

# CHECKPOINT LEARNING

Contact us at: 2395 Midway Rd., Carrollton, TX 75006  
checkpoint.learning.cpecustomerservice@tr.com  
800.431.9025

## CPE NETWORK TAX REPORT

MAY 2023

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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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**Attention NCRPs:** This course does *not* qualify for AFSP professionals requiring "Federal Tax Law Update" credits.

Topics for future editions may include:

- Alternative Collection Methods
- Return Positions and Disclosures

# EXECUTIVE SUMMARY

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## PART 1. CURRENT DEVELOPMENTS

### EXPERTS' FORUM..... 3

The field of taxation is an everchanging landscape. Practitioners must be cognizant of the changes brought about administratively, legislatively, and judicially. This material alerts you to some of the changes that may be applicable in your practice.

#### **Learning Objectives:**

Upon completion of this segment, the user should be able to analyze current issues in taxation, including assessing the IRS dirty dozen tax frauds for 2023, analyzing the methods of collecting nonassessable penalties, and analyzing what constitutes a properly filed return. [*Running time 27: 27*]

## PART 2. INDIVIDUAL TAXATION

### Collection Hearings ..... 17

Practitioners are often confronted with client situations that must be resolved outside the audit process. These are commonly in collections. There are a number of alternatives; and practitioners need to be aware of the myriad of rules and procedures to best represent the client and select the most appropriate action(s).

#### **Learning Objectives:**

Upon completion of this segment, the user should be able to analyze issues related to the collection process, including evaluating the use of an audit reconsideration, analyzing whether a CDP is appropriate, and assessing the use of a CAP. [*Running time 29:36*]

## PART 3. BUSINESS TAXATION

### Employee Retention Credit (ERC) ..... 31

The Employee Retention Credit (ERC), also called the Employee Retention Tax Credit, has undergone significant changes since enacted with the CARES Act in 2020. This credit is beneficial for employers that were experiencing COVID-related economic issues. However, there was and still is confusion regarding application of the credit. There has been significant growth in what the IRS calls “ERC Mills,” and the IRS has, therefore, included them in the 2023 Dirty Dozen Tax Fraud Schemes. Clients need to be aware of the possible issues with the ERC.

#### **Learning Objectives:**

Upon completion of this segment, the user should be able to analyze issues related to the employee retention credit, including assessing the tax fraud potential for clients, determining the period of availability of an ERC, and assessing the correction of an ERC. [*Running time 31:57*]

## 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.

**Gary Bluestein, JD** a partner in the law firm of Andreozzi Bluestein LLP, focuses his practice exclusively on tax representation. He previously served as a Senior Attorney for the IRS and a Special Assistant United States' Attorney, represented the IRS in the U.S. Tax and Bankruptcy Courts, served on several National Task Forces addressing IRS enforcement issues, and received numerous Special Act Merit Awards. Gary has taught Tax Practice & Procedure at the University at Buffalo School of Law and in the Canisius College's Master in Tax Program. He is a member of the Erie County Bar Association, the Tax Committee, and the Bankruptcy Committee. He also serves on the Planning Committee for the University at Buffalo School of Management Tax Institute. Gary frequently lectures and writes on a variety of topics relating to tax representation for numerous local and national professional groups and has published articles in the Thompson Reuters Tax Practice Series and the Erie County Bar Bulletin.”

**Karen Davis, EA, MBA, PhD** is an enrolled agent with over 15 years of tax experience. She is a tax specialist and works for T.M. Byxbee Company in Hamden, Connecticut, where her areas of responsibility include tax research, tax planning and preparation, responding to IRS and state notices, representing clients at audit, developing and presenting in-house CPE, and staff training.

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### PART 1. CURRENT DEVELOPMENTS

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#### Experts' Forum

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Experts' Forum is a popular feature in which we review recent developments in taxation. In this month's discussion, Ian includes the most recent "Dirty Dozen" issued by the IRS. Compiled annually, the "Dirty Dozen" lists a variety of common scams that taxpayers may encounter anytime, but many of these schemes peak during filing season as people prepare their returns or hire someone to help with their taxes.

Let's join Ian.

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#### A. News Release 2023-71

##### The 2023 Dirty Dozen Summary

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Hi, everybody! I'm Ian Redpath. This is the Experts' Forum. This is the segment where we go over a number of things that have happened within the IRS, the courts, Congress—anything that is new since the last time that we got together.

So, let's start off right away. I know a lot of our viewers tell us that this is one of the more interesting segments—the IRS has released the 2023 Dirty Dozen. This is the "dirty dozen" of tax schemes and tax frauds, but they are things we really need to pay some attention to. Often, we have to tell our clients, "Hey, watch out for these things," because they don't always know; and, unfortunately, if your clients are a lot like mine, they are not going to tell you until after something has happened. So, maybe let them know some of these things that are going on out there. Some of these things are really geared to practitioners, also, because the IRS is saying that there are certain things that practitioners need to be very aware of.

Let's start right off with the number one thing that the IRS said, and this is News Release 2023-71. This news release I am giving you is a summary of the Dirty Dozen because the Dirty Dozen are issued over a period of weeks. So, this is the summary of the Dirty Dozen.

We first start off with the Employee Retention Credit. "You can get all of this money back"—we hear the ads on television, on radio, about the millions and millions of dollars that you can get back. The IRS says there is so much fraud out there going on that they have highlighted this. There are promoters that are blasting out these ads and contacting people directly. They are making direct contact, so you really need to watch out. I have had several issues where they have reached out to clients directly, and the clients sometimes think, "Oh, my accountant has screwed up." They don't realize that this is a fraud.

We have a whole segment with Karen Davis on the Employee Retention Credit and all of the frauds, and I think you will find that very interesting [with] some things for you to watch out for. One of the more interesting things (that I didn't think of) was that some of these advertisers are just trying to get the information in order to steal the personal information of a client. They basically [say], "We are going to get you all this money. You just need to answer a few questions online." Well, if you answer those questions, they get your personal information, so watch out. A lot of stuff going on. Please watch the segment with Karen on the Employee Retention Credit and all of the things going on. You will find some very interesting things in that.

As usual, phishing, smishing—I love all the terms we come up with—phishing and smishing, but fake communications [from fraudsters] posing as legitimate organizations. We know the phone calls from [them] claiming that they represent the Internal Revenue Service. Now, they are using what is called *smishing*, which is unsolicited texts (*phishing* is the emails), trying to get valuable information. The IRS again says, "We contact people by mail.

We don't send emails and texts, and certainly"—and this is a new thing, social media—the IRS says, “we don't use social media regarding your tax bills. We are not going to reach out to you on Facebook.” So, a lot of things going on out there and [we should] keep our clients aware to watch out for these.

Next, online account help from third-party scammers. This is getting more and more common, where organizations are posing as [being] there to help taxpayers, third-party taxpayers. They are also gearing this towards small practitioners, [claiming] that they are going to help you set up an account with the IRS. So, for example, with a taxpayer, they will contact them and say, “We are contacting you. You need to set up an IRS online account. I don't know if you have done it yet, but this is what we do to make it easier for you.” And, of course, all they are trying to do is steal the personal information.

Certainly, taxpayers can establish it themselves; you can work with them to do that. They just need to know, third-party people [may be] calling them, trying to have them hire [the third party] to set up this very difficult account, but something they need with the IRS. Watch out.

False fuel tax claims—the IRS says this is huge. They are getting a lot of that.

Number five, fake charities. Every year, same thing, especially as we have more and more potential natural disasters. It seems like more and more fraudulent organizations are coming up, saying, “Donate to us because we are helping the victims of XYZ tragedy.” All they are trying to do is get personal information and/or money because, obviously, the charity [may be fake].

What you can do with a client is simply go to the TEOS system online—the Tax Exempt Organization [Search]—and it will tell you if this organization is a charity. If it doesn't come up and they insist, just ask them for a copy of their determination letter; and then, you can call the Internal Revenue Service's tax-exempt line. Call them and ask because it is possible that it was missed and not put up. I actually had a client [charity], and they had a very large donation that was being given to them; [but] they were not appearing on Publication 78, they were not appearing online. So, we said, “Look, we are tax exempt,” and gave [the prospective donors] the information. They contacted the Internal Revenue Service who verified it, and they made the large donation. So, from the donor's side, look at the TEOS system first if you suspect that this is not a valid charity and, especially, some of these ones that pop up all the time during any type of disasters.

The next one, obviously, doesn't apply to you, but unscrupulous tax return preparers—that is a huge [scam]—so-called ‘ghost’ preparers. They prepare their return but won't sign it, and they don't have a PTIN number. They just want the taxpayer to sign a blank form. That is another [warning sign when they say] “Sign this. Just sign it now so we can take care of it for you.”

Number seven—this is really becoming huge—social media issues, giving inaccurate and misleading tax information. The IRS says they have seen a lot of information out there related to W-2s, and then obscure forms, like the 8944; those are real limited types of forms. Again, it is to get the taxpayers to submit false, inaccurate information. The idea is, “We can get you a refund.” Hopefully, [your clients] come to you and don't listen to that—just like the Employee Retention [Credit].

Number eight is geared directly to you. It is directly to the practitioner because what is happening is we are getting, basically, *spearphishing*. That is tailoring phishing attempts to a specific business or organization. Spearphishing is being used to go to a taxpayer and get data from the client; and now, it is starting to go directly to some practitioners. So, they may contact a staff person (they have done their research). “We are the payroll preparer now for XYZ Company. We need this information. Can you send us this information? Joe or Jane Smith over at SmithCo, they said to call you to get this information because we are now going to be doing their payroll tax returns.”

There can be all sorts of ways that they try to do it. They have also been calling, saying, “We are calling you from Ultra Tax,” for example. “We are calling you from a professional tax program and we noticed a problem,” and ask you for information. What they are trying to do is get your credentials to get in to get the data.

So, really be careful with this. Warn especially [your staff]. Staff should be very, very cognizant that this is going on because that is where they are targeting it. Again, also, they are targeting the client. “We represent”—it is not the IRS; they are not saying they represent the IRS, but they are saying, “We represent a payroll company. We are trying to do this.” They might even say, “We work with Jones Accounting,” who are the [client’s] accountants/CPAs, “and they said to call you to get this information.” Make the clients aware of this; but also, staff should be aware.

Number nine comes up every year, [going back] years and years. “The IRS is settling for pennies on the dollar.” Well, we know that is not true. We know that there are offers in compromise, but with the offers in compromise and the offer in compromise program, we also know that there are “mills” out there that are offering it and doing very little.

If you listen to the programs with Gary Bluestein, he talks about some of those issues and his experiences with them. Sometimes [the taxpayers] just pay and nothing happens. They don’t do anything. Sometimes they will file one [and say], “Oh, sorry, the IRS denied it,” and that is done, but they have collected a lot of money. So, really be careful and make clients cognizant of these “pennies on the dollar” [claims]. That could be, but generally is not, true. It is possible, but it has to be a rare set of circumstances.

Number ten, the schemes aimed at high-income filers. They say charitable remainder annuity trusts (CRAT) are often misused by promoters and advisors to try to eliminate ordinary income and capital gain on the sale of property, and the IRS is attacking these regularly. There is nothing wrong with the CRAT; it is a very good instrument, a charitable remainder trust, but just be careful on how it is done. Remember, what happens is you donate something—property in trust—to a charity and you draw annual income for either a specific period of time, or it could be for life, and there are different ways to do it. There is what is called a unitrust, so there are different ways of doing it, but they are being highly scrutinized.

Then, monetized installment sales. Again, [the IRS] sees these as potentially abusive to defer the recognition of gain on appreciated property by using these monetized installment sales. And of course, the [promoters] collect a fee for that, so watch out.

Number eleven, bogus tax-avoidance strategies. Again, micro-captive insurance arrangements hit the top of the list [of] abusive schemes. It doesn’t have the attributes of legitimate insurance; and, often, it will have implausible risks—risks that, really, are never going to happen. The odds of them happening are so minute. If the circus comes to town, and they do a parade through town, and the elephants get loose, and they happen to come into my plant and do some damage, [the promoters say], “You have to insure against that. That could maybe happen.” This type of thing. It doesn’t really have any type of commercial coverage that would be able to get it.

Again, this year and for a number of years now, syndicated conservation easements. Any time your client comes to you and says, “I got this promotion to invest. My investment advisors are telling me I should invest in this conservation easement—this syndicated conservation easement.” Watch out. The IRS is going after them, and the courts have been supporting the IRS on a number of issues relative to, if you don’t dot every i and cross every t, they are going to deny it. If the language is not exactly what the IRS is looking for, they are going to deny it. Now, we do know that there have been some courts stepping in. And under the APA [Administrative Procedures Act], they did say that the extinguishment regs violated the APA, so they were therefore invalid, but that is a rarity. And, of course, the IRS is going to address that.

Number 12, schemes with international [elements]. One of the biggest is offshore accounts and, of course, digital assets. The IRS can generally track anonymous transactions from foreign accounts and digital assets. They are getting better at it, and we know there is going to be more reporting coming in for digital assets. The IRS is looking for those.

Maltese retirement [arrangements]. If a client says that a promoter [offers them] a retirement arrangement in Malta, it is trying to abuse the Maltese tax treaty. Watch out; it is probably not going to happen.

Then, similar to the micro is the Puerto Rican and foreign captive insurance. The owner sets up a company, he has a financial interest in a company, and then claims a deduction for the amounts that are premiums (so-called insurance premiums) that are paid to the so-called group *fronting carrier* which, then, reinsures the coverage with a Puerto Rican or other foreign corporation. It lacks what really is legitimate—or looks like legitimate—insurance. Again, watch out for this because the IRS is not shy about bringing in the Criminal Investigation division into any of the things that we just mentioned.

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## **B. Notice 2023-31**

2023-16 IRB

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Now, we have Notice 2023-31. If you are doing anything internationally and you have a foreign tax credit, just note that the IRS announced that it will provide a longer transition period for the documentation requirement when you have a single-country exception to source-based attribution. The transition will be—and this really, usually involves a license agreement—that it must be no later than 180 days after the final regs are adopted with the single-country exception. It is a limited exception with royalties, generally. It applies if the income subject to foreign tax is characterized as royalty under that country's law, and the payment giving rise to it is made under a single-country license.

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## **C. *Farhy v. Commissioner***

160 TC No. 6

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We have an interesting case, *Farhy v. Commissioner*. It is a Tax Court case, interesting because there was a requirement to file Forms 5471. [He was] trying to avoid tax—that is not even an issue here. They didn't file the 5471; and the IRS assessed penalties under Section 6038(b) for a failure to file, for each year, for the 5471s. [He] didn't pay the assessment. The taxpayer, Farhy, says, "No, I am not going to pay the assessment." The IRS proposes to collect it by levy. It goes to Appeals. Appeals upholds the IRS. The taxpayer files in Tax Court and says, "IRS, you don't have authority to assess the penalties and collect by levy because that is not in the statute. The law does not give you that authority." It says you can collect it through a civil action; you can sue us and collect it, but you can't assess it and administratively collect it. They are not assessable penalties.

Well, the IRS said assessable penalty means, essentially, any penalty that isn't subject to the deficiency procedures. The Court came back and said, "No, the statute does not provide that. Therefore, these are not assessable penalties, so you can't collect them via levy. You can bring an action against the person to collect in a civil action, but you can't use the levy process. You can't do it administratively."

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## **D. IR-2023-56**

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Now, we have another [release], IR-2023-56. I think this is interesting just to read; and if you don't do a lot of work—audit work, appeals work—it is good. It is something that goes back with our fraud in the Dirty Dozen. It just reminds taxpayers that the IRS is going to reach out to you by letter first. Generally, if you don't respond, they are going to reach out to you, then, with a phone call. And if you still don't respond, they might stop at your home. It tells you they are going to have two forms of ID; you should check them. You also have the right to call the supervisor to verify.

It also goes through and tells you what the different types of [IRS employees are]. What is a revenue officer? Those are civil enforcement employees to resolve compliance issues, such as unfiled returns or taxes owed. Again, they won't contact you unless there have been multiple letters. The revenue agents, those are the ones that generally conduct the audits. Then, the IRS special agents—the IRS-CI (Criminal Investigation) agents—those are the "Dick Tracys," those are the ones that can carry weapons, and they are going to investigate criminal actions. So again, something to at least keep your clients aware of to help avoid fraud.

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**E. IR-2023-64**

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Then, we have IR-2023-64. The IRS has issued proposed regs, as well as updated the FAQs relative to the proposed issues relative to the requirement about critical materials and battery components for the Clean Vehicle Credit. These apply for any vehicle placed in service on or after April 18th, 2023. Again, we have proposed regs—those are going to be reliance regs—and updated FAQs on this.

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**F. *Seaview Trading, LLC***

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(CA 9) en banc, 131 AFTR 2d 2023-988

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We also have another interesting case, *Seaview Trading, LLC*. What happened here is you have a \$35 million loss on a return in 20[01]. In 20[05], they have taken the loss. The IRS agent looking at the 20[05] return says, “We don’t have a record of that 20[01] return having been filed.” The accountant turns around and gives the agent a copy of the 20[01] return and a certified mailing [showing] that he had mailed it. [He had] no receipt that it had been received. He just claimed, “I sent this to Ogden, Utah, and it had the return in it.” At another point, he was asked, and he faxed the return. The bottom line was he never properly filed the return. He mailed a return, but it was never sent to the right processing center. The IRS said, “Look, you never filed a return. Therefore, since [faxed returns] don’t constitute filing of returns, there is no statute of limitations. You didn’t file that return, so we can go back after that.”

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**G. *Polselli v. IRS***

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(CA 6) 129 AFTR 2d 2022-335, *Polselli v. IRS*, 21-1599 (S.Ct.)

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We have now another case in the Supreme Court. In *Polselli v. IRS*, it is an appeal of a Sixth Circuit, which upheld the District Court in Michigan that the IRS didn’t have to notify a wife and two law firms of attempts to collect the husband’s unpaid taxes, which were over \$2 million. The IRS said they feared that the delinquent taxpayer was shielding assets using his wife’s bank account and through his limited liability company. So, administrative summonses were issued to Wells Fargo, as well as Chase Morgan and Bank of America, where his two law firms used accounts. The bottom line is the IRS used the exception that says they don’t have to give notice for summonses issued in aid of collection, assessment, or judgments.

The Sixth Circuit and the Seventh Circuit ruled the same way, but the Ninth Circuit did not. So now, we have a split in the Circuits. The question is whether the IRS can summons the records it needs, only if it gives information. Basically, the IRS says, “Trust us, we police ourselves.” Do they have to give notice? We will have to wait and see what the Supreme Court says on that.

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**H. Revenue Ruling 2023-2**

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2023-16

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We have a new revenue ruling, Revenue Ruling 2023-2. Essentially, a taxpayer who is now deceased creates an irrevocable trust, retains power so it is taxed for income tax purposes as a grantor trust. It is intentionally defective. They don’t include the trust assets in his gross estate. He had treated the funds as a completed gift for gift tax purposes; and the IRS said, “You do not get a step-up in basis.” They were trying to get a step-up in basis for that to date of death.

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**I. Retirement Plan/IRA Required Minimum Distributions FAQs**

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The IRS now has updated, and if you are interested, they have updated their FAQs in regard to distributions under SECURE 2.0. So, if you are concerned as to that, you may want to look at the new FAQs.



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**J. IR-2023-53; Fact Sheet 2023-06 FAQs**

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In addition, in IR-2023-53 and Fact Sheet 2023-06, the IRS has updated questions regarding [Form] 1099-K that they have been putting off. They basically say there is going to be no requirement to report personal payments like gifts, or reimbursements, or cost share (like a meal or a household bill). So, you may want to look at that to see where they have made any changes.

I want to thank you for joining me today. We had the Dirty Dozen, that is always an interesting one, and we had a number of other things to go over today. I really want to thank you for joining me. I appreciate it, and please be safe.

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## SUPPLEMENTAL MATERIALS

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### Current Material: Experts' Forum

By Ian J. Redpath, JD, LLM

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#### A. News Release 2023-71

The 2023 Dirty Dozen Summary

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##### 1. Employee Retention Credit Claims

Taxpayers should be aware of aggressive pitches from scammers who promote large refunds related to the Employee Retention Credit (ERC). The warning follows blatant attempts by promoters to con ineligible people to claim the credit. The IRS highlighted these schemes from promoters who have been blasting ads on radio and the Internet touting refunds involving Employee Retention Credits. These promotions can be based on inaccurate information related to eligibility for and computation of the credit. Additionally, some of these advertisements exist solely to collect the taxpayer's personally identifiable information in exchange for false promises. The scammers then use the information to conduct identity theft.

##### 2. Phishing and Smishing

Taxpayers and tax professionals should be alert to fake communications from those posing as legitimate organizations in the tax and financial community, including the IRS and the states. These messages arrive in the form of an unsolicited text (smishing) or email (phishing) to lure unsuspecting victims to provide valuable personal and financial information that can lead to identity theft. The IRS initiates most contacts through regular mail and will never initiate contact with taxpayers by email, text, or social media regarding a bill or tax refund.

##### 3. Online Account Help from Third-party Scammers

Swindlers pose as a "helpful" third party and offer to help create a taxpayer's IRS online account at IRS.gov. In reality, no help is needed. The online account provides taxpayers with valuable tax information; however, third parties making these offers will try to steal a taxpayer's personal information this way. Taxpayers can and should establish their own online account through IRS.gov.

##### 4. False Fuel Tax Credit Claims

The fuel tax credit is meant for off-highway business and farming use and, as such, is not available to most taxpayers. However, unscrupulous tax return preparers and promoters are enticing taxpayers to inflate their refunds by erroneously claiming the credit. The IRS has seen an increase in the promotion of filing certain refundable credits using Form 4136, Credit for Federal Tax Paid on Fuels.

##### 5. Fake Charities

Bogus charities are a perennial problem that gets bigger whenever a crisis or natural disaster strikes. Scammers set up these fake organizations to take advantage of the public's generosity. They seek money and personal information which can be used to further exploit victims through identity theft. Taxpayers who give money or goods to a charity might be able to claim a deduction on their federal tax return if they itemize deductions; but charitable donations only count if they go to a qualified tax-exempt organization recognized by the IRS.

##### 6. Unscrupulous Tax Return Preparers

Most tax preparers provide outstanding and professional service. However, people should be careful of shady tax professionals and watch for common warning signs, including charging a fee based on the size of the refund. A major red flag or bad sign is when the tax preparer is unwilling to sign the dotted line. Avoid these "ghost" preparers, who will prepare a tax return but refuse to sign or include their IRS Preparer Tax Identification Number (PTIN) as required by law. Taxpayers should never sign a blank or incomplete return.

## 7. Social Media: Fraudulent Form Filing and Bad Advice

Social media can circulate inaccurate or misleading tax information, and the IRS has recently seen several examples. These can involve common tax documents like Form W-2 or more obscure ones like Form 8944. While Form 8944 is real, it is intended for a very limited, specialized group. Both schemes encourage people to submit false, inaccurate information in hopes of getting a refund. Taxpayers should always remember that if something sounds too good to be true, it probably is.

## 8. Spearphishing and Cybersecurity for Tax Professionals

Phishing is a term given to emails or text messages designed to get users to provide personal information. Spearphishing is a phishing attempt tailored to a specific organization or business. The IRS is warning tax professionals about spearphishing because there is greater potential for harm if the tax preparer has a data breach. A successful spearphishing attack can ultimately steal client data and the tax preparer's identity, allowing the thief to file fraudulent returns.

## 9. Offer-in-Compromise Mills

Offers in compromise are an important program to help people who cannot pay to settle their federal tax debts. However, "mills" can aggressively promote offers in compromise in misleading ways to people who clearly do not meet the qualifications, frequently costing taxpayers thousands of dollars. A taxpayer can check their eligibility for free using the IRS Offer in Compromise Pre-Qualifier Tool.

## 10. Schemes Aimed at High-income Filers

- *Charitable Remainder Annuity Trust (CRAT)*: Charitable remainder trusts are irrevocable trusts that let individuals donate assets to charity and draw annual income for life or a specific period. Unfortunately, these trusts are sometimes misused by promoters, advisors, and taxpayers to try to eliminate ordinary income and/or capital gain on the sale of the property.
- *Monetized Installment Sales*: In these potentially abusive transactions, promoters find taxpayers seeking to defer the recognition of gain upon the sale of appreciated property. They facilitate a purported monetized installment sale for the taxpayer in exchange for a fee.

## 11. Bogus Tax-avoidance Strategies

- *Micro-captive Insurance Arrangements*: A micro-captive is an insurance company whose owners elect to be taxed on the captive's investment income only. Abusive micro-captives involve schemes that lack many of the attributes of legitimate insurance. These structures often include implausible risks, failure to match genuine business needs, and in many cases, unnecessary duplication of the taxpayer's commercial coverages.
- *Syndicated Conservation Easements*: A conservation easement is a restriction on the use of real property. Generally, taxpayers may claim a charitable contribution deduction for the fair market value of a conservation easement transferred to a charity if the transfer meets the requirements of IRC §170. In abusive arrangements, which generate high fees for promoters, participants attempt to game the tax system with grossly inflated tax deductions.

## 12. Schemes with International Elements

- *Offshore Accounts and Digital Assets*: The IRS continues to scrutinize attempts to hide assets in offshore accounts and accounts holding digital assets, such as cryptocurrency. The IRS continues to identify individuals who attempt to conceal income in offshore banks, brokerage accounts, digital asset accounts, and nominee entities. Asset protection professionals and unscrupulous promoters continue to lure U.S. persons into placing their assets in offshore accounts and structures, saying they are out of reach of the IRS. These assertions are not true. The IRS can identify and track anonymous transactions of foreign financial accounts as well as digital assets.

- *Maltese Individual Retirement Arrangements Misusing Treaty*: These arrangements involve U.S. citizens or residents who attempt to avoid U.S. tax by contributing to foreign individual retirement arrangements in Malta (or potentially other host countries). The participants in these transactions typically lack any local connection to the host country. By improperly asserting the foreign arrangement as a “pension fund” for U.S. tax treaty purposes, the U.S. taxpayer misconstrues the relevant treaty provisions and improperly claims an exemption from U.S. income tax on gains and earnings in and distributions from the foreign individual retirement arrangement.
- *Puerto Rican and Foreign Captive Insurance*: U.S. business owners of closely held entities participate in a purported insurance arrangement with a Puerto Rican or other foreign corporation in which the U.S. business owner has a financial interest. The U.S. business owner (or a related entity) claims a deduction for amounts paid as premiums for “insurance coverage” provided by a fronting carrier, which reinsures the “coverage” with the Puerto Rican or other foreign corporation. Despite being labeled as insurance, these arrangements lack many of the attributes of legitimate insurance.

Where appropriate, the IRS will challenge the purported tax benefits from these types of transactions and impose penalties. The IRS Criminal Investigation Division is always on the lookout for promoters and participants of these types of schemes. Taxpayers should think twice before including questionable arrangements like this on their tax returns. After all, taxpayers are legally responsible for what is on their return, not a promoter who is making promises and charging high fees. Taxpayers can help stop these arrangements by relying on reputable tax professionals they know and trust.

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## **B. Notice 2023-31**

2023-16 IRB

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Once the Foreign Tax Credit final regulations regarding the single-country exception to the source-based attribution requirement are finalized, the IRS will provide an extended period for the “documentation requirement.” The transition period will provide that the required license agreement must be executed no later than 180 days after the date the final regulations adopting the single-country exception are filed with the Federal Register. This is longer than in the proposed regulations. Generally, the single-country exception applies if (1) the income subject to the foreign tax is characterized as royalty income under that country’s tax law, and (2) the payment giving rise to such income is made under a single-country license. Taxpayers may rely on this Notice for foreign taxes paid in tax years after December 28, 2021.

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## **C. *Farhy v. Commissioner***

160 TC No. 6

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The Court determined that the IRS did not have authority to assess penalties and attempt collection through levy for failure to file information returns imposed by §6038(b). These are not “assessable penalties” so the IRS must resort to civil action collection.

Alon Farhy failed to file required Forms 5471. The failure was willful and not due to reasonable cause. The IRS assessed §6038(b) failure to file penalties for each year he failed to file. The IRS proposed to collect the unpaid penalties by levy, which was sustained in Appeals. Farhy filed a Tax Court petition claiming that these are not administratively “assessable penalties” and thus not subject to levy action.

The Court noted that “no mode of recovery or enforcement is specified for these penalties” and the Court cannot grant the IRS the power to administratively assess and collect the taxes when the law does not provide for such. The IRS will have to resort to a civil action to collect.

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**D. IR-2023-56**

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This release from the IRS provides information on when and how the IRS will contact taxpayers. It also has a listing of the types of employees that may contact a taxpayer. It emphasizes that the IRS usually makes first contact with taxpayers using regular mail delivered by the U.S. Postal Service. If the taxpayer does not respond to the letter, then the IRS will try calling the taxpayer. If that does not get a response, the IRS may show up at the taxpayer's home or business. Generally, IRS employees will not show up at a taxpayer's home or business without trying to contact the taxpayer first.

These IRS employees will be visiting a taxpayer for different reasons:

- Revenue officers—Revenue officers are civil enforcement employees who work to resolve compliance issues such as unfiled returns and/or taxes owed. Typically, the taxpayer will have received multiple letters from the IRS about these compliance issues. Revenue officer visits to a taxpayer may be unscheduled and are usually made after previous attempts to contact the taxpayer have failed.
- Revenue agents—Revenue agents usually conduct field audits. Field audits typically take place wherever the taxpayer's financial books and records are located. Revenue agents will contact the taxpayer using U.S. Postal Service mail or will phone the taxpayer before any visit.
- IRS-CI agents—IRS-CI agents investigate possible criminal violations of the Internal Revenue Code, Bank Secrecy Act laws, and other financial crimes. IRS-CI agents may visit a taxpayer's home or business unannounced during an investigation.

All of the above IRS employees carry two forms of identification.

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**E. IR-2023-64**

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The IRS has issued proposed regulations related to certain requirements that must be met for critical minerals and battery components for the new Clean Vehicle Credit, which will apply to vehicles placed in service on or after April 18, 2023. It has also updated the website FAQs on this credit.

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**F. *Seaview Trading, LLC*,**

(CA 9) en banc, 131 AFTR 2d 2023-988

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The Ninth Circuit Court of Appeals, in an en banc decision, ruled that the statute of limitations did not prohibit the IRS from readjusting a partnership's tax liability because the business's late-filed submission(s) was not a properly filed tax return.

Seaview Trading, LLC was taxed as a partnership. In 2001, it claimed a \$35.5 million loss from a tax-shelter transaction. In July 2005, an IRS revenue agent told Seaview it had no record of the 2001 return and asked for a copy and proof of mailing to be mailed to the agent's office in South Dakota. Seaview's accountant complied in September 2005 by sending the return and a copy of a certified mailing receipt for an envelope delivered to the IRS's Ogden, Utah service center in July 2022 that Seaview claimed included the 2001 return. There was no return receipt.

The audit concluded in July 2007, and the partnership's attorney mailed the same copy of the business's return to the office of an IRS attorney in Minnesota. Neither the faxed nor the mailed returns were forwarded to the IRS's processing center in Ogden, and Seaview did not forward those copies to the proper processing center.

The Tax Court ruled in the IRS's favor, and Seaview appealed, finding that Seaview did not intend to file a return when it faxed and mailed its 2001 return to the IRS because it enclosed a copy of a certified mail receipt purporting to show that the return had been filed in 2002. The Tax Court's decision was reversed and remanded (by CA 9), which decision was vacated after a petition for review en banc.

To be a properly filed return to begin the statute of limitations, the return must be filed "at such time, in such manner, and at such place as may be prescribed in regulations." [§6230(i)] Since the faxing and mailing of the returns did not qualify as "filing," the statute of limitations did not begin.

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## **G.     *Polselli v. IRS***

(CA 6) 129 AFTR 2d 2022-335, *Polselli v. IRS*, 21-1599 (S.Ct.)

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The Supreme Court has agreed to hear a case involving when the IRS must give notice of third-party record summonses. There is a split in the circuit courts on this issue. The Sixth Circuit held that the IRS did not have to notify a wife and two law firms of the agency's attempts to collect the husband's unpaid taxes, which exceeded \$2 million. Fearing that the taxpayer was shielding assets using his wife's bank account or through his limited liability company, administrative summonses were issued to Wells Fargo, where the wife was a customer, as well as J.P. Chase Morgan Bank and Bank of America, where two law firms used by the taxpayer held accounts. The IRS did not give notice to them based on the exception "in aid of collection" in §7609(c)(2)(D)(i). The Sixth Circuit upheld the IRS as had the Seventh Circuit. However, the Ninth Circuit previously held that the exception applies to summonses on third-party record-keepers only if the delinquent taxpayer owns or has a legal interest in the records sought by the IRS, which was not the case here.

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## **H.     Revenue Ruling 2023-2**

2023-16

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The IRS ruled that a deceased taxpayer's irrevocable trust that retained a power which made it a grantor trust for income purposes but was defective (because the assets were not later included in the decedent's estate for estate tax purposes), did not allow a basis adjustment to FMV at the time of death. The assets in the trust were a completed gift for gift tax purposes.

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## **I.     Retirement Plan/IRA Required Minimum Distributions FAQs**

The IRS has updated its FAQs following SECURE 2.0. The update deals primarily with required minimum distributions.

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## **J.     IR-2023-53; Fact Sheet 2023-06 FAQs**

The IRS has updated its FAQs concerning Form 1099-K. In December 2022, the IRS delayed the third-party settlement organization's (TPSO) new reporting thresholds on Forms 1099-K. For calendar years beginning after 2022, TPSOs are required to report payments that exceed the new, lower \$600 threshold.



## GROUP STUDY MATERIALS

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### **A. Discussion Problems**

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- 1) Your client, Janet, has approached you indicating that she has been contacted by an organization which helps victims of a major natural disaster. The client has agreed to donate \$20,000 to the organization.
- 2) You have a new client, Jennifer, who has brought in a notice of levy on penalties for failure to file Form 5471. You have determined that her former accountant did not file the forms as required.
- 3) Another new client, Zhao, has brought information regarding a situation with the IRS. She claimed a large loss on a 2018 return, which has carried over to future years. The IRS is auditing her 2020 return and claims it has no record of the 2018 return having been filed. She brought in copies of the returns in question, but no proof of mailing. Zhao tells you that during the audit, the agent mentioned that the return had not been filed, so her accountant gave her a copy of the return. You have determined that the statute of limitations has expired based solely on the due date.

#### **Required:**

- 1) What cautions and any recommended actions would you have for Janet before making the donation?
- 2) What can you advise Jennifer about the levy notice and this penalty?
- 3) What issues are raised by the fact pattern for Zhao?



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**B. Suggested Answers to Discussion Problems**

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- 1) One of the Dirty Dozen tax scams the IRS warns about are fake charities. The first thing to do before making the donation is to determine if it is a genuine charity. The Tax Exempt Organization Search (TEOS) online system would be the starting point. If nothing is found, then contact the IRS directly.
- 2) This penalty is a nonassessable penalty, and the IRS may not use administrative actions like the levy; they must use the civil process. The levy should be set aside by the IRS and/or courts.
- 3) If there is no way of showing that the return was actually filed, then the statute of limitations does not begin to run. This could be determined from a transcript. A mailing receipt does not suffice, and giving a return to the agent is also not considered properly filed.

## PART 2. INDIVIDUAL TAXATION

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### Collection Hearings

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The Internal Revenue Service is generally aggressive when trying to collect unpaid taxes. However, they also provide several methods to obtain potential relief. It is important that practitioners are aware of the options available and what types of situations apply to each. There are significant differences that may determine which method should be used and which methods may have unintended or unwanted results. Ian Redpath and Gary Bluestein discuss the collection process and the potential relief options.

Let's join Ian and Gary.

#### Mr. Redpath

Gary, welcome to the program.

#### Mr. Bluestein

Thank you very much, Ian. I appreciate you having me.

#### Mr. Redpath

It is great to have you here because you are a former IRS counsel, so you have a little bit of the dark side. You can look at it from that side, too, as well as looking at it from representing the taxpayers. Your firm does work around the country for a lot of different people; it's not just limited to New York. You are engaged around the country; and, certainly, your firm is one of the top firms in the country dealing with these types of issues. Certainly, a firm that I would go to right away.

A lot of our accountants here—most of our audience are CPAs—and a lot of our viewers are relatively new. They may be staff, they may [have] five years, but they don't always see these collection things. That is why I think it is so important and, especially, to get your view of these things, because you are in the trenches every day dealing with the IRS on these issues. So, I think it is important that our viewers understand, what are these things? We know there are these acronyms, CAP, CDP. Well, what are they? Because they are very different in the things that we really need to know about them. Can you give us kind of a summary? Then, we will get into the CDP and the CAPs.

#### Mr. Bluestein

The CAP [Collections Appeals Program] has existed for decades. That was the policy where the IRS allowed you to have an appeal before they took certain collection actions. In 1998, Congress enacted the Restructuring and Reform Act; and that put into effect the right to have what is called a collection due process appeal, which is referred to as a CDP. Now, that is by statute, by law, much more powerful than a CAP and, in my opinion, much more useful in most cases. So, the CAP appeal right still exists, and they do have their place. I'll be honest; I have used it once in the last four years, I think.

With regards to CAP appeals, I don't use them very often, and I'll tell you why. First of all, there are better options—usually a CDP (a collection due process appeal) or, what I will talk briefly about, is a 911 taxpayer assistance order request. These are much more powerful to me. A CAP appeal is where you have a situation—and you have to be aware that the IRS is about to do something; and often, you are not aware of it. But if you are aware, maybe you're dealing with a revenue officer, and those are usually larger cases that are assigned to a revenue officer, who is an IRS employee in the field who is in charge of collection. And they tell you, "I am going to take collection action. I am going to do something." You have a right to say, "No, I don't want you to do that, and I want to talk to your manager." If that doesn't get anywhere, you can say, "I want a CAP appeal." And that could be [in response] to the threat to file a Notice of Federal Tax Lien, it could be the threat to do a levy after certain rights have already been exhausted, and

various other things. If you exercise that right, they have to send it to IRS Appeals, which is, allegedly, independent from collection. Although, I will tell you, a lot of the people who handle CAP appeals at Appeals are former revenue officers, so they are a little bit geared towards collection, in some respects.

The thing is, the CAP appeal is supposed to happen really quickly—two to three days, or five to fifteen at the most. In reality now, since COVID, I did a CAP appeal recently and it took months. I don't know if that is going to be an aberration; like I said, I don't often use this option. The reason I don't like it is the appeals officers, I think, have a little bit of a bad attitude on it; and, also, there is no appeal to that. You have no judicial rights, no judicial review. If you lose, you lose. And again, it happens very quickly—at least it is supposed to—which often isn't good. Sometimes, we want to buy some time for various reasons.

So, the CAP appeal is not something I use a lot; but I will tell you where it could be critical, as opposed to a collection due process appeal. I don't know how many of you deal with this; but let me talk a little bit about a collection due process appeal to show the contrast. Since the Restructuring and Reform Act of 1998, the IRS cannot just go out and levy. Now, I have to talk a little bit about what the difference between a *levy* and a *lien* is. Those are the two tools the IRS uses to collect.

With a lien, the IRS actually has a lien against the taxpayer just by assessing the tax, and that lien is on all of the taxpayer's property; they are a unique creditor. A mortgage identifies what the lien is on, it says what property it is. A UCC filing identifies the assets the lien attaches to. But with the IRS, they don't identify anything. The lien attaches to absolutely everything, and they can start the collection process. The problem they have, though, is this *assessment lien* as they refer to it, is a secret lien. Nobody knows about it other than the taxpayer and the IRS.

Because of that, Congress realized there are certain interests that would be treated very unfairly if they didn't know about this IRS lien and they bought property from the taxpayer, or lent money to the taxpayer, putting a lien on their property. And the IRS comes along and says, "I'm sorry you bought that house with our lien on it," or "You lent money, and your lien is behind us." Congress realized that would be unfair. So, they said the assessment lien is not good against certain interests, such as a bona fide purchaser, a secured creditor, a judgment lien creditor, or a mechanic's lienholder; and this is in IRC Section 6323(a) of the Internal Revenue Code.

The IRS knows they will be behind those interests with their assessment lien; but they don't have to wait around for that to happen. So, what do they do? They file what is called a Notice of Federal Tax Lien. They file it in the county clerk's office where the taxpayer resides, and with the Secretary of State. Now, the world is on notice; it's not secret anymore.

Now, if you buy property from somebody and there is a Notice of Federal Tax Lien on it, tough luck for you—same with a lender. So, that is why they file that lien. It doesn't take anything from the taxpayer, it doesn't help their credit any, and it does encumber their assets just like a mortgage would. That is why the IRS does it. For some of my clients, it is devastating; because, if you're a financial planner, or you're an insurance agent with certain licensing requirements, or you're a business that relies on commercial financing, that filing of that lien is going to destroy you. So, you want to stop that—which I am going to talk about really quickly—but it is very difficult to stop. That's what a lien is.

A levy, on the other hand, is where they actually seize your stuff. They can take a bank account; they can levy your wages. That is obviously, for most people, more of a problem. So, this is the way it works after the Restructuring and Reform Act. The IRS has to, under IRC Section 6330, send out to a taxpayer who owes an assessed liability—before they take collection action—what is referred to as a final Notice of Intent to Levy.

Now, there is a notice that comes before that that scares and confuses a lot of practitioners. It is called a CP504 Notice. This says, "Urgent, we intend to levy..." just to scare the taxpayer because they cannot levy on that. The statute says, under IRC Section 6330, they have to send a final notice. That final notice has to give appeal rights; and it is a form, called a 12153 form, where you can fill it out and say, "I want to file what is referred to as a collection

due process appeal.” If you file that (you have 30 days to file a timely appeal), if you do that, all collection is frozen. The IRS has to give you a hearing with an independent appeals officer, and that can buy you a lot of time because they are so backed up. It could take a year to get a hearing sometimes, but they cannot collect during that timeframe.

So, the good thing about it is you get to go to an independent person and ask for something less invasive than them taking your stuff. You can ask for an installment agreement; you can ask for an offer in compromise where you settle for less than what is owed, which I am going to talk about later; and other remedies, potentially, that could be available to you. So, it’s a very useful tool. And if you don’t get what you want at Appeals (if the appeals officer’s determination is not favorable), you have a right to go to the United States Tax Court and challenge that determination.

Now, I will say that it is hard to win at the tax court level. I have done it; I have taken cases there. But the thing is, the standard of review normally is abuse of discretion, which is a very high standard to show. The vast majority of the cases go in favor of the government, but just having that right is important because the appeals officers know you have a right to appeal their decision. So, that’s the collection due process appeal.

Now, the problem with that is, you have it two ways. You have the right to do it for a levy, and you have a right to do it for a lien. The problem is, with the lien, the right is only after the lien is filed. Well, that’s useless. The horse is already out of the barn by then. The damage is done; the lien is public record. They will rarely withdraw it; and even if they did, the damage is already done. So, I am going to talk about options to do something to try to prevent that; but, before I do that, I want to finish talking about collection due process appeal, in general.

If you miss the 30 days, that doesn’t mean you’re totally out of luck. By statute you are; you missed the right to timely file an appeal. But, for some reason, out of the goodness of their hearts (which is unusual for the IRS), they will give you, as a policy—not by law, they are not required—but they give you what is called an equivalency hearing if you file a late appeal but it’s within one year of that final Notice of Intent to Levy. So, they will give you the same hearing, they will listen to what your complaints are, and they will give you, if you qualify, an offer in compromise or an installment agreement. Everything is the same, except you have no right to go to tax court. You have no judicial review if you don’t like the determination, because there is no statute requiring them to do that. It’s all policy on their part.

### **Mr. Redpath**

That sounds like the CAP hearing—you don’t have a right to appeal. But one of the questions I have for you is, can I challenge the underlying liability, or am I just challenging the collection? I think there is a difference, right? Generally, in a CAP hearing, I can’t challenge the underlying liability at all; I just am challenging whether or not they followed proper procedures.

### **Mr. Bluestein**

Right. In a collection due process appeal, normally, you cannot challenge the liability, either. The exception would be if, in the rare circumstance you can demonstrate you didn’t receive the Notice of Deficiency, or you didn’t have the opportunity to challenge it.

I should back up a little bit. What is a Notice of Deficiency? If there’s an income tax adjustment (an audit, basically), you have 90 days to challenge a Notice of Deficiency, which is a document required to be sent out by the IRS before they assess a tax against you. If you challenge that—and the way to challenge it is very clear, [but] this is messed up all the time. A lot of accountants and sometimes lawyers don’t know that, when you get that notice, you might say, “I have substantiation for that. My client should have paid attention to the audit. I will send it to the IRS.” That’s no good; you can’t do that. You have to petition the United States Tax Court. You have to send a petition in, and it says right on the form that you have to do it, and you have 90 days to do it. That is why it is often referred to as a 90-day letter. If you do that timely, then you get the right to litigate in the tax court. There are cases where people say, “I never got it,” or “I didn’t have the opportunity to challenge it,” and then the appeals officer in a collection due process appeal has the authority to look at that issue. If you don’t like their results, you have the right to go to tax court and have a *de novo* review, as they call it.

**Mr. Redpath**

I think the point that you're making is really important. I had a situation once where the date that the IRS—as you know, they have a stamped date when you are supposed to file in the tax court by—it was wrong. The accountant contacted me (as you know, I used to have an office in New York City), and the accountant said, “There's no problem; we have plenty of time. Next time you're here, I'll go over it with you.” And I [said], “Wait, the 90 days has run up.” And the tax court [said], “It doesn't matter that they put that date. You should have known what the 90-day period is.” It's not 91 [days]; it's 90.

There's an interesting case that went to the Supreme Court last year, the *Boechler* case. That was a question of whether that 30 days to file in the tax court from a CDP is jurisdictional; and they said, “No, it is not jurisdictional. The court can hear it.” But the IRS is very adamant that does not apply to things like the 90 days, that those are jurisdictional as far as the tax court is concerned.

**Mr. Bluestein**

You are exactly right. That has been bedrock law since my days as an attorney for the IRS many long years ago. It was the best, easiest thing for me when I got a tax court case that I was going to have to work on and I looked at it, and I realized that the petition came in one day late. It doesn't matter what happened; there is no jurisdiction. I would file a motion to dismiss, and I would win 100 percent of the time. You are right, though—and it was kind of surprising to, I think, all tax practitioners, to some extent.

The Supreme Court has made a distinction with the collection due process appeal, saying that there could be equitable relief for being late—which is really strange to me in a way, because being late on a collection due process appeal is not that devastating, because the government does give you an equivalency hearing.

Being late on a Notice of Deficiency is devastating because you lost your right to challenge the tax liability without paying it first. Now, it is beyond the scope of this discussion, [but] there are ways I found to do that—to challenge it without paying it because, often, the taxpayers cannot afford to pay whatever the liability is—but it is much more difficult. So, I always would rather have them timely file a tax court petition; but I'm getting off the subject a little bit.

The point is that the collection due process appeal is a great tool to stop a levy; but it is not useful at all with a lien because, again, the remedy is after the lien is filed. A CAP appeal—if you know the lien is being proposed—that is the fight I just had; the first CAP appeal I have done in years was to stop a lien. And, fortunately, it worked, but you don't always know when a lien is going to be spit out. The Service center can spit out a lien, and your client will not even know it was happening, and then the damage is done.

So, what I have done often, when there are clients who have come to me with big liabilities and they haven't been contacted by the IRS necessarily (or not recently), I will do what is called a 911 taxpayer assistance order request, using the Taxpayer Advocate's office. I find them to be extremely helpful. I'll explain that we tried to contact the IRS, which is very difficult; the client needs an installment agreement without a lien—it will destroy his business, destroy his whatever. And they will freeze collection, at least for a while, until you have an opportunity to try to prevent a lien from being filed. So, that is a useful tool.

A CAP appeal, again, can be useful, but a collection due process appeal, I use all the time. Now, a little key strategy, though—a very important strategy—people learned it many, many years ago. Bankruptcy is an incredibly useful tool to solve a collection problem under the right circumstances. Many years ago, before the bankruptcy laws were changed in 2005, you could file a collection due process appeal [which] freezes all collection, and there are these key timing issues to make taxes dischargeable in bankruptcy that would keep running. Many times, I would file the appeal—I wouldn't do anything frivolous; I had a legitimate appeal. Maybe I would ask for an offer in compromise to that, or a payment agreement; but they were so backed up, by the time I got it, I didn't really care if they gave me what I wanted because everything was dischargeable in bankruptcy, and the IRS wasn't collecting during that whole time period. I would use what was a fallback option as a primary option.

Well, I wasn't the only one who probably had that experience. So, Congress changed the law and said, if you file a collection due process appeal, you will freeze those timing periods in bankruptcy that are key to discharging income taxes, and 90 days will be added to the time that you were in the appeal while the collection was frozen. A lot of lawyers and tax professionals realize that now. In case bankruptcy may be a fallback option, they don't want to file a timely appeal.

They will actually, purposely, do an equivalency hearing because that does not stop the bankruptcy periods; but it does, as a policy, stop collection, and you get your hearing. Also, an equivalency hearing does not stop the statute of limitations on collection, like a collection due process appeal will do. That ten-year collection statute may be relevant for some cases; and I will tell you, it is much more relevant now (same with the bankruptcy timing periods) than it was before COVID. Because of COVID, the IRS has kind of sat on their hands for two to three years. A lot more cases are close to expiring. Not only statute of limitations, but even more, the bankruptcy timing periods (which are beyond this segment) have all run, or are close to running, before the IRS even starts looking at cases.

**Mr. Redpath**

That is a potential malpractice issue right there, with the timing on bankruptcy. We all know we've seen cases where it has been two or three days, and you could have gotten rid of a lot of liability.

One of the things you are mentioning with the tolling, if you file an offer in compromise request, there is tolling of that statute. I think back—and you're going to be familiar with what I say—because you and I worked on a case with a particular doctor that the IRS wanted to go after. There was somebody [who made a mistake]. They had it, but when you went through the account transcript, the IRS did screw up, and they screwed up on a significant amount of tax because the statute had run. Now, that was a crazy situation. There were various tollings of the statute and everything but, when you actually ran it out, there was a significant amount of tax—but the statute had run. The ten years had run on it, because the IRS had screwed up. I think that is one of the things that our viewers should be aware of. You need to, in any of these situations, get a transcript. Find out exactly what has happened.

**Mr. Bluestein**

And don't assume the IRS is right—because you are right about the case you are talking about, and I have had at least a couple others that shocked me. I found out they were wrong; and I had to fight with them quite a bit, but we eventually prevailed, and the statute had expired. So, that is worth definitely looking into.

**Mr. Redpath**

Now, the CAP hearing, there is no appeal. What about the underlying penalties? Can we use a reasonable cause argument in both a CDP and a CAP, relative to penalties?

**Mr. Bluestein**

I have never used a CAP for a challenge of reasonable cause. I have used the collection due process appeal often for that because you can challenge a penalty and you can appeal a denial. That is different than a CAP appeal. You are appealing the denial of a penalty. Or you can wait to get a final Notice of Intent to Levy and challenge the penalty that way.

**Mr. Redpath**

Now, let's take that case you mentioned where you filed a CAP hearing. You were successful, so you were happy.

**Mr. Bluestein**

It is a unique case, and it ties into the installment agreement discussion.

**Mr. Redpath**

Right. We are going to do a segment on these alternatives. But my question really is, let's say that you weren't totally happy, or you didn't get the result you wanted. Can you, later, file for a CDP and raise the same issues again? Or can you file on a CDP if, all of a sudden, you say, "There are other issues I haven't raised"? Can you dovetail them?

**Mr. Bluestein**

If you are arguing the same issue, you're at risk of them saying you already had your bite at this apple. That is another reason—and I am glad you pointed that out—I don't really like CAP appeals unless I really need to use them. I don't find them that useful. I would rather do a CDP because I have the judicial review and I find the appeals officers, in my experience, have been more geared towards trying to resolve it at a CDP than at a CAP appeal.

In a CAP appeal, I almost got the feeling that it is an annoyance to them. They have to do it really quick, they are more likely (in my opinion), to rubber stamp whatever the IRS is doing, and they know there is no judicial review. I would guess that appeals officers do not like to be dragged in front of the tax court and told they made a mistake and have it remanded—and that happens—you see these reported opinions. They know that someone can appeal their decision to the tax court on a CDP, so I think that is a much more powerful tool, and I would rather use that.

**Mr. Redpath**

I agree with you, and I think this is very enlightening for our viewers because the collection side of it is often something that the accountant gets involved in and is not, really, that clear. Now, for a lot of these issues, timing is so important. Even if you are never going to do a CDP hearing, [let's say] you are going to bring Gary Bluestein's office in to handle all of your CDP hearings or CAP hearings—and obviously for tax court, et cetera—you need to be knowledgeable. You can't just miss deadlines, and everything is so important. At least have a working knowledge of what the potential process is that we can work through on these issues. Then, if your office is capable of doing them, absolutely; you have every right to do them.

If you are in a CDP—I always look at it this way and [say], "If this is going to go to tax court, I better get that attorney involved now." Don't wait until after the decision and then say, "Hey, Gary, can you appeal this for me?"

**Mr. Bluestein**

That is absolutely right. You have to build the record at the appeal, and it is hard [when you] get a case that your hands are tied by the time you get it.

**Mr. Redpath**

And that is a great point, because one of the things I think you see sometimes is accountants who are familiar with this process out there [and they say], "I can just do it; I can fill out the Form 12153 and file for a collection due process, and I can handle it." But like you said, you are probably trying to build a record for potentially going to tax court; and you really need, if nothing else, to have worked with an attorney to figure out, what is that record, and what are we looking to do? Because the last thing you want to do is screw it up. Like you mentioned, you might file a CAP hearing thinking, this is fast, I can get it done. Whoops, guess what? You have a limited amount of issues, and you can't appeal it. So, I think that being aware of all of these things is incredibly important.

One last thing I wanted to ask you [is about] the general reasonable cause. I know the IRS is now saying, "Don't give us a statement of reasonable cause when you file the return." Have you had a lot of success in trying to get penalties set aside based on reasonable cause?

**Mr. Bluestein**

I have; it is difficult. I get frustrated with clients who call up and [say], "Just have them waive the interest and penalties," like we have a magic wand. Interest will never waive. They don't have authority to, unless it was their

error, which is very rare. Secondly, with penalties, they don't just magically waive it. You have to show reasonable cause, which is a difficult standard, unless—and here is something people miss all the time—it is a first-time penalty abatement. If your client has been clean for the three prior years to a year you are trying to get relief (it would have to be the first year if there are multiple years, but the three prior years), you can request a first-time penalty abatement. And it's automatic; the IRS will give it to you. They don't make that well known often, but that is a very useful tool.

If they don't qualify for that—and I have to get a transcript when they say they do, because they often are wrong; they often have a penalty in a prior year that they told me they didn't—if they don't qualify for that [first-time penalty abatement], then you are right, you have to go for reasonable cause, and it is not a slam dunk. Yes, we have had success with it; and I will never (well, rarely) will I tell somebody don't even try. Sometimes, it's obvious they don't have any grounds at all; but I have found that it's going to depend on who you have looking at it sometimes.

**Mr. Redpath**

I think an interesting issue right now, and I'm not sure you've seen any yet, but you certainly are aware of the issues out there, and that is these employee tax retention credit—the retention credit—mills. What is your thought on that? Because I am hearing different things, like sometimes the IRS is saying, "If you get defrauded, that is your problem." And when they came out with the Dirty Dozen fraud schemes [for 2023, the IRS spotlighted widely circulating claims involving Employee Retention credits. Improperly claiming this credit could result in taxpayers having to repay the credit and includes] the warning: there are penalties and interest on that. They did not sound like they are going to be that lenient on this. What is your thought?

**Mr. Bluestein**

No, they are not; they are coming after people. There are three situations. You have people who are entitled to it who don't know it. Then, you have people who are entitled to it and the IRS is going to potentially audit them and fight them on it—and that is going to be a lot of work for tax lawyers. Then, you have the third group who were not entitled to it; and the IRS is going to go heavily after them, civilly and criminally. So, there will be cases that we will [come] across—and they already have started doing this—they will be looking at criminal prosecution.... You, like me, are old enough to remember the tax shelters in the big tax shelter era. Well, it's going to be like that. It's going to be a huge explosion of litigation, I'm sure.

**Mr. Redpath**

It's crazy stuff out there. Gary, I want to thank you for your insight. There is a lot to think of. And I think the main takeaway, viewers, is understand these things, know what is going on. If you are going to get involved and you are not actively doing these all the time, you really should consult with legal counsel on this. Gary Bluestein, thank you very much for your insight. I really appreciate it.

**Mr. Bluestein**

Thank you, Ian. It was a pleasure.





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## SUPPLEMENTAL MATERIALS

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### Collection Due Process Versus Collection Appeals Program

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By Ian J. Redpath, JD, LLM

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#### A. Introduction

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Generally, the IRS will be aggressive in trying to collect unpaid taxes. The IRS provides several methods to obtain potential relief, and it is important that practitioners be aware of what is available and what types of situations apply to each. There are significant differences that may determine which method is used; and awareness of these differences can help practitioners and taxpayers avoid results that are unintended and unwanted. In some circumstances, it may be advisable to involve an attorney, especially when an appeal to the U.S. Tax Court may be the end result.

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#### B. Audit Reconsideration

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An audit reconsideration is often overlooked. It is available if the taxpayer:

- Did not appear for the audit,
- Moved and did not receive correspondence from the IRS,
- Has additional information to present, or
- Disagrees with the assessment from the audit.

The IRS will not accept the audit reconsideration request if:

- The taxpayer previously agreed to pay the amount of tax by signing an agreement such as a Form 906, Closing Agreement; an offer-in-compromise agreement; or an agreement on Form 870-AD with the Appeals office;
- The amount of tax owed is the result of final partnership item adjustments under TEFRA (Tax Equity Fiscal Responsibility Act); or
- The U.S. Tax Court, or another court, has issued a final determination on the tax liability.

An audit reconsideration request can be made any time after an examination assessment has been made and the tax remains unpaid. All reconsideration requests are first reviewed in the appropriate IRS campus. The IRS should respond within 30 days after submission. If a face-to-face meeting is necessary, the campus will transfer it to the office nearest the taxpayer.

While no special form is required, the IRS would like taxpayers to use Form 12661, Disputed Issue Verification. Attach an explanation of the disagreement and any additional information to be considered (note that the IRS will not return the documentation, so only send copies). If the taxpayer currently has an installment agreement, payments must continue to be made during the process. If the taxpayer disagrees with the reconsideration, there may be a request for an appeals conference.

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#### C. Collection Due Process (CDP) Appeal

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The Restructuring and Reform Act of 1998 requires the IRS to serve a final notice of intent to levy prior to taking any levy or seizure action. This requirement is codified in IRC §6330. If the IRS has assessed the tax and the liability is not paid, a series of notices are sent out during the collection process. An initial notice threatening to levy is referred

to as a CP504 Notice. Although this notice says, “Urgent, we intend to levy,” the IRS cannot seize assets based on this notice. It must first send a Final Notice of Intent to Levy, which can be a CP90, LT11, or 1058 letter. This notice must allow for an appeal to the proposed levy action, which is referred to as a Collection Due Process Appeal (or CDP). The taxpayer has 30 days to file a timely CDP. This will stop collection until resolution of the CDP. The CDP is available if a taxpayer receives one of the following notices:

- Notice of Federal Tax Lien Filing and Your Right to a Hearing Under IRC §6320;
- Final Notice—Notice of Intent to Levy and Notice of Your Right to a Hearing;
- Notice of Jeopardy Levy and Right of Appeal;
- Notice of Levy on Your State Tax Refund—Notice of Your Right to a Hearing; or
- Post Levy Collection Due Process (CDP) Notice.

If, after the hearing, the Appeals Officer’s determination is not acceptable to the taxpayer, an appeal can be made to the U.S. Tax Court. However, the level of review is “abuse of discretion.” This is a difficult standard for the taxpayer to demonstrate, and the majority of the cases are decided in favor of the government.

During a CDP hearing, the taxpayer may raise any relevant issue relating to the unpaid tax or the proposed levy, including spousal defenses, challenges to the appropriateness of collection actions, and offers of collection alternatives. A taxpayer may also challenge the existence or amount of the underlying tax liability for any tax period; however, this is limited to situations where the taxpayer did not receive a statutory notice of deficiency for that liability or did not otherwise have an opportunity to dispute the liability.

All collection action is stayed, by statute, while the appeal process is pending. As a result, the ten-year statute of limitations on collection is also stayed while the appeal is pending. Additionally, the timing periods for discharging income taxes in bankruptcy under bankruptcy code §507(a)(8) are also stayed, and 90 days is added to any remaining time on bankruptcy timing periods.

If the request for a hearing is filed after the 30-day period, up to one year, the request for an appeal becomes a CDP equivalency hearing. In this situation, the IRS may, but often does not, continue collections. Once the Appeals office makes a determination, there is no appeal to the Tax Court.

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## **D. Collection Appeals Program (CAP)**

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A CAP hearing is similar to a CDP. However, there are significant differences that practitioners must consider in determining if they want to request a CAP. The CAP is available to appeal a broad range of collection actions. The CAP procedure can be used to dispute the following:

- Before or after the IRS files a Notice of Federal Tax Lien;
- Before or after the IRS levies or seizes property;
- Termination, or proposed termination, of an installment agreement;
- Rejection of an installment agreement; and
- Modification, or proposed modification, of an installment agreement.

Some of these actions may also be appealed during a CDP hearing. Two important distinctions between the CDP and CAP procedures are that (1) the decision from a CAP conference cannot be appealed in Tax Court, and (2) the amount or existence of the underlying tax liability cannot be disputed in a CAP.

It should be noted that a taxpayer can use a CAP and then later use a CDP, if it qualifies. However, any issue that is determined in the CAP cannot be appealed in the CDP, unless it can be established that there is new information to be presented on the issue. The CAP hearing is considered to be a “previous administrative... proceeding” as described in §6330(c)(4). Importantly, this could result in not being able to appeal the issue(s) to the Tax Court as the determination was made in a CAP.

The CAP can be valuable for appealing actions related to installment agreements, which cannot be appealed during a CDP hearing. If the IRS terminates an existing installment agreement, perhaps because the taxpayer missed a payment or failed to file a tax return, the IRS may initiate collection actions, such as bank account levies. However, they cannot levy until 30 days after the levy or termination of the installment agreement and, if the taxpayer appeals, they will not appeal during the appeals process unless they believe the collection is in jeopardy. It is also helpful in an appeal before or after the filing of a lien or levy or the seizure of property.

It should be noted that third parties also have the right to use the CAP procedure to contest the filing of liens against alter ego or nominee property. They do not have the right to a CDP hearing.

The CAP request generally is made using Form 9423, Collection Appeal Request. Normally, in the case of liens, levies, and seizures, the IRS will not take any collection action until the Appeals office makes its decision, unless the IRS believes the collection of the tax is at risk.

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## **E. Taxpayer Advocate Service (TAS)**

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The Taxpayer Advocate Service (TAS) is an independent organization within the IRS. It was established to help protect taxpayer rights and assist individuals, business owners, and exempt organizations resolve tax-related issues that they have not been able to resolve through normal IRS channels. The TAS may help to mediate issues with the IRS, such as:

- Facing a time-sensitive financial hardship due to the tax situation;
- The IRS is threatening immediate adverse action;
- The IRS is not responding or working in a timely manner; or
- The IRS is not recognizing the specifics of the situation.

The TAS will not assist if an IRS-established administrative procedure, such as requesting an appeal, was not done or if the case is in the criminal investigation division of the IRS. If the taxpayer’s position is that of a tax protestor or that they simply cannot or will not pay the tax under any circumstances, the TAS will not get involved. (See Publication 1546 for more information.)

Generally, a request for assistance by the TAS is made using Form 911, Request for Taxpayer Advocate Service Assistance, and mailing or faxing it to the local TAS office. Each state, the District of Columbia, Puerto Rico, and the Pacific and Caribbean U.S. territories all have at least one local TAS office. There is an interactive tool on the TAS website to find the local TAS office. Note that if there is a need for immediate assistance, such as an imminent seizure of assets, the taxpayer should call or fax a request with a detail of the need for immediate action. There is also a toll-free number to call: (877)-777-4778.

The IRS says that a significant hardship means not being able to “provide the necessities of life” for the taxpayer or their dependents. The TAS will look to determine the seriousness of the hardship. Generally, it must be shown that the IRS action will harm the taxpayer’s:

- Ability to obtain or keep shelter, food, and clothing for the taxpayer and the taxpayer’s family;
- Transportation to work;

- Employment;
- Ability to get medical care;
- Education;
- Credit rating; or
- Ability to meet a business payroll or stay out of bankruptcy (the IRS is less likely to help a business than an individual, however).

According to IRM §1279 (10)(70), the IRS cannot hold the following against the taxpayer:

- The degree of fault in causing the hardship;
- Any past history of IRS difficulties;
- The type of tax involved; or
- TAS/IRS employees' biases.

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## **F. Conclusion**

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The selection of alternatives to collection actions by the IRS is extremely important. Practitioners must be cognizant of all the tools available to taxpayers and the rules applicable to each. The decision may be driven by a number of factors that may, or may not, be within the control of the taxpayer. Care must always be taken to assess the appropriate action(s) in light of the taxpayer's situation, type of tax, and IRS procedures and rules. When properly utilized, practitioners may be successful in assisting taxpayers in these matters.

## GROUP STUDY MATERIALS

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### A. Discussion Problems

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- 1) Your office has a new client, José. The client has brought in an audit report and indicates that the prior accountant had not provided the IRS with information that is important to the outcome. The client has not agreed to any assessment.
- 2) Another client, Jamie, has receive a CP504 initial notice threatening a levy. There are collections alternatives available that you discussed with the client.
- 3) Your client, Roberta, has had an assessment of a significant amount of additional taxes. She has not received any notices from the IRS on collections but wants to pursue collection alternatives.

#### **Required:**

Discuss all issues fairly presented by the above factual situations.

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**B. Suggested Answers to Discussion Problems**

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- 1) You may want to consider a request for Audit Reconsideration. The fact that there is additional evidence that was not considered at the initial audit is one factor in making this available. Another factor, that José has not agreed to the tax, leaves this option open.
- 2) Since Jamie has received a CP504, a request for a CDP is appropriate. In this type of hearing, collection alternatives can be proposed, and it will stop any collection efforts while pending. This may be better than a CAP because appeal to the Tax Court remains available.
- 3) At this stage, a CDP is not available for Roberta, however, a CAP is available. Collection alternatives may be addressed at a CAP. Care should be taken related to issues that you are convinced may have to go to Tax Court, because raising it at the CAP will preclude raising it at a subsequent CDP and, thus, no appeal to the Tax Court.

## PART 3. BUSINESS TAXATION

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### Employee Retention Credit (ERC)

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The Employee Retention Credit—or ERC—was initially introduced by the CARES Act for a portion of wages paid to certain employees during the COVID-19 crisis. Although the program has ended, taxpayers have the opportunity to claim the ERC retroactively. Since its inception, the credit has gone through numerous and significant changes in amounts, definitions, and application. This has caused confusion for practitioners and business owners, which has resulted in mistakes and errors. The IRS also warns that businesses and practitioners must be cautious to avoid potential fraud scams generated by ERC mills. Ian Redpath and Karen Davis discuss key rules regarding eligibility for and calculation of the ERC, which can provide a great benefit to employers when processed correctly.

Let's join Ian and Karen.

#### Mr. Redpath

Karen, welcome to the program.

#### Ms. Davis

Thanks for having me, Ian.

#### Mr. Redpath

Well, the great thing about having you here is, I think, nationally, you're kind of the guru of the employee retention credit. So, we've got one of the top experts here. That's great. Some of our viewers are probably going, "Employee retention credit? I thought that's gone," or, "Employee retention credit. Why are we talking about that? Didn't we talk about that a year ago?" And my answer to both of those is yes, yes, and no, *no*. I had a [message]—last week, this is just last week—and I brought my phone: "Ian, I'm an accountant in [blank]. Our firm has prepared returns for [blank]. And our client just came in, and we found out that they had received \$700 and some thousand dollars—I'm not going to give an exact amount—in employee retention credits. They've gotten a check for \$350,000. The next check is coming. We have gone over and over this. They don't qualify. They were contacted by somebody. What do we do?"

That's an easy one, right? If you haven't cashed the check, send it back. If you have cashed it, send the money back with an explanation. But the company's already collected, so they don't have all the money to pay back. Now, they're going to have to chase this company—whatever it is—chase them to try to collect it. There's a lot of judgments out there against some of the old offer in compromise mills. Well, that's great. You got a judgment. You got a piece of paper. You're still out the money. We have a real interesting one. We're going to put up a slide here, Karen, and you can kind of help us with this one because you provided this one to me. I think this is really interesting.

#### Ms. Davis

Yes.

#### Mr. Redpath

We'll start with the first slide. Here comes a notice. This is from the IRS, right? This notice? I'm sure it is.

#### Ms. Davis

This is from the Department of Employee Retention Credit, the Accelerate Tax Notice in New York, New York, 10080, which is not really an address. It's the zip code of the World Trade Center. It's made to look like an IRS notice. It looked to me like an IRS notice, and it was addressed to a principal of our firm. And what it says is, "We estimate..."



**Mr. Redpath**

Karen, can I interrupt? I don't want our viewers to miss what you just said.

**Ms. Davis**

Okay.

**Mr. Redpath**

It was addressed to your accounting firm.

**Ms. Davis**

So, you want me to not say that?

**Mr. Redpath**

No, I mean, they don't even know who they're targeting.

**Ms. Davis**

Right. I have to tell you, Ian, I don't know if it's that I'm getting older, but I call people sweetheart a lot. It's like, "Do you know who you're talking to, sweetheart?" People come up the elevator with me and say, "Oh yes, you know about employee retention credit, right?"

Anyway, they're offering our firm \$728,000 of possible retention credit based on the number of employees—\$26,000 per employee. Contact us at this 877 number. Again, it looks like an IRS notice, and it's a promise of this big tax refund. And it's clearly fraudulent. Like you said, a lot of these people, these mills, they're charging typically, I think, 15% of the credit amount. So, 15% of \$700,000 in your case; \$728,000 on this particular offer letter. And then, they're gone. You won't find them. There is no address called Accelerate Tax Notice at that zip code. There is that number. I haven't called the number. I don't try to kick hornets' nests if I can't.

Following the IRS guidance, what they say is that, if you see these frauds, there are ways to report them and to try to shut them down. One of them is to address yourself to the Treasury Inspector General for Tax Administration. They have a hotline team. I called the hotline team, and they said, "You know, our hotline has fried because of overuse. Please write us a letter." So, the IRS does give you ways to report what you see as these frauds.

Now, this one in particular, TIGTA, Treasury Inspector General, wants to hear about schemes involving the use of computer technology or mail that impersonate the IRS or IRS personnel. This is not just an ad on TV. I'd take this to be clearly impersonating the IRS. This is one that really caught my eye, especially because it crossed my desk where I live rather than just coming from a client to me.

**Mr. Redpath**

I'm going to put up another slide here, which is on the bottom of the form. What we just showed is the top of the form, and on the bottom, it says, "Tax Refund" and has the firm's name and everything. "Tax refunds may be paid in a series of payments made out..." And that had the firm's name on it. "Qualifying businesses may receive their refunds in as little as five business days. Here's your refund." Again, contact us, the Department of Employee Retention Credit.

But the problem is—much like the woman that I got the email from—clients don't know this. And these offer in compromise mills are as bad, if not worse, than, "The IRS is settling for pennies on the dollar!" Well, this is the same type of thing. "The IRS is just giving away money! Just call us, and we're going to get you your money." And then we're gone, as you said, and then we're gone. Now, that doesn't mean there aren't legitimate people out there in that field who get employee retention credits and go back because there [were] so many problems with the employee retention credit.

But an interesting one—and you pointed this out—the data points as to where we are with [the Form] 941s. Where is the IRS? They’ve caught up, right? They’ve caught up with all the 941s?

**Ms. Davis**

You know what’s interesting, Ian? The IRS maintains an operational status website, since the COVID pandemic when they fell far behind, and they’ve been trying to up their game with computer platforms and technologies. So, they do keep a listing of the operational status.

I have a client who’s filed a [Form] 1040-X. They say, “How long should I expect to wait?” I go there, and I see how many [the IRS is] working. So, as of June last year—in June of 2021—they had a backlog of maybe 220,000.

**Mr. Redpath**

By the way, that was 2022, June of 2022.

**Ms. Davis**

Oh, 2022—I lost a year—so, June of 2022. And so, here we are in March of 2023, and they have more than 800,000 as their backlog of [Form] 941-X. Now, not all of these are going to be COVID-related employee retention credit claims, but a lot of them are. The Service centers at Cincinnati and Ogden have been specially trained for this credit. At the same time, and we’ll talk about this later in the program, they’re also specially training audit agents to bird-dog this credit and make sure [it was] not improperly claimed. So, just now, they’re trained up and ready to go. It seems to me they could almost put it in one of those little vacuum tubes that deliver things from one part of the building to the other. They could just put it from the refund claim to the audit claim because many of these, like you said, are going to be fraudulent.

**Mr. Redpath**

Julie Forrester—the IRS Small Business and Self-Employment division—at a meeting back in November, she stated that, “We’re going to start auditing this. We’re training people, and in [the] February/March period, we’re going to roll out these audits.” And so, the fact of the matter is, we’re going to see, with this increase as [Form] 941-Xs keep coming in, we can expect to see more and more audits, especially targeting certain industries. For example, one of the things that was mentioned is restaurants, the employee retention credit on restaurants. And then, to say how important this is to the IRS, the IRS has just recently come out with the infamous Dirty Dozen—the Dirty Dozen of tax frauds.

**Ms. Davis**

Exactly. You know what’s interesting? The IRS rolls out the Dirty Dozen during tax season because that’s when there’s the most taxpayer awareness, but it’s also when we’re the busiest. So, thank you for that, IRS. But this is number one. It’s the first one on their list this time. And partly, I mean, these are big numbers—\$26,000 per employee. You see the ads on TV, you get the solicitations in the mail, and you get the plainly fraudulent explanations of the eligibility. And that’s something that, you know—how long have we been talking about this? Well, the CARES Act originally was March of 2020, at the beginning of the pandemic. At the time, it was really important to get this money out into the economy. Same with the Paycheck Protection [Program (PPP)] loans. There was a reason these went out, but with this much money at stake, there was a lot of fraud. Right now, you hear [of] people going to jail because of the PPP fraud; and there’s just going to be one year of lag time, I think, before we’re hearing these same stories [about the employee retention credit], whether it’s the mills or the individual taxpayers.

**Mr. Redpath**

That’s a good point, because in the release with the Dirty Dozen—and this is IR-2023-49—the IRS Commissioner specifically stated, and I’m going to quote here, “The aggressive marketing of these credits is deeply troubling and a major concern to the IRS. Businesses need to think twice before filing for these credits.” And then, the final warning,

“People should remember the IRS is actively auditing and,” as you just said, “conducting criminal investigations in regard to these false claims.” You hear the claim—like you said, you can’t put the radio on without hearing an ad. You can’t watch television without hearing an ad. Does that mean that they’re all fraudulent? I wouldn’t say that. But we know the IRS is saying there’s so many fraudulent schemes; and I just read an email and we just put up what went to an accounting firm. They’re just targeting anybody.

**Ms. Davis**

Yes. And let me tell you one more thing, Ian. On the first floor of our building is a law firm that we do a lot of business with. They send people upstairs, and we send people downstairs. So, there’s a deep set of professional connections between us and this law firm. And two of the lawyers came up and said, “I want for you to tell me about employee retention credit, because it’s not our area, but our clients are calling us.” I sat down with them and went through the eligibility criteria—you know, the full or partial government shutdown, the decline in revenue test, and who really is eligible for it. And they really listened. They wanted to understand it because they’re hearing it from their clients.

But what they also understood was, if it seems to them a client either needs more explanation or is in fact entitled to it, they’re going to send them to me. Again, this is why you develop professional relationships. As soon as you have a mill out there saying, “For 15% of the credit amount, we’ll do this return,” it makes it easy for our firm to do value billing. Like, [for] some number that’s less than 15%, we will do the claim but also stand behind any follow-up questions by the IRS. But obviously, we’re not going to send anything out that’s not bulletproof. And part of making it bulletproof is the workpapers that coordinate the PPP forgiveness wages with the ERTC wages; and the IRS told us how to do that in Notice 2021-20. So, it’s important to, like I said, make it bulletproof. And then the client asked me, “Well, are these going to be audited?” I was like, “Maybe, yes, but we’re ready for that.” And that’s going to be part of the fee we build in and part of the workpapers that we develop.

**Mr. Redpath**

Another thing, Karen, is that we have a situation where, if you’re going to take the employee retention credit, you also have to amend the income tax return. And, to my knowledge, anything I’ve seen, these mills are just filing the 941-X, and we’re done. We’re done here, but the taxpayer isn’t done. And I think that’s one of the things that’s missed.

As you mentioned, another great example is the PPP loan coordination. If you took a PPP loan, you still can get the employee retention credit, but there has to be a coordination there of the wages. I have yet to see, from a company who’s been affected by this, an amended say 1120, reflecting the wages. And that’s another thing—the IRS in the Dirty Dozen said specifically [that] taxpayers should rely on their trusted tax professional.

**Ms. Davis**

That’s us.

**Mr. Redpath**

You, our viewers. Rely on them. But something that I really never thought about—the IRS pointed this out, and sometimes you go, “Wow, I should have thought of that one.” They said what a lot of companies are doing is they’re using the employee retention mill. They’re using this to collect personal identification material in exchange for these promises to collect all this information. Essentially, it’s not just a scheme to apply [and] do a 941. It’s a scheme to get the client’s personal information. I didn’t even think about that, but, boy, I can see now, yes, that’s absolutely true.

**Ms. Davis**

Let me give you an example, Ian. I had a client recently who had a collection notice from the SBA, the Small Business Administration, for an EIDL loan [Economic Injury Disaster Loan] from Alabama. And we’re up here in Connecticut,

right? So, how did my client's business and EIN get attached to an EIDL loan from the pandemic when the SBA's flinging money out the door to save businesses? The level of scrutiny on the front end was not there. There again, the SBA has a reporting procedure if you think you've been a victim of identity theft. But, same as you, it hadn't even crossed my mind that some of these solicitations for employee retention credit are simply for the purpose of collecting personal and business information that would allow for an identity-theft-type fraud. I mean, this is the Wild West. It's the Wild Cyberspace, right? How much fraud there is, and how many different avenues they can dream up faster than we can swat them down.

### **Mr. Redpath**

Right? I'm going to put up a slide right now. This comes from the Dirty Dozen, and it is to report a fraud. You can file Form 14242, and that can be faxed or mailed to the IRS. The address is up on your screen, viewers. Also, you can use the IRS Whistleblower Office if you believe that potentially there's a monetary award. I'm not sure how that's going to work in this case, but those are some of the options that you have. Also, you can notify, as you mentioned, the Treasury Inspector General. They want to know of these fraudulent schemes. So, there's a few options that you have when you're doing this.

We know the audits are coming. We know the audits are going to be not easy. We know there's a lot of fraud out there. In the time we have remaining, Karen, can you tell us exactly what is the—so, we're that lawyer downstairs coming up to you and asking you, can you just fill us in and tell us what's going on with the credit?

### **Ms. Davis**

I can, and, you know, Ian, there were four separate legislation initiatives that caused us to have and follow through for these two years the employee retention credit. The first was the CARES Act in March of 2020, which gave us the 50% credit on annual wages up to \$10,000, and the decline in revenue qualification was 50%. Also, at the beginning, under the CARES Act, if you got a PPP loan, you just couldn't even apply for employee retention credit. That's why it was sort of a sleeper. We were all so busy with the Paycheck Protection Act loans because that's where the money was.

And then, with a budget act at the end of 2020 in December, they said, "Okay, we're going to revise it retrospectively, and now say even if you got a PPP loan, you can still get employee retention credit so long as you don't count the same wages for both."

So, now we have to go back and think of amending these returns. And it was in that same legislation that they said, "Let's expand it into the first and second quarter of 2021 and change the eligibility criteria." Now, the eligibility would be under the gross receipts test a decline of 20%, and the payout is 70% of \$10,000 per quarter instead of 50% of \$10,000 for the full year. And it was going to run for the first and second quarter.

Then, we got the American Rescue Plan Act—that's the third one I'm mentioning—that said, "Okay, let's go ahead and extend it to the third and fourth quarter." And there were some minor changes about the refundable and nonrefundable portions. But then the Infrastructure Act later that year said, "You know what? Let's just 'whap' the fourth quarter except for recovery start-up businesses." And their logic, Congress's reasoning was, nobody's using this credit. I mean, it's sort of—nobody's using it, so why keep it? It was targeted for small businesses. The small businesses are not availing themselves of it, so let's just drop it.

Well, that was then; this is now, right? Now, the mills have started up, and the outreach is there—part of the outreach being ours also to the clients telling them, "This is here, and we have to amend, and we have to amend the income tax return as well, correspondingly. But if we left money on the table, we have a three-year statute of limitations to go get that." So, we're still well within the statute of limitations. And, Ian, for the quarterly payroll tax returns of 2020, the last of those was due January 31, 2021. So, the statute of limitations for all of 2020 is January 31, 2024. Nothing has expired, and nothing will expire this tax season. People can still step back and say, "What do I want to do?"

But it can be very complicated, like you mentioned, amending the income tax return, especially if it was an NOL; and under CARES, we had a five-year lookback. You could really make a huge mess with these amended returns for 2020. [In] 2021, at least we had the full set of rules, which is we knew PPP coordination was a thing, and we could make it work. So, we were much better positioned for 2021.

But [in] regard to the mills, I just want to say one thing as well. Some of those businesses are legitimate. We will look at this for you. We have analysts who are prepared to tell you yes or no, and we're prepared to make that return and file that return for you. Now, the more illegitimate mills say, "Here's the money; you're totally qualified. We're putting together a credit package, but we're not preparing the return. You give the credit package to your CPA, and they'll sign the return." Well, we are Circular 230 preparers. That was part of the IRS's admonitions in March of this year, which is, "Oh, by the way, these are your responsibilities under Circular 230. You can't just make up stuff."

**Mr. Redpath**

Well, I think that you're right, and that we have to point that out. There are legitimate businesses out there. I think one thing that this has done is bring forward that maybe we do need to look at some of our clients and say, "Did we miss something?"

I thought it was very interesting that the woman that contacted me by email earlier, she said that, initially, we determined they weren't eligible when they brought this in. She said we might have made a mistake. There were so many different changes that went on. So, we went back and analyzed it again. No, we came to the same result. They don't qualify. Literally, the client, it was like five questions. Oh, yes, you qualify.

I'm not sure. I mean, those are the five secret questions we don't know, but there were five questions. Oh, yes, you qualify. And I'm not sure it's ever that easy as five questions, but that was essentially what it was. Nope, you qualify, and we're going to file. Here's what information to send us, and we're going to file your amended 941s. We could very easily have made a mistake. There's no question about it. Legitimately, any accountant is going to have to say, "Yes, I could have made a mistake during that period of time because things changed so rapidly."

**Ms. Davis**

Sure.

**Mr. Redpath**

But if you've looked at it, and you say they don't qualify—and that becomes part of the problem—what steps do we take to protect our client? Is there anything that you [do]? Are you trying to notify your clients, "Hey, beware of these things?" Or are you taking any proactive role with the clients?

**Ms. Davis**

Yes, when the client comes to us with a solicitation, we listen to all the facts and circumstances, and we also look for those partial or full government shutdowns. So, for instance, as relates to attorneys, right? If you have an attorney that litigates personal injury claims, but the courts have shut down, all you can really do is settle the cases because you can't ever go to court or seat a jury. That impacts their business for real because they're not going to be able to get as good a settlement without the threat of going to court, and they can't go to court. So, those were shutdowns, and we looked at the entirety of—here in Connecticut, it's Governor Lamont's directives—and sorted through them. You know, when did the courts close down? When did the courts open up? What was that time period?

If you're claiming based on decline in revenue, it's for the full quarter. If you're claiming based on a full or partial government shutdown, it's just for the period of the shutdown, those wages. So, it's important that you know the nuances of this, and the IRS did give us three significant notices in 2021 giving us guidance. That was Notice 2021-20, 23, and 49. All the answers are there. All of the IRS guidance hasn't been updated, really. Now, the new guidance is simply these warnings that there's fraudsters out there; but the guidance of how to actually do it is contained in those three notices from 2021.

**Mr. Redpath**

Yes. And I'm thinking that a lot of people have newsletters. They put things up on their website. I think this might be a good thing. Look, the IRS is saying there's scams out there—beware. Because it's so much harder to deal with when you have a situation like the woman that contacted me saying, "Hey, they've got the money, and here we are," than it is to say to the client, "Look, before you do anything, let us look at it."

And even if they do come in and they've gotten the refund, remember you've got to look now and say, "Okay, what else do I have to do? Do I have to go back and amend?" And you're almost always going to have to go back and amend the income tax returns now. Now, you have more work to do. The clients just added more and more work on there for something that, even if it's legitimate, you still, as the accountant, may have to do something additional beyond the fact that the 941 was filed, and most 941s are sitting somewhere in the IRS computer.

**Ms. Davis**

Yes. Ian, you had also mentioned the IRS, as part of their audit activities, they've sort of hinted they're going to look at the North American industry classification codes. Restaurants, we know shut down. Tattoo parlors, of course. Tanning salons, of course. They had to shut down. But the healthcare industry, they were essential workers here in Connecticut. Manufacturers were essential workers here in Connecticut. One of the examples the IRS gives in their guidance for manufacturers is, if I'm an automobile manufacturer here in Connecticut and we haven't been shut down, but I'm waiting for brake assemblies that come from New Jersey and they were shut down, then, yes—I have been subject to a partial government shutdown.

But in the heyday of these mills trying to throw out the credit, they're saying the Port of Los Angeles was shut down because of COVID. There weren't enough workers, so your brake assemblies are backed up on a ship. They haven't been offloaded yet, so you're a victim of a COVID restriction. You're not, actually. You're just the victim of a global supply chain disruption. There was no government-mandated shutdown that affected you. Again, the mills are the ones saying you qualify if you had to wear extra latex gloves when you served the food. It's like, no. Extra precautions you took for COVID that raised your expenses didn't give rise to this credit that's based on revenue or these full or partial government shutdowns. So, we know the rules; the rules are clear. The IRS has been clear, but playing whack-a-mole with all of these fraudulent claims is the position we find ourselves in.

**Mr. Redpath**

Right. And again, I would even become proactive to the extent that if I have a newsletter or anything, I think the fact that this is right on the Dirty Dozen now is something that we can come out to our clients and say, "Look, this isn't us saying it. This is the Internal Revenue Service saying it." And legitimately, we can look at that. Presumably, you have. Yes, it's very possible that someone might have made a mistake. It's almost impossible not to have had some errors back in those days, the way things changed daily. But again, you looking at it as a trusted tax professional versus a client getting sucked in by the mills.

And the other problem, I think, is that when they get sucked in by the mills, what do they think? A lot of clients say, "Oh, I'm going to go to my accountant," as you mentioned. Other ones are going to say, "Well, my accountant obviously screwed up. I got \$300,000. Where was my accountant?" And the next thing you know, they're looking at you as if you're the problem. I'm sure a lot of accounting firms are going to lose some business as a result of this because they're not going to come back to that accountant. They're going to go somewhere else because they're going to assume the accountant screwed up even though they didn't. So, I think at least putting something out there—if it's on your website, something proactive—to at least warn them. Because the first thing I would like to do is get that phone call, like you said, get that phone call saying, "Hey, I just got contacted. Is this legitimate?"

**Ms. Davis**

Yes. The IRS warns in its usual way—if it's too good to be true, it probably is—but this was a very complicated set of legislations. People were understandably confused.

Now, one of the things I want to also mention is what if your client figures out, “I filed this because I was approached by this mill, but now I’m having misgivings. Am I going to be subject to a 20% penalty when the IRS comes calling and reverses that credit?” The answer is yes. “What do I do now?” You amend now to reverse that credit. You give the money back, and you’re likely to have evaded the penalty by self-correcting before the IRS came calling. I’m not just making that up. I’ve been talking to another professional colleague who is at a white-shoe tax law firm, and that’s what they’re doing, is fielding. The kind of numbers you threw out—\$700,000 here, and we’re expecting another \$300,000—those are typical claims. A million is not far-fetched for a medium-sized workforce.

**Mr. Redpath**

Right, absolutely. It’s a huge issue. That’s why we’re bringing it back up—something to be very, very careful on. Karen, thank you for your insight. As always, I enjoy having you on the program, and you provide our viewers with a lot of value added. This is another thing to be very careful on. So, Karen Davis, thank you very much for joining me today, and everybody else.

**Ms. Davis**

Thanks for having me, Ian, and if there’s a reunion tour, I’ll be back.

**Mr. Redpath**

Thank you very much. Thank you everybody for joining us today.

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## SUPPLEMENTAL MATERIALS

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### The Employee Retention Credit (ERC)

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By Ian J. Redpath, JD, LLM

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#### A. Introduction

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The ERC was adopted with the Coronavirus Aid, Relief, and Economic Security (CARES) Act and is applicable to wages paid beginning on March 13, 2020. The ERC is a credit against payroll taxes and not income taxes. However, since the credit results in a reduction to the compensation-paid deduction for income taxes, it affects an employer's income tax return. The IRS revised Form 941 in the second quarter of 2020. The ERC provided relief for eligible employers whose business operations were fully or partially shut down by a government order or who experienced a significant decline in gross receipts [§3134]. The ERC was extended in the Taxpayer Certainty and Disaster Tax Relief Act (TCDTRA) to wages paid through June 30, 2021. It was extended further by the American Rescue Plan Act (ARPA) to include wages for the third and fourth quarters of 2021; however, the Infrastructure Investment and Jobs Act (IIJA), passed in November 2021, retroactively repealed the ERC for the last quarter of 2021 unless certain conditions were met. Therefore, the credit expired for most employers on October 1, 2021.

Since its inception, the credit was subject to numerous and significant changes in amounts, definitions, and application.

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#### B. Fraud Schemes

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It is almost impossible to avoid the radio and television advertisements suggesting that there is money just waiting for employers to file an amended Form 941 and claim the ERC. In News Release IR-2023-71, the IRS summarized the Dirty Dozen tax fraud schemes for 2023. At the top of the list are the ERC mill scammers. While there are legitimate groups and legitimate ERC claims, practitioners need to make clients aware of the fraud currently happening in this area. These scams are more than just ads; they include aggressive marketing and personal contact.

The IRS warns taxpayers to be aware of aggressive pitches from scammers who promote large refunds related to the ERC. The warning follows blatant attempts by promoters to con ineligible businesses into claiming the credit. The IRS highlighted these schemes from promoters who have been blasting ads on the radio and the internet touting refunds involving the ERC. These promotions can be based on inaccurate information related to eligibility for and computation of the credit. Additionally, some of these advertisements exist solely to collect the taxpayer's personally identifiable information in exchange for false promises. The scammers then use the information to commit identity theft. In addition, the mills are generally not amending the income tax returns to reflect the reduction in wages for the ERC.

Below is an actual fraud scam sent to a CPA firm.



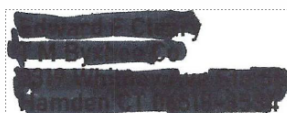
Department of Employee Retention Credit  
Accelerate Tax Notice  
New York, NY 10080

Notice ERTC Employee Retention Credit  
Notice Date 01/13/23  
Business Name [REDACTED]  
Proprietor [REDACTED]  
To contact us 877 [REDACTED]  
Your Caller ID 1024856  
Page 1 of 1

Contact us 877 [REDACTED]  
(Mon-Fri 8am-5pm EST)

Your notice of pending Employee Retention Tax Credit  
Amount of estimated Tax Credit: **\$728,000**

Tax Refund



Notice ERTC Employee Retention Credit  
Notice date 01/13/23  
SIC Code 729101

Tax refunds may be paid in a series of payments made out to [REDACTED] and  
qualifying businesses may receive their refunds in as little as 5 business days.

Amount of estimated tax credit

**\$728,000**

Department of Employee Retention Credit  
New York, NY 10080

Contact us 877 [REDACTED]  
(Mon-Fri 8am-5pm EST)

1561 515151 884115 15154 1578

To demonstrate the high demand, here are two comparative data points from the IRS operational status site:

- “As of June 8, 2022, our total inventory of unprocessed Forms 941-X was approximately 222,000, some of which cannot be processed until the related 941s are processed.”
- “As of March 22, 2023, our total inventory of unprocessed Forms 941-X was approximately 853,000, some of which cannot be processed until the related 941s are processed.”

While not all of these returns involve a COVID-19 credit, the inventory is being worked at two sites (Cincinnati and Ogden) that have trained staff to address possible COVID-19 credits. The IRS has warned that audits are coming, which could result in criminal cases.

## C. The CARES Act

The CARES Act provided a refundable payroll tax credit for 50% of wages paid by eligible employers to certain employees during the COVID-19 crisis [§2301(a)]. The credit was available to employers, including nonprofits, whose operations had been fully or partially suspended as a result of a government order limiting commerce, travel, or group meetings or who had experienced a greater than 50% reduction in quarterly receipts, measured on a year-over-year basis. [Act §2301(c)(2)]. The 50% rose to 80% after the first quarter of eligibility. The credit was not available to employers receiving Small Business Interruption Loans under the Act, including Paycheck Protection Program (PPP) loans.

If an employer had an average of 100 full-time employees or fewer for 2019, then all employee wages qualify, even if the employees were not furloughed. If the employer averaged more than 100 employees, only the wages of furloughed employees or those who had reduced hours as a result of the employer's closure or reduced gross receipts are eligible for the credit [Act §2301(c)(3)(A)].

The employer's status is calculated by counting the average number of full-time employees employed during 2019. A *full-time employee* is an employee who, with respect to any calendar month in 2019, worked an average of at least 30 hours per week or 130 hours in that month. A new employer that started its operations during 2019 determines the number of its full-time employees by taking the sum of the number of full-time employees for each full calendar month that it operated in 2019 and dividing that sum by the number of months. An employer that started its operations during 2020 determines the number of its full-time employees by taking the sum of the number of full-time employees for each full calendar month that it operated in 2020 and dividing that sum by the number of months, which is the same as the approach for employers that began business operations during 2019.

Aggregation rules apply when determining the number of full-time employees. In most cases, all entities are considered a single employer if they are a "controlled group" of corporations, are under common control, or are aggregated for benefit plan purposes. The ERC is not available with respect to an employee for any period in which the employer is allowed a Work Opportunity Credit for that employee. Wages for the purposes of calculating the ERC include the costs of health benefits. The total wages eligible for the credit are capped at the first \$10,000 paid by the employer to an eligible employee. They do not include amounts used for the payroll credits, required paid sick leave, or required paid family leave provided in the Families First Coronavirus Act, nor do the eligible wages include the general credit for paid family and medical leave [Act §2301(h)(2)]. Thus, the maximum credit was \$5,000.

The ERC was and is a credit against payroll taxes and, thus, is taken on Form 941. The IRS was granted the authority to advance payments to eligible employers and to waive applicable penalties for employers who did not deposit applicable payroll taxes in anticipation of the credit [Act §2301(k)]. Form 7200 was developed for requesting advanced credits.

The credit applied to wages paid after March 12, 2020, and before January 1, 2021. These dates were extended by the Consolidated Appropriations Act (CAA) of 2021, which was signed into law December 27, 2020.

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## **D. Extension and Modification of the Employee Retention Credit—TCDTRA**

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The Taxpayer Certainty and Disaster Tax Relief Act of 2020 (TCDTRA) was included in the CAA. Sections 206 and 207 address the ERC. The TCDTRA modified the credit and extended the availability of it until June 30, 2021.

The ERC rate was raised from 50% to 70% of qualified wages. Further, the TCDTRA expanded the eligibility for the credit by reducing the required year-over-year gross receipts decline from 50% to 20% with a safe harbor allowing employers to use the prior quarter's gross receipts to determine eligibility. Another major change was the amount of eligible wages. The limit on per-employee creditable wages was raised from \$10,000 for the year to \$10,000 for each quarter. Additionally, the TCDTRA increased the 100-employee delineation for determining the relevant qualified wage base to 500 or fewer employees.

The TCDTRA provided that employers who receive a PPP loan may still qualify for the ERC for wages that are not paid for with forgiven PPP proceeds. This has major implications for those seeking forgiveness of a PPP loan. Practitioners should remember that only 60% of the loan forgiveness amount must be payroll. Many employers simply used payroll to meet the full forgiveness amount, especially on smaller loans. The SBA will not allow an amended loan to be forgiven, but when preparing future loan forgiveness applications, practitioners should work with clients to maximize the ERC and loan forgiveness.

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## **E. Extension and Modification of the Employee Retention Credit—ARPA**

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The American Rescue Plan Act (ARPA) provided further expansion and extension of the ERC. The law's important changes applied beginning in July 2021, when the existing ERC provisions were set to expire, and it extended the credit through 2021. Some clients became eligible to claim the ERC for the first time in July 2021. The ARPA codified the ERC as IRC §3134. Making the ERC available for the third and fourth quarters of 2021 meant that, for many employers, the credit might be worth as much as \$28,000 per employee in 2021.

Beginning in the third quarter of 2021, severely distressed employers who suffered a decline of 90% or more in gross receipts compared with the same quarter in 2019 could treat all wages paid as qualified wages to meet the \$10,000 maximum for the ERC. This applied even if the business had more than 500 employees, regardless of whether the employees provided services while receiving the wages. The business could use the prior calendar quarter to determine eligibility based on a decline in gross receipts.

Under the ARPA, the ERC for the third and fourth quarters was applied against the 1.45% Medicare tax. The Act also extended the statute of limitations on assessments with respect to the ERC from three years to five years from the date the tax return claiming the credit is filed for the third and fourth quarters [Notice 2021-49].

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## **F. Additional IRS Guidance**

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The IRS has issued significant guidance on the ERC. In addition, the IRS website contains FAQs that address many areas of concern for the IRS and practitioners. As a result, it may be necessary for practitioners to amend their clients' Form 941 due to an overpayment or underpayment of payroll taxes.

Some of the significant guidance issued by the IRS, usually applicable to different periods, includes the following:

- Notice 2021-20, which updates guidance related to the ERC for the wages in 2020.
- Notice 2021-23 and Notice 2021-49, which deal with the retroactive termination of the ERC in 2021.

Practitioners should consult this guidance to determine if a Form 941X is required.

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## **G. Reporting and Auditing Considerations**

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The ERC is taken on Form 941 against an employer's payroll taxes. There are two lines that affect the ERC—line 11c and line 13d. The nonrefundable portion of the credit is the amount necessary to reduce the current quarter's tax liability. That is on line 11c. The refundable portion on line 13d is the remaining amount of the credit that will be refunded to the employer.

Form 7200 is used to apply for an advance of the ERC. Many practitioners have indicated that they are not using the advance on a regular basis. Many employers reduced their federal payroll tax deposits in anticipation of the credit, including those for the fourth quarter of 2021.

Julie Forrester of the IRS Small Business and Self-Employed Tax Center indicated that the IRS began training agents in the February and March 2023 time period to audit ERCs. Examinations are likely to start ramping up shortly. Regardless of whether the IRS actually commences examinations, advisers are still required to be able to justify any positions on returns or claims prepared by the adviser or positions taken. While the rules were often complex and the substantiation requirements thorough, the ERC was a valuable credit. Undoubtedly, however, credits were missed, and/or mistakes were made. Many times, the credit was determined by a payroll service. This credit relies on income/receipts and other tests that are generally not within the expertise of those services. Additionally, there has

been a growth of “credit mills” that approach companies and advertise that they can provide significant cash refunds with these credits. One common problem is that many employers reduced their federal payroll tax deposits in anticipation of the credit for the fourth quarter of 2021. Taxpayers can file an amended Form 941-X payroll tax return to fix underpayments and make a credit refund claim for overpayments. It should be noted that the IRS has five years to assess additional tax for ERC claims made during the third and fourth quarter of 2021.

Employers who *underreported* their payroll tax should correct errors in the period they are discovered and pay the amount due when they file an amended Form 941-X for an interest-free adjustment [Reg. Sec. 31.6205-1(b)(2)(i)]. Generally, an interest-free adjustment is available if an error is ascertained, corrected, and paid within the statute of limitations (SOL) period and by the due date for filing the next payroll tax return for the quarter in which the error is ascertained. Otherwise, interest will begin to accrue on underpayments from the date Form 941-X is filed until the payment is received by the IRS [§ 6601].

The SOL period for filing a refund claim on Form 941-X is the later of—

- three years from the date the employer filed its original return or
- two years from the date the tax was paid [§6511 for reference].

The five-year period only applies to the IRS assessment period and does not apply to the taxpayer SOL.

For clients who failed to repay anticipated ERCs claimed on their fourth-quarter 2021 payroll tax return, correction and payment of the tax due on Form 941-X should occur in the period they discover the omission. Two methods can be used to correct or recover an *overpayment*:

- Under the adjustment process, an employer can claim the credit against the regular payroll tax due on its next Form 941 filing and then file the required Form 941-X to report the correction.
- Under the claim process, the employer can request a refund of its share of the overreported amounts directly on Form 941-X.

If an employer has both overreported and underreported amounts, it may use the overreported amount to adjust and net against the underreported amount. However, employers must use the claim process to request a refund of an overpayment if it is within 90 days of an expiring SOL. The ERC will affect the deduction for compensation. Thus, filing a Form 941-X may also require amending federal and/or state income tax returns.

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## H. Conclusion

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The ERC can provide a great benefit to employers in helping to mitigate the effects of the uncertain economic time during the pandemic. Combined with other available benefits, this credit can provide a necessary lifeline for employers and employees. Practitioners need to be cognizant of the several variations of the ERC and its interaction with other tax provisions.



## GROUP STUDY MATERIALS

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### A. Discussion Problems

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A new client, Betty, has come to the office. She owns a small corporation where payroll is done internally. The corporation has filed its 2020 and 2021 income tax returns as well as Form 941 for each quarter of 2020 and 2021. However, no ERC was applied. In 2020 and 2021, the corporation suffered a significant downturn in business and was forced to close operations at various times due to government orders for COVID. During that time, it continued to pay its employees. You have determined that the corporation is entitled to an ERC of \$50,000. The owner indicates that she has been contacted by an organization that claims it can get her \$700,000 in “free” government money using the ERC.

**Required:**

- 1) What concerns do you have about the organization that claims to get Betty that large sum for her corporation?
- 2) What issues are relevant for the 2020/2021 ERC?
- 3) What are the reporting issues?

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**B. Suggested Answers to Discussion Problems**

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- 1) Betty should be advised that there are ERC mills. These mills are part of the “Dirty Dozen” tax scams. If the business takes the larger sum and later finds out it was the victim of a scam, it will have to pay back the \$650,000 difference. Providing information to an ERC mill could also open the business up to identity fraud.
- 2) The firm should determine whether the company qualifies for an ERC for any or all of the quarters of 2020 and 2021. If available, the applicable wages paid from March 13, 2020, through September 30, 2021, are subject to the ERC. If the business qualifies as a recovery startup business, it may also get the ERC for the last quarter of 2021.
- 3) If the business qualifies for the ERC in any of these quarters, it would be considered an overpayment since the credit would reduce the tax due. There are two methods to correct or recover an overpayment:
  - Under the adjustment process, the business can claim the credit against the regular payroll tax due on its next Form 941 filing and then file the required Form 941-X to report the correction.
  - Alternatively, under the claim process, the business can request a refund of its share of the overreported amounts directly on Form 941-X.

## GLOSSARY OF KEY TERMS

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**American Rescue Plan Act of 2021 (ARPA)**—The American Rescue Plan Act (ARPA) of 2021 (H.R. 1319, P.L. 117-2) was signed into law on March 11, 2021, and contains numerous individual, business, payroll, and pension provisions. The provisions, including \$1,400 stimulus payments and an extension of payroll credits, relate to the COVID-19 pandemic. Additionally, the Act makes certain 2020 unemployment benefits tax-free, provides premium assistance for COBRA continuation coverage, expands the 2021 child tax credit, provides additional support for small businesses, and other relief.

**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.

**Offer in Compromise**—The IRS has the ability to “compromise” a civil or criminal tax liability after assessment and before referral to the Department of Justice. The taxpayer may seek a compromise based on doubt as to collectibility, doubt as to liability, or to promote effective tax administration. The process is known as offer in compromise (OIC) and constitutes an agreement between a taxpayer and the IRS to accept less than full payment.

**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.

**Spearphishing**—Spearphishing is the fraudulent practice of sending emails ostensibly from a known or trusted sender in order to induce targeted individuals to reveal confidential information—for example, an email scam that attempts to steal a tax professional's software preparation credentials.





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<b>Speaker</b>	<b>Month</b>	<b>Speaker</b>	<b>Month</b>
Bluestein, Gary .....	May	Lickwar, Robert C. ....	Jan-Mar
Davis, Karen .....	May	Redpath, Ian .....	Jan-May
Jemiolo, Shannon.....	Mar	Urban, Greg.....	Jan-Feb

# Tax Report

Volume 36, Issue 4

May 2023

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

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1. According to Ian Redpath, what is the difference between phishing and smishing?
  - A. Phishing is fraud, while smishing is legitimate communication.
  - B. Phishing is fraud via email; smishing is fraud via text message.
  - C. Phishing is focused on taxpayers; smishing is focused on practitioners.
  - D. Smishing is one of the IRS's Dirty Dozen tax frauds, while phishing is uncommon.
2. According to Ian Redpath, the IRS's Tax Exempt Organization Search (TEOS) system can help practitioners and their clients avoid which of the following fraud schemes from the 2023 Dirty Dozen?
  - A. False fuel tax claims
  - B. Spearphishing
  - C. Schemes with international elements
  - D. Phony charities
3. According to Ian Redpath, what was the result of the *Farhy v Commissioner* case?
  - A. The Tax Court said the penalties were assessable penalties.
  - B. The Tax Court said the penalties were subject to the deficiency procedures.
  - C. The Tax Court allowed the IRS to collect the penalties using the levy process.
  - D. The Tax Court said the IRS could only collect the penalties in a civil action.
4. According to Ian Redpath, what methods will the IRS use to contact taxpayers, per IR-2023-56?
  - A. Letter first, phone second, visit to taxpayer's home third
  - B. Email first, letter second, phone third
  - C. Text message first, email second, letter third
  - D. Visit to taxpayer's home first, phone second, email third
5. According to Ian Redpath and as specified in IR-2023-53, do taxpayers need to report personal payments like gifts, reimbursements, or cost sharing (meals, bills, etc.) on Form 1099-K?
  - A. Yes, income from such items is subject to income tax.
  - B. Yes, but only if the income from these items reaches a certain threshold.
  - C. No, there is no requirement to report these types of personal payments.
  - D. It depends on the individual facts and circumstances of each personal payment.

*Continued on next page*

6. According to Ian Redpath and Gary Bluestein, which of the following statements best describes the relationship between the collections appeal program (CAP) and collection due process appeals (CDPs)?
  - A. The CAP is used more commonly than CDPs.
  - B. CDPs are more powerful and more useful than the CAP.
  - C. To use a CDP, taxpayers have to know the IRS is going to do something; with a CAP, they do not.
  - D. If taxpayers lose under the CAP, they can request an appeal, but they cannot with a CDP.
7. According to Ian Redpath and Gary Bluestein, which of the following is a characteristic of an *assessment lien*?
  - A. It allows the IRS to seize a taxpayer's stuff (bank accounts, wages, etc.).
  - B. It happens very quickly—within two or three days.
  - C. It only covers items of the taxpayer's property that are called out in the lien documents.
  - D. It is a secret lien that only the taxpayer and the IRS know about.
8. According to Ian Redpath and Gary Bluestein, how long do taxpayers have to timely file for a CDP hearing after receiving specified IRS notices?
  - A. 30 days
  - B. 90 days
  - C. Six months
  - D. One year
9. According to Ian Redpath and Gary Bluestein, what type of appeal is more useful for a levy and what type is more useful for a lien?
  - A. The CAP is more useful for a levy, and a CDP is more useful for a lien before it is filed.
  - B. A CDP is more useful for a levy, and the CAP is more useful for a lien before it is filed.
  - C. Because they are more powerful, CDPs are more useful for both levies and liens.
  - D. Both the CAP and CDPs are equally useful for both levies and liens.
10. According to Ian Redpath and Gary Bluestein, what is the easiest way to get the IRS to waive a taxpayer's penalties?
  - A. Based on reasonable cause
  - B. As part of the CDP process
  - C. As a first-time penalty abatement
  - D. As a response to a Notice of Deficiency

*Continued on next page*

11. According to Ian Redpath and Karen Davis, what is one method taxpayers can use to report fraudulent employee retention credit (ERC) solicitations?
  - A. Requesting that the IRS list ERC credit mills as part of its Dirty Dozen
  - B. Hiring a white shoe law firm to litigate against the fraudster
  - C. Enlisting agents from the Cincinnati and Ogden service centers to bird-dog ERC credits
  - D. Sending a letter to the Treasury Inspector General for Tax Administration (TIGTA)
12. According to Ian Redpath and Karen Davis, what form is used to request a refund if a business was eligible for the ERC in a prior tax year?
  - A. Form 941
  - B. Form 941-X
  - C. Form 1040
  - D. Form 14242
13. According to Ian Redpath and Karen Davis, what is one consequence of engaging with an ERC mill?
  - A. The ERC mill will make sure the ERC claim is bulletproof for the IRS.
  - B. Use of an ERC mill allows taxpayers to qualify for the ERC more easily.
  - C. The ERC mill can steal the taxpayer's personal identification for identity theft purposes.
  - D. IRS audits are invalid if the taxpayer used an ERC mill to file for the employee retention credit.
14. According to Ian Redpath and Karen Davis, how did the budget act issued in December 2020 affect the ERC rules?
  - A. It allowed employers with a PPP loan to also claim the ERC.
  - B. It dropped the ERC for recovery startup businesses
  - C. It set the ERC amount at 50% of annual wages up to \$50,000.
  - D. It lowered the decline in revenue threshold from 80% to 50%.
15. According to Ian Redpath and Karen Davis, taxpayers are more likely to evade the 20% penalty for erroneously claiming the ERC if they do which of the following?
  - A. Amend their Form 941 after the IRS reverses the credit
  - B. Self-correct and give the money back before the IRS gets involved
  - C. Seek classification as a recovery startup business for the fourth quarter of 2021
  - D. Report an ERC mill to the TIGTA or file Form 14242



## Subscriber Survey Evaluation Form

Please take a few minutes to complete this survey related to the **CPE Network® Tax Report** and return it by mail to 2395 Midway Road, Carrollton, Texas 75006, Attn: Managing Editor. All responses will be kept confidential. Comments in addition to the answers to these questions are also welcome. Please send comments to [CPLgrading@thomsonreuters.com](mailto:CPLgrading@thomsonreuters.com).

How would you rate the topics covered in the May 2023 **CPE Network® Tax Report**? Rate each topic on a scale of 1–5 (5=highest):

	Topic Relevance	Topic Content/ Coverage	Topic Timeliness	Video Quality	Audio Quality	Written Material
Experts' Forum	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Collection Hearings	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>
Employee Retention Credit (ERC)	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>	<input type="text"/>

Which segments of the May 2023 issue of **CPE Network® Tax Report** did you like the most, and why?

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Which segments of the May 2023 issue of **CPE Network® Tax Report** did you like the least, and why?

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What would you like to see included or changed in future issues of **CPE Network® Tax Report**?

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Are there any other ways in which we can improve **CPE Network® Tax Report**?

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How would you rate the effectiveness of the speakers in the May 2023 **CPE Network® Tax Report**? Rate each speaker on a scale of 1–5 (5 highest):

	<b>Overall</b>	<b>Knowledge of Topic</b>	<b>Presentation Skills</b>
Ian Redpath	<input type="text"/>	<input type="text"/>	<input type="text"/>
Gary Bluestein	<input type="text"/>	<input type="text"/>	<input type="text"/>
Karen Davis	<input type="text"/>	<input type="text"/>	<input type="text"/>

Which of the following would you use for viewing CPE Network® A&A Report? DVD ☐ Streaming ☐ Both ☐

Are you using **CPE Network® Tax Report** for: CPE Credit ☐ Information ☐ Both ☐ \_\_\_\_\_

Were the stated learning objectives met? Yes ☐ No ☐ \_\_\_\_\_

If applicable, were prerequisite requirements appropriate? Yes ☐ No ☐ \_\_\_\_\_

Were program materials accurate? Yes ☐ No ☐ \_\_\_\_\_

Were program materials relevant and contribute to the achievement of the learning objectives? Yes ☐ No ☐ \_\_\_\_\_

Were the time allocations for the program appropriate? Yes ☐ No ☐ \_\_\_\_\_

Were the supplemental reading materials satisfactory? Yes ☐ No ☐ \_\_\_\_\_

Were the discussion questions and answers satisfactory? Yes ☐ No ☐ \_\_\_\_\_

Were the audio and visual materials effective? Yes ☐ No ☐ \_\_\_\_\_

Specific Comments: \_\_\_\_\_

\_\_\_\_\_

Name/Company \_\_\_\_\_

Address \_\_\_\_\_

City/State/Zip \_\_\_\_\_

Email \_\_\_\_\_

**Once Again, Thank You...**

**Your Input Can Have a Direct Influence on Future Issues!**

**CPE Network<sup>®</sup>**

Firm/Company Name: \_\_\_\_\_

Account #:

**Location:**

Program Title: \_\_\_\_\_ Date: \_\_\_\_\_

[illegible]

I certify that the above individuals viewed and were participants in the group discussion with this issue/segment of the CPE Network® newsletter, and earned the number of hours shown.

Instructor Name: \_\_\_\_\_

Date: \_\_\_\_\_

E-mail address:

License State and Number:

# CPE Network/Webinar Delivery Tracking Report

<b>Course Title</b>	
<b>Course Date:</b>	
<b>Start Time:</b>	
<b>End Time:</b>	
<b>Moderator Name, Credentials, and Signature Attestation of Attendance:</b>	
<b>Delivery Method:</b>	Group Internet Based
<b>Total CPE Credit:</b>	3.0
<b>Instructions:</b>	During the webinar, the moderator must verify student presence a minimum of <u>3</u> 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.
<b>Brief Description of Method of Polling</b>	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.

[illegible]

# CHECKPOINT LEARNING NETWORK

# CPE NETWORK®

# USER GUIDE

REVISED May 1, 2023

## 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.
- **Transitioning From DVDs:** For groups playing the video from the online platform, we suggest downloading the video from the Checkpoint Learning player to the desktop before projecting.
- **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**

CPE Network program materials are copyrighted and may not be reproduced in another document or manuscript in any form without the permission of the publisher. As a subscriber of the **CPE Network Series**, you may reproduce the necessary number of participant manuals needed to conduct your group study session.

# “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

**Note:** DVDs no longer ship with this product effective 3/1/2023.

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/>

The entire transcript is also available as a pdf in the Checkpoint Learning player in the resource toolbox at the top of the screen, or via the link in the email sent to administrators.

## 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](mailto: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**

**Note: DVDs are no longer shipped effective 3/1/2023**

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](mailto: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:

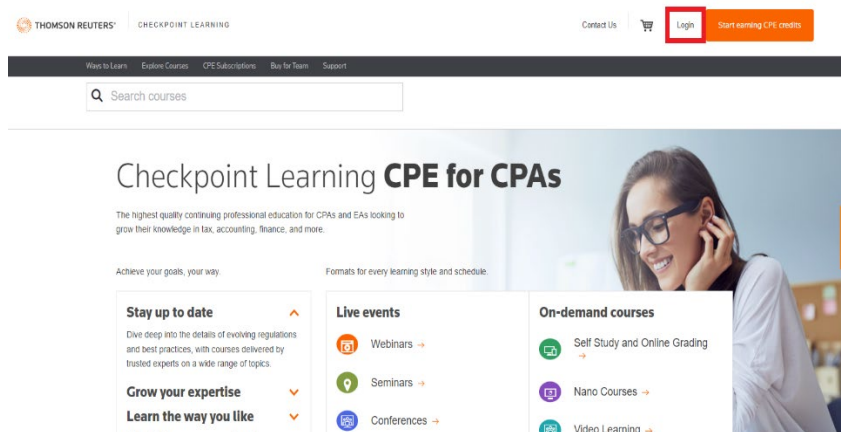
- Watch the DVD.
- Review the supplemental materials.
- Read the discussion problems and the suggested answers.
- Complete the quizzer by filling out the bubble sheet enclosed with the transcript package.
- Complete the survey. We welcome your feedback and suggestions for topics of interest to you.
-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

**Thomson Reuters**  
**PO Box 115008**  
**Carrollton, TX 75011-5008**

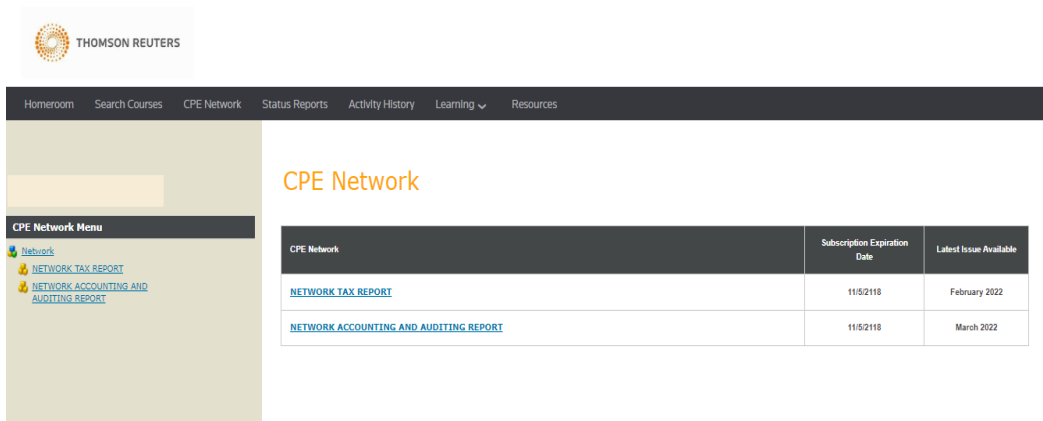
## Self-Study—Online

Follow these simple steps to use the online program:

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

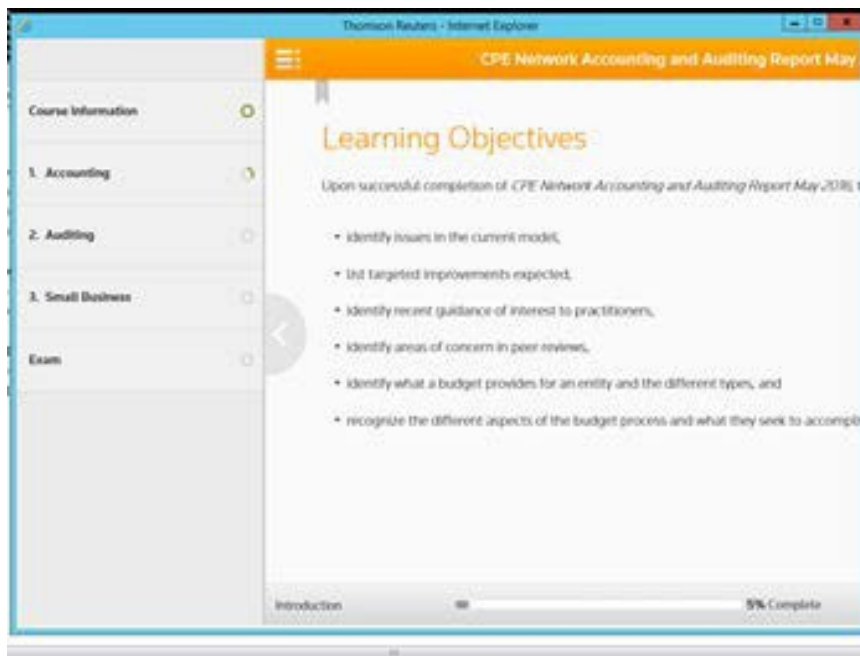


- In the **CPE Network** tab, select the desired Network Report and then the appropriate edition.



CPE Network	Subscription Expiration Date	Latest Issue Available
<a href="#">NETWORK TAX REPORT</a>	11/5/2118	February 2022
<a href="#">NETWORK ACCOUNTING AND AUDITING REPORT</a>	11/5/2118	March 2022

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



Thomson Reuters - Internet Explorer

CPE Network Accounting and Auditing Report May 2018

## Learning Objectives

Upon successful completion of *CPE Network Accounting and Auditing Report May 2018*:

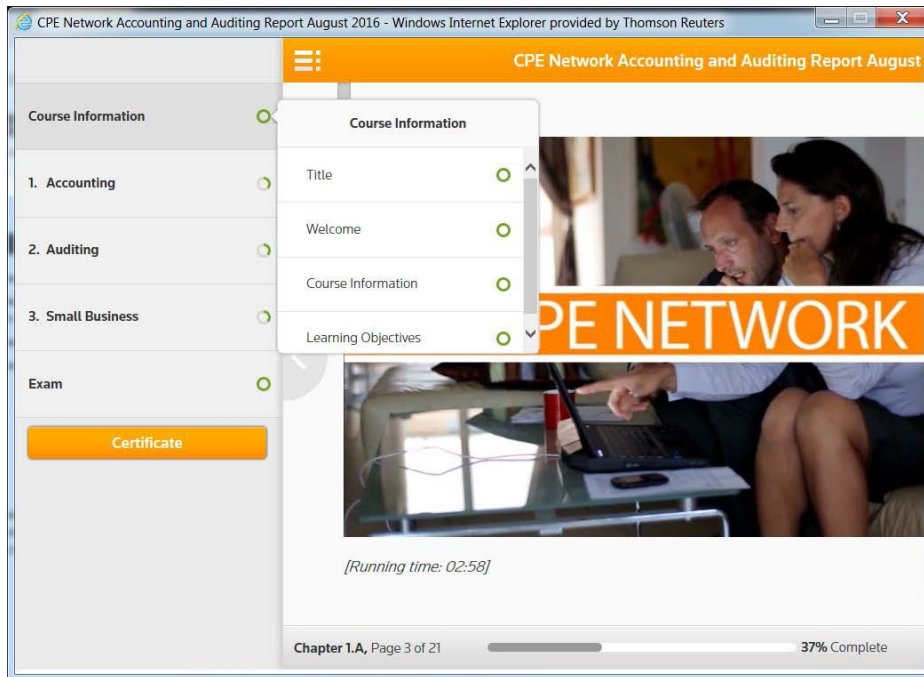
- identify issues in the current model;
- list targeted improvements expected;
- identify recent guidance of interest to practitioners;
- identify areas of concern in peer reviews;
- identify what a budget provides for an entity and the different types; and
- recognize the different aspects of the budget process and what they seek to accomplish.

Introduction 5% Complete

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



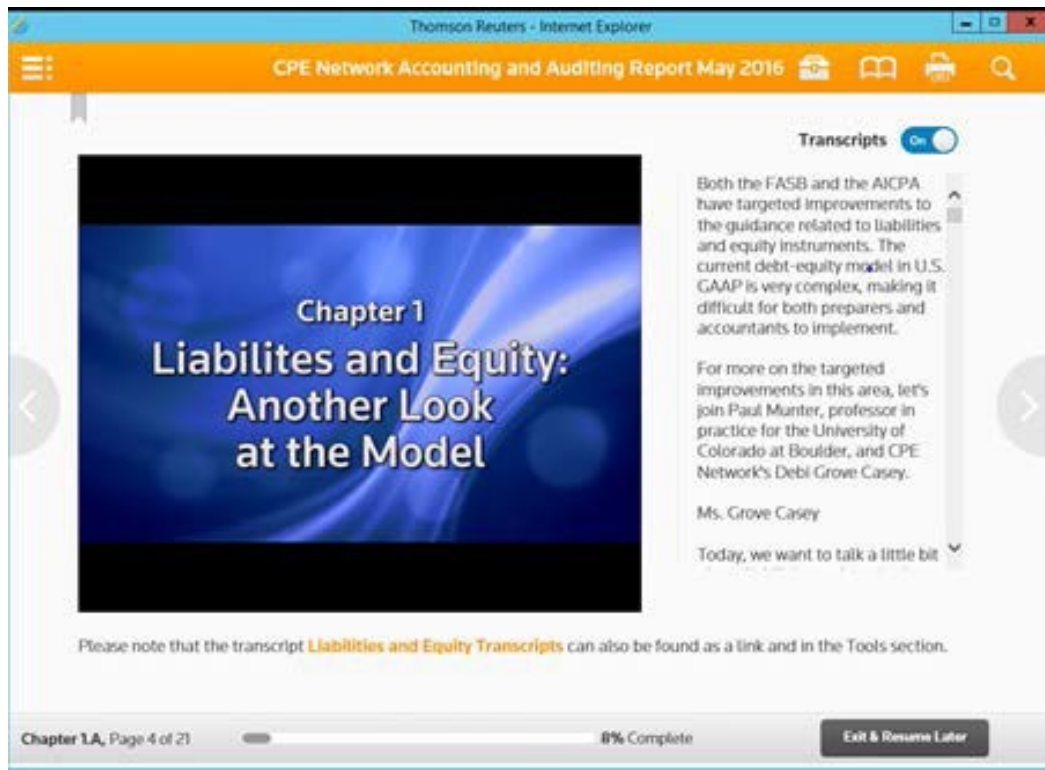
- **Course Information** is the course Overview, including information about the authors and the program learning objectives



- **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.



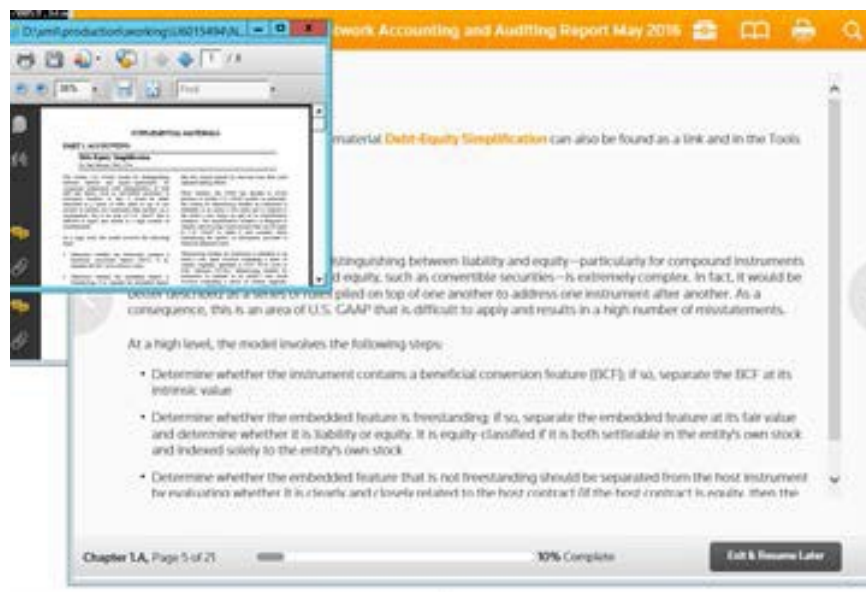
Video segments may be downloaded from the CPL player by clicking on the download button. Tip: you may need to scroll down to see the download button.



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 problems related to the segment.

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

The screenshot shows a web interface for the CPE Network Accounting and Auditing Report July 2016. The header is orange with a menu icon, title, and icons for a briefcase, book, printer, and search. The main content area is titled "Suggested Answers to Discussion Problems" and contains three numbered items:

1. ASC 320 requires that, at acquisition, an enterprise classify debt and marketable equity securities into one of three categories:
  - Held-to-maturity
  - Trading
  - Available-for-sale

An entity decides how to classify securities based on its intended holding period for each individual security, using the framework in ASC 320. In establishing its intent, an entity should consider relevant trends and experience, such as previous sales and transfers of securities. Classification decisions should be made at acquisition and, preferably, formally documented. It is not appropriate to use "hindsight" to classify securities transactions, perhaps by considering changes in value after acquisition.
2. The trading securities category includes securities that are bought and held principally for the purpose of selling them in the short term. Trading generally reflects active and frequent buying and selling, and trading securities are generally used with the objective of generating profits on short-term differences in price. "Short-term," in this context, is intended to be measured in hours and days, rather than in months or years, according to ASC 320. However, an entity is not precluded from classifying as trading a security it plans to hold for a longer period, as long as that designation occurs at acquisition.
3. Impairment is recognized in earnings when a decline in value has occurred that is deemed to be other than temporary, and the current fair value becomes the new cost basis for the security. An investment is considered to be impaired if the fair value of the investment is less than its cost basis. Cost includes adjustments made for

The bottom of the screen shows a progress bar at 100% Complete, the text "Chapter 3.A, Page 20 of 20", and an "Exit & Resume Later" button.

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.

The screenshot shows a web interface for the CPE Network Accounting and Auditing Report June 2016. The header is orange with a menu icon, title, and icons for a briefcase, book, printer, and search. The main content area is titled "Course Exams Completed" and contains the following text:

You have completed the exam for this course.

Please choose your next course of action by selecting on one of the buttons below.

"Review My Answers" will take you back through exam, giving you the opportunity to make changes.

**Review My Answers**

"Grade My Answers" will result in providing you with a final score for this course.

**Grade My Answers**

The bottom of the screen shows a progress bar at 100% Complete, the text "Course, Completed", and an "Exit & Resume Later" 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.

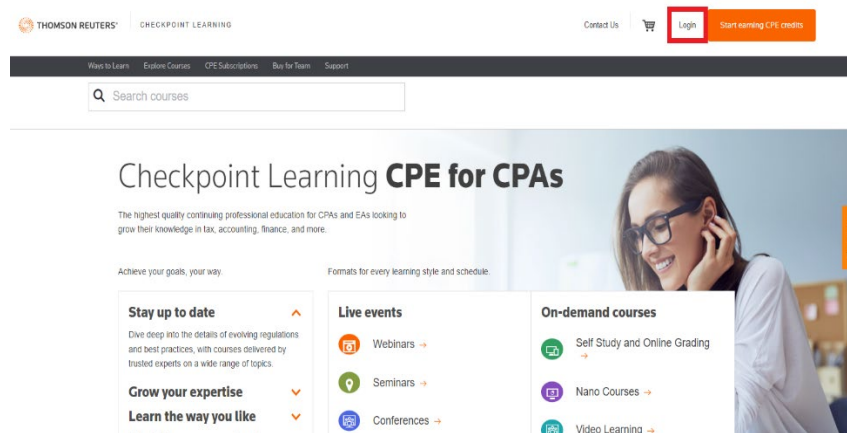
### **Print**

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**.

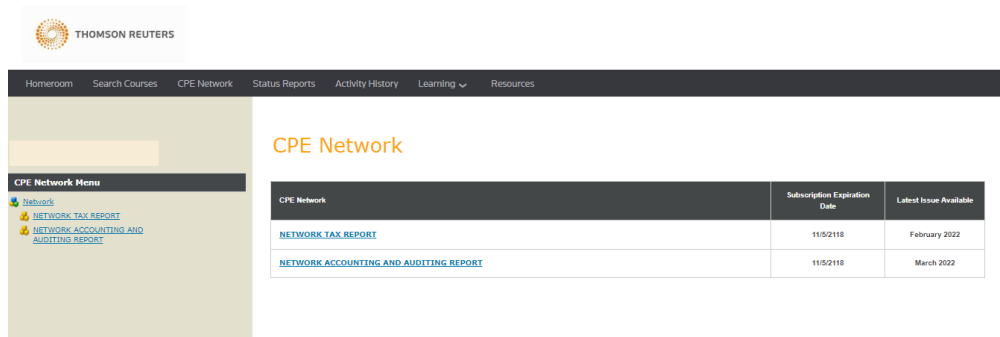
# Transitioning From DVDs

Follow these simple steps to access the video and pdf for download from the online platform:

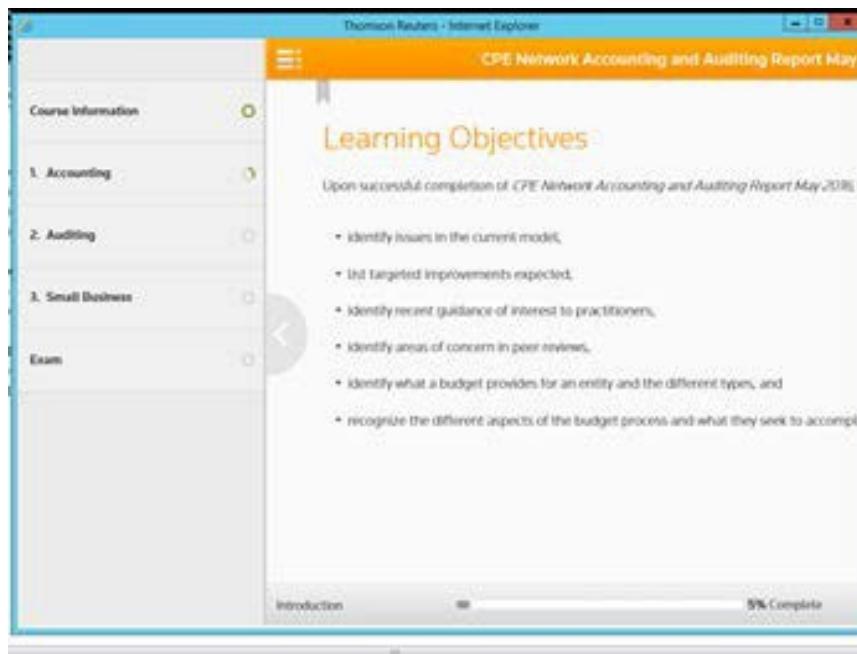
- Go to [www.checkpointlearning.thomsonreuters.com](http://www.checkpointlearning.thomsonreuters.com) .
- Log in using your username and password assigned by your firm's administrator in the upper right-hand margin ("Login").



- In the CPE **Network** tab, select the desired Network Report by clicking on the title, then select the appropriate edition.



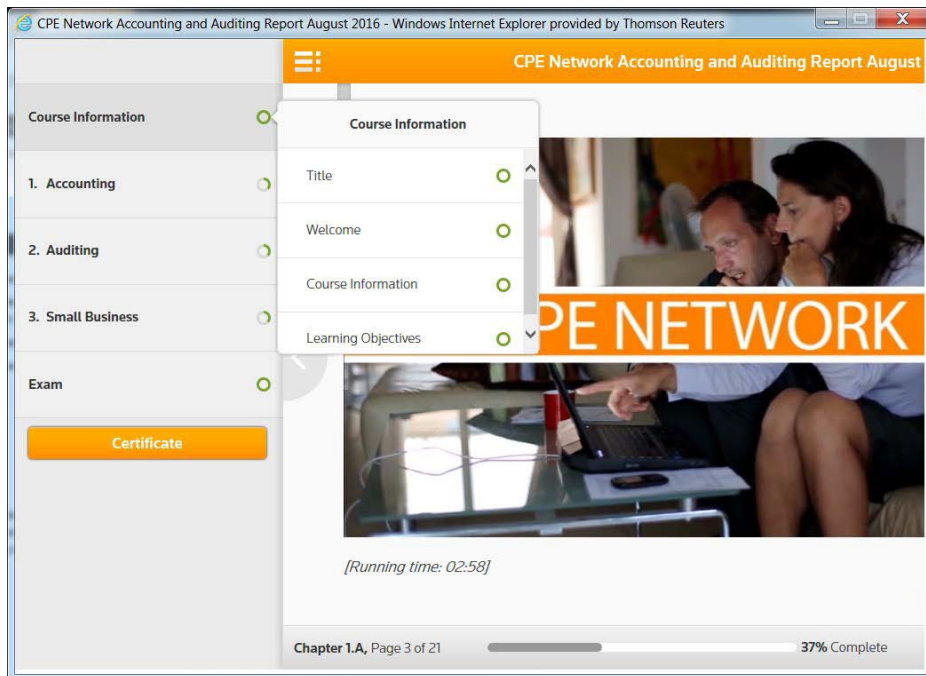
The Chapter Menu is in the gray bar at the left of your screen:



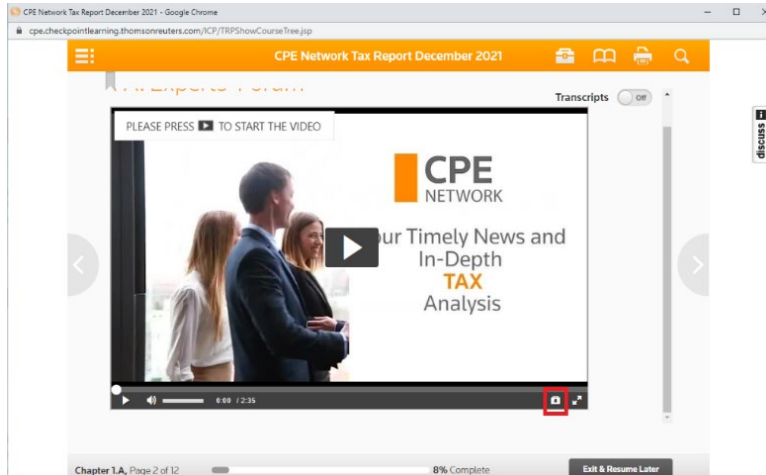
Click down to access the dropdown menu and move between the program Chapters.

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





- Each Chapter is self-contained. 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.



Video segments may be downloaded from the CPL player by clicking on the download button noted above. You may need to use the scroll bar to the right of the video to see the download button. **Tip: You may need to use the scroll bar to the right of the video to see the download button.**

PDFs may be downloaded from either the course toolbox in the upper right corner of the Checkpoint Learning screen or from the email sent by CPENetworkgroupstudy.





# 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	<ul style="list-style-type: none"><li>• Browser-based</li><li>• Certificate discrepancies</li><li>• Accessing courses</li><li>• Migration questions</li><li>• Feed issues</li></ul>
Product Support	800.431.9025 (follow option prompts)	checkpointlearning.productsupport@thomsonreuters.com	<ul style="list-style-type: none"><li>• Functionality (how to use, where to find)</li><li>• Content questions</li><li>• Login Assistance</li></ul>
Customer Support	800.431.9025 (follow option prompts)	checkpointlearning.cpecustomerservice@thomsonreuters.com	<ul style="list-style-type: none"><li>• Billing</li><li>• Existing orders</li><li>• Cancellations</li><li>• Webinars</li><li>• Certificates</li></ul>