begin.

When you have completed the quizzer, click the button labeled **Grade or the Review button**.



- Click the button labeled **Certificate** to print your CPE certificate.
- The final quizzer grade is displayed and you may view the graded answers by clicking the button labeled **view graded answer**.

Additional Features Search

Checkpoint Learning offers powerful search options. Click the **magnifying glass** at the upper right of the screen to begin your search. Enter your choice in the **Search For:** box.

Search Results are displayed with the number of hits.

Print

To display the print menu, click the printer icon in the upper bar of your screen. You can print the entire course, the transcript, the glossary, all resources, or selected portions of the course. Click your choice and click the orange **Print**.

What Does It Mean to Be a CPE Sponsor?

If your organization chooses to vary from the instructions outlined in this User Guide, your firm will become the CPE Sponsor for this monthly series. The sponsor rules and requirements noted below are only highlights and reflect those of NASBA, the national body that sets guidance for development, presentation, and documentation for CPE programs. **For any specific questions about state sponsor requirements, please contact your state board. They are the final authority regarding CPE Sponsor requirements.** Generally, the following responsibilities are required of the sponsor:

- Arrange for a location for the presentation
- Advertise the course to your anticipated participants and disclose significant features of the program in advance
- Set the start time
- Establish participant sign-in procedures
- Coordinate audio-visual requirements with the facilitator
- Arrange appropriate breaks
- Have a real-time instructor during program presentation
- Ensure that the instructor delivers and documents elements of engagement
- Monitor participant attendance (make notations of late arrivals, early departures, and “no shows”)
- Solicit course evaluations from participants
- Award CPE credit and issue certificates of completion
- Retain records for five years

The following information includes instructions and generic forms to assist you in fulfilling your responsibilities as program sponsor.

CPE Sponsor Requirements

Determining CPE Credit Increments

Sponsored seminars are measured by program length, with one 50-minute period equal to one CPE credit. One-half CPE credit increments (equal to 25 minutes) are permitted after the first credit has been earned. Sponsors must monitor the program length and the participants’ attendance in order to award the appropriate number of CPE credits.

Program Presentation

CPE program sponsors must provide descriptive materials that enable CPAs to assess the appropriateness of learning activities. CPE program sponsors must make the following information available in advance:

- Learning objectives.
- Instructional delivery methods.
- Recommended CPE credit and recommended field of study.
- Prerequisites.
- Program level.
- Advance preparation.
- Program description.
- Course registration and, where applicable, attendance requirements.
- Refund policy for courses sold for a fee/cancellation policy.
- Complaint resolution policy.
- Official NASBA sponsor statement, if an approved NASBA sponsor (explaining final authority of acceptance of CPE credits**).**

Disclose Significant Features of Program in Advance

For potential participants to effectively plan their CPE, the program sponsor must disclose the significant features of the program in advance (e.g., through the use of brochures, website, electronic notices, invitations, direct mail, or other announcements). When CPE programs are offered in conjunction with non-educational activities, or when several CPE programs are offered concurrently, participants must receive an appropriate schedule of events indicating those components that are recommended for CPE credit. The CPE program sponsor's registration and attendance policies and procedures must be formalized, published, and made available to participants and include refund/cancellation policies as well as complaint resolution policies.

Monitor Attendance

While it is the participant's responsibility to report the appropriate number of credits earned, CPE program sponsors must maintain a process to monitor individual attendance at group programs to assign the correct number of CPE credits. A participant's self-certification of attendance alone is not sufficient. The sign-in sheet should list the names of each instructor and her/his credentials, as well as the name of each participant attending the seminar. The participant is expected to initial the sheet for their morning attendance and provide their signature for their afternoon attendance. If a participant leaves early, the hours they attended should be documented on the sign-in sheet and on the participant's CPE certificate.

Real Time Instructor During Program Presentation

"Group live" programs must have a qualified, real time instructor while the program is being presented. Program participants must be able to interact with the real time instructor while the course is in progress (including the opportunity to ask questions and receive answers during the presentation).

Elements of Engagement

A “group live” program must include at least one element of engagement related to course content during each credit of CPE (for example, group discussion, polling questions, instructor-posed question with time for participant reflection, or use of a case study with different engagement elements throughout the program).

Awarding CPE Certificates

The CPE certificate is the participant’s record of attendance and is awarded at the conclusion of the seminar. It should reflect the credit hours earned by the individual, with special calculation of credits for those who arrived late or left early. Attached is a sample *Certificate of Attendance* you may use for your convenience.

CFP credit is available if the firm registers with the CFP board as a sponsor and meets the CFP board requirements. IRS credit is available only if the firm registers with the IRS as a sponsor and satisfies their requirements.

Seminar Quality Evaluations for Firm Sponsor

NASBA requires the seminar to include a means for evaluating quality. At the seminar conclusion, evaluations should be solicited from participants and retained by the sponsor for five years. The following statements are required on the evaluation and are used to determine whether:

1. Stated learning objectives were met.
2. Prerequisite requirements were appropriate.
3. Program materials were accurate.
4. Program materials were relevant and contributed to the achievement of the learning objectives.
5. Time allotted to the learning activity was appropriate.
6. Individual instructors were effective.
7. Facilities and/or technological equipment were appropriate.
8. Handout or advance preparation materials were satisfactory.
9. Audio and video materials were effective.

You may use the enclosed preprinted evaluation forms for your convenience.

Retention of Records

The seminar sponsor is required to retain the following information for a period of five years from the date the program is completed unless state law dictates otherwise:

- Record of participation (the original sign-in sheets, now in an editable, electronic signable format)

- Copy of the program materials
- Timed agenda with topics covered and elements of engagement used
- Date and location of course presentation
- Number of CPE credits and field of study breakdown earned by participants
- Instructor name(s) and credentials
- Results of program evaluations

Appendix: Forms

Here are the forms noted above and how to get access to them.

Delivery Method	Form Name	Location	Notes
"Group Live" / "Group Internet Based"	Advertising / Promotional Page	Transcript	Complete this form and circulate to your audience before the training event.
"Group Live"	Attendance Sheet	Transcript	Use this form to track attendance during your training session.
"Group Internet Based"	Webinar Delivery Tracking Report	Transcript	Use this form to track the 'polling questions' which are required to monitor attendance during your webinar.
"Group Live" / "Group Internet Based"	Evaluation Form	Transcript	Circulate the evaluation form at the end of your training session so that participants can review and comment on the training.
Self Study	CPE Quizzer Answer Sheet	Transcript	Use this form to record your answers to the quiz.

Getting Help

Should you need support or assistance with your account, please see below:

Support Group	**Phone Number**	**Email Address**	**Typical Issues/Questions**
Technical Support	800.431.9025 (follow option prompts	checkpointlearning.techsupport@ thomsonreuters.com	• Browser-based • Certificate discrepancies • Accessing courses • Migration questions • Feed issues
Product Support	800.431.9025 (follow option prompts	checkpointlearning.productsupport@ thomsonreuters.com	• Functionality (how to use, where to find) • Content questions • Login Assistance
Customer Support	800.431.9025 (follow option prompts	checkpointlearning.cpecustomerservicet@ thomsonreuters.com	• Billing • Existing orders • Cancellations • Webinars • Certificates