CHECKPOINT LEARNING

Contact us at: cplsupport@cerifi.com
844.245.5970

CPE NETWORK TAX REPORT

JANUARY 2024 VOLUME 37, ISSUE 1

NOTE: DVDs are no longer being manufactured. Video may be viewed/downloaded from your Checkpoint Learning account. See the user guide for more information on how to download the video and about credit for online meetings.

Attention Enrolled Agents: If you are an IRS Enrolled Agent and wish to get IRS credit for this course, be sure to enter your PTIN into your Checkpoint Learning profile before taking the course.

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

Topics for future editions may include:

- Business-Related Car Deductions
- Estate Tax Basics

CERIFI

EXECUTIVE SUMMARY

PART 1. CURRENT DEVELOPMENTS

Tax is an extremely dynamic field of accounting. Practitioners must keep up to date with the constant changes brought about by the courts, the IRS, and sometimes Congress. This material covers some updates since last month.

Learning Objective:

Upon completion of this segment, the user should be able to analyze current issues in taxation, including evaluating the applicability of the limited partner exception to self-employment taxes, determining when the Tax Court is inaccessible, and assessing the OSHA rules as related to the employee retention credit. [*Running time 31:44*]

PART 2. INDIVIDUAL TAXATION

Transfers of property for less than full or adequate value will usually result in a potential tax consequence to the donor in the form of gift taxes. Gifts are generally taxed to a donor at the FMV of the property transferred [§2502] regardless of the type of property transferred. It is important to identify the appropriate tax treatment of a transfer and whether it has a gift component. It should be noted that if the donee is two or more generations younger than the person making the transfer, the separate generation-skipping transfer tax also applies. Even if taxes are not due, there are reporting requirements that must be met.

Learning Objective:

Upon completion of this segment, the user should be able to analyze issues related to the basics of gift tax, including determining taxable gifts, applying the unified credit, and assessing the applicability of the generation-skipping transfer tax. [*Running time 35:19*]

PART 3. BUSINESS TAXATION

The Corporate Transparency Act (CTA) enacted rules for reporting of beneficial ownership information (BOI) of certain business entities. The filings are not with the IRS but with FinCEN and commenced January 1, 2024. It is important that accountants have a working knowledge of these rules and the implications for their practice.

Learning Objective:

Upon completion of this segment, the user should be able to analyze issues related to beneficial ownership information (BOI) reporting, including determining whether an entity is a reporting company, assessing beneficial ownership, and determining reporting requirements. [*Running time 37:02*]

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 developing, writing, and presenting professional CPE programs. In addition to his active tax practice, he serves as Chairman of the Department of Accounting, Director of Graduate Accounting Programs, and Professor of Taxation and Forensic Accounting at Canisius College in Buffalo.

Jonathan Tretter, CPA, is a Director in Freed Maxick's Enterprise Advisory Services Practice and focuses on corporate and flow-through tax, high-net worth individual taxation, and federal and multi-state taxation. He also has extensive knowledge of federal and state tax credits and incentives, methods of accounting, and estate and business succession planning. Jonathan has been a leader in the firm's response to federal legislation surrounding the CARES Act, most notably focused on the Paycheck Protection Program and the Employee Retention Credit. He has worked with manufacturing, automobile dealerships, real estate, equipment rental and sales, construction, restaurant and hospitality, and medical and professional service clients.

Gregory Urban, CPA, CVA, is a partner in the Tax Advisory Group of Dopkins and Company, LLP, in Buffalo, New York, and has served on the firm's Leadership, Executive, and Recruiting Committees. Greg's over 20 years of experience in public accounting includes several years with KPMG, LLP. Greg's focus is on providing tax consulting, compliance, and valuation services to privately held businesses and their owners. He has extensive experience advising clients on complex tax compliance issues, including tax credit optimization and mergers and acquisitions. In addition, Greg performs and consults on a variety of business valuation engagements, including valuations relating to transfer tax and purchase price allocation issues.

Be sure to include the completed sheet when you request certificates for this event.

Title of Course (Enter full title)	
Date of Class (MM/DD/YYYY)	
Time (Enter time of class)	
Location (Enter location of class)	

Learning Objectives (Refer to executive summary)	
Program Description (Refer to executive summary)	
Instructional delivery method	Group Live
Recommended CPE credit	3.0 Credits
Recommended field of study(ies) (Refer to executive summary)	
Program Level	Update
Prerequisites (Circle One)	• Basic Accounting and Auditing professional experience
	• Basic Tax professional experience
	• Basic Governmental professional experience
Advance preparation	None required
Course registration and, where applicable, attendance requirements (1)	

(1) Insert instructions for your students to register for the class and any other attendance requirements (e.g., bring your laptop, be prepared to work in groups, you will be required to sign in and sign out of the session, etc.)

PART 1. CURRENT DEVELOPMENTS

Experts' Forum

Experts' Forum is a popular feature in which we review recent developments in taxation. Ian Redpath begins this month with an update on a tax court case related to the self-employment tax on limited partnerships.

Let's join Ian.

Mr. Redpath

Hi everybody, welcome to the program. It's great to have you here again. This is the part of the program where we're going to go over a number of things that have happened—a lot of things going on with the courts. We try to have an update from our last time getting together with what the IRS is doing and the courts. Congress, not so much; they haven't been doing much, so we don't have a whole lot to say about them. But we do have a number of important cases that are either in the process of being heard or have been heard, and a lot of them relate to things that we have discussed in the past. So, let's jump right in.

A. *Soroban Capital Partners LP, 161 TC No. 12 (Tax Ct.)*

Soroban Capital Partners LP. This is the long-awaited tax court case related to the self-employment tax on limited partnerships. Now, there are two cases. There's *Soroban*, which was just decided by the court; and then, there's another one, *Sirius*, and the *Sirius* case is scheduled for hearing, I believe, in June of 2024. But surprisingly, in *Soroban*, we did get an answer. This has always been a major issue. To what extent are individuals, especially in an "LLC," [subject to self-employment tax]? Is it possible to have members who will not be subject to self-employment tax? And, if you're just simply a limited partner in a limited partnership, or if you're a limited partner (the equivalent of one) in an LLC, are you subject to self-employment tax like the general partners?

We know that one of the great benefits of an S corp is the fact that you're able to flow through, not subject to self-employment tax, the profits of the S corp. You pay the salary, and that salary is subject to FICA; and, of course, the issue always is, is it an unreasonably low salary? That's the challenge that the IRS has—you have an unreasonably low salary. And if you are, in fact, in a service-related business, they basically say all of the partners—excuse me, all of the shareholders—of the S corp in a service-related business are going to be subject to the reasonable comp[ensation]. That would be reasonable comp to them and, therefore, subject to FICA. But for capital-intensive [businesses], especially, you're able to avoid a lot of potential self-employment tax by establishing an S corp, and that's one of the reasons S corps are still one of the most popular forms.

In a lot of states, what people are doing is they're forming LLCs and electing to be Ss. Now, why would they do that? Long legal issues, but a lot of lawyers will tell you that they think that you actually get better legal protection with an LLC than you do with a corporation. For example, let's say there's a spouse or creditors. They can get a charging order against the profit, but they can't become partners. Now, they could garnish, or they could actually seize the stock in a corporation and become stockholders. Again, there could be all sorts of restrictions, so I don't want to get into all of that but, in general, the general rule is that you can become a financial partner and share in the finance, but not in management, without the approval of the other partners (whatever percentage that might be), but it isn't an automatic. So therefore, a lot of people think there's greater protection. And the relationships among the members are different than the relationships among shareholders, their relationship with management—manager-managed, member-managed, all of those—because you are still an LLC for purposes of state law. It's for tax that you're taxed as an S corp.

So, in a lot of situations, people have tried in an LLC to avoid self-employment tax. Now, we know it's wrong, but it's still being done. The IRS says they still see where people give the members of the LLC a W-2 and treat it like it's an S corp. And one of the worst things you can do is to do that and then try to put them into any fringe benefit programs. Then, you've got an even greater problem. But it's quite common—I wouldn't say it's quite common; it used to be much more common, but we still see situations where people are doing that. Well, that's wrong. Revenue Ruling 69-184 says partners are *not* employees for purposes of FICA, FUTA, or withholding, so the IRS has been clear for years. But this argument, then, still comes up. If they're partners, if they're not employees, can you have limited partners that do not have to pay any self-employment tax on their earnings?

So, in *Soroban Capital*, first off, it's a limited partnership. It was established as a limited partnership. A lot of the case goes on and talks about the fact that this was not under the new audit rules for partnerships. There wasn't a BBA partnership, but this is under the old rules. However, it doesn't really matter because what the court said was that the net earnings from self-employment *is* a partnership item which is determined at the partnership level so, therefore, it wouldn't have mattered. That would have been exactly the same. So, the court had to inquire as to what are the roles of the partners here. Are the partners going to be [established] simply because they list themselves as limited partners? Does that make them limited partners? Now, Code Section 1402(a)(13) excludes from net income from the self-employment computation a limited partner's distributed share. This is commonly referred to as the *limited partner exception*. So, the question is, can you simply say a person is a limited partner? Can you establish a limited partner? And how does that relate to LLCs?

So, in *Soroban*, what happened here is that you have some partners. The partners themselves, there are actually single-member LLCs as partners. There are six partners in total—one general partner and five limited partners. But within the limited partners, there are two LLCs that are single members. They said "No, those are owned by the individuals who own them." So, we're really talking about three limited partners (or individuals listed as limited partners). Now, these individuals did do work for the partnership, and they were paid a guaranteed payment. The guaranteed payments were subject to self-employment tax—picked up as ordinary income, deducted by the partnership, and were subjected to self-employment tax. So, all three of the limited partners received guaranteed payments for the years in question and, again, they were properly handled. What they didn't [properly handle] is they excluded all of the other earnings that were passed through to them—the total net earnings from self-employment of $2,035,395 one year, and $1,901,131 for another year. So, the question then is whether or not this income (which was in the ordinary business of the limited partnership) was subject to the limited partner exception.

The partnership was established as a limited partnership under state law. For all purposes, they are shown as being limited partners. They're listed as limited partners, and the agreements show them as limited partners, so they said, "We are limited partners. Therefore, the limited partner exception applies to us and we're not subject to self-employment tax." Now, there are a couple of previous cases, one being *Renkemeyer*, where the courts have looked at it and said, "No, just because you call yourself a limited partnership isn't enough."

The Section 1402(a)(13) limited partner exception excludes, again, the net earnings from self-employment, the distributive share of any income of a limited partner—not the guaranteed payments, but those were properly picked up—as long as they're not remuneration for services. So, for the limited partner exception, the question then becomes, to what does that limited partner exception apply? Is it simply that you say you're a limited partner, the documents say you're a limited partner, and you establish a limited partnership?

Let's go back and remember that for the LLC, generally, the reason you set up an LLC is to have limited liability. So, how did you establish it? In previous programs, we talked about the fact that there are 1997 Treasury regs. They issued proposed regs to define the scope of a limited partner exception. Basically, you would not be treated as a limited partner if you had personal liability for the debts, authority to contract, or you participated more than 500 hours. There are some other little exceptions in there, but that was the general rule. Congress came down and said, "IRS, you can't issue regulations in this area. We're going to put a moratorium." Of course, that moratorium went by, and these have never been applied. But the IRS has said, essentially, that if you follow them, they're not going to challenge you. So again, is that any level of authority that they could use? Again, the moratorium is long gone.

In *Renkemeyer*, as I mentioned, the court looked at the history of the limited partner exception and said that this is to ensure that individuals who are just investors and not actively participating in the operations don't get credits towards their social security coverage. In other words, they're not subject to self-employment tax. However, it doesn't support the holding that was contemplated here, excluding partners who perform services simply because you *call* them self-employed. Again, in *Renkemeyer*, they held that the partners in that case were not limited partners under that exception because—and this [case] involved lawyers—their distributive shares arose from the legal services performed on behalf of the firm and not as a return on their investment; this wasn't meant to be a return on their investment. In *Renkemeyer*, the court applied a functional analysis test to the limited partner exception. So, in this case, then, the taxpayer is saying, "No, in the limited partner exception, it says, 'limited partners,' and they *are* limited partners set up in a limited partnership by law. They should not be subject to self-employment tax." But in *Renkemeyer* again, they looked at it more broadly and did a functional analysis. In *Renkemeyer*, the case dealt with an LLP and not a limited partnership. This particular case is a limited partnership, so it's more clear that we're talking about a limited partner. Basically, however, in *Renkemeyer* and the cases that have interpreted it, if you're in a pass-through entity and considered a limited partner, they've never had to address, is it just by state law? Is that sufficient? Does that make you a limited partner?

The court in this particular case said, "We've got these limited partners, so we do have people who are listed as limited partners, but we have to apply a functional analysis, not just go by what their names are." And the court agreed that a functional analysis has to be applied to determine whether the limited partner exception applies to limited partners in state-law limited partnerships and, by the way, by extension, LLPs, LLCs. And they said this excludes—but it doesn't just use the word "limited partner," it says, "limited partner, as such," and the court said the "as such" means that there's kind of a flexibility. The *principles of construction*—that means that we have to look at it and say, "Are there people acting as something other than a limited partner or are they functionally the equivalent of a limited partner?" So again, the court said, adding the "as such," Congress made it clear that the limited partner exception is going to apply *only* to a limited partner who was functioning as a limited partner. In this particular case, then, the court found that they weren't functioning as limited partners.

Now, the taxpayers tried to rely on the instructions, and they were relying on the instructions that defined a "limited partner" as a partner in a limited partnership formed under a state law whose liability is limited to the amount of money or property contributed. The court said, "Yes, but you're missing the next part, which is the definition of net earnings from self-employment." In that case, it says, generally, a limited partner's share of earnings is not subject to self-employment tax. *Generally*. They said by using the term "generally," that means that's not always true. Sometimes, it is subject to self-employment tax.

So, the bottom line here is, according to *Soroban*, this long-awaited case, the court came down and said, "We're going to apply a functional equivalent test. We are not just going to apply a bright line, you're-a-limited-partner-under-state-law [approach]." They also indicate that this would be the exact same result if applying the proposed regulations from 1997. They said it still would have ended up with the same result, and that there really isn't going to be a distinction if you're applying *Renkemeyer* to this. There isn't going to be a distinction between an LLP and *Soroban*.

B. *Charles G. Moore, et ux. v. United States*

Now, a case in the Supreme Court. It's going to be interesting. The oral arguments were heard in December. *Moore v. the United States*, Docket Number 22-800. That is pending. This is an interesting case because it could have some wide-ranging implications. One of the things I would point out is when Biden's first Green Book came out, one of the proposals he had was for individuals making more than $400,000. He proposed taxing them on their unrealized income. So, at the end of the year, you had to determine that if you had unrealized income, you were going to be taxed. Again, it was just a proposal. It never, obviously, went through, but the thought process was there and that's the important thing.

So, in this particular case, Charles and Kathleen Moore invested $40,000 in an Indian business in exchange for 11 percent of the company's equity. The company was a CFC (controlled foreign corporation). The company had profit every year, but it never distributed its earnings; it just reinvested its profits in the business. So, those earnings were not subject to tax until 2017. With the Tax Cuts and Jobs Act, it changed the corporate—and by the way, there was no Subpart F income in that company, so there was no subpart F issue—so, in 2017, the Tax Cuts and Jobs Act changed the corporate and Subpart F regime on domestic profits, and it imposed a one-time mandatory repatriation tax on profits held overseas. The Moores paid $14,729 in the tax that they owed; and then, they challenged it as violating the Sixteenth Amendment requirement.

The Sixteenth Amendment is the amendment that allows Congress to tax income, and the Sixteenth Amendment says, essentially, that Congress shall have the right to tax income from whatever source derived. The [Moores] say that "No, the Sixteenth Amendment has a *realization requirement*. You can't tax income before it has been realized," and they refer to *Eisner v. Macomber* that there has to be a realization event. Now as accountants, we know there's got to be—that's a general concept, right?—there's got to be a realization event. So, the question is, if there is no realization event, can Congress still tax income, or is that realization event necessary? There is no "statement of realization event" in the Sixteenth Amendment. There's no realization event stated in Section 61. The question is, "Should that be read in?" *Eisner v. Macomber* says yes, it's a general concept that if there hasn't been a realization event, it's not income. Well, this particular law says, no, there's a repatriation tax, even though you haven't "realized the income" per se as the shareholder-taxpayer.

The district court ruled for the government, and the Court of Appeals affirmed it, and so it is now in the Supreme Court. The Supreme Court has heard oral arguments on this case, so we can be expecting a decision literally any day now on this particular case. So, that's a major change. Commentators are saying that they doubt that the Supreme Court is going to want to change precedent for all of these years and maybe turn the tax code on its ears, but we'll wait and see. We'll see how the Court comes out.

C. *Madiodio Sall v. Commissioner, 161 T.C. No. 13, Code Sec(s) 6213, 7451*

Now, we have another case in the tax court, *Sall*. We've been talking about a number of issues related to whether that 90-day [limit] to file in the tax court is jurisdictional. Can there be equitable tolling? Yes, we have a circuit court that has said that it is subject to equitable tolling, it's not jurisdictional. But other than in that circuit, the tax court is adamant that it is jurisdictional and, therefore, that 90 days has to be met.

In this particular case, the IRS—this is how absurd this is—the IRS attempted to reject as untimely a petition that was due on Thanksgiving. The petition is due on Thanksgiving Day. Now, Code Section 7451(b) says that if the court is inaccessible on the date the petition is due, the period for filing is tolled for the period it's inaccessible, plus 14 days. Well, it was closed for Thanksgiving, and then, administratively, it was closed for the following day (which would be Friday), it then was closed Saturday and Sunday. So, Thanksgiving was a federal holiday, the court administratively was closed the next day, and then it was Saturday and Sunday. So, Mr. Sall mailed the petition to the tax court on Monday, November 28 (the Monday after). The court received it and filed it on December 1.

The IRS filed a petition to dismiss for lack of jurisdiction because [Mr. Sall] had missed the 90 days. The court here said no. When the court is inaccessible (as it was here) and that 90th day falls within the inaccessibility—in this particular case, the due date falls on a weekend or a federal holiday—the due date is extended to the next business day. Well, you could argue that they didn't make the next business day. However, for inaccessibility, if the court is inaccessible (on the federal holiday it was closed, and it was closed the next day, so it was inaccessible), the due date is extended by the number of days the location is inaccessible, plus an additional 14. They clearly fell within that period of time.

D. AM 2023-007

Now, we've got the never-ending, ongoing issues with ERCs, the employee retention credit, in a Generic Legal Advice Memorandum, AM 2023-007; and this kind of relates back to legal advice issued by the Associate Chief Counsel, 2023-007. So, what happened here? The question becomes, can you rely on communications from OSHA, the Occupational Safety and Health Administration, during COVID to meet the definition of an *eligible employer* for purposes of filing an ERC?

In this particular case, one of the tactics that the claimants have been arguing for an ERC eligibility is an OSHA guidance that was issued in 2021 on stopping the spread of COVID in the workplace. And what the Chief Counsel said was that does *not* qualify as an order to suspend operations. To be considered an eligible employer for the credit, the order has to come from an appropriate governmental authority and limiting commerce, travel, or group meetings (commerce, social, religious, or other purposes) due to the coronavirus, not this OSHA memo.

The OSHA communication served as recommendations, for example, about wearing masks and sanitizing supplies. It's not enough to treat that as a government order to close down. And the court said even if that were the case, you need to demonstrate, according to Notice 2021-20, under the facts and circumstances, that the order suspended more than a nominal portion of the business. Now, one of the other things that's been going on is people have been saying supply chain [problems]. They've been trying to say that supply chain disruption because of COVID issues is sufficient to qualify, and the IRS has said absolutely not, unless the supplier in the supply chain was closed by a government order. So, it's not just enough to say, "Well, there were supply chain disruptions." We know there were a lot of supply chain disruptions during COVID, but that doesn't make it eligible [unless it was] the result of a government order. And they mentioned the new withdrawal that we [have previously] talked about.

E. IR-2023-230

Now, we have something from the IRS, issue number IR-2023-230. The IRS has expanded its work on the employee retention credit, and they basically have come out in this notice. What they tell us is that they are in the process of sending out 20,000 denials notifying of a disallowed ERC claim. They are saying that two of the primary reasons are that the entity didn't exist during the proper period of time or did not have paid employees during that [time]. They have been very aggressive. What the IRS does here is remind taxpayers that basically, before we catch you, withdraw [the claim]. Go through the withdrawal program. They also indicated that they will shortly be coming out with a voluntary disclosure: "I got the money, but I wasn't entitled to it." You make a voluntary disclosure and a payback. All the details have not been issued, only the withdrawal of an application. The voluntary compliance has not been issued yet. We would expect it anytime now. The IRS has been saying they were hoping to have it by the end of 2023 or early 2024 at the latest. But again, the IRS is going after three main areas—the companies that weren't in existence during the appropriate time, companies that didn't actually pay qualifying wages during that time, and also, people claiming supply chain disruption as the reason that they are entitled to this. So, keep in mind that the withdrawal is still there, and watch for the IRS to come out with this disclosure program that they have been talking about.

So, I want to thank you very much for joining me. I hope to see you on the next program and, as always, please be safe.

Current Material: Experts' Forum

By Ian J. Redpath, JD, LLM

A. *Soroban Capital Partners LP,* 161 TC No. 12 (Tax Ct.)

In a major decision, the tax court determined that the limited partner exception in §1402(13) does not apply to a partner who is limited on paper only. The court agreed with the IRS that the determination of a partner's status as a limited partner is a factual determination by applying a functional analysis. The court also determined that the issue of net earnings from self-employment is a partnership item and subject to determination at the partnership level. This was a TEFRA audit.

Soroban Capital Partners LP (Soroban) is a limited partnership composed of a general partner and limited partners. For 2016 and 2017 (the years in issue), Soroban was subject to the TEFRA unified audit and litigation procedures. Soroban made guaranteed payments and distributed ordinary income to its limited partners. On its returns for the years in issue, Soroban reported as net earnings from self-employment its guaranteed payments to its limited partners plus the general partner's share of ordinary business income. However, Soroban excluded from its computation of net earnings from self-employment the ordinary income distributions to its limited partners. After an audit, the IRS adjusted Soroban's net earnings from self-employment by increasing it to include the shares of ordinary business income allocated to the limited partners, taking the position that they were limited partners in name only.

Partnerships are required to include in their calculation of net earnings from self-employment the distributive shares of their partners' income. Section 1402(a)(13) excludes from this computation a limited partner's distributive share of income—this is called the *limited partner exception*. Because the partnership is required to calculate net earnings from self-employment at the partnership level, any adjustment to this calculation must be made in a partnership-level proceeding.

Soroban is an investment firm originally formed as a limited liability company (LLC) but converted to a Delaware limited partnership on January 1, 2015. Soroban is classified as a partnership for federal income tax purposes. Soroban's Limited Partnership Agreement states that it has six partners in total, which includes one general partner and five limited partners. The petitioner is the general partner and tax matters partner. The limited partners are Eric Mandelblatt, Gaurav Kapadia, Scott Friedman, EWM1 LLC, and GKK LLC. Because both EWM1 and GKK are single-member LLCs wholly owned by Mr. Mandelblatt and Mr. Kapadia, respectively, they are disregarded for federal income tax purposes and, therefore, Soroban is considered to have only three limited partners (Mr. Mandelblatt, Mr. Kapadia, and Mr. Friedman). The Limited Partnership Agreement provides the roles and responsibilities of the partners. It lists the general partner and its role and authority over the business affairs of the partnership, the limited partners and their roles and interests in the partnership, how the profits and losses are to be allocated, the terms surrounding capital contributions, the voting classes, and the compensation provided to the limited partners in exchange for their services.

Mr. Mandelblatt, Mr. Kapadia, and Mr. Friedman received guaranteed payments in exchange for providing services to Soroban, but the balance of the ordinary business income allocated to the limited partners was excluded from the net earnings from self-employment of the limited partners. It reported total net earnings from self-employment of $2,035,395 and $1,901,131 for 2016 and 2017, respectively, consisting of the guaranteed payments received by Mr. Mandelblatt, Mr. Kapadia, and Mr. Friedman for their services to the partnership, and the petitioner's share of Soroban's ordinary business income.

On April 25, 2022, the Commissioner issued Notices of Final Partnership Administrative Adjustment for the years in issue, increasing Soroban's net earnings from self-employment and gross nonfarm income. The petitioner, as tax matters partner, filed a timely petition challenging the Commissioner's determinations and requesting the court to determine as a matter of law that §1402(a)(13) excludes Mr. Mandelblatt's, Mr. Kapadia's, and Mr. Friedman's shares of Soroban's ordinary business income from net earnings from self-employment and, thus, excludes those earnings from self-employment tax simply due to being designated limited partners under state law and the partnership agreement.

Section 1402(a)(13) contains a limited partner exception that excludes from net earnings from self-employment the distributive share of any item of income or loss of a limited partner, as such, other than guaranteed payments described in §707(c) to that partner for services actually rendered to or on behalf of the partnership to the extent that those payments are established to be in the nature of remuneration for those services. Soroban included the guaranteed payments distributed to Mr. Mandelblatt, Mr. Kapadia, and Mr. Friedman in its net earnings from self-employment, but not their distributive shares of ordinary business income. The court had to determine whether Mr. Mandelblatt, Mr. Kapadia, and Mr. Friedman are "limited partners, as such" as that phrase is used in §1402(a)(13).

The limited partner exception does not define the phrase "limited partner, as such." However, legislative history and case law provide insight on Congress's intended meaning. It was intended to exclude from social security coverage the distributive share of income or loss received by a limited partner from the trade or business of a limited partnership; essentially, to exclude earnings that are in the nature of a return on investment.

In 1997, the Treasury issued a proposed regulation seeking to define the scope of the limited partner exception. [Prop. Treas. Reg. §1.1402(a)-2] The proposed regulation provided that an individual would not be treated as a limited partner if the individual had personal liability for partnership debts, had authority to contract on behalf of the partnership, or participated in the partnership's trade or business for more than 500 hours during the partnership's taxable year. The proposal received much criticism and Congress issued a moratorium prohibiting the Treasury from issuing any temporary or final regulation with respect to the definition of a limited partner under §1402(a)(13) until July 1, 1998. The regulations were never reissued or finalized.

In 2011, the court applied statutory construction principles to determine whether partners in an LLP should be considered limited partners for self-employment (SE) tax purposes. In *Renkemeyer*, 136 T.C. at 150, the court analyzed the legislative history of §1402(a)(13) and concluded that its intent "was to ensure that individuals who merely invested in a partnership and who were not actively participating in the partnership's business operations … would not receive credits towards Social Security coverage." Additionally, "[t]he legislative history … does not support a holding that Congress contemplated excluding partners who performed services for a partnership in their capacity as partners (i.e., acting in the manner of self-employed persons), from liability for self-employment taxes." Lastly, that the partners in that case were not limited partners for purposes of §1402(a)(13) because their "distributive shares arose from legal services … performed on behalf of the law firm" and not "as a return on the partners' investments." In so finding, the court specifically applied a functional analysis test to determine whether the limited partner exception applied. However, *Renkemeyer* specifically dealt with an LLP and not a limited partnership as presented here.

The tax court concluded that a functional analysis test should be applied when determining whether the limited partner exception is applicable under §1402(a)(13).

B. *Charles G. Moore, et ux. v. United States*

This case is pending in the United States Supreme Court which, in December, held oral arguments. It challenges the ability of the federal government to tax unrealized gains as currently taxable income. The fact that the Supreme Court is hearing a case involving the realization concept is probably surprising to most practitioners.

Charles and Kathleen Moore invested $40,000 in an Indian business named KisanKraft in 2005, in exchange for 11 percent of the company's equity. KisanKraft is a controlled foreign corporation (CFC). The company made a profit every year of its existence and reinvested profits in the business rather than making any distributions to the shareholders. Prior to the passage of the Tax Cuts and Jobs Act of 2017 (TCJA), income on such earnings, absent certain provisions of Subpart F, generally did not have to be paid until they were distributed to shareholders. The TCJA changed the treatment to focus on domestic profits and imposed a one-time mandatory repatriation tax on profits held overseas. The Moores paid the $14,729 in tax owed and challenged the law as being unconstitutional in violation of the Sixteenth Amendment. They claimed that the Sixteenth Amendment imposes a realization requirement for income to be taxed. [See *Eisner v. Macombe*r, 252 U.S. 189 (1920).] The District Court ruled for the government, and the Ninth Circuit Court of Appeals affirmed that decision that there is no realization requirement for taxation of income in the Sixteenth Amendment.

Obviously, this case has wide-ranging implications for future legislation. One issue that has been raised by commentators is the implication on estate and gift taxes—would that be considered taxing unrealized income? However, it should be remembered that those wealth taxes are under the general taxing power, not the Sixteenth Amendment. A decision should be coming down shortly.

C. *Madiodio Sall v. Commissioner,* 161 T.C. No. 13, Code Sec(s) 6213; 7451

The tax court allowed the petitioner's petition filed after the 90-day period as being timely under statutory principles because the court was inaccessible. The IRS sought to have the petition dismissed as untimely.

The IRS issued a deficiency notice to the petitioner. The IRS mailed the notice on August 26, 2022. The 90th day after August 26 was November 24, which was Thanksgiving Day (a federal holiday). On the notice, the IRS listed the "last day" to file a petition in the tax court as November 25 (the day after Thanksgiving). However, the day after Thanksgiving was an administrative holiday for the tax court, so the courthouse was closed. The court's electronic filing system was operational and accessible at all relevant times. Mr. Sall mailed his petition to the tax court on Monday, November 28, and the court received and filed the petition on December 1, 2022. The IRS filed a motion to dismiss it as untimely.

The court agreed with the IRS that the 90-day period is "jurisdictional and not subject to tolling." However, the filing deadline may be extended in certain circumstances. For example, the deadline for filing a petition is extended if the due date is a weekend day or a federal holiday or if the "filing location" is inaccessible. The court, citing §7451(b), held that since the court was inaccessible on the date the petition was due, the period for filing was tolled for the period of inaccessibility plus 14 days.

The tax court was closed for Thanksgiving, a federal holiday, and was also administratively closed the following day, so the filing location was inaccessible on those two days. The court received the taxpayer's petition on December 1, 2022, which was within the additional 14 days allowed by §7451(b). Moreover, because the filing location was inaccessible, the availability of the court's electronic filing system was immaterial.

It should be noted that there is a controversy as to the concept of equitable tolling of the 90-day period. This case does not deal with equitable tolling but rather a statutory period when the court is inaccessible.

D. AM 2023-007

The Office of Chief Counsel has determined that taxpayers cannot rely on communications from the Occupational Safety and Health Administration (OSHA) during the COVID-19 pandemic to meet the definition of an eligible employer for purposes of filing a claim for the employee retention credit (ERC). This attacks a tactic some have used to argue for ERC eligibility. OSHA guidance issued in 2020 and 2021 on stopping the spread of COVID-19 in the workplace does not qualify as orders to suspend operations. "To be considered an 'eligible employer' for the credit, an order used to claim the credit must be both (a) from an appropriate governmental authority and (b) limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to coronavirus disease 2019 (COVID-19)," according to the memo. The OSHA communications served as recommendations for wearing masks, providing sanitization supplies, and encouraging social distancing, the IRS explained; it is not enough for employers to point to the OSHA guidance as a government order. However, even if that were the case, taxpayers would also need to demonstrate, per Notice 2021-20, under the facts and circumstances, such an order suspended "more than a nominal portion" of their business.

As a reminder, taxpayers may, if applicable, use the new ERC withdrawal.

E. IR-2023-230

As part of continuing efforts to combat dubious ERC claims, the Internal Revenue Service is sending an initial round of more than 20,000 letters to taxpayers notifying them of disallowed ERC claims. The primary reasons are:

- **Entity not in existence during period of eligibility:** The ERC applies to qualified wages for periods between March 13, 2020, and December 31, 2021. Entities established after December 31, 2021, are not entitled to the ERC under the law passed by Congress.

- **There are no paid employees during the period of eligibility:** The ERC is intended as a credit against qualified wages paid. Entities that did not pay any wages are not eligible for the ERC.

The letter is Letter 105 C, Claim Disallowed. The disallowance letter will explain that a taxpayer that disagrees with the disallowance can respond with documentation that supports their eligibility or claim amount, or they can file an administrative appeal.

The IRS recently unveiled its withdrawal procedures for certain ERC claims. It will be setting up a voluntary disclosure program for taxpayers to disclose receipt of questionable payments and to avoid future IRS action. That is expected to be announced by the end of December 2023.

GROUP STUDY MATERIALS

A. Discussion Problems

Your client, Simone, is a partner in SMLT, LP, a limited partnership organized in New Hampshire. Simone is listed as a limited partner. She has received a K-1 from the partnership that lists guaranteed payments for services of $50,000. The balance of the ordinary income of the partnership is not listed as net earnings from self-employment. Simone tells you that the LP's accountant informed her that she is not subject to SE taxes because she is a limited partner under state law.

Another client, Roberta, brought in a copy of a motion by the government to dismiss her tax court petition as untimely. The motion was filed by her attorney after the 90 days had expired. She explains that the 90-day period ended on Thursday, December 25, Christmas Day, a federal holiday. The court was closed the following day (Friday) by administrative order. Her attorney mailed it the following Monday, and it was filed the following Wednesday. The IRS, in its motion, mentions that the electronic filing system was open and available at all times. The IRS points out that this circuit has not ruled on the 90-day and equitable tolling, so the tax court position that equitable tolling does not apply should be applied in her case.

Jon, another client, brings in a claim for an ERC that was filed by a company that had contacted him by phone and advertises on TV. The basis of the claim is that Jon qualifies as an eligible employer based on certain OSHA-mandated COVID-19 guidance.

Required:

1) Discuss the SE tax in relation to Simone's position.

2) Discuss whether the IRS is correct that the tax court will dismiss Roberta's petition as untimely.

3) Discuss the eligibility of Jon's ERC claim based on OSHA workplace guidance.

B. Suggested Answers to Discussion Problems

1) Simone's position as a limited partner on paper is not determinative of her being subject to the limited partner exception for SE tax. She will have to pay SE tax on her guaranteed payments for services. The K-1 she received for providing services indicates that Simone is not only a pure investor. This scenario requires a facts-and-circumstances test to determine if she is "functioning" as a limited partner. Further inquiry will be needed to determine Simone's classification under the "functional" test.

2) Roberta's issue is not one of equitable tolling; it is a matter of statutory construction. If the court is inaccessible, then the 90-day period is extended for the period of inaccessibility plus 14 days. The court is deemed inaccessible for both December 25 and 26, Thursday and Friday, plus the following weekend; therefore, the period is extended by 18 days. The petition was filed within that time. The court has said the fact that the online filing system was available is not relevant. The IRS's motion should be denied.

3) The IRS has taken the position that OSHA's COVID-19 guidance was not a government-ordered shutdown and, therefore, cannot be relied on for purposes of claiming the ERC as Jon did in this scenario.

PART 2. INDIVIDUAL TAXATION

Basics of Gift Tax

For CPAs and other tax professionals, understanding the intricate relationship between gift tax, estate tax, and generation-skipping transfer tax is fundamental. Gift and estate taxes are interconnected through a unified tax credit system, which allows for a certain amount of assets to be transferred either during life or at death without incurring taxes. The generation-skipping transfer tax adds another layer of complexity. Mastery of these concepts is essential for effective estate planning and helping clients navigate the potential tax implications of wealth transfer across generations. Ian Redpath and Jonathan Tretter discuss the basics of gift tax.

Let's join Ian and Jonathan.

Mr. Redpath

Jonathan, welcome to the program.

Mr. Tretter

Hi, Ian. Thanks for having me. Looking forward to it.

Mr. Redpath

Always great to have you; great to have your insight. Today we're going to talk about gift tax, and this is just something that for a lot of people, they never think about it. It doesn't apply to them. But you know what? There are a lot of people it does apply to. The IRS, in general, believes that there's a lot of non-compliance in the gift tax area because people will make a taxable gift. Oh, Grandma and Grandpa just bought a car for their kid to go to college. Oh, it's a used car. Yes, but what was it worth? What did you pay for it? Oh, well, it doesn't matter because we can both give $17,000, so it was less than $34,000. Yes, but did you gift split? I mean, how did you do it? So, these issues can come up where you may have to file a return. Quite often, usually, there's no gift tax, but it doesn't mean you don't have to file a return. I think that's a real confusion that people have; there is a difference between when you have to file a return and whether or not you owe gift tax. They think, "Well, if I don't owe gift taxes, why would I file a return?" Well, because it might be required. That, I guess, is the best answer, right?

So, let's start with gift tax, estate tax—my fear, generation-skipping tax. I hate the term; I always wince. Give us an overview of how these all kind of fit together.

Mr. Tretter

These essentially—the three that you listed—are considered transfer taxes. Depending on when the transfer happens is what tax is imposed. *Estate tax* is imposed on a decedent's entire estate. [The estate is] taxed on the right to pass property at death, so estate tax is taxed at the death of the decedent.

Gift tax is essentially a tax that's imposed during the lifetime on a gift that's done for a transfer. Gift tax, I think, many times is misunderstood. If there is a gift tax, it's payable by the donor, not by the donee, but gift tax usually applies during the lifetime of a person.

Then *generation-skipping tax*—essentially, it's the IRS's way of saying every generation, they want their fair share of tax or estate tax. So, generation-skipping tax can come into play if gifts or transfers happen that skip a generation; even if it's within or out of a family, a generation-skipping tax could come into play.

Mr. Redpath

I always think about the vultures; I think about the cartoons when the vultures are circling to get their money. "How dare you transfer money to a grandchild? What's wrong with you? That's got to be subject to generation-skipping tax." That one, to me, is bothersome.

You mentioned that the donor pays the gift tax, and the donee, that's often confused because the donee has no income tax. It's an exclusion from income tax—as are inheritances; they are exclusions from income tax—but the donor has to pay the gift tax.

People do things quite often, and they don't think about the tax consequence per se. "Oh, I didn't gift that. I sold it." "What did you sell it for?" "Well, I sold it for a dollar." "You sold your house for a dollar to your child?" "Yes, I sold it for a dollar. It was a sale. The deed says a dollar." I'm sorry, that's a part sale/part gift. So, anytime it's less than full and adequate consideration, you've got part sale/part gift. I think that's missed a lot, Jonathan, where people think they're being cute by selling it. They're selling it for a nominal value, not realizing the IRS could come in and go, "I'm sorry, that is a gift. There's gift tax on that." And if you die and it's brought back in, there is no statute of limitations if you never filed a gift tax return. If the IRS questions it, there is no statute. They could come in and say, "No, the value was significantly higher." It's a lot of problems.

I always think you're safe in filing a gift tax return. But less than full and adequate consideration—I think that's an area where people are confused because they think that these nominal transfers to a child avoid gift tax, or to anyone to avoid gift tax—it technically doesn't work.

Mr. Tretter

I see it where there's loans with family members, and they're not bona fide loans or they're not acceptable interest rates. The IRS could look at that as, essentially, a gift and not legitimate loans. So, there are a lot of factors that come into play to make sure that, whether it's a sale or a loan, it really is at arm's length and at fair value.

Mr. Redpath

Yes, that's a great point that you made because we do see that quite often where, here is a loan, and maybe it says, on death, the loan will be forgiven. Now, you have a forgiveness of debt issue, and you've got some things there to deal with. But the fact of the matter is that it may have been a gift. Now, it may be a present gift, and the present gift may very well be forgiveness of debt. So, what the donee is going to do is not dependent on whether that was a gift. If it was a gift, we gave up the right to the interest. Well, now you're going to say, "Okay, that was a legitimate gift." But you've got a lot of arguments there that the IRS can come in and argue, "No, no, no, no, no! That's forgiveness of debt income, donee. You've got a lot of income coming up." So, you can see that there could be a lot of issues on that type of situation quite often.

So, what's the formula? We talk about gifts. We often think about gift taxes in an isolated circumstance. Okay, this year, what did I do? Okay, next year starts all over; what did I do? And it's really not like that, is it? It's kind of an accumulation. So, what is the actual formula that we should be looking at?

Mr. Tretter

The gift tax formula—it starts with the fair market value of the property that's gifted, and then, you're able to deduct or carve away the annual exclusion per donee. You're able to deduct any charitable deductions that were made and any marital deductions that were made, so when you take those into account, that equals your taxable gifts for the year. At that point, you would calculate the tentative tax on that gift for the year. Then, you [subtract] the available unified credit. Then, at that point, you would calculate what the tax payable would be. In a lot of situations, it's rare that, when a gift takes place [and] when you take into account all the reductions, there is tax payable. But, you know, that can happen.

One comment you made earlier that I see a lot of my clients struggling with or that they don't think about is they're so keen on staying under that annual exclusion amount because they don't have to file a return, but filing returns is the only way the statute of limitations does start. So, I think, in a lot of cases, people are afraid to file the return; but in more cases than not, that protects you more than it hurts you. I just think that's an important thing for people to understand.

Mr. Redpath

Yes, and the other thing that can come up—I had this situation where there was a transfer. Again, it's about three people down the list, and they died. There were transfers; they just kept making transfers. Nobody filed anything.

The only deeds that were ever filed on these transfers—a dollar. Well, it was 500 acres of farmland. It was a nice-sized little family farm, and the tracking of who got it follows through the family. Well, the problem is, you had $1 and other good and valuable consideration. Then the next transfer was $1 and other good and valuable consideration. One dollar and other good and valuable consideration. So, what was the basis in this property? I have no idea what anybody's basis in the property was because nobody ever bothered to file a gift tax return. The gift was out of the estate because the person had made a gift, supposedly, but did they? You've got to bring back the taxable gifts. Well, I think the 500 acres was taxable—it wasn't a dollar—so the taxable portion would be brought back into the estate. I don't know what happened back then. People don't think about that, that the statute of limitations doesn't begin to run if you don't file a return.

And the other thing—so it's $17,000 this year; it'll be $18,000 next year—is that exclusion. So, I have a piece of property in my name, and I'm going to want to give it away. I have some stock, and I'm going to transfer that stock, but that stock is worth $30,000. Well, if I want to use my spouse's [annual gift tax exclusion], I have to file a gift tax return. Even though it's under the combined $34,000, to use my spouse's annual exclusion, I have to file a gift tax return. We, my spouse and I, have to file a gift tax return, or we can't combine it. So, I have a taxable gift, even though it's under the combined [amount]. So, to get the joint gift, you have to file a gift tax return. A lot of people just—there's such a lot of non-compliance in filing gift tax returns. People just don't want to do it. We have to explain to them, as you said, that there are important reasons why you would want to file it.

Now, you mentioned the annual exclusion, and charitable deductions, and the marital deduction. This annual exclusion—I think one of the things that is misunderstood is the annual exclusion has to be a present right. It has to be a present interest. You can't transfer something to someone and they have no right to it. So, what does that mean, a *present interest*, in order to get the exclusion?

Mr. Tretter

Essentially, a *present interest*, they must have—I think you kind of touched on it—the person receiving it must have a present right to it, not a *future interest* where it's not really yours until the date of death. Essentially, you have to have a right to it and control over the asset that's being gifted or transferred to you to really be considered a present interest and a gift from the donor.

Mr. Redpath

Yes, and there's [the] Uniform Gift to Minors Act [UGMA] or [the] Uniform Transfers [to Minors Act (UTMA)]. The difference is that uniform gifts, you can't [use to] transfer real estate. Uniform transfers go longer, up to 21, and you can put real estate [and] other assets there. The IRS has this thing called a 2503 trust.

Then, there's a Crummey trust, which is Crummey not as in bad; [it's] Crummey as in the name of the person. In *Crummey*, what they did was, when they put the annual amount in, equal to the exclusion, [the trust] notified them that you have 30 days to take this out. If you don't, you lose the right to take it. The IRS said, "Well, wait a second. That's not a present interest." And the court said, "Yes, it is. That is a present interest because they had 30 days to do it." Even though you're going to tell the kid or the grandchild, "You touch that money, and you're getting nothing," you always say, "You can take out an amount equal to the lesser of the amount put in or the exclusion amount." That's a present interest, so that, kind of, avoids all of this issue.

I had a client ask me, "Well, how do I notify it? Because it's for my young child." The child was essentially a couple of years old. "And I'm the trustee of the trust, and I'm putting the money in." I said, "You send yourself a certified letter, just as if you were sending it to an independent person, and you put it in the file." And I said, "Treat yourself as if you're independent. Just follow the rules. Don't try to avoid a step just because you're the parent, the trustee, and you're putting the money in." I said, "Just try to avoid that [if] at all possible."

There's also a special rule for 529 plans because they give you the ability to make an increased lump sum payment. What is that about?

Mr. Tretter

Yes, you can make a lump sum contribution to a 529 plan. They allow up to five times the annual gift tax exclusion. So, five times the $17,000.

Mr. Redpath

Five times the $17,000.

Mr. Tretter

Right. Yes. You have the ability to elect to spread that gift evenly over the five years even though it's done in one year, and that allows you to completely avoid the federal gift tax provided there [are] no other gifts that are made to the same beneficiary during that five-year period. I think, honestly, that's probably where a lot of people get tripped up. They do this, and then a year later, they forget, and then they make other gifts. But you do have to be able to not provide future gifts over that five-year period if you make that election.

Mr. Redpath

It might be wise for the accountant who recommended this to send them a letter to that effect in the future years. "Keep in mind that you've used your exclusion." Because, otherwise, they'll come back and go, "What do you mean I can't do this?" So, I always make sure that they know that in writing.

One issue, too, that can come up is, is it really a gift? I mean, did you make an actual gift? Did you make a completed gift? I had this situation once, Jonathan, where this individual had made a bunch of gifts. We found out about the gifts because what the person had done is put these gifts in accounts and put all the documentation in the safe, and it was in an envelope that said, "Open upon my death." Well, is that a gift? Were those gifts?

Every year, by the way, he put in these accounts just under the annual exclusion amount. Whatever it was, he would put them in accounts for his grandkids. But he had all the information; his grandkids knew nothing about this. No one knew anything about it until he died, and he goes, "Well, here you go." Were those gifts?

Mr. Tretter

No, not under my interpretation. There are some requirements for a gift. The donor is competent to make the gift, and the donee is capable of receiving and possessing the property. The native intent of the donor. There has to be actual or constructive delivery of property to the donee or the donee's representative. And it also has to be accepted; the gift has to be accepted by the donee. So, if the donee is not aware of it and hasn't accepted it, then I don't think in that case it would be considered a gift.

Mr. Redpath

No, and the last two things you mentioned—actual or constructive receipt—there wasn't either. Constructive receipt would be if he had given, let's say, the account statements to the representatives—which would have been his kids because these are for his grandkids—and if they could have accepted the gift on his behalf, that would have been constructive receipt. You don't get the actual money, [but] what represents it. But none of that was done. He set up these accounts. They just weren't completed gifts. And that's something that does happen sometimes, so that gets brought in.

We mentioned the big thing, the part gift/part sale; below market loans; loans in general with forgiveness. There are some things that are excluded, like tuition payments. So, what are some of the things that would be excluded from gifts? We would not even think of them as gifts.

Mr. Tretter

Transfers to political organizations, those are not considered gifts. Tuition payments, but they have to be made to an educational organization on a person's behalf. If it's organized in that way, then it would not be considered a gift. You're also allowed to pay on another person's behalf for medical care, but those medical payments, similar to tuition, must be made directly to the provider, whether a physician, hospital, [or] college. Satisfying an obligation of support is also not a gift. Certain property settlements, whether it's through a divorce or other marital proceedings, are not subject to gift tax as well.

Mr. Redpath

Property settlements used to be subject to income tax. If I transferred to my spouse—so you take the brokerage accounts; I'm taking the house—we both had a gain on half of that. That was done away with. The property settlement isn't a gift either. It's a forced transfer; it isn't really a gift.

There's this basis issue to the donee that has to really be considered because people don't think about it. When a person gets property, what is their basis?

Mr. Tretter

To the person receiving the property, it's essentially a carryover basis from the donor. That's essentially the basis that the donee is inheriting or taking over. Honestly, I think, basis—and income tax basis—is something that maybe is lost in gift and estate planning because [with] gift tax, the basis carries over; there's no step-up in basis. When it comes to estate matters, there is a step-up in basis. So, if gifting is going to happen, I think it's important to really look at your assets and determine what [are] the best assets to gift, taking into account the loss of a step-up if, essentially, you pass away with it.

Mr. Redpath

You generally don't want to gift low-basis/high fair market value things to someone. That's the type of thing you'd like to keep till you die and get that step-up in basis. But you've got to also consider, okay, what's the value today versus the value when I die? If I have to bring it back into my estate at that value, what will be the estate taxes on it versus the current gift tax? There are so many different elements here to look at when you're planning someone's estate. I think that's a really great point.

You also get a step-up in basis for the gift tax on the appreciation—it's only the appreciation. [The] donor pays the gift tax on the fair market value. They're paying gift tax on whatever appreciation [occurs] while they've held it. Well, if you take carryover basis, that would be double taxed if the person sold it the next day. It would have been subject to the gift tax and subject to the income tax to the donee. So, you get to step-up the basis for the gift tax paid on the appreciation. Not on the whole value; just on the difference between the fair market value and the basis. That pro-rata share of any gift tax paid would increase the basis.

But there's a bifurcated rule that's important here. If the fair market value is less than the basis on the date of the gift, then you really don't know until you dispose of it what the donee's basis is. You have that bifurcated basis until you dispose of it. So, what does that mean?

Mr. Tretter

Like you said, you don't know at that point in time, but the donee's basis is the lesser of the basis for gain or the fair market value on the date of the gift. So, essentially, the lesser of the two is what the donee's basis is.

Mr. Redpath

There's a gain basis and a loss basis. If the fair market value is greater than the basis on the date of the gift, then you'll always use carryover basis plus gift tax on the appreciation. It's when it's less that you have an issue. I think the problem that you have is your client comes in and the client says, "I made a gift." And you say, "Okay, what was the value? Okay. We're done." And that may not be enough information unless you know, "Okay, what was your basis?" Because, clearly, the donee is going to want to know what the basis is.

One of the reasons I would never want to date an accountant is every time I'd give them a gift, they'd want the receipts. "What did you pay for that now? Do you have the receipts?" But that's not really bad advice. I may not dispose of this for ten years, so what was the value? It puts the donee in the situation that—how many donees really know what the fair market value or the basis is on any gift that they get? They don't. If there [are] no gift tax returns filed, you have an even bigger problem because you don't have a way to track that back. That's the one I was [talking about]. We had these gifts that were made in deeds that said, "One dollar and other consideration." We don't know what these values are. So, something to keep in mind because you really don't know what that is going to be.

With gifting, there's all sorts of [issues]—valuation, minority and marketability discounts, family LLCs, et cetera. What are the issues that we need to concern ourselves [with] when we start looking at gifting for more high-wealth individuals, so businesses, family limited partnerships, or family LLCs? What are some of the things the IRS is going to be targeting us for?

Mr. Tretter

When it comes to family businesses, partnerships, [and] LLCs, the IRS really is going to hammer you on the value of the business. I always say it's a good practice to get a formal business valuation prepared if there are business interests that are being transferred or gifted, especially if you want to apply discounts, whether it be lack of marketability, minority interest—all the various discounts that you want to apply. You really should have a business valuation done to make sure those discounts hold water in the eyes of the IRS.

Mr. Redpath

These are always problems, especially when you are gifting interests in a closely held business. So, what are some of the things that we need to look at there when we're talking about a closely held business?

Mr. Tretter

Valuation discounts for minority and marketability. You look at whether parents and grandparents can retain a level of control until [they're] ready to give up [control]. Those are the couple that come to mind for me. What else did you have in mind there?

Mr. Redpath

Well, if you have a closely held business, you're going to look at things like goodwill, the nature of the business, the economic outlook, the book value and financial condition of the business, [and] the earnings and dividends. I think the problem here—and you and I have talked off camera about this—is a firm like yourself, a large firm, you have the ability to have people on staff that are certified valuation experts. But not every firm has that, especially smaller firms.

What [are] your thoughts when you're gifting interest in a closely held business or even, in an estate, you're valuing a closely held business? What are your thoughts about that, and what would you personally do or recommend, especially to smaller firms?

Mr. Tretter

Generally, I always recommend that there is a formal business valuation done. I know it's going to cost some money because they're not always cheap. But, in comparison to what could happen if they're not done, it can pale in comparison. On the tax forms, there are boxes you have to check if you're applying valuations or discounts. Having that valuation is critically important to substantiate any discounting that's happening because, in a lot of cases, it could—if there's an adverse opinion by the IRS, and you're not able to substantiate your valuation—it could be the difference between an estate that has no estate tax or one that is taxable. So, I always say it's worth the investment and the money to get that formal valuation done, especially for gifting closely held businesses.

Mr. Redpath

And the other thing is that, when you're gifting, you have to keep in mind that if you don't file the gift tax return, you're not starting the statute of limitations, and you mentioned earlier that these taxable gifts get brought back into the estate and are taxed again. So, most people file their gift tax return; they apply their unified credit against their gifts. Then they bring all of the taxable gifts since 1977 back in—the taxable gifts, the gifts over the exclusion and any deductions. And then they [the IRS] tax it again, which, of course, increases the potential to move you up brackets. But then you use the full unified credit again. So, most people are using their unified credit as they go along. There shouldn't be a lot of fear of filing a gift tax return, even though it's not always done. But you never start the statute of limitations, and now, when the person dies, especially if you have a closely held business and you have no valuation you've brought in, or if you did file gift tax returns and you didn't use someone to value… Hopefully, you filed gift tax returns, but I think there's a serious problem that can exist here for you in not taking that extra step for value and not filing the gift tax returns.

Mr. Tretter

Exactly. I think, also, depending on when you file them, if they're filed late, although you start the statute of limitations, it could also alter the value of the gift. If it's stock, I think [the IRS] could value it on the date of the filing and not necessarily the date of the gift if the gift tax return wasn't timely filed. There are a lot of things that come into play that make the filing of the gift tax returns critically important.

Mr. Redpath

One of the most important issues between gift and estate is valuing things, like typical planning types of techniques. Maybe you have a grantor lead trust or a grantor retained annuity trust. Maybe you have a charitable—very common—charitable remainder trust, charitable unitrust, charitable lead trust. But the key to all of those is the valuation, isn't it?

Mr. Tretter

Exactly, yes. We haven't hammered it home enough, but yes. Valuation, in all instances, is really one of the most important things in all of this.

Mr. Redpath

You said something, Jonathan, I think, which is something that we can leave our viewers with. You talked about the importance of valuation, but you talked about the cost. You said, "You know, it's not cheap," and that's true. It's not cheap, but it's usually a heck of a lot cheaper than if you don't do it. If you don't do it, maybe nothing happens. Then, yes, you save some money. But, boy, I don't want to be in a position, if something does happen, that I don't have a valuation that I can rely on, that I feel comfortable that I have someone who is competent, and I can go in and rely on that valuation and say, "Okay." I'm going to turn to the valuation expert and say, "You go argue with the IRS about your valuation. I'll be with you. I'll be sitting next to you. But you go argue with it because that was your valuation number. We relied on it." In some respects, you're passing the buck a little bit, but I'm not going to argue with the IRS about the valuation issues, and the discounts, and everything. I'm going to let the expert in that field do it. So, I agree with you 100 percent. I think that the cost of not doing it can far outweigh the cost of doing it.

Mr. Tretter

Exactly. Yes.

Mr. Redpath

Jonathan Tretter, thank you for joining me today. Really appreciate your input. A lot of great things that you've given our viewers. To our viewers, thank you again for being here, and, as always, please be safe.

Mr. Tretter

Thank you.

Gift Tax Basics

By Ian J. Redpath, JD, LLM

A. Introduction

Transfers of property for less than full or adequate value will usually result in a potential tax consequence to the donor in the form of gift taxes. Gifts are generally taxed to a donor at the fair market value (FMV) of the property transferred [§2502], regardless of the type of property transferred. It will apply to transfers of cash as well as real, tangible, and intangible property. Some transfers may be partially a gift and partially something else, such as a sale. It is important to identify whether a transfer may have a gift component and to determine the appropriate tax treatment. Practitioners must take care to ensure the optimal tax treatment for the client. It should be noted that if the donee is two or more generations younger than the person making the transfer, the separate generation-skipping transfer tax also applies. Even if taxes are not due, there are reporting requirements that must be met.

Valuable consideration does not include a payment or transfer based on "love and affection … promise of marriage, etc." Consequently, property settlements in consideration of marriage (for example, pre- or ante-nuptial agreements) are regarded as gifts [Reg. §25.2512-8].

Example: Jamie sells property to her nephew, Paul, for $100,000. The property has an FMV of, and could reasonably be sold for, $300,000. This is a transfer for less than full consideration and is part sale and part gift.

Example: To effectuate the sale, Jamie loans Paul the $100,000 with an interest-free loan. The applicable federal rate that would apply is 3 percent. The forgone interest (imputed interest) is a gift.

A unified transfer tax applies to all gratuitous transfers of assets by an individual, regardless of how or when the transfers are made. Transfer taxes are a single, cumulative tax over a person's lifetime which consists of gift, estate, and generation-skipping components. Payment of gift tax is essentially a prepayment of the transfer tax. The generation-skipping tax is a penalty on aggressive planning. These taxes apply to residents or citizens of the United States, regardless of where the transferred property is located. A donor who is not a U.S. citizen or resident is subject to the taxes only if the transferred property is located in the United States [§§2001(a), 2511(a), and 2801].

The term "taxable gifts" means the "total amount of gifts" made by the donor during the "calendar period" [as defined in §25.2502-1(c)(1)] less the deductions provided for in §§2521 (before its repeal by the Tax Reform Act of 1976), 2522, and 2523 (specific exemption, charitable gifts, etc., and the marital deduction, respectively). The term "total amount of gifts" means the sum of the values of the gifts made during the calendar period less the amounts excludable under §2503(b) [Reg. §25.2503-2]. The entire value of any gift of a future interest in property must be included in the total amount of gifts for the calendar period in which the gift is made [Reg. §25.2503-3]. The formula for gift taxes is:

1. Current year gifts subject to gift tax [§§2501(a) and 2503(a)]
2. Minus applicable annual exclusion [§2503(b)]
3. Minus deductions—charitable and/or marital [§§2522–2524]
4. Equals current-year taxable gifts
5. Add prior taxable gifts
6. Equals total taxable gifts
7. Times gift tax rate
8. Equals tentative gift tax [§§2502(a)(1) and 2001(c)]

9. Minus any prior gift taxes paid

10. Minus unified credit [§2505(a)]

11. Equals current gift tax

The taxable gifts are taxed at the following rates:

Taxable Amount	**Tax**
Not over $10,000	18% of the amount
Over $ 10,000 but not over $ 20,000	$ 1,800, plus 20% of the excess over $ 10,000
Over $ 20,000 but not over $ 40,000	$ 3,800, plus 22% of the excess over $ 20,000
Over $ 40,000 but not over $ 60,000	$ 8,200, plus 24% of the excess over $ 40,000
Over $ 60,000 but not over $ 80,000	$ 13,000, plus 26% of the excess over $ 60,000
Over $ 80,000 but not over $ 100,000	$ 18,200, plus 28% of the excess over $ 80,000
Over $ 100,000 but not over $ 150,000	$ 23,800, plus 30% of the excess over $ 100,000
Over $ 150,000 but not over $ 250,000	$ 38,800, plus 32% of the excess over $ 150,000
Over $ 250,000 but not over $ 500,000	$ 70,800, plus 34% of the excess over $ 250,000
Over $ 500,000 but not over $ 750,000	$155,800, plus 37% of the excess over $ 500,000
Over $ 750,000 but not over $1,000,000	$248,300, plus 39% of the excess over $ 750,000
Over $1,000,000	$345,800, plus 40% of the excess over $1,000,000

The tax is payable by the donor [§2502(c)]. If the donor fails to pay the tax when due, the donee may be held liable for the tax to the extent of the value of the property received [§6324(b)].

For individuals who are neither residents nor citizens of the United States, the federal gift tax applies only to gifts of property situated within the United States. Gifts of intangibles, however, such as stocks and bonds, are exempted.

The taxable lifetime gifts are added back to the tentative taxable estate and subjected to tax again. The estate may now use the full unified credit and will receive credit for any gift taxes paid.

A concern arose on what would happen to taxable gifts upon death if the unified credit is reduced, as is currently scheduled to happen in 2026. In IR-2019-229, the IRS announced Proposed Regulation §20.2010-1. Taxpayers making gifts in reliance on the existing law will not be adversely impacted if the unified credit is reduced.

B. Valuation

The valuation of gifts is generally the FMV on the date of the gift. For certain future interests, the IRS provides valuation tables. For gift and estate tax purposes, the FMV of property transferred to another party is measured on the date of the transfer as "the price at which the property would change hands between a [hypothetical] willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts" [the "willing-buyer-willing-seller test," Treas. Reg. §20.2031-1(b)]. For assets traded on an established market or that have a readily ascertainable value, the value for gift and estate tax purposes is their FMV on the date of the transfer. For other assets, valuation must be established by an educated estimate.

Gifts may be subject to discounts for such things as minority or marketability. Additionally, for certain remainder or lead trusts, the IRS provides valuation tables.

C. Requirements for a Gift

While it seems obvious, in order for gift tax to apply, there must be a completed legal gift. State laws may differ slightly on the elements but, in general, there must be the following:

- The donor must be competent to make the gift—this may differ from contractual competency.
- The donee must be capable of receiving and possessing the property.
- There must be donative intent on behalf of the donor—this refers to the conscious desire to make a gift, which is different from giving something for nothing by mistake or under pressure. There is a rebuttable presumption that donative intent is present when the grantee is the natural object of the grantor's bounty.
- There must be actual or constructive delivery of the property to the donee or the donee's representative. This may be symbolic or by conduct.
- There must be an acceptance of the gift by the donee, actual or constructive. A donee may refuse or disclaim a gift.

There is no gift tax if the gift is not complete. For example, if the purported donor retains the right to revoke the gift or has retained possession and control over it, it is not a taxable event.

Gift tax does not apply to certain transactions. For example, tuition or medical payments for another will not be subject to gift tax provided the payments are made directly to the school or medical provider [§2503(e)]. The patient or student does not have to qualify as a relative or dependent of the person making the payment. Additionally, contributions to political organizations are exempt [§2501(a)(5)]. Transfers of property interests made under the terms of a written agreement between spouses in settlement of their marital or property rights are deemed to be for adequate consideration. These transfers are exempt from the federal gift tax if a final decree of divorce is obtained within the three-year period beginning on the date one year before the parties entered into the agreement [§2516].

D. Annual Gift Tax Exclusion

A donor has an annual exclusion of $18,000 per donee in 2024 ($17,000 in 2023) [§2503(b)]. To qualify, it must be the gift of a present interest. For a gift in trust, each beneficiary of the trust is treated as a separate person for this purpose. A husband and wife may agree to "gift-split," thereby using both exclusions of up to $36,000 per donee [§2513]. To do so, a gift tax return must be filed.

A present interest is an unrestricted right to the immediate use, possession, or enjoyment of property. A future interest means such if postponed to a future date. Examples of future interests include rights such as remainder interests that are commonly encountered when property is transferred to a trust. Gifts under the Uniform Gifts to Minors Act, Uniform Transfers to Minors Act, and §2503 trusts are considered present interests for this purpose. Additionally, a Crummey trust will qualify. Under a Crummey trust, the beneficiary is given a limited period, such as 30 days, to take out the annual contribution up to the annual exclusion amount [*Crummey et al. v. Commissioner of Internal Revenue*, 397 F.2d 82 (9th Cir. 1968)]. Contributions to a §529 educational plan are provided a special rule that allows the donor to use five years of annual exclusions, but only once in a five-year period.

Example: By a lifetime gift, Riley transfers property to a trust with a life estate (with income payable annually) to Amanda, and the remainder upon Amanda's death to Peter. Riley has made two gifts when the trust is created—one to Amanda of a life estate, and one to Peter of a remainder interest. The life estate is a present interest and qualifies for the annual exclusion. Peter's remainder is a future interest and does not qualify for the exclusion. If the income does not have to be paid out annually but rather at the discretion of the trustee, the transfer to Amanda also would not be considered a present interest and, therefore, would not quality for the exclusion.

Example: Aurora and Peter would like to start building a college education fund for their 10-year-old grandson, Griffin. Aurora contributes $150,000 to the designated carrier of their state's §529 plan. By electing to split the gift and by using five annual exclusions, no taxable gift results. Making the five-year election precludes them from using an annual exclusion on gifts to Griffin for the next four years.

E. Deductions

Deductions are allowed for contributions to qualified charitable organizations. With the following exceptions, they are also the same organizations that qualify a donor for an income tax deduction [§§170, 2055, and 2522]:

- Certain nonprofit cemetery associations qualify for income tax purposes but not for estate and gift tax purposes.
- Non-U.S. charities may qualify under the estate and gift tax but not for income tax purposes.

A deduction is also allowed for transfers between spouses. The marital deduction allows spouses to arrange their financial affairs without federal gift or estate tax consequences. The marital deduction is available to same-sex married couples. The transfer must be of a present interest to qualify for the deduction. Property passing to a surviving spouse who is not a U.S. citizen is not eligible for the estate tax marital deduction [§2056(d)(1)]. Similarly, no gift tax marital deduction is allowed where the spouse is not a U.S. citizen. However, the annual exclusion for these gift transfers is $185,000 for 2024 ($175,000 for 2023) [§2523(i)]. The property cannot be terminable interest property unless it meets the requirements as qualified terminable interest property (QTIP). This is defined as property that passes from one spouse to another by gift or at death, and for which the transferee-spouse has a qualifying income interest for life.

- The person is entitled for life to all of the income from the property (or a specific portion of it), payable at annual or more frequent intervals.
- No person has the power to appoint any part of the property to any person other than the surviving spouse during his or her life [§§2523(f) and 2056(b)(7)].

If a later transfer occurs during the surviving spouse's life, the gift tax applies, measured by the FMV of the property as of that time [§2519].

F. Unified Credit

The unified credit applies to all gratuitous transfers of assets by an individual, regardless of how or when the transfers are made. The 2024 unified credit is $13,610,000 ($12,920,000 in 2023). That means that a person may make total transfers of $13,610,000 that will not be taxed.

G. Procedural Matters

Form 709 (U.S. Gift Tax Return) must be filed whenever the gifts for any one calendar year exceed the annual exclusion or involve a gift of a future interest. Form 709 also must be filed when the election to split gifts is made by the nonowner spouse. Form 709 need not be filed, however, for transfers between spouses that are offset by the unlimited marital deduction, regardless of the amount of the transfer [§6019(a)(2)].

Example: This year, Mike makes gifts in the amount of $15,000 to each of his 10 grandchildren. If the gifts do not involve future interests, a Form 709 need not be filed to report the transfers.

Example: Lauren makes a gift of $36,000 cash of her separate property to her daughter. To double the amount of the annual exclusion allowed, Jerry (Lauren's husband) is willing to split the gift. To make the gift-splitting election, Form 709 must be filed, even though no gift tax will be due as a result of the transfer.

A gift tax is due on or before the fifteenth day of April following the year of the gift [§6075(b)(1)].

H. The Generation-Skipping Transfer Tax (GSTT)

The GSTT is designed to foreclose the avoidance of either the estate tax or gift tax that could occur when making transfers that bypass the next lower generation. (In the typical family setting, this involves transfers from grandparents to grandchildren.) The result for the government is that they are denied a level of tax by skipping a generation. It is triggered by any of three events: a taxable *termination* occurs, a taxable *distribution* takes place, or a *direct skip* is made [§2611].

The GSTT rate is the highest rate under the gift and estate tax schedules—40 percent. The GSTT base is reduced by the same exemption equivalent amount that is available against the federal estate and gift tax. For a donor who is married, the election to split the gift can double the amount of the exemption. The tax base also is reduced by the annual gift tax exclusion and the charitable and marital deductions. The GSTT does not apply to gifts made for political, medical, and educational purposes, if the corresponding gift tax exemption applies. A credit is allowed for certain state-level GSTT taxes paid.

Generations are assigned by birth or marriage. For other parties, a generation is 25 years long. The GSTT computation is made on a schedule that is part of Form 706 or 709 (i.e., the gift or estate tax return to which it relates).

Example—birth or marriage: Mother Cara (age 60) and son Brock (age 40) are in successive GSTT generations. Father Stu (age 60) and daughter Alissa (age 15) are in successive generations. Spouses are in the same generation.

Example—other parties: Unrelated individuals, Ethan (age 60) and Jean (age 50), are in the same generation. Unrelated individuals, Kerry (age 60) and Kaylee (age 12), are two generations apart.

I. Conclusion

Practitioners are often confronted with higher-wealth clients that have estate-related issues. Even without any tax due, there may be filing requirements. As a result, practitioners should be aware of the tax implications related to any transfer that is made for less than full and adequate consideration.

GROUP STUDY MATERIALS

A. Discussion Problems

You have the following client situations:

1) Bill makes a transfer of property to Mary without consideration. He does not want Mary to know of the transfer until sometime in the future. Is this a gift?

2) Jimmy wants to transfer as much as possible to his five adult married children (including spouses) and seven minor grandchildren without using any unified transfer tax credit. He asks how much he can give, so as to accomplish his tax goal? What if his wife joins in the gifts? Are there any filing requirements and, if so, what are they?

3) Jane is considering making a significant gift to her grandson. Would this be subject to GSTT?

Required:

Address the questions raised in each separate fact situation.

B. Suggested Answers to Discussion Problems

1) In order for gift tax to apply, there must be a completed legal gift. In general, there must be actual or constructive delivery of the property to the donee. Since Bill's transfer of property has not been actually or constructively delivered to and accepted by Mary, it is not a gift.

2) Jimmy will be able to transfer $18,000 per year (per donee) without using his unified credit. If his wife agrees to "gift-split," that exclusion would be doubled per donee. To do this, a Form 709 will need to be filed.

3) Since Jane's grandson is more than one generation below, the gift would be subject to the GSTT.

PART 3. BUSINESS TAXATION

BOI Rules under Corporate Transparency Act

The Corporate Transparency Act introduces Beneficial Ownership Information—or BOI—rules, which CPAs and other financial professionals must understand. These rules mandate that certain corporations, LLCs, and similar entities disclose information about their beneficial owners to the Financial Crimes Enforcement Network, known as FinCEN. Compliance with the BOI rules requires accurate reporting of the identities and details of individuals who own, control, or influence such entities. Navigating these requirements is crucial for ensuring legal compliance and aiding in the prevention of financial crimes. Ian Redpath and Greg Urban discuss the Beneficial Ownership Information rules introduced by the Corporate Transparency Act.

Let's join Ian and Greg.

Mr. Redpath

Greg, welcome to the program.

Mr. Urban

Hey, Ian. Nice to be with you again.

Mr. Redpath

It's always great to have you, always great to have your insight. This is an interesting topic, I think, because I'm hearing all sorts of different things from different people as to exactly what the role of the accountant is going to be. I know you mentioned off camera that you've had discussions in your firm as to, is this something that you should be doing, or should this be done by the attorneys? I mean, certainly, you're going to be involved to some degree with it, but I don't think this is as simple a question as it may have seemed like a few months ago.

Mr. Urban

I think this is an area that has been out for a while and many people thought it would be changed, maybe deferred, maybe the requirements would be changed, or maybe it just wouldn't come to be. Where this really picked up steam was over the summer. I was at a meeting of firms like ours, firms of about 100–120 people. Somebody had brought it up, and it was news to a lot of people at that meeting. Certainly, they had heard of it, but it was on nobody's radar. Since then, you've seen a lot of discussion on the topic. Firms have become aware of clients' lack of knowledge on this particular topic, and it has evolved into something that people are really now talking about.

Now, what we think is, this is really an area that may be better for law firms to embrace. You think of some of the requirements—and we'll get into all the details—but newer businesses have to register within 30 days or 90 days. Given some of those tight timeframes, a lot of times firms don't even know that maybe a client has set up an LLC or we find out after the fact. It just seems more logical to do that as part of the corporate registration process, and that's the way we're viewing it. The other thing is just to stay on top of changes—whether they be in owners of the company or in substantial control, which is going to be a topic down the road—it's very difficult to do. So, how do you capture that? How are you on top of it? Accepting responsibility for that, for many firms, has become a very difficult and challenging issue.

Mr. Redpath

And as you said, if it's done as part of the initial process of establishing the organization, it would make some sense. Otherwise, you're gathering the additional information at some point, but you have a real burden because, a lot of times, the client isn't always coming in to tell you, "I set up something" or "I set this up," unless you are involved in it from a planning perspective, whereas their attorney is [involved] and more likely has the information. My concern here, Greg, is going to be much like the [Form] 2553: “Oh, I thought the attorney was filing it,” or “Oh, I thought the accountant was filing it,” and nobody filed it. So, you ended up with a lot of S corps where there was a lot of finger-pointing saying, “I thought the accountant was doing it,” or “I thought the lawyer was doing it.” So, I think, from the accountant’s perspective, if the expectation is that the lawyer is going to be doing these things, that should be clearly set out with the client. I’m wondering, too, Greg, have you given thought to whether, or to what extent, you may want to mention or disclaim it in your engagement letters going forward?

Mr. Urban

Yes, it’s interesting. Not speaking really on behalf of our firm here, I’m just speaking on what we’re reading in the industry, and we’re seeing large malpractice carriers starting to comment on this. The question that I’ve read is, can CPAs even practice and make determinations in this area? Is this an unauthorized practice of law? This is outside of Title 26, so there’s a question of, are there legal determinations here, and are CPAs even able to make some of those determinations? So, that’s one issue.

Some of what you read, too, is there is proposed language that would go into the arrangement letters, and a lot of that deals with we’re not taking any responsibility for compliance under this particular initiative. So, 100 percent, we have given consideration to putting something into our arrangement letters, and we think that there will be something in the arrangement letters. What we’re worried about though, it’s one thing to put something in an arrangement letter, but I think hiding behind that and using that as an excuse is probably not the only thing [we could be doing]. I think what we should be doing is talking with our clients about what this is and who they need to contact. Our suggestion is that they should contact their attorney to help them with some of the compliance in this area. But going beyond that, I think, is something that maybe a lot of firms are just unsure of how far they can go on those particular fronts.

So, I would say, right now, where most firms are—and I’m speaking just from experience in talking with firms of our size—is maybe feeling a requirement to notify their clients of what the Corporate Transparency Act is. Clients are not aware of this particular topic. Then, number two is to put something in the arrangement letter that does protect the firm. I think it’s also important to follow up with correspondence. I can just see this fact pattern playing out: “Yes, Greg, we talked about that, but you were going to take care of that. Remember?” You want to clarify exactly who is going to take the responsibility for this, and I think most accounting firms feel that this is something that probably is better suited for their legal counsel.

Mr. Redpath

Yes, and I think, as you pointed out, this is an evolving area. It is going to be much like the offshore reporting. It’s going to be FinCEN, it’s going to be on forms (which have yet to be released but are being developed) by FinCEN, so your reporting is all going to go through FinCEN, and it’s not your typical reporting. It’s not like April 15 or March 15 and I know I have a filing deadline. This is, “Something happened; I have to report something.” I think the easier part is going to be the initial reporting. I think the more difficult part, for the accountant, especially, is going to be the ongoing reporting requirements, the “Okay, what happened?” How do you know what happened or what changes have taken place? You’re going to have to have a significant amount of additional communication from clients in order to get that information to say, “Okay, we made the initial filing. Now we have to file an amendment.” So, I think those are the things that, really, are going to take a while for them to sort themselves out. But we do have to talk to our clients about it, and I think we have to be knowledgeable about it as accountants.

Mr. Urban

Right. And like you say, we do so many other filings under FinCEN, it’s very easy to draw the parallel. Whether it’s foreign bank accounting or other reporting of foreign assets, that is something that accountants would typically take care of, and I just think that this is a different animal.

Mr. Redpath

Yes, I totally agree with you that it's a hybrid, and anytime you start getting into hybrid, as you mentioned, your malpractice carrier starts throwing up flags—regularly. They don't like hybrid areas for accountants to get into.

So, exactly what are the basics of this BOI (or beneficial ownership) information? I guess we should preface that by asking, why was this even an issue? Well, there's a belief that there's a significant amount of fraud going on, [such as transferring] assets offshore. Also, they believe that there is a lot of nefarious use of entities, including funding terrorism. That's one of the things specifically that has been mentioned in the Corporate Transparency Act. Basically, the government is saying we want to get a handle on information on who are these "beneficial owners." So, really, what does all of this mean? What are we going to be telling our clients?

Mr. Urban

I think first of all, you've got to look at what entities are subject to this. In the most typical sense, you'll see U.S. entities (corporations, LLCs, any entity that really needs to file with a secretary of state), so I think that's where you start. There are also foreign entities that are corporations, that are LLCs, that are registered to do business in the United States, those types of entities. So, it's broad. Then, you're really looking at capturing information on who are the owners of that entity (greater than or equal to 25-percent ownership interest) or you're looking at reporting on individuals who have substantial control.

When you really play this out, I think you could be capturing a lot of really small entities. I picture some clients that we've got that have LLCs that maybe have a single rental property in them. Probably in those scenarios, I think we are going to have to likely report many of these entities, and those are small entities that don't file necessarily their own return, in a lot of cases. Many times, they're disregarded entities. So, that's the hard part, I think, for accountants. We have due dates for tax returns and things like that that are due. Here, it's really broad, and to put everything on a due date, I think, could be a very difficult thing for many firms. Now, hopefully, the reporting for these entities, because they're smaller—and we'll get into some exceptions later on that will talk about the size of entities and exceptions to filing and things like that—but nonetheless, while the filing might not be complex and you might be only reporting maybe a single owner or one person with substantial control—it's not like you'd have a group of executives there—I think that capturing everything is the issue.

Mr. Redpath

Yes, and I think some of the determinations to make [such as] what constitutes substantial control. We can add up stock ownership, but substantial control, I think, is going to become an issue. You know what's going to happen. People are going to come up with relationships that are trying to hide substantial control. Who is this person? What is their title versus what is their power within the organization? And we're going to have a lot of situations (I think) where people are going to nefariously attempt to circumvent having to report the *real* control person by hiding it under some nefarious name that seems to be innocuous but is where all the power lies.

Mr. Urban

Yes. Let's just take a scenario we might have in the office. A family owns a rental property, and maybe you've got a parent that's been instrumental in forming that entity, maybe funded it, maybe even saw it through its early stages. Well, now, children come into play, and the reality is, sometimes parents become maybe passive in some of these entities. So now, are they thinking about the child who might be making a lot of the decisions on a day-to-day basis? Would we even know that has happened? Those are the situations that I think are where some of the determinations you're talking about are going to be difficult.

Mr. Redpath

Yes, and as we said earlier, there's going to be a requirement not just to report but there's a requirement to report changes, and that requirement to make change reporting is basically 30 days after the change. And as you said, are you even going to be aware of it? I just think it doesn't even matter whether it's the accountant or the attorney who's taking responsibility here. The reality is that, for the most part, your clients aren't going to let you know that [something has changed] within that short period of time. I mean, the education that is going to be required with clients to get clients to know, "Hey, I have to report this." Like you said, in a family situation, Uncle Joe is no longer going to be doing much work here and is not taking the same level of responsibility. What's the first thing they're going to do? Call their accountant or call their attorney and tell them that? No. They're just going to [decide] Uncle Joe is going to stop and start doing something differently.

Mr. Urban

And that doesn't happen on one date, a lot of times. A lot of times, that will happen over time. So, at what point does maybe the son (in my example) have substantial control? When does the clock start running with it? Those are some of the things, I think, that are challenging.

Mr. Redpath

It's so bad right now that FinCEN has already come out and notified people that there is no reporting requirement right now as we speak. The reporting requirements don't kick in till next year, till 2024, because people are already getting scam letters. They're getting scam notices about failing to file with FinCEN. So, the scammers are already aware of this, and the scammers are already out there. So, something very, very important [to keep in mind].

The organizations you mentioned—you would think of this area as only having to do with international—but we're talking about a small entity here in the United States that has rental property and that is not engaged in any multinational relationships. So, what exactly is the focus here going to be?

Mr. Urban

I think the focus is really on entities, like you say, that are maybe otherwise under the radar. I think you've got to look at who could potentially have to file, and then, what are some of the exceptions to filing? So, in my judgment, we're looking at, like we said, LLCs, we're looking at corporations, we're looking at any other entity that registers basically with a secretary of state. And of course, they're doing business within the United States.

You're really excluding entities that are, first of all, registered maybe with another regulatory body, such as the SEC. There's a long list of organizations that an entity can be registered with, and they don't need to file, so that will help to exclude many organizations. An accounting firm would be an example; if you're registered with the PCAOB, that would be an exception. I think the exception that's going to capture the majority of not only our clients but also the audience's clients is going to be this definition of what is a "large business." In those situations, you're really looking at $5 million worth of gross receipts. Do we have more than 20 employees? So, if you've got organizations that are larger than that—which is going to be a good number of our clients—they are exempted from filing under these particular provisions. It's those smaller entities, below the $5 million worth of gross receipts, below 20 employees; those are the organizations that I think the audience has got to be on the lookout for.

Mr. Redpath

I thought it was interesting because I've done some work in this area, but they include tribal jurisdictions. If you set up a resolution corporation on tribal lands, that is going to be subject to the reporting, same as if you set up a corporation.

So, we know that this is all very broad. You mentioned substantial control and you mentioned the 25-percent-or-more ownership. Can you kind of define [substantial control]? I know it's going to be very difficult; we're going to be taking some time over a year to figure this out, but how do you look at substantial control?

Mr. Urban

Yes, I think for substantial control, if you look at a document that FinCEN had put out, it's very helpful. They've got a really good FAQ; I've got to tell you, I've read it, it's 40-ish pages, and it really is a nice document. I think the first thing that you'd look at is you'd look at corporate officers. Who is the president, the CEO, the CFO? Kind of the classic positions that would have control. I think, then, you have to look maybe beyond that, too. My understanding is it's not limited to those types of individuals; it would be anybody else who can influence the operations of the entity.

Mr. Redpath

I think the way they look at it is that if you're a senior officer, you're automatic, but if you're not a senior officer, it doesn't mean you're free and clear. It means you still might have to report if you have control over or influence over—I don't want to say control, just influence—if you have the right to exercise substantial influence over important decisions of the reporting company. Now, we're going to get into all those decisions that you were talking about. What does that mean? What's an important decision? What does it mean that I may exercise substantial influence? Exactly what does that mean? So, those are the things that we have to ferret out here.

Mr. Urban

Right. The reality is, with businesses like this, you see families transferring control slowly over time. Sometimes, the children have very active roles in the background. Think about a real estate situation. They're handling maybe acquisitions, they're handling tenant matters, they're handling all these different facets. They might not necessarily have a formal ownership percentage or even a title in those situations. Those are the ones I think that we've just got to be on the lookout for.

Mr. Redpath

Now, there is no form yet. The FinCEN is developing the form, so there's nothing to file. I was listening to an individual saying, "Oh, you send in a spreadsheet now." No, there's nothing to file. They're not going to accept anything. What are the reporting deadlines that will be established? We know when reporting kicks in; we just don't know what the form is.

Mr. Urban

I think the big thing is when was the entity formed. So, entities that were formed before 2024, they have a year to make the filing. You really have through the end of 2024 to make that filing. The concern is the new entities that get formed. It had been 30 days from formation that you had to make this filing with FinCEN and disclose maybe some of the information that we can talk about. I mean, there's a long list; we may not cover it all, but we can give the audience a spirit of what needs to be disclosed. I believe, as we're sitting here today, that has been extended to 90 days. I think I saw that just actually before we started recording here. Something had come out. So, that's something to monitor. But nonetheless, the point is, for entities that are formed in 2024, the reporting timeframe is much tighter than an entity that was in existence pre-2024.

Mr. Redpath

Once you file your initial report, for any change, you have 30 days to report that. That 90-day period doesn't apply to any changes. So, you have 90 days—if the organization is organized after January 1 of 2024—you have 90 days in which to file your initial report, but for any changes, you have to file them within 30 days. So, as you said, we get the information initially. A lot of things can happen, especially in family businesses. And what's that date? When does the date kick in that we have to do the actual filing? [When does] that 30-day period begin? So, that actually kicks in. Now, for any new organizations filed in 2025, it goes back to 30 days. The 90 days is only going to apply to organizations that file—that were organized, rather—in 2024.

There are different types of applicants, right? There are company applicants, and then there is something called an "identifier." What's an identifier?

Mr. Urban

The identifier is a driver's license number or a passport number. That's the other question—what if you get a new driver's license? Do you have to report if you have a different identifier? I think you do—at least based upon what

I've understood. So, that's another thing that you hear. Our clients are changing residency. On a regular basis, we've got residency changes going on. So, you've reported, basically, name, address—a lot of basic information. I would say that maybe the observation I would make is the information that's being reported is relatively handy, and it's not something that's much beyond basic information (name, address, that type of thing, driver's license numbers, identifying numbers). Even with a company applicant, when you have a company that is making a new application, the person making that application has to be identified, as well as the address of the firm that's making the application. So, different requirements, I guess, based upon who you're looking at—the person making the application for the company, or the information relative to the beneficial owners themselves.

Mr. Redpath

Yes, you've got all of this information that they're requiring. Like you said, it has to be the individual's name, date of birth, address, and this unique identifying number, and of course, obviously, the jurisdiction where it was issued. There's going to be a lot of information that people don't have. So, what are some forms that will be acceptable identification?

Mr. Urban

Driver's licenses, passports, that type of information is what you're going to see most. Those are the documents, I think, that you'll see most people using. The question will be, what happens when you change your address? Does that 30-day window start to run, like you were identifying before? It probably does.

Mr. Redpath

They also say that it doesn't have to be, for example, a driver's license. Some people have IDs. They don't drive, but they have a state-issued ID because you need ID for a lot of things, and if you don't drive, you don't have a driver's license. So, you can go and get a state-issued [ID]. In almost every state, I think, the DMV will issue you an ID. It looks like a driver's license, it has a number on it, but it's not a driver's license. Basically, what the FinCEN has said is any type of identification document, if it's issued by a government, a state government—and government again includes state, local, and it includes Indian tribes—if they're for purposes of identification, they will be considered acceptable forms of identification for this purpose, as long as they're not expired. That's going to be the key. They can't be expired documents. You could also have, if you don't have that type of document or a [U.S.] passport, the reporting company can provide an identification number from a non-expired passport issued by a foreign government. You have to submit an image of the identification document with the unique identifying number that's reported to FinCEN. Now, the reporting, Greg, it looks like it's going to be electronic. Is that correct?

Mr. Urban

Looks to me like you'll log onto their website and submit some of the information we were just discussing. As far as I understand, that's how it'll be submitted, and that's what you'll do is you'll log onto a website that FinCEN designates. Once the forms are there—like you say, you can't do it today as we sit here, which is the end of November in 2023—but by the beginning of 2024, I think that this filing will be open, and you'll submit this likely online.

Mr. Redpath

The company is going to report where it was formed, its taxpayer ID number, and indicate the type of filing. I think there's probably going to be two different forms, an initial report and a change form or a correction. And that's the other thing. If you later discover, "Oh, wait, I made a mistake," you have to go back and correct it. You can't let it sit just because it's been six months and [you think] it doesn't matter. No, if you find that there was a mistake made in the filing, you've got 30 days from the date that you discovered it in order to correct it.

Mr. Urban

And it's important to know that entities—I don't know how frequently this will come up—but entities organized in U.S. territories also are subject to filing under these rules. We don't see that all that often within our office, but I imagine [for some] in the audience, that will be something people will encounter.

Mr. Redpath

Yes, a lot of people do have things going on in the Virgin Islands and in Puerto Rico. Those are all considered state political subdivisions, so those are all included in the jurisdictions that are going to require that you be subject to this reporting. So, Greg, any other hints that we can scare people with as we move forward?

Mr. Urban

I would just say that firms should adopt a strategy on how they want to handle this. At a minimum, I believe that we should put it into the engagement letter, one way or the other, just to clarify what firms will be doing in this particular arena. I do believe that probably there is a level of professional responsibility to make sure clients are aware of this. I think if you want to document within that conversation the advice that we gave (such as this is something you should work with your attorney on), it's probably best practice to do that, just so that there's no confusion later on. I've seen that the AICPA and some other organizations have had some language that firms might want to consider for their arrangement letters. Those are probably the two big things—do something to make sure your clients are aware of it and clarify whose responsibilities are in this area, and then put it in an arrangement letter and just monitor changes that come forth.

Mr. Redpath

I think it's a good idea to look, at least, at the organizations that your clients have now (as you mentioned, there are so many—I think it's 23—exemptions) to look and see, okay, are you subject? Now, I don't think you want to make that decision, but I think it's something that you want to look at and at least make them aware of the fact that, look, you've got these entities that more than likely will have to report, or you've got entities that may be exempt, but you need to speak with your attorney about it. We don't make that decision, but I think you need to make them aware of it, and so, you need to be aware of what they have got going on.

Mr. Urban

Yes, and it's interesting, even though there are a lot of exemptions, many of them are just situations where an entity is otherwise registered with some governmental body. The one that probably is most relevant, like we were talking about, is the large-organization exemption and if you think about that, we've got a lot of clients that are underneath those thresholds. I think the other thing that I found that just surprises clients has been when you start talking about the example I gave before, your single-member LLC that owns a rental property could have to file this. The eyes sort of open. You may have an individual that's got three or four of those on their return, or they run a Schedule C (that's the form [used by] an LLC) through their return. Registering for those entities and capturing all that, those are the situations I think we have to be aware of.

Mr. Redpath

I think we've mentioned it, and not to beat it to death, but it really is going to be a problem because the breadth of an engagement letter or an arrangement letter, [since] you're going to prepare all the tax returns, [the client might say] "Well, you were preparing my tax returns. I have all these corporations, I have these separate entities, these LLCs, that I have property in, and they have to be reported. How come you didn't report it?" I think there's going to be a real communication issue. The burden—since the communication from the accountant is saying, "We're not taking responsibility. You need to talk to your attorney"—I think that is something that puts the burden on the accounting firm to notify the client and make sure that the client is aware of it, to protect the accountant, because I can see exactly what's going to happen. They're going to come in and say, "You prepared the tax returns. Why didn't you file that?" Because, especially, we have to remember this next year.

Mr. Urban

"You make other filings for me with FinCEN. Why would this one be any different?"

Mr. Redpath

"It's 2024, I had these entities that were in existence. How come you didn't file for me?" I think there's going to have to be a lot of caution and communication, the two main things.

Mr. Urban

One thing we didn't mention, why are we talking about the urgency of this? There is penalty exposure for not making the filing. So, that's why. You get an individual that has five or six LLCs, maybe there are rental properties, maybe it's a Schedule C, whatever it is, if the filings aren't made, it could be a substantial penalty exposure. That's why we're talking about the arrangement letter and the communication in the method that we are.

Mr. Redpath

FinCEN loves their penalties, don't they? I don't know that FinCEN's ever seen a penalty they don't like, so I agree with you, some real potential problems there.

Greg Urban, thanks for joining me. Really appreciate your insight. I'll have you here on another program. Greg, thanks again.

Beneficial Ownership Information Reporting

By Ian J. Redpath, JD, LLM

A. Introduction

The beneficial ownership information (BOI) reporting provisions are part of the Corporate Transparency Act (CTA) enacted by Congress as part of the Anti-Money Laundering Act of 2020. These rules take effect January 1, 2024, and have been somewhat controversial as this becomes an important determination and the reporting will affect many companies and accountants. The CTA and its regulations provide essential information to law enforcement, national security agencies, and others to help prevent criminals, terrorists, proliferators, and corrupt oligarchs from hiding illicit money or other property in the U.S.

On September 30, 2022, regulations were adopted to implement this reporting. These are referred to as the BOI Final Rule. [87 Fed. Reg. 59,498] The BOI Final Rule requires certain U.S. companies and foreign companies registered to do business in the U.S. to file reports with the Financial Crimes Enforcement Network (FinCEN) identifying the entity's beneficial owners and the persons who applied to create or register the entity. On March 24, 2023, FinCEN released updated FAQ guidance regarding the new beneficial ownership information reporting requirements. These are available on the FinCEN website.

B. Who Must Report

"Reporting companies," including a domestic reporting company or a foreign reporting company, are required to report their beneficial ownership information to FinCEN. A "domestic reporting company" is defined as a corporation, limited liability company, or any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe. A "foreign reporting company" is defined as a corporation, limited liability company, or other entity formed under the law of a foreign country, that is also registered to do business in any U.S. state or in any Tribal jurisdiction [FinCEN FAQ #7]. If the company had to file a document with a state or Indian Tribal-level office, such as a secretary of state, to create the company, or to register it to do business if it is a foreign company, then the company is a reporting company, unless an exemption applies. For the definitions of both domestic and foreign reporting companies, a "state" means any state of the U.S., the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and any other commonwealth, territory, or possession of the U.S.

The CTA exempts 23 types of entities from the beneficial ownership information reporting requirement. Types of entities that are exempt are:

i. Certain types of securities reporting issuers

ii. A U.S. governmental authority

iii. Certain types of banks

iv. Federal or state credit unions as defined in Section 101 of the Federal Credit Union Act

v. Any bank holding company as defined in Section 2 of the Bank Holding Company Act of 1956, or any savings and loan holding company as defined in Section 10(a) of the Home Owners' Loan Act

vi. Certain types of money transmitting or money services businesses:

vii. Any broker or dealer, as defined in Section 3 of the Securities Exchange Act of 1934, that is registered under Section 15 of that Act (15 U.S.C. 78o)

viii. Securities exchanges or clearing agencies as defined in Section 3 of the Securities Exchange Act of 1934, and that are registered under Sections 6 or 17A of that Act

ix. Certain other types of entities registered with the Securities and Exchange Commission under the Securities Exchange Act of 1934

x. Certain types of investment companies as defined in Section 3 of the Investment Company Act of 1940, or investment advisers as defined in Section 202 of the Investment Advisers Act of 1940

xi. Certain types of venture capital fund advisers

xii. Insurance companies defined in Section 2 of the Investment Company Act of 1940

xiii. State-licensed insurance producers with an operating presence at a physical office within the United States, and authorized by a state, and subject to supervision by a state's insurance commissioner or a similar official or agency

xiv. Commodity Exchange Act registered entities

xv. Any public accounting firm registered in accordance with Section 102 of the Sarbanes-Oxley Act of 2002 (Section 102 requires a public accounting firm that performs or participates in any audit report with respect to any issuer to register with the Public Company Accounting Oversight Board.)

xvi. Certain types of regulated public utilities (Any financial market utility designated by the Financial Stability Oversight Council under Section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010.)

xvii. Any financial market utility designated by the Financial Stability Oversight Council under section 804 of the Payment, Clearing, and Settlement Supervision Act of 2010

xviii. Certain pooled investment vehicles

xix. Certain types of tax-exempt entities

xx. Entities assisting a tax-exempt entity

xxi. Large operating companies with at least 20 full-time employees, more than $5,000,000 in gross receipts or sales, and an operating presence at a physical office within the United States

xxii. The subsidiaries of certain exempt entities

xxiii. Certain types of inactive entities that were in existence on or before January 1, 2020 (the date the CTA was enacted) [FinCEN FAQ #8].

C. Beneficial Owner

A "beneficial owner" of a reporting company is any individual who (1) directly or indirectly exercises "substantial control" over the reporting company, or (2) directly or indirectly owns or controls 25 percent or more of the "ownership interests" of the reporting company. Substantial control is based on what power an individual exercises over a reporting company, particularly in regard to directing or influencing important decisions the reporting company makes. It is essentially a facts-and-circumstances test. A beneficial owner includes all senior officer(s), such as a president, chief financial officer, general counsel, chief executive officer, chief operating officer, or any other officer in function, regardless of title [FinCEN FAQ #9]. A reporting company must identify all individuals with substantial control over the reporting company. FinCEN expects that the majority of reporting companies will have a simple ownership and control structure.

Example: The reporting company is an LLC. It has a sole owner who also serves as the president of the company. She makes the important decisions for the company. No other person controls any ownership interests in or exercises substantial control over the reporting company.

The owner/president is a beneficial owner of the reporting company in two different ways:

- First, the owner/president exercises substantial control over the company because she is a senior officer and makes important decisions for the company, and
- Second, the owner/president owns 25 percent or more of the reporting company's ownership interests.

Example: The reporting company is a corporation. Three individuals, A, B, and C, own 50 percent, 40 percent, and 10 percent of the stock, respectively. Individual D is the president and makes all the important decisions for the company.

- Individual A owns 50 percent of the company's stock and therefore is a beneficial owner because they own 25 percent or more of the company's ownership interests.
- Individual B owns 40 percent of the company's stock and therefore is a beneficial owner because they own 25 percent or more of the company's ownership interests.
- Individual C does not own the requisite 25 percent of the stock, is not a company officer, and does not directly or indirectly exercise any substantial control over the company. Thus, C is not a beneficial owner.
- Individual D is president of the company and is, therefore, a beneficial owner. As a senior officer of the company, Individual D exercises substantial control, regardless of whether the individual owns or controls 25 percent or more of the company's ownership interests.

D. Reporting

Reporting is made to FinCEN and not the IRS. A "company applicant" is any individual who (1) (a) directly files the document that creates, or first registers, the reporting company (for a domestic reporting company) or (b) directly files the document that first registers the reporting company to do business in the United States (for a foreign reporting company); and (2) is primarily responsible for directing or controlling the filing of the relevant document if more than one individual is involved in the filing of the document (for both foreign and domestic reporting companies). The filing will be available only online with FinCEN and will be opened January 1, 2024. There is not a fee to file with FinCEN.

For reporting companies registered before January 1, 2024, they must submit their legal name, any trade names, their address, their jurisdiction of formation, their Taxpayer Identification Number (TIN), and their "beneficial ownership information." Beneficial ownership information is identifying information (including name, date of birth, address, and a unique identifying number from an identification document such as a driver's license or passport) about the individuals who directly or indirectly own or control a company. Those companies registered on or after January 1, 2024, must report similar identifying information for the persons who applied to create the entity (for domestic entities), who registered it to do business in the U.S. (for foreign entities), or who directed these activities.

If an individual engages in the business of corporate formation (e.g., as an attorney or corporate formation agent) and files the formation or registration document in the course of that business, then the reporting company must report the current street address of the company applicant's business. For example, if the company applicant is a paralegal who filed the document while working at a law firm, the reporting company must report the business address of the law firm where the paralegal worked when filing the document.

FinCEN provides that a reporting company may report an entity's FinCEN identifier in lieu of information about an individual beneficial owner. A FinCEN identifier is a unique number that FinCEN will issue upon request after receiving the required information. Although there is no requirement to obtain a FinCEN identifier, doing so can simplify the reporting process and allows entities or individuals to provide the required identifying information directly to FinCEN. The Final Rule, which amends FinCEN's final Beneficial Ownership Information Reporting Rule, specifically responds to commenter concerns that the reporting of entity FinCEN identifiers could obscure the identities of beneficial owners in a manner that might result in greater secrecy or incomplete or misleading disclosures. The Final Rule provides clear criteria that must be met in order for a reporting company to report an intermediate entity's FinCEN identifier in lieu of information about the individual beneficial owner.

Reporting companies that are registered to do business in the United States before January 1, 2024, are not required to file their reports until January 1, 2025. Reporting companies created or registered on or after January 1, 2024, must file their reports within 90 calendar days of receiving notice that the company's creation or registration is effective. Note that this was originally 30 days, but FinCEN extended it for the initial reports in 2024. In 2025, it will go back to 30 days. In addition, reporting companies are required to update reports within 30 days if there are any changes to the information reported.

Those representing companies or working for companies that will have reporting requirements should make sure they have systems in place to capture the information necessary for reporting.

The form for filing was not available at the time this material was written, and FinCEN would not accept reports before January 1, 2024 [FinCEN, FAQ #5].

E. Who Needs to do the Filing?

FinCEN indicates that it believes most companies can report without the need for an attorney or accountant. Many accountants are finding some reluctance on the part of their malpractice carrier to cover this reporting, indicating that it might be more legal than accounting. All practitioners should address this as soon as possible. In addition, this may require a change in engagement letters to reflect whether BOI reporting will be included in the engagement which can help avoid certain later disagreements if the form(s) are not filed.

GROUP STUDY MATERIALS

A. Discussion Problems

1) You have several clients with corporations and LLCs that are doing business in the United States. They all have various ownership and management structures. You are also in the process of working with some clients that will be setting up corporations and/or LLCs in the first quarter of 2024. What can you tell your clients about who will be required to report their beneficial ownership information (BOI) to FinCEN?

2) You have a reporting company that is a corporation. Three individuals, Jill, Jack, and Juan, own 50 percent, 40 percent, and 10 percent of the stock, respectively. Natasha, an individual, is the president and makes all the important decisions for the company. Which of these individuals is (are) considered to be beneficial owner(s)?

3) Several of your clients have asked you when the BOI reporting requirements begin and how much time they have to file their reporting. What can you tell them?

Required:

Discuss the issues raised in the facts set forth above.

B. Suggested Answers to Discussion Problems

1) Unless one of the 23 exceptions applies, "reporting companies," including a domestic reporting company or a foreign reporting company, are required to report their beneficial ownership information to FinCEN. A "domestic reporting company" is defined as a corporation, limited liability company, or any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe. A "foreign reporting company" is defined as a corporation, limited liability company, or other entity formed under the law of a foreign country, that is also registered to do business in any U.S. state or in any Tribal jurisdiction [FinCEN FAQ #7]. If they had to file a document with a state or Indian Tribal-level office such as a secretary of state to create the company, or to register it to do business if it is a foreign company, then the company is a reporting company, unless an exemption applies. For the definitions of both domestic and foreign reporting companies, a "state" means any state of the U.S., the District of Columbia, the Commonwealth of Puerto Rico, the Commonwealth of the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and any other commonwealth, territory, or possession of the U.S.

2) Jill owns 50 percent of the company's stock and, therefore, is a beneficial owner because she owns 25 percent or more of the company's ownership interests.

   Jack owns 40 percent of the company's stock and, therefore, is a beneficial owner because he owns 25 percent or more of the company's ownership interests.

   Juan does not own the requisite 25 percent of the stock, is not a company officer, and does not directly or indirectly exercise any substantial control over the company. Thus, Juan is not a beneficial owner.

   Natasha is president of the company and is, therefore, a beneficial owner. As a senior officer of the company, she exercises substantial control, regardless of whether she owns or controls 25 percent or more of the company's ownership interests.

3) Reporting companies that are registered to do business in the United States before January 1, 2024, are not required to file their reports until January 1, 2025. Reporting companies created or registered on or after January 1, 2024, must file their reports within 90 calendar days of receiving notice that the company's creation or registration is effective. Note that this was originally 30 days, but FinCEN extended it for the initial reports in 2024. In 2025, it will go back to 30 days.

GLOSSARY OF KEY TERMS

BBA Partnership—A BBA partnership is not a type of partnership but rather a tax treatment of a partnership. BBA partnership refers to how the IRS handles the partnership on audit. These partnerships are subject to the centralized partnership rules introduced by the Bipartisan Budget Act of 2015. These rules allow the IRS to audit partnerships at the partnership level rather than auditing each individual partner separately.

Beneficial Ownership Information (BOI)—Beneficial Ownership Information is the identifying information of the individuals who directly or indirectly own or control a reporting entity. Beneficial ownership information that an entity must report includes the full legal names, dates of birth, and addresses of all individuals who have "substantial control" or who own at least 25% of the entity.

BOI—Beneficial Ownership Information

CTA—Corporate Transparency Act

Domestic Reporting Company—A "domestic reporting company" is defined by FinCEN as a corporation, limited liability company, or any other entity created by the filing of a document with a secretary of state or any similar office under the law of a state or Indian tribe.

FinCEN—Financial Crimes Enforcement Network

Foreign Reporting Company—A "foreign reporting company" is defined by FinCEN as a corporation, limited liability company, or other entity formed under the law of a foreign country, that is also registered to do business in any U.S. state or in any Tribal jurisdiction.

Limited Partner Exception—Section 1402 generally requires partners to include any distributive share of partnership income when determining their self-employment taxes, but Section 1402(a)(13) provides an exception for the distributive shares of limited partners. This is known as the limited partner exception.

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

UGMA—Uniform Gifts to Minors Act

UTMA—Uniform Transfers to Minors Act

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

1. According to Ian Redpath, Congress made it clear that the limited partner exception will only apply to partners in a limited liability company (LLC) under what circumstances?

   A. The taxpayer pays self-employment taxes on earnings from the LLC.
   B. The taxpayer is enrolled in the LLC's fringe benefit programs.
   C. The taxpayer is called a limited partner in the governing documents.
   D. The taxpayer is actually functioning as a limited partner.

2. According to Ian Redpath, what issue will the Supreme Court decide when it rules on *Moore v. United States*?

   A. Whether taxpayers are eligible for certain legal protections if they form LLCs and then elect to treat them as S corporations
   B. Whether a realization event must occur before the government can tax income as allowed under the Sixteenth Amendment
   C. Whether the verdict in the *Soroban* case will change the current rules related to LLCs and limited liability partnerships (LLPs) from the *Renkemeyer* case
   D. Whether taxpayers can rely on communications from the Occupational Safety and Health Administration (OSHA) to meet the definition of an eligible employer when filing for the Employee Retention Credit (ERC)

3. According to Ian Redpath, what is the maximum extension to the 90-day deadline for filing in the tax court if the last day occurs when the court is inaccessible (e.g., on a federal holiday)?

   A. Taxpayers must file on the first day the court is open again.
   B. The deadline is extended by the number of days the court was inaccessible.
   C. The deadline is extended an additional 14 days.
   D. The deadline is extended by 14 days plus the number of days the court was inaccessible.

4. According to Ian Redpath, what was a best practice in December 2023 for taxpayers who received funds for an ERC that they then determined they were ineligible to claim?

   A. Go through the process to withdraw the claim before it is audited and disallowed by the IRS.
   B. Wait to address the problem after receiving notice from the IRS that the claim has been disallowed.
   C. Make a voluntary disclosure and pay back the funds under the IRS's new voluntary compliance system.
   D. If the claim is related to supply chain disruption, ignore the issue as the IRS is unlikely to audit their claim.

5. According to Ian Redpath, which of the following details the primary reason (or reasons) for the Internal Revenue Service disallowing ERC claims, as indicated in their notification to taxpayers?

   A. The entity was in existence during the period of eligibility and had paid employees.
   B. The entity was established after December 31, 2021, or had no paid employees during the eligibility period.
   C. The taxpayer can provide documentation supporting their eligibility for the ERC.
   D. The taxpayer has filed an administrative appeal against the disallowance.

Continued on next page

6. According to Ian Redpath and Jonathan Tretter, what type of transfer tax is imposed upon a taxpayer's death?

   A. Estate tax
   B. Generation-skipping tax
   C. Gift tax
   D. Self-employment tax

7. According to Ian Redpath and Jonathan Tretter, how do taxpayers ensure that the statute of limitations starts running on tax for a specific gift?

   A. The donor must retain some control of the gifted assets.
   B. The donee must pay taxes on the full amount of the gift.
   C. The donor must file a gift tax return.
   D. The donor must sell the assets to the donee for a dollar.

8. According to Ian Redpath and Jonathan Tretter, what is the annual gift tax exclusion amount for 2023?

   A. $15,000.
   B. $16,000.
   C. $17,000.
   D. $18,000.

9. According to Ian Redpath and Jonathan Tretter, what must taxpayers remember if they make a lump-sum contribution to a 529 plan that is five times the annual gift tax exclusion amount?

   A. They can combine annual exclusion amounts with their spouse without filing a gift tax return.
   B. The amount will not qualify as a gift because the donees will not have a present interest in the funds.
   C. The total gift amount must be considered in isolation related to the year that it was put in the 529 plan.
   D. They can elect to exclude the amount over five years, but no other gifts can be made in those years.

10. According to Ian Redpath and Jonathan Tretter, what is one of the most important things to do when gifting interests in a closely held business?

   A. Keep the gift amount low enough to avoid filing a gift tax return.
   B. Pay to have a formal business valuation done by a valuation expert.
   C. Transfer the interests after the taxpayer's death so it is part of the estate instead of a gift.
   D. Ensure that the donor retains control of the business for at least five years after the gift.

Continued on next page

11. According to Ian Redpath and Greg Urban, how long do new corporations formed in 2024 have to report their beneficial ownership information (BOI) under the Corporate Transparency Act (CTA) and a recent ruling from FinCEN?

    A. 15 days
    B. 60 days
    C. 90 days
    D. 120 days

12. According to Ian Redpath and Greg Urban, a best practice for new corporations formed after 2023 will be to report their BOI information when?

    A. While researching/planning when to start a new business
    B. During the initial corporate registration process
    C. At the end of the corporation's first full year of operations
    D. When the corporation files its first tax return

13. According to Ian Redpath and Greg Urban, who is most qualified to take responsibility for BOI reporting under the CTA?

    A. The accounting firm
    B. The corporation's management
    C. The corporation's legal counsel
    D. The U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN)

14. According to Ian Redpath and Greg Urban, to help avoid scammers, FinCEN has notified people that the BOI reporting requirements go into effect when?

    A. 2023
    B. 2024
    C. 2025
    D. 2026

15. According to Ian Redpath and Greg Urban, which of the following is an example of an identifier in relation to BOI reporting under the CTA?

    A. A driver's license number
    B. An address
    C. A birth date
    D. A federal taxpayer identification number

Subscriber Survey

Evaluation Form

Please take a few minutes to complete this survey related to the **CPE Network® Tax Report** and return it with your quizzer or group attendance sheet to CeriFi, LLC. All responses will be kept confidential. Comments in addition to the answers to these questions are also welcome. Please send comments to **CPLgrading@cerifi.com**.

How would you rate the topics covered in the January 2024 **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	|______|	|______|	|______|	|______|	|______|	|______|
Basics of Gift Tax	|______|	|______|	|______|	|______|	|______|	|______|
BOI Rules under Corporate Transparency Act	|______|	|______|	|______|	|______|	|______|	|______|

Which segments of the January 2024 issue of **CPE Network® Tax Report** did you like the most, and why?

____

____

____

____

Which segments of the January 2024 issue of **CPE Network® Tax Report** did you like the least, and why?

____

____

____

____

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

____

____

____

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

____

____

____

____

How would you rate the effectiveness of the speakers in the January 2024 **CPE Network® Tax Report**? Rate each speaker on a scale of 1–5 (5=highest):

	Overall	**Knowledge of Topic**	**Presentation Skills**
Ian Redpath	|______|	|______|	|______|
Jonathan Tretter	|______|	|______|	|______|
Gregory Urban	|______|	|______|	|______|

Which of the following would you use for viewing **CPE Network® Tax 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 contributed 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®

CPE Group Attendance Sheet

Firm/Company Name: ______________________

Account #: ______________________

Location: ______________________

Program Title: CPE Network Tax Report, January 2024 Date: __________

Name	**Email**	**Total Hrs**	**IRS PTIN ID (if applicable Tax only)**	**Sign In**	**Sign Out**

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: ______________________

CPLgrading@cerifi.com

CPE Network/Webinar Delivery Tracking Report

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

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

CHECKPOINT LEARNING NETWORK

CPE NETWORK®
USER GUIDE

REVISED December 31, 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 CeriFi, LLC.

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

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

Copyrighted Materials

“Group Live” Format

CPE Credit

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

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

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

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

Advertising / Promotional Page

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

Monitoring Attendance

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

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

Real Time Instructor During Program Presentation

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

Elements of Engagement

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

Make-Up Sessions

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

- If the emailed 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 email 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 the following means:

Email: CPLgrading@cerifi.com

When sending your package to CeriFi, 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 CeriFi 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. Participants’ two-way video should remain on during the entire presentation.

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 asks 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.

Where individual participants log into a group live program they are required to enable two-way video to participate in a virtual face-to-face setting (with cameras on), elements of engagement are required (such as group discussion, polling questions, instructor posed questions with time for reflection, or a case study with engagement throughout the presentation) in order to award CPE credits to the participants. Participation in the two-way video conference must be monitored and documented by the instructor or attendance monitor in order to authenticate attendance for program duration. The participant-to-attendance monitor ratio must not exceed 25:1, unless there is a dedicated attendance monitor in which case the participant-to-attendance monitor ratio must not exceed 100:1.

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 emailed 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 email 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 the following means:

Email: CPLgrading@CeriFi.com

When sending your package to CeriFi, 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 CeriFi 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—Email

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

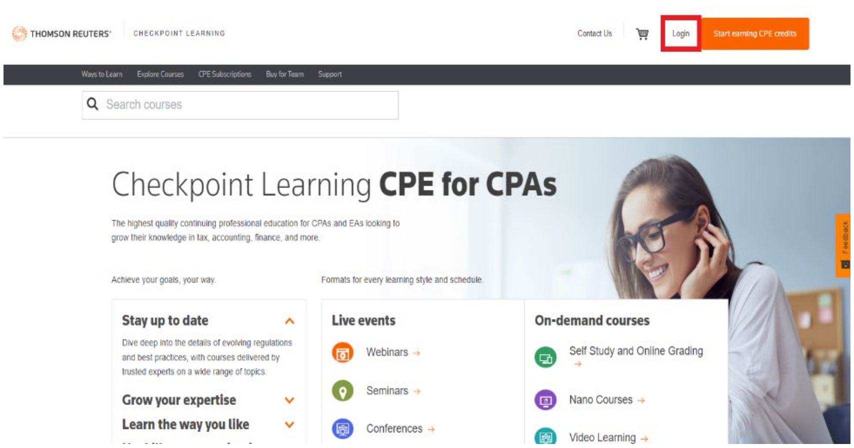
- Watch the video.
- Review the supplemental materials.
- Read the discussion problems and the suggested answers.
- Complete the quizzer by filling out the bubble sheet enclosed with the transcript package.
- Complete the survey. We welcome your feedback and suggestions for topics of interest to you.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

CPLgrading@cerifi.com

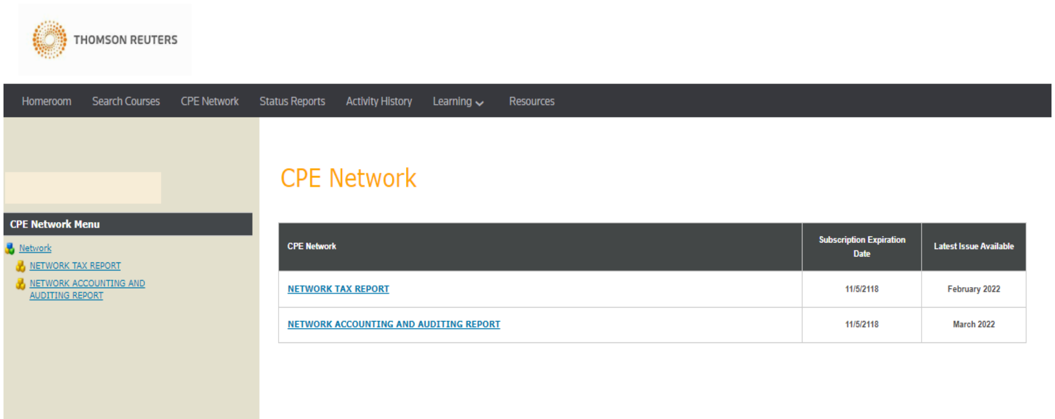
Self-Study—Online

Follow these simple steps to use the online program:

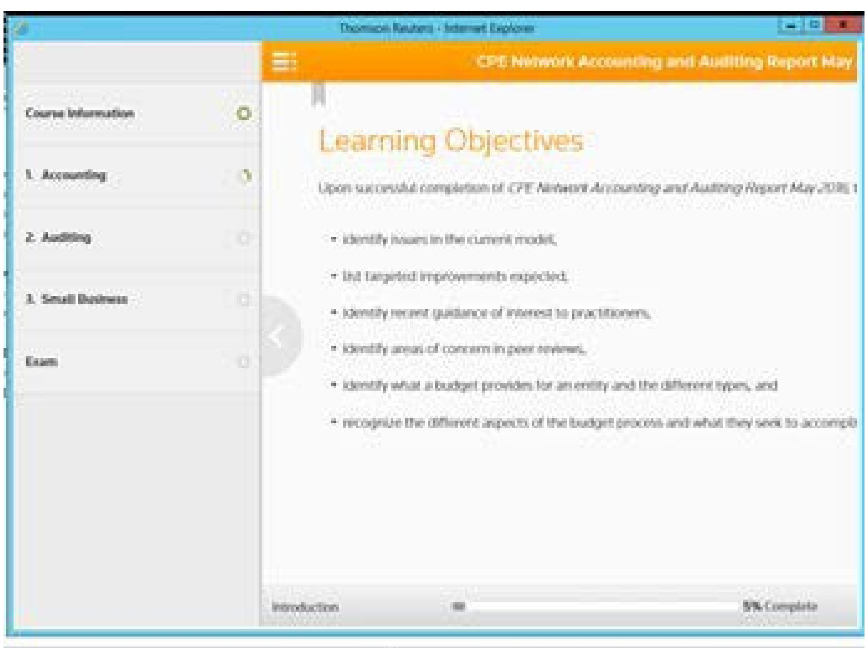
- Go to www.checkpointlearning.thomsonreuters.com .
- Log in using your username and password assigned by your firm’s administrator in the upper right-hand margin (“Login or Register”).



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

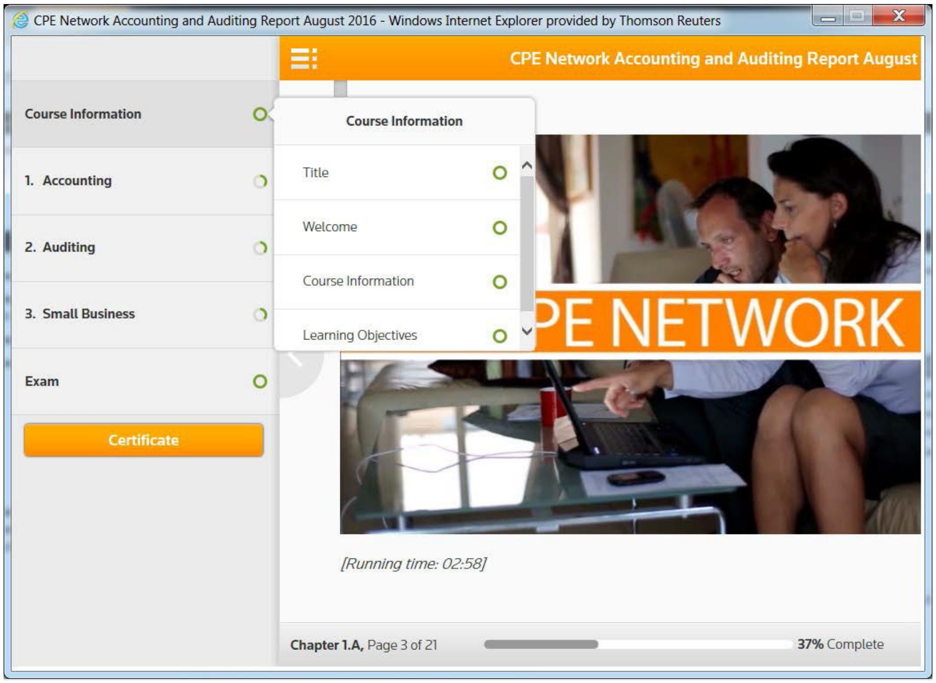


The Chapter Menu is in the gray bar at the left of your screen:

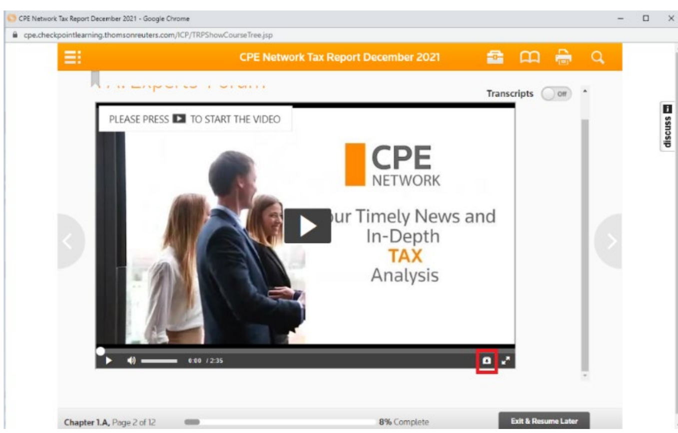


Click down to access the dropdown menu and move between the program Chapters.

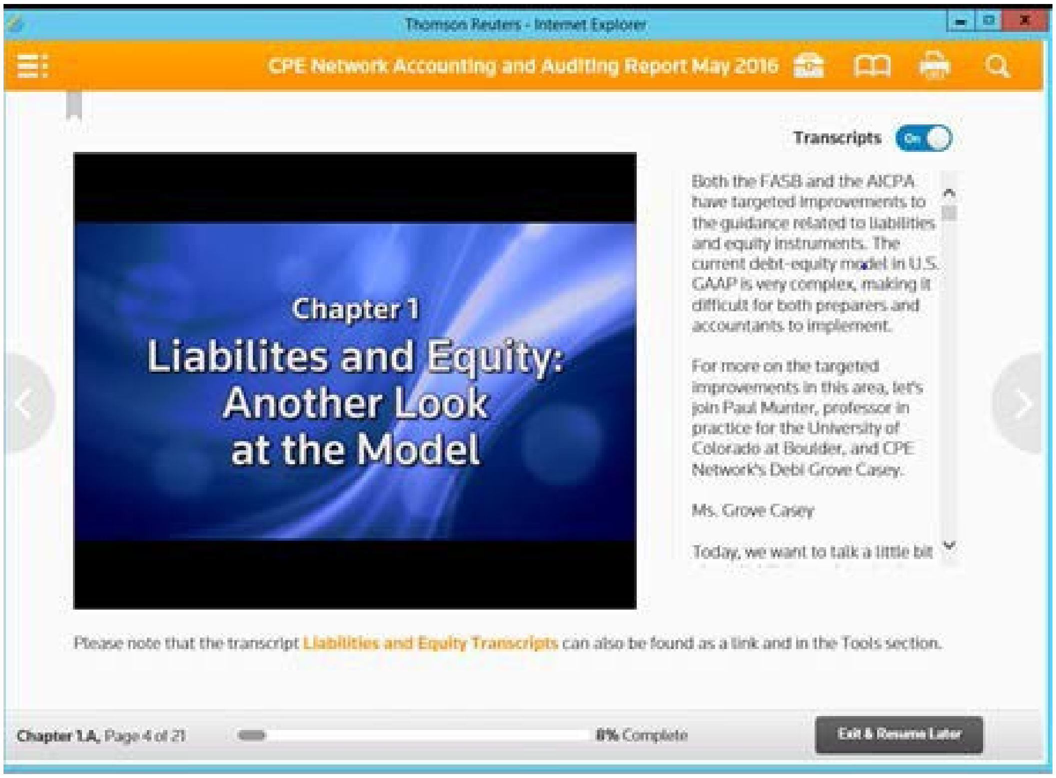
- **Course Information** is the course Overview, including information about the authors and the program learning objectives



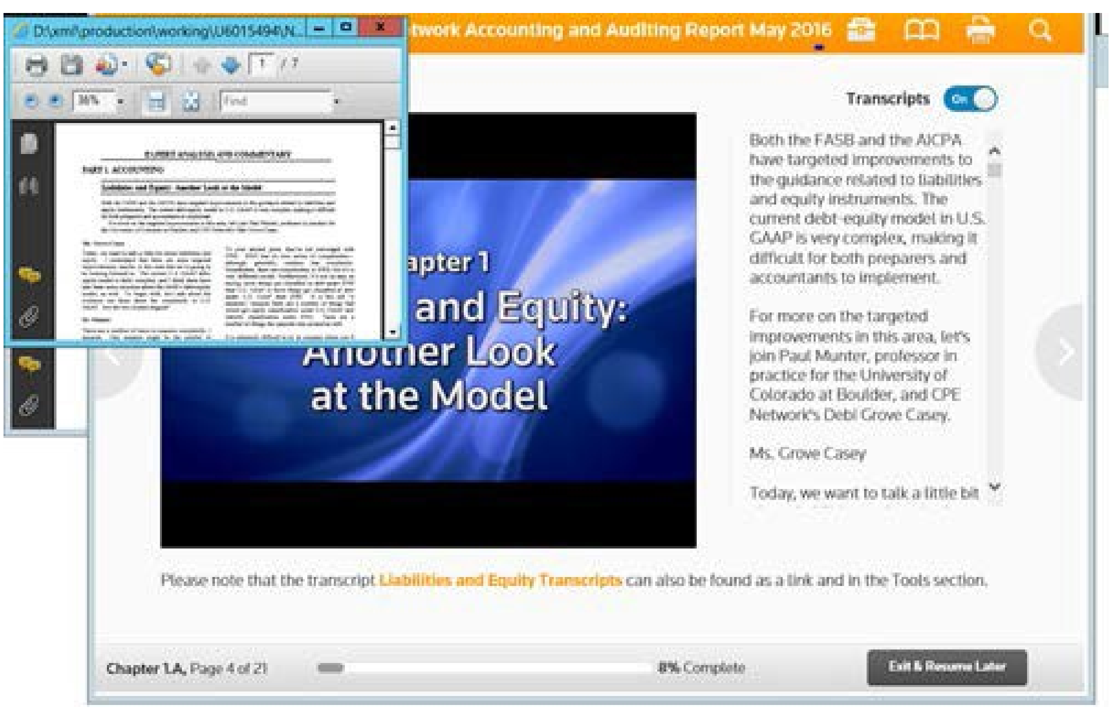
- **Each Chapter is self-contained.** Each chapter contains the executive summary and learning objectives for that segment, followed by the interview, the related supplemental materials, and then the discussion questions. This streamlined approach allows administrators and users to more easily access the related materials.



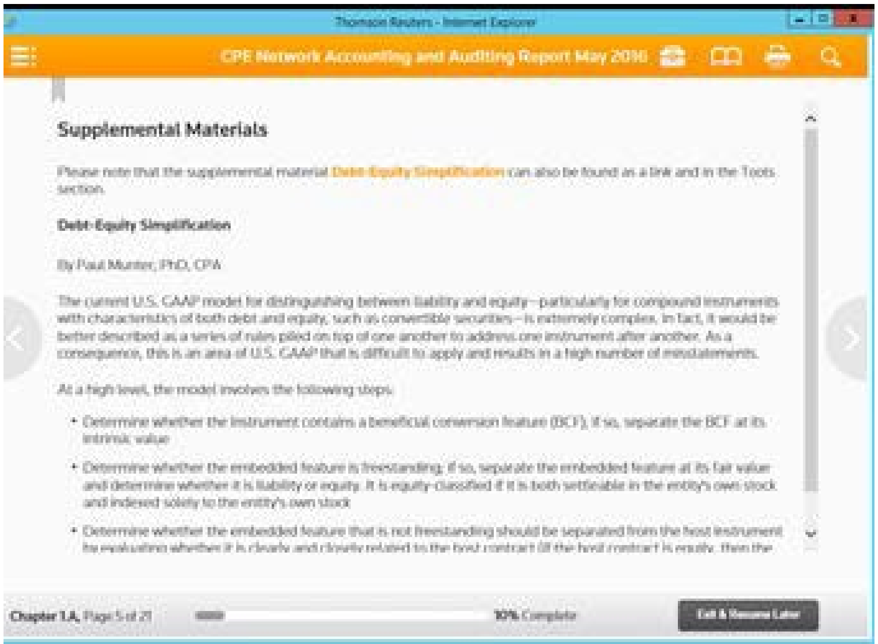
Video segments may be downloaded from the CPL player by clicking on the download button. Tip: you may need to scroll down to see the download button.

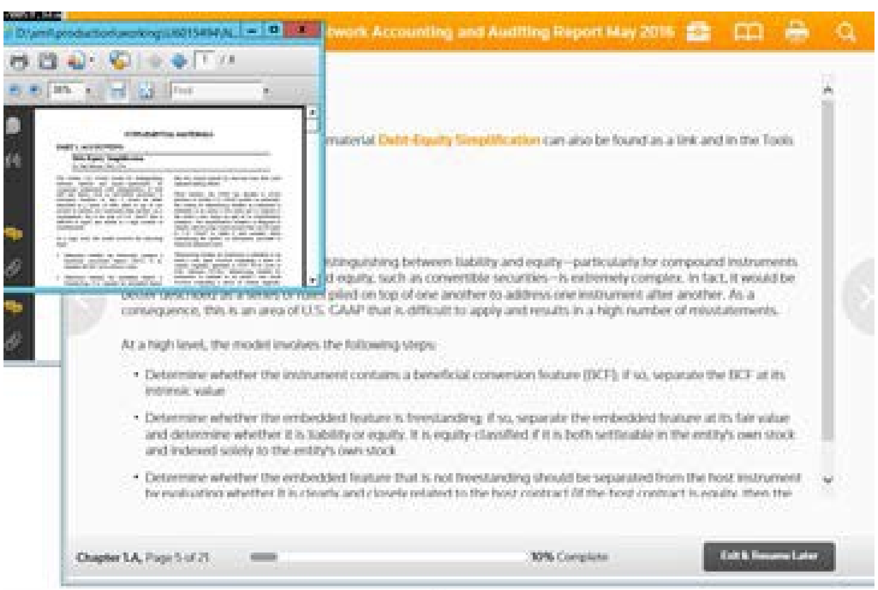


Transcripts for the interview segments can be viewed at the right side of the screen via a toggle button at the top labeled **Transcripts** or via the link to the pdf below the video (also available in the toolbox in the resources section). The pdf will appear in a separate pop-up window.



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 p roblems related to the segment.

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

Suggested Answers to Discussion Problems

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

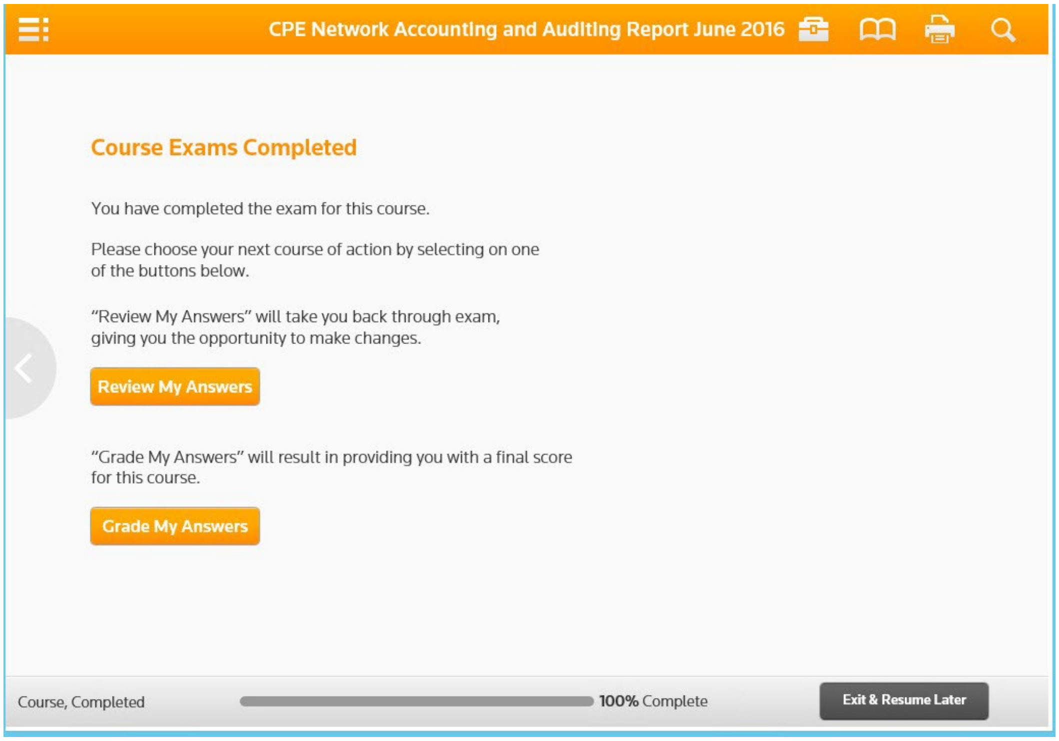
   An entity decides how to classify securities based on its intended holding period for each individual security, using the framework in ASC 320. In establishing its intent, an entity should consider relevant trends and experience, such as previous sales and transfers of securities. Classification decisions 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 **Exam** is accessed by clicking the last gray bar on the menu at the left of the screen or clicking through to it. Click the orange button to begin.

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



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

Additional Features Search

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

Search Results are displayed with the number of hits.

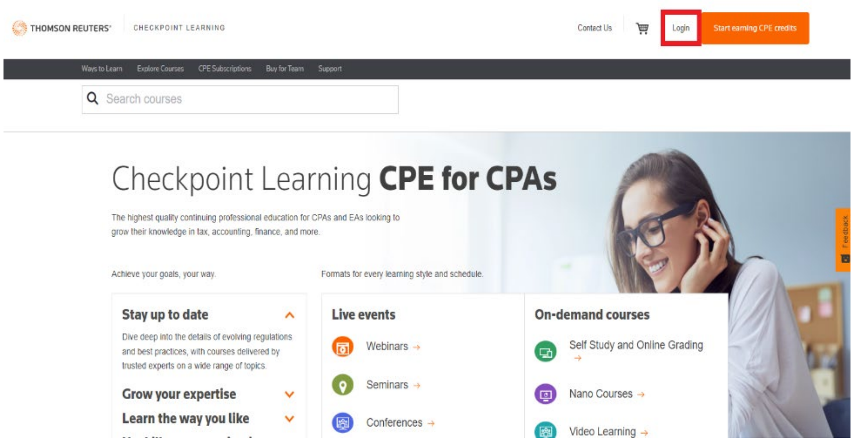
Print

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

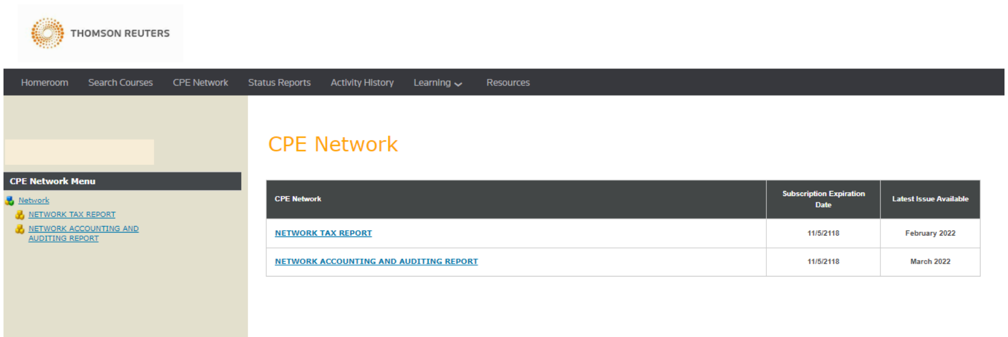
Transitioning From DVDs

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

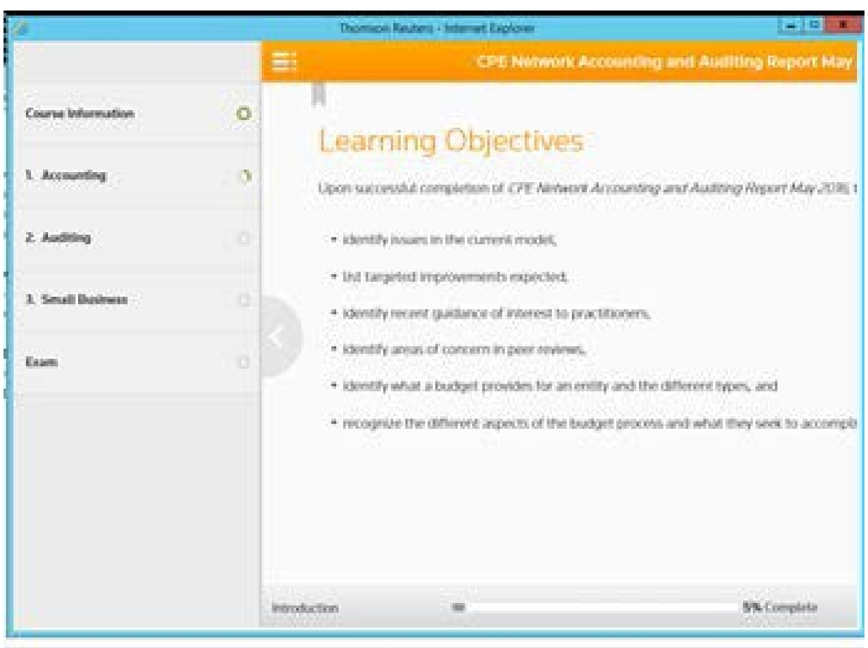
- Go to www.checkpointlearning.thomsonreuters.com .
- Log in using your username and password assigned by your firm's administrator in the upper right-hand margin ("Login").



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

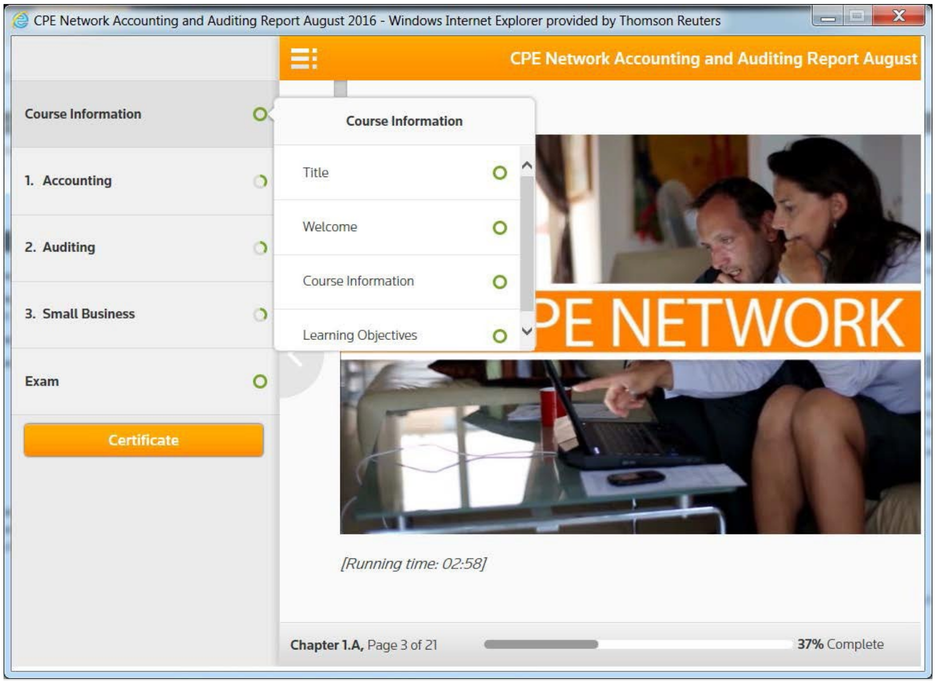


The Chapter Menu is in the gray bar at the left of your screen:

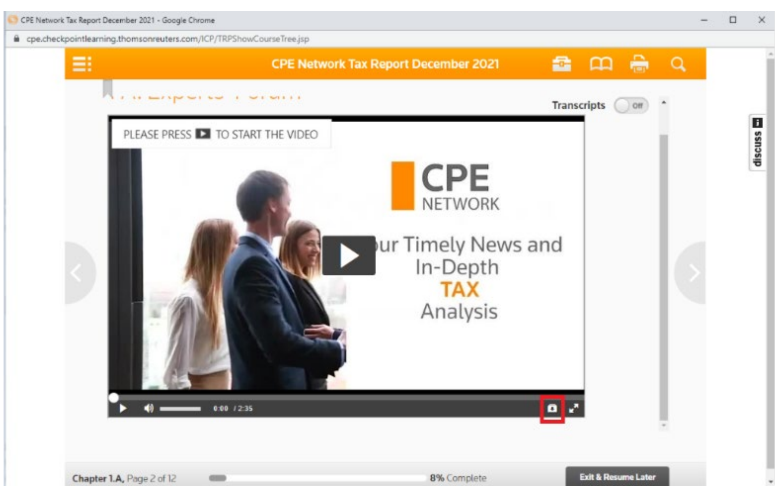


Click down to access the dropdown menu and move between the program Chapters.

- **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 to administrators with each release.

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 (if any).
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	844.245.5970	Cplsupport@cerifi.com	• Browser-based • Certificate discrepancies • Accessing courses • Migration questions • Feed issues
Product Support	844.245.5970	Cplsupport@cerifi.com	• Functionality (how to use, where to find) • Content questions • Login Assistance
Customer Support	844.245.5970	Cplsupport@cerifi.com	• Billing • Existing orders • Cancellations • Webinars • Certificates