What's New(ish) for 2017

1-1

The fact that 2016 was a presidential election year resulted in no significant tax legislation being passed last year in anticipation that Congress and the newly elected president would turn their attention to tax reform in 2017

1-1

In 2015 Congress had passed several tax bills that affect 2017.

- The Trade Preferences Extension Act of 2015
- The Surface Transportation and Veterans Health Care Choice Improvement Act of 2015
- The Bipartisan Budget Act of 2015
- The Fixing America's Surface Transportation Act ("FAST Act")
- The Consolidated Appropriations Act of 2016
- The Trade Facilitation and Trade Enforcement Act of 2015

1-1

As of September 30, 2017, Congress failed to pass "repeal and replace" legislation as to the Affordable Care Act ("ACA")

On September 27, 2017, the Big Six released their tax reform framework, a nine-page document described in detail below that contained some specifics as to rate cuts for individuals, corporations, and pass-through entities, but lacked specifics on many significant items.

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- In April 2016 the IRS estimated that the net tax gap, measured in 2006 at $385 billion, has risen to $406 billion.

1-4

The Trade Preferences Extension Act of 2015

Sections 25A and 222 of the Code are amended to provide that

- no taxpayer may claim the credits for qualified tuition and related expenses under § 25A,
- or the above-the-line deduction for qualified tuition and fees under § 222,

unless the taxpayer receives a statement required under § 6050S (Form 1098-T)

1-4

Sections 6721 and 6722 impose penalties for failure to file information returns or to furnish payee statements

- The first-tier penalty is increased to $50 per return, with a maximum penalty of $500,000 per calendar year.
- The second-tier penalty is increased to $100 per return, with a maximum penalty of $1,500,000 per calendar year
- The third-tier penalty is increased to $250 per return, with a maximum penalty of $3,000,000 per calendar year
- For failures or misstatement due to intentional disregard, the penalty per return or statement increases from $250 to $500, with no calendar-year limit

1-5

The Act provides that a taxpayer who elects to exclude from gross income for a taxable year any amount of foreign earned income or foreign housing costs under § 911 may not claim the refundable portion of the child tax credit for the taxable year

1-5

The Surface Transportation and Veterans Health Care Choice Improvement Act (the "Surface Transportation Act").

- The Act exempts employees from the employer mandate in the Affordable Care Act (the "ACA," often referred to as "Obamacare") who have healthcare coverage through the Department of Veterans Affairs or TRICARE.

1-5

The Act requires mortgage lenders to provide the following additional information on information returns

- The amount of outstanding principal on the mortgage as of the beginning of the calendar year;
- The loan origination date; and
- The address of the property securing the debt (or other description in the case of property without an address).

1-5

The Act amends § 1014 and adds § 6035 to require consistent basis reporting between estates and persons acquiring property from decedents, and information reporting by executors.

The Act amends § 1014 generally to require consistency between the estate tax value of property and basis of property acquired from a decedent

1-6

New § 6035 provides that an executor of a decedent's estate that is required to file an estate tax return under § 6018(a) is required to report to both the recipient and the IRS the value of each interest in property included in the gross estate.

On March 4, 2016, the IRS published temporary and proposed regulations under §§ 1014(f) and 6035 (T.D. 9757 and REG-127923-15) to clarify rules for consistent basis reporting.

1-7

The proposed regulations provide rules as to when the final value of property has been "determined," what property is covered and excluded; and

Key provisions include the following:

- Prop. Reg. § 1.1014-10(a) provides that the consistency requirement applies only to property the inclusion of which in an estate increases estate tax liability

1-7

- Prop. Reg. § 1.1014-10(c)(3) provides rules to determine final value of property that is discovered after the filing of a return or is otherwise omitted from the return.
- If such property is not reported before the limitations period on assessment expires, the final value is zero.
- Executors should use Form 8971 to report, and the beneficiary statement is Schedule A to Form 8971.

1-8

The Surface Transportation Act overrules Supreme Court cases by amending § 6501(e).

- That section provides a six-year limitations period on assessment rather than the normal three-year period if a taxpayer "omits from gross income" an amount properly includible therein, and such amount is in excess of 25% of the amount of gross income stated in the return.
- Previously the Supreme Court held that an overstatement of basis of property resulting in an understatement of gross income does not cause an omission from gross income within the meaning of this provision.

1-8

The Act provides for new filing original due dates and extension dates for some taxpayers starting with taxable years beginning after December 31, 2015. The changes are as follows.

- For partnerships and S corporations, the original due date of returns will be the fifth day of the third month following the close of the taxable year, or March 15
- C corporations will have an original due date of the 15 date of the fourth month after the close the of the taxable year, or April 15, for calendar-year C corporations.

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If, however, a C corporation has a fiscal year ending June 30, the original due date will remain at September 15 and will not change to October 15 until taxable years beginning after December 31, 2025.

- Calendar-year trusts will retain an original due date of April 15 and be allowed an extension to file of 5.5 months, until September 30.
- The extension to file the Form 5500 due date is October 15 for calendar-year plans (2.5 months after the end of July).

1-9

The FinCEN Form 114 (the FBAR) will be due April 15 and the IRS has regulatory authority to grant a six-month extension to October 15.

The maximum extension for returns of **tax-exempt organizations** using a calendar year is an automatic six-month period ending on November 15.

1-29

Fixing America’s Surface Transportation Act (the FAST Act).

No Passports for Seriously Delinquent Taxpayers.

The Secretary of State may refuse to issue or renew a passport if the applicant owes child support in excess of $2,500 or owes certain types of Federal debts.

1-29

Exceptions to these rules are permitted for emergency or humanitarian circumstances, including the issuance of a passport for short-term use to return to the United States by the delinquent taxpayer.

The provision applies only to "seriously delinquent tax debt," which includes any outstanding Federal tax liability (including interest and any penalties) in excess of $50,000 for which a notice of lien or a notice of levy has been filed.

1-31

Contractors to Collect Inactive Tax Receivables.

www.irs.gov

1-31

The Consolidated Appropriations Act of 2016.

The excise tax on "Cadillac plans" under the Affordable Care Act (ACA) is delayed to 2020.

The Act places a moratorium on annual fees imposed on health insurance providers under the ACA.

1-33

The Act extends and then phases out credits for producing electricity from wind under §§ 45 and 48.

The Act modifies the § 48 energy investment credit.

- Currently an increased 30% business energy credit for solar energy property is allowed through 2016, and thereafter the credit rate reverts to 10%.
- The Act extends and modifies the increased credit rate, The credit rate is 30% for 2017-2019, 26% for 2020, and 22% for 2021. Thereafter the rate reverts to 10%.

1-33

The Act extends the § 25D credit for residential energy efficient property for five years through December 31, 2021, but only for qualified solar electric property and solar water heating property. The credit rate is reduced from 30% to 26% in 2020 and to 22% in 2021.

THE 25C CREDIT HAS EXPIRED

1-33

The Protecting Americans from Tax Hikes Act of 2015 (the PATH Act).

- Permanently extends 22 provisions;
- Extends four provisions through 2019;
- Extends 30 provisions through 2016;

1-34

Permanent Extensions.

The lower earnings threshold of $3,000 for the refundable child tax credit .

The § 25A American Opportunity Tax Credit (AOTC).

Modifications of the earned income tax credit (EITC) presently effective through 2017 are made permanent under § 32.

1-34

The § 62(a)(2)(D) $250 above-the-line deduction for school teachers who pay for qualified expenses is made permanent and will be adjusted for inflation after 2015.

The election to deduct state and local sales taxes in lieu of state and local income taxes under § 164 is made permanent.

The § 408(d) exclusion from gross income for qualified charitable dispositions from an IRA is made permanent.

1-35

Rules under § 1367 concerning charitable contributions of property by S corporations are made permanent. Shareholders reduce their adjusted basis in stock by the pro rata share of the adjusted basis of the property contributed rather than by their share of the fair market value of the property.

1-35

The Act makes permanent the differential wage payment credit for eligible small business employers.

- The credit applies when an employee is called to active duty in the U.S. military and the employer pays that employee the difference between normal wages and military pay.

1-36

The Act makes permanent the 15-year recovery period under § 168 for:

- Qualified leasehold improvement property;
- Qualified retail improvement property; and
- Qualified restaurant property.

1-36

The Act makes permanent the $500,000 deduction limit under § 179 with a $2,000,000 phase-out.

- Taxpayers may revoke any § 179 election without IRS consent.
- The provision in § 179(f) treating qualified real property as § 179 property is made permanent, with a $250,000 limit in 2015.

The Act makes permanent a five-year recognition period for S corporations built-in-gains tax.

1-37

Extensions Through December 31, 2019

- The Act extends the new market tax credit under § 45D for five years.
- The Act extends the work opportunity tax credit (WOTC) under § 51-52 through 2019.

1-37

The Act extended bonus depreciation through 2019, but phased down the percentage amount.

- For 2015-2017, bonus depreciation will remain at 50%.
- In 2018 the percentage will be 40%.
- In 2019 the percentage will be 30%.

Bonus depreciation will be allowed for all "qualified improvement property."

1-38

The following provisions were extended through December 31, 2016, only.

- The exclusion from gross income under § 108 for cancellation of qualified principal residence indebtedness of up to $2 million;
- The treatment of mortgage insurance premiums allocated qualified residence interest;
- The § 222 above-the-line deduction for qualified tuition and related expenses;

1-39

Other PATH Act Provisions

- Forms W-2 and 1099- MISC reporting non-employee compensation to be filed with the IRS by January 31
- The Act also provides that after 2016, no refund shall be made before the 15 day of the second month following the close of the taxpayer's taxable year if the taxpayer claimed the EITC, the AOTC, or the CTC on the return

1-40

The Act prevents retroactive claims for the earned income tax credit (EITC), the child tax credit (CTC), and the American Opportunity Tax Credit (AOTC).

SEE PAGE 1-40

Tax return preparers after 2015 will have to meet due diligence requirements for all three credits rather than just the EITC.

1-40

The Act expands the disallowance rules that apply to the EITC to the CTC and the AOTC.

- If a fraudulent claim is made for any of these credits, the taxpayer must wait **ten years** to claim that credit again.
- If there is a reckless or intentional disregard of rules in claiming the credit, the taxpayer must wait two years to claim that credit again.

Under § 6662, the definition of an underpayment subject to the 20% penalty is expanded to expressly include the amount of an improperly claimed refundable credit in excess of tax.

1-41

The Act increases the tax return preparer penalty under § 6694(b) for conduct that is

(a) a willful attempt in any manner to understate the liability tax; or

(b) a reckless or intentional disregard of rules or regulations.

The Act increase this penalty to an amount equal to the greater of $5,000, or 75% of the income derived (or to be derived) by the preparer with respect to the return or claim. The percentage previously was $50%. The higher penalty applies for returns prepared for taxable years ending after December 18, 2015.

1-41

After 2015, taxpayers claiming the AOTC must provide the employer identification number of the education institution, which must provide that number on Form 1098T.

1-41

The Act provides relief for wrongly incarcerated individuals in new § 139F.

- Gross income shall not include any civil damages, restitution, or other monetary award relating to a "wrongfully incarcerated individual,"

1-45

The Act revises § 6051 to require employers to include an "identifying number" for each employee, rather than an employee's SSN, on Forms W-2. This permits regulations requiring or permitting a truncated SSN on Forms W-2 under authority currently provided in § 6109(d).

1-47

The IRS issued Rev. Proc. 2017-33, which is effective April 20, 2017.

In Rev. Proc. 2017-33, the IRS provides that, for any tax year beginning after 2014, a taxpayer can make a § 179 election with respect to any § 179 property without the IRS's consent on an amended federal tax return for the tax year in which the taxpayer places in service the § 179 property. The IRS will amend Reg. § 1.179-5(c) to incorporate this guidance.

1-48

In Rev. Proc. 2017-33, the IRS provides that an air conditioning or heating unit qualifies as § 179 property if such unit is § 1245 property, depreciated under § 168, acquired by purchase for use in the active conduct of the taxpayer's trade or business, and placed in service by the taxpayer in a tax year beginning after 2015.

1-48

Qualified Improvement Property.

Section 168(k)(3) defines the term “qualified improvement property” as any improvement to an interior portion of a building that is nonresidential real property if the improvement is placed in service after the date the building was first placed in service.

Qualified improvement property does not include any improvement attributable to the enlargement of the building, any elevator or escalator.

1-48

Building Was First Placed in Service.

A building is first placed in service when first placed in a condition or state of readiness and availability for a specifically assigned function.

1-49

The Trade Facilitation and Trade Enforcement Act of 2015.

- The Act increases the minimum penalty for failure to file a timely return under § 6651(a)(3) from $135 to $205.
- The Act also permanently extends the Internet Tax Freedom Act, which bans all State and local taxation of Internet access.

1-49

Effect of President Trump's Executive Orders on Tax Regulations.

Timeline

- Immediately after taking office on January 20, 2017, President Trump or his staff issued a series of Executive Orders or other orders that affected regulations issued by the Department of the Treasury and IRS guidance.

1-49

- The "freeze order" required that no regulations be sent to the Office of the Federal Register "until a department or agency head appointed or designated by the President after noon on January 20, 2017, reviews and approves the regulation."

- The Treasury department was not free from the freeze until June 2017 because of delays in appointing Treasury officials in the tax division.

1-50

- As a result of the “freeze order” the Treasury Department immediately withdrew the following tax regulations.
- Proposed partnership audit regulations.

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On January 30, 2017, the White House issued Executive Order 13771, which provided: “Unless prohibited by law, whenever an executive department or agency publicly proposes for notice and comment or otherwise promulgates a new regulation, it shall identify at least two existing regulations to be repealed.”

1-50

The “two-for-one” order is not clear as to precisely what regulations are covered, whether tax regulations are covered.

the OMB stated that no pending tax regulations are “economically significant,” which is the usual standard as to whether the OMB will engage in review.

1-50

On February 24, 2017, President Trump signed Executive Order 13777, which empowers regulatory reform officers (“RROs”) and creates task forces within Federal agencies to impose regulatory reform efforts and report in 90 days.

1-51

On April 21, 2017, the White House issued Executive Order 13789. It orders the Secretary of the Treasury to immediately review "all significant tax regulations" issued on or after January 1, 2016, and in consultation with the OMB identify within 60 days in an interim report to the President all such regulations that:

- Impose an undue financial burden on taxpayers;
- Add undue complexity to the Federal tax laws; or
- Exceed the statutory authority of the IRS or the Treasury Department.

1-52

On July 7, 2017, the IRS issued Notice 2017-38 in response to Executive Order 13789, identifying eight regulations.

On October 4, 2017, the Treasury Department issued its "Second Report" on tax regulation review under Executive Order 13789.

- Treasury also stated that it and the IRS have initiated a comprehensive review, coordinated by the Treasury Regulatory Reform Task Force.
- The report states that the IRS Office of Chief Counsel "has already identified over 200 regulations for potential revocation, most of which have been outstanding for many years."

1-57

The Affordable Care Act (ACA or "Obama Care") Is Still in Place in 2017.

The most important part of the new health reform law is the mandate for most residents of the U.S. to obtain health insurance.

Effective for taxable years after December 31, 2013, new § 5000A requires non-exempt U.S. citizens and legal residents to maintain minimum essential coverage.

1-80

The monthly penalty amount for any taxpayer will be an amount equal to 1/12 of the greater of a flat dollar amount or a percentage of income.

- The flat dollar amount.
- $695 for 2016 and later years.
- The percentage of income used.
- 2.5% for tax years beginning after 2015.

1-82

The penalty of § 5000A does not apply to:

- Individuals who cannot afford coverage because their required contribution for employer-sponsored coverage or the lowest cost "bronze plan" in the local Insurance Exchange exceeds 8% of household income for the year.

1-82

- Taxpayer with income below the income tax filing threshold.
- Those exempted for religious reasons.
- Individuals residing outside of the U.S.
- Individuals who are incarcerated or are not legally present in the U.S.
- All members of Indian tribes.
- Individuals may also apply HHS for a hardship exemption.

1-89

Recent Developments Concerning the Individual Mandate.

Taxpayers filed about 6.6million 2014 returns that reported an individual mandate penalty, and the average payment was $190.

1-90

Refundable Credit for Health Insurance.

- § 36B creates a refundable tax credit (the “premium assistance credit”) for eligible individuals and families who purchase health insurance through an exchange.
- The premium assistance credit is available for individuals (single or joint filers) with household incomes between 100 and 400% of the Federal Poverty Level (FPL) for the family size involved who do not received health insurance through an employer or a spouse's employer.

1-96

Repayment of Premium Tax Credit.

- In Walker v. Comm'r, T.C. Summ. Op. 2017-50, the Tax Court held that a couple had to repay an advance premium tax credit they received to help pay for health insurance because their household income exceeded poverty level household income by more than 400 percent.
- While sympathetic to the couple's claim that their insurance company told them they qualified for the advance credit, the court said the simple fact was that their income exceeded eligible levels and thus they had to repay the credit.

1-97

- The Walkers filed a petition with the Tax Court in which they asserted that they were informed by Covered California that they qualified for insurance coverage through Anthem Blue Cross for 2014.
- They also said that they would not have purchased insurance through Covered California if they had known that they did not qualify for the PTC.

1-97

A taxpayer who receives an APTC is required to reconcile the APTC payments made during the year with the amount of the PTC for which he is actually eligible.

The Tax Court, while sympathetic to the Walker's predicament because it appeared they were incorrectly told by Covered California that they were eligible for the advanced credit, nevertheless held that the couple had to repay the APTC.

1-126

IRS Guidance on Employer Health Care Arrangements. On September 13, 2013, the IRS issued Notice 2013-54, expanding prior guidance on the application of "market reforms" and other provisions of the Health Care Act to health reimbursement arrangements (HRAs), employer payment plans, and health flexible spending arrangements (health FSAs). The guidance on employer payment plans is designed to prevent employees from receiving both premium tax credits from the government and tax-free reimbursements from employers for substantiated premiums for individual health insurance policies.

1-134

21 Century Cures Act.

Exception from Group Health Plan Requirements for Qualified Small Employer Health Reimbursement Arrangements.

Exclusion for Employer-Provided Health Benefits.

1-135

- An employee may exclude from gross income amounts provided through an arrangement under which (a) an employer pays or reimburses premiums for health insurance for the employee and family members purchased in the individual insurance market.

1-135

- a self-insured medical reimbursement plan must meet certain nondiscrimination requirements in order for the benefits provided to a highly compensated individual to be excluded from income. For this purpose, the following groups of employees may be excluded: employees who have not completed three years of service with the employer, employees under age 25, part-time or seasonal employees.

1-135

- Employer payments and reimbursements for health insurance and medical expenses are also excluded from wages for employment tax.
- For employer payments or reimbursements under these arrangements to be excluded from gross income, premiums and other expenses must be substantiated and an employee must be entitled to receive payments from the employer only if he or she incurs qualifying expenses.

1-136

- The exclusion applies also to amounts paid or reimbursed from funds withheld from an employee's salary under a cafeteria plan.
- The value of employer-provided health benefits for a year is generally required to be reported by the employer on an employee's Form W-2.

1-136

Group Health Plan Requirements.

- Under the Code, an employer is generally subject to an excise tax of $100 a day per affected individual if it sponsors a group health plan that fails to meet any of these requirements.
- Section 4980B(d)(1) provides an exception for plans of employers with fewer than 20 employees. Section 4980D(d)(1) provides an exception for a plan of an employer with no more than 50 employees if coverage is provided solely through insurance.

1-136

- In some cases, the excise tax does not apply if the failure is due to reasonable cause and not to willful neglect and the failure is corrected within a certain period.
- IRS guidance holds that employer payment plans generally fail to meet certain group health plan requirements

1-136

- In addition, an HRA fails to meet those requirements unless the HRA has complied with IRS rules relating to HRAs provided in conjunction with (or "integrated" with) certain other employer-sponsored coverage that meets the group health plan requirements. An HRA that is integrated with such employer-sponsored coverage is often referred to as an "integrated" HRA, and an HRA that is not integrated with such employer-sponsored coverage is often referred to as a "stand-alone" HRA. Thus, an employer may be subject to an excise tax if it provides an employer payment plan or a stand-alone HRA.

1-137

Reasons for Change.

- Many small employers wish to provide pretax funds that employees may use to purchase their own health insurance or pay for expenses not covered by their insurance.
- The Congress wishes to enable small employers to provide such funds without incurring an excise tax.

1-137

Qualified Small Employer Health Reimbursement Arrangement.

- (Referred to herein as a QSEHRA) is generally not a group health plan under the Code, ERISA or PHSA and thus is not subject to the group health plan requirements.

1-138

- A QSEHRA is defined as an arrangement (1) that is provided on the same terms to all eligible employees of an eligible employer;
- That is funded solely by the eligible employer and no salary reduction contributions may be made under the arrangement;
- That provides, after an employee provides proof of minimum essential coverage, for the payment or reimbursement of medical expenses.

1-138

- Under which the amount of payments and reimbursements for a year cannot exceed specified dollar limits.
- The initial dollar limits are $4,950 ($5,050 for 2018); and $10,000 ($10,250 for 2018).

1-138

An “eligible employee” means any employee of an eligible employer, except that the terms of the QSEHRA may exclude employees who have not completed 90 days of service with the employer, employees under age 25, part-time or seasonal employees, employees covered by a collective bargaining agreement and nonresident aliens with no earned income from sources within the United States.

1-138

“Eligible employer”

- (That is, generally, an employer with fewer than 50 full-time employees and full-time equivalents during the preceding year), and;
- Does not offer a group health plan to any of its employees.

1-138

Income Tax Treatment of QSEHRA Benefits.

- Under the provision, if an employee's medical care expenses are paid or reimbursed under a QSEHRA and the employee does not have minimum essential coverage for the month in which the medical care was provided, the amount of the payment or reimbursement for those expenses is includible in the employee's income. (The provision does not change the treatment of such payments or reimbursements for employment tax purposes.

1-139

Coordination with Other Code Rules.

- An eligible employee under a QSEHRA is not eligible for the premium assistance credit for a month if the QSEHRA constitutes affordable coverage for the month.
- A QSEHRA continues to be treated as a group health plan for purposes of the excise tax on high-cost coverage.

1-139

- Not later than 90 days before the beginning of a year in which an employer will fund a QSEHRA the employer must provide eligible employees with a written notice containing the amount of the employee's permitted benefit and certain other information. An employer that fails to provide the notice may be subject to a tax penalty of $50 per employee, subject to a maximum of $2,500 for the year.
- The employer must report an employee's permitted benefit for a year on the employee's Form W-2 for the year.

1-139

Effective Date.

- The provision generally applies to years beginning after December 31, 2016 .
- In Notice 2017-20, the IRS provides eligible employers additional time to furnish the initial required written notice to eligible employees following the issuance of such guidance. An eligible employer that provides a QSEHRA to its eligible employees for a year beginning in 2017 is not required to furnish the initial written notice to those employees until after further guidance has been issued by Treasury and the IRS.
- No additional guidance has been issued as of October 15, 2017.

1-147

Other Developments Under the ACA.

- The IRS also issued the following guidance on ACA issues in 2014 and 2015.
- eligibility for affordable employer-sponsored minimum essential coverage, which for plan years beginning in 2016 will be 9.66%.

1-148

An Executive Order and ACA Enforcement.

- On January 20, 2017, the White House issued an "Executive Order Minimizing the Economic Burden "To the maximum extent permitted by law, the Secretary of Health and Human Services and the heads of all other executive departments and agencies with authorities and responsibilities under the [ACA] shall exercise all authority and discretion available to them to waive, defer, grant exemptions from, or delay the implementation of any provision or requirement of the [ACA] that would impose a fiscal burden on any State or a cost, fee, tax, penalty, or regulatory burden.

1-148

- Some have interpreted this to provide that no agency should enforce any ACA provisions, including the individual mandate penalty. In this regard, there were millions of 2014 and 2015 returns where taxpayers did not check Box 61. The IRS, which calls such returns “silent Box 61 returns” or “silent returns,” indicated that as of the 2016 filing season, it would begin rejecting such returns and sending enforcement letters to taxpayers who filed them.

1-148

- Due to the Executive Order, the IRS pivoted away from rejecting silent Box 61 returns. This caused some return preparers to believe that the IRS will not enforce compliance with the individual mandate, even though attempts to repeal and replace the ACA have failed in Congress as of September 30, 2017.

1-148

- Commentators point out that the ACA is still the law, and preparers face the ethical issue of whether they will sign a return that is a silent return. They also point out that an Executive Order may not change requirements in the Code or tax regulations, and note that regulations implementing the individual mandate can only be changed by following APA rules. Generally, preparers are not supposed to take part in filing false or fraudulent returns.

1-148

WHAT OTHER ACA QUESTIONS DO WE HAVE?

1-187

Foreign Account Tax Compliance Act and FBAR Reporting.

In General.

- The Hiring Incentives to Restore Employment (HIRE) Act of 2010 contained a revenue offset provision referred to as the Foreign Account Tax Compliance Act (FATCA). FATCA creates a host of new anti-abuse measures designed to deter U.S. individuals from attempting to hide assets overseas.

1-189

- For tax years beginning after March 18, 2010, the HIRE Act provides that individuals with an interest in a "specified foreign financial asset" during the tax year must attach a disclosure statement to their in come tax return for any year in which the aggregate value of all such assets is greater than $50,000 (§ 6038D(a)).

1-189

- "Specified foreign financial assets" are: (1) depository or custodial accounts at foreign financial institutions, and (2) to the extent not held in an account at a financial institution, (a) stocks or securities issued by foreign persons, (b) any other financial instrument or contract held for investment that is issued by or has a counterparty that is not a U.S. person, and (c) any interest in a foreign entity.

1-189

- Individuals who fail to make the required disclosures are subject to a penalty of $10,000 for the tax year. An additional $10,000 penalty per each 30 days of failure to disclose, up to a $50,000 maximum penalty.

The HIRE Act provides that a new six-year limitations period applies for assessment of tax on understatements of income attributable to foreign financial assets.

1-195

Regulations and IRS Guidance on FBAR Reporting and FATCA.

- The enactment of FATCA in addition to historical FBAR rules, and the current emphasis on tax avoidance by taxpayers using foreign accounts, has required the Treasury Department and the IRS to address numerous issues. In recent years, guidance has been issued in three areas.

1-196

- The new rules under FATCA did not replace the requirement under the Bank Secrecy Act requiring every U.S. person who has a financial interest in, or signature or other authority over, bank accounts, securities accounts, or other financial accounts in foreign countries to annually report information on FinCEN Form 114 (old Form TD F 90-22.1).
- The FBAR is not attached to a taxpayer's return, but is filed separately with the Treasury Department.

1-197

Is “virtual currency” such as bitcoin required to be reported on an FBAR? According to a an IRS program analyst speaking on an IRS webcast on June 4, 2014, there is no such requirement for 2014 or earlier, but FinCEN and the IRS are monitoring the issue and may change their position in the future. In March 2014 the IRS issued Notice 2014-21, stating that virtual currencies such as bitcoin are considered “property” for Federal income tax purposes, rather than currency.

1-209

IRS Chart Comparing Requirements for Form 8938 and FBAR. Following is a chart released by the IRS on March 26, 2012, comparing filing requirements for both Form 8938 for specified foreign financial assets and Form TD F 90-22.1 (FBAR).

https://www.irs.gov/businesses/comparison-of-form-8938-and-fbar-requirements

1-211

Professional Responsibility with Respect to Client FBARs. On June 7, 2013, the IRS posted on its website information on professional responsibility and foreign bank account reporting. It posted the information because practitioners have requested guidance on their professional responsibilities given the fact that Form TD F 90-22.1 (the FBAR reporting form) is not a tax return and is required under the Bank Secrecy Act rather than under the Code.

1-211

FinCEN finalized a new rule that all FBARs must be e-filed if filed after June 30, 2012.

1-211

- The IRS also noted that in April 2003, the authority to enforce FBAR rules was co-delegated from the Financial Crimes Enforcement Network (FinCEN) to the Commissioner of the IRS. The IRS was authorized to access and collect civil penalties related to FBAR filing.
- The IRS described the increased civil penalties for willful violations of FBAR reporting requirements

1-211

- The IRS understands that some U.S. persons required to file FBARs may claim a reasonable cause defense against penalty impositions by blaming their preparers for failing to ask about the existence of a foreign bank account or to advise about the FBAR filing requirement. Consequently, some practitioners have expressed concerns about their duties under Circular 230 with respect to both the responses required on returns concerning foreign accounts, and the preparation and filing of the FBAR Form TD F 90-22.1.

1-212

- The IRS believes that return preparers who prepare Forms 1040, 1041, 1065, and 1120 have a duty under Circular 230 “to inquire of their clients with sufficient detail to prepare correct responses to the foreign bank and financial account questions” on those forms.

Diligence required is addressed in Circular 230, § 10.22.

1-212

Under Circular 230, § 10.34(d), a practitioner may generally rely, in good faith and without verification, on information furnished by a client. However, good faith reliance contemplates that a practitioner will make reasonable inquiries when a client provides information that implies possible participation in overseas transaction/accounts subject to FBAR requirements.

1-212

A practitioner may rely on information provided by the client in good faith, but may not ignore the implications of any information provided to or actually known by the practitioner.

If the information furnished by the client appears to be incorrect, inconsistent with other known facts, or incomplete, the practitioner is required to make further inquiry.

1-212

The practitioner is also required by Circular 230, § 10.34(c), to advise a client of any potential penalties.

The practitioner "is not obligated to prepare the FBAR form for the client unless the practitioner feels competent to do so and the client has agreed to this additional service."

Notwithstanding the lack of obligation to prepare the FBAR, the practitioner does have an affirmative obligation to advise the client of the need to file the FBAR form.

1-212

What Does Willfully Failing to File an FBAR Entail?

- In U.S. v. Williams, 2012-2 U.S.T.C. (CCH) ¶50,475 (4 Cir. 2012), held that evidence presented by the government was sufficient to show a taxpayer had willfully failed to file a FBAR.

1-215

The most recent case involving the issue of willfulness in the FBAR area is Bedrosian v. U.S., 2017 U.S. Dist. LEXIS 154625 (E.D. Pa. 2017), where the Court ruled consistently with Williams as to the standard for proving willfulness, and then concluded on the facts that the taxpayer had only been negligent and was not liable for the higher penalty.

1-217

Other Recent FBAR Issues.

- In U.S. v. Warner, 792 F.3d 847 (7 Cir. 2015), the Seventh Circuit affirmed what many considered a lenient sentence given to Beanie Babies creator H. Ty Warner. He pled guilty to tax evasion after having earned more than $24.4 million of unreported interest income on deposits in a Swiss bank of more than $97 million. The tax loss to the IRS was more than $5.6 million. He paid $53.6 million in penalties and received a sentence of two years' probation and 500 hours of community service.

1-217

- Jury Run Wild? In U.S. v. Zwerner, No. 1:13-cv-22082–CMA (S.D. Fla. 2014) (TNT Doc. 2014-15857), a Florida jury returned a verdict that included a $2.2 million penalty for willful failure to file FBARs, an amount representing 50% of the defendant's account balance in foreign accounts in each of three consecutive years.

1-218

- Online Gambling Accounts and FBARs. In U.S. v. Hom, 2016-2 U.S.T.C. (CCH) ¶ 50,358 (9 Cir. 2016), the Court held that an individual was required to file foreign bank account reports (FBARs) for an online foreign account he used to transfer funds related to gambling, but did not have to report two online gambling accounts that were used only to play poker.

1-218

WHAT OTHER FBAR QUESTIONS DO WE HAVE?

1-218

Issues Concerning Tax Return Preparers and Related Matters Under Circular 230.

Challenges to the IRS Based on Loving Have Been Successful.

1-224

In Ridgely v. Lew, 2014-2 U.S.T.C. (CCH) ¶ 50,359 (D. D.C. 2014), the Court held that the Treasury Department and the IRS lack the statutory authority to regulate a CPA's contingent fee arrangements for the preparation and filing of ordinary refund claims. The Court granted a permanent injunction against enforcing the contingent fee provisions in Circular 230.

1-224

Section 10.27 of Circular 230 provides that a practitioner may not charge an unconscionable fee in connection with any matter before the IRS. A practitioner also “may not charge a contingent fee for services rendered in connection with any matter before the IRS,” except a practitioner may charge a contingent fee for services rendered in connection with:

1-224

- The Service’s examination of, or challenge to (a) an original tax return, or (b) an amended return or claim for refund where the amended return or claim for refund was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to, the original tax return;
- A claim for refund filed solely in connection with the determination of statutory interest or penalties assessed by the IRS; and
- Any judicial proceeding arising under the Code.

1-225

Ridgely is a practicing CPA who provides clients with a broad array of services, including preparation of “ordinary” refund claims, i.e., a refund claim filed when a taxpayer allegedly has overpaid taxes, prior to the commencement of any adversarial proceedings with the IRS or any formal legal representation by the CPA (for example, by filing a power of attorney for a client). Ridgely claimed that complying with § 10.27 of Circular 230 caused him to lose clients and significant revenue.

1-225

The Court concluded that if a TRP does not “practice” before the IRS when he simply assists in the preparation of a client’s tax return, then a CPA hardly “practices” before the IRS when he simply prepares and files a taxpayer’s refund claim before being designated as the taxpayer’s representative and before the commencement of an audit or appeal.

1-225

In Sexton v. Hawkins, 2017-1 U.S.T.C. (CCH) ¶50-181 (D. Nev. 2017), the Court held that the IRS lacked the authority to regulate a lawyer who had been suspended from practice before the IRS, was operating a return preparation business, and had offered to give written tax advice to clients.

1-226

The Nevada district court did not find the IRS arguments persuasive, first agreeing with the reasoning of Loving and stating that if preparing returns is not practice before the IRS, the OPR cannot regulate a mere return preparer and force him or her to comply with a demand for documents under Circular 230. Here there was no evidence Sexton did anything other than prepare returns.

1-226

Challenge to PTIN Fee Is Successful.

- Many practitioners objected to the IRS charging them an annual PTIN fee, which originally was $64.25 before being lowered on October 30, 2015, to $50. See T.D. 9742 (IRS portion of the fee lowered from $50 to $33, but vendor portion increased from $14.25 to $17). Those practitioners agreed that the IRS could require a preparer to provide an identification number on returns he or she prepared, but disagreed that the IRS could charge preparers for the identification number because it provided a special benefit on the recipient.

1-226

In Jesse E. Brannen, III, PC v. U.S., 682 F.3d 1316.

In Steele v. U.S., 2017-1 U.S.T.C. (CCH) ¶ 50,238 (D. D.C. 2017), a class action covering all persons who have paid a PTIN fee.

Meanwhile, the IRS had temporarily suspended PTIN registrations and renewals, but on June 21, 2017, the IRS reopened its PTIN registration and renewal portal and made the service free, to comply with the decision.

1-228

IRS Temporary Response to Loving: A Voluntary Program for TRPs.

- Rather than appeal the Loving case, the IRS announced in June 2014 that it would establish a voluntary program to encourage TRPs who are not attorneys, CPAs, or enrolled agents to complete CPE courses to increase their tax law and return preparation knowledge and skills. On July 1, 2014, the IRS issued Rev. Proc. 2014-42 to provide the requirements for its voluntary "Annual Filing Season Program" (AFSP). TRPs who meet the requirements of the AFSP will receive an annual AFSP "Record of Completion" (RC), and their names will be included in a new public directory that will be added to the IRS website. The program will first be effective for the 2015 filing season.

1-228

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1-236

Identity Theft Is a Big IRS Problem.

IRS Warnings to Practitioners.

- Tax return preparers are now also the subject of identity thieves. In IR-2016-119, the IRS warned TRPs that it had learned of new attacks in which thieves somehow remotely took over practitioner's computers, accessed client data, and completed and e-filed returns that directed refunds to the criminals' own accounts. Victims learned of these thefts when reconciling e-file acknowledgments. At least 24 cases have been reported. In another scam, thieves send emails which appear to be updates to tax software that TRPs may have.

1-238

- In IR-2017-3 the IRS announced an email scam. The criminal first claims in the email to need a preparer. If the preparer responds, a second email is sent that typically has either an embedded web address or a PDF attachment that has an embedded web address.
- In IR-2017-111 the IRS described a scam where a criminal sends an email to preparers purporting to be from a tax software education provider.

1-238

- A variation announced in IR-2017-126 is one where the criminal impersonates a tax software provider and sends an email with the subject line "Software Support Update." The email provides a link to a fictitious website that mirrors the software provider's actual login page.
- In IR-2017-130, the IRS announced a scam that has the purpose of obtaining employees' Forms W-2 and then using that information to file fraudulent refund claims.

1-238

- In IR-2017-134, the IRS announced a scam where criminals use a phishing scheme that impersonates the IRS and FBI as part of a ransomware scam to take computer data hostage.
- Practitioners can report such scams to phishing@irs.gov.

1-239

Disclosures Allowed in Identifying Theft Returns.

- In AM 2017-004, the IRS has addressed a number of issues involving disclosure of returns, return information, etc. where the return was filed by an identity thief or by an undocumented worker with a stolen Social Security number (SSN).
- Section 6103(a) provides the general rule that returns and return information must be kept confidential and can only be disclosed as authorized under the Code.

1-239

In AM 2017-004, the IRS stated that when it confronts identity theft and refund fraud, complex disclosure questions often arise. The determination of whether to release certain information depends on numerous factors, including what kind of return information is involved, whose return information it is, and who would receive the information in a disclosure.

The conclusions are:

1-240

Is a return filed by an identity thief protected under § 6103?

- An invalid return is not "required by, or provided for or permitted under" the Code, as described in § 6103(b)(1), so if a document is not a valid return, it may not be afforded disclosure protection under § 6103.
- Requirements for a valid return include that the return be filed as part of an honest and reasonable attempt to comply with the tax laws.

1-240

- Note that this rule does not apply in the case of an undocumented worker who uses a stolen SSN, but otherwise reports actual wages. His W-2 would be a valid return because, under the circumstances, it represents a reasonable effort to comply with the tax laws.

1-240

Whose return information is it?

- A fraudulent refund return is the return information of both the victim and the thief from the moment it is filed with IRS. When a fraudulent refund return is first filed with IRS, IRS will assume it is the return information of the victim.

1-241

Who may receive the disclosure?

- IRS may disclose a taxpayer's return information to the taxpayer, but an identity thief is not necessarily a taxpayer.
- IRS is not authorized to disclose the identity thief's separate and distinct return information to an identity theft victim. The Code provides no authority for disclosure of an identity thief's separate and distinct return information to an identity theft victim. The victim is not even entitled to disclosure of the identity thief's identity

1-241

IRS does allow victims to obtain redacted versions of identity thieves' returns.

- IRS is authorized to disclose return information to other employees of the Department of the Treasury.
- IRS is authorized to disclose return information in a Federal or State judicial or administrative tax proceeding.
- Legal guardians of minor victims may obtain copies of the minor victim's return information.
- IRS may disclose information to confirm a return's legitimacy.

1-242

End of *my*RAs.

On July 28, 2017, the Treasury Department announced that it was winding down its initiative on the *my*RA retirement savings program, which opened in November 2015.

- Treasury noted that there had been little demand for the program, and that its cost of almost $70 million since the program began could not be justified.

1-242

- *My*RA participants are being notified to move their savings to another Roth IRA. For information see www.myRA.gov.
- On August 15, 2017, Representative Joseph Crowley (D-N.Y.) introduced H.R. 3653 to allow continuation of *my*RA retirement accounts.

1-242

IRS Budget.

- The Consolidated Appropriations Act of 2017, passed by Congress in May 2017 to fund the government through September 30, 2017, provided for an IRS budget of $11.25 billion for fiscal 2017

1-243

Former Tax Court Judge Kroupa Is Sentenced.

- On April 4, 2016, former Tax Court Judge Diane L. Kroupa and her husband were indicted for tax-related conspiracy, evasion, and false return charges.
- Judge Kroupa pled guilty after her husband entered into his plea deal and asked for leniency in sentencing due to alcoholism, substance abuse, and bipolar disorder. On June 22, 2017, she was sentenced to 34 months in jail, which was within sentencing guidelines. Her husband received 24 months in jail, and both owe joint restitution of $457,104.

1-243

Late Partnership Returns Due to Changed Due Date.

- In Notice 2017-47, the IRS provided penalty relief for late partnership returns due to the change of filing dates in the Surface Transportation Act of 2015.
- Some taxpayers missed the change and filed 2016 partnership returns under the old rule, by April 15, 2017, or requested an extension to file under the old rule, by April 15, 2017. Computer-generated penalty notices for late filing followed.

1-244

- The Notice provides that no late filing penalty applies if the partnership filed its required return with the IRS and provided required documents to partners by the date that would have been timely prior to the change. Relief is also provided if the partnership filed Form 7004 to request an extension of time to file by the date that would have been timely prior to the change, and files the return and provides required documents to partners by the 15 day of the ninth month after the close of its taxable year.

1-244

Relief will be granted automatically for the penalties for failure to timely file the return.

- For reconsideration of a penalty covered by the Notice that has not been abated by February 28, 2018, contact the number listed in the penalty letter or call (800) 829-1040 and claim relief under the Notice.
- Taxpayers who qualify for relief will not be treated as having received a first-time abatement under the IRS administrative penalty waiver program.

1-244

Hurricane Disaster Relief.

In IR-2017-160 the IRS has outlined key tax relief that is available for victims of hurricanes Harvey, Irma, and Maria. Generally;

- Taxpayers will have until January 31, 2018, to file any returns and pay any taxes due, including filers whose tax-filing extensions were until September 15 or October 15, 2017;

1-244

- A variety of other returns, payments, and tax-related actions also qualify, and are continually being updated on the disaster relief page on IRS.gov;
- Besides extra time to file returns and pay taxes, the IRS has offered other special assistance to disaster-area taxpayers.

Further details on IRS disaster relief page, as well as on the special pages for Hurricane Harvey and Hurricane Irma.

1-245

On September 28, 2017, Congress sent to the President for signature H.R. 3823 which provides disaster-related relief, including elimination of the requirement that taxpayers itemize deductions to qualify for relief, providing an exception to the 10% early retirement withdrawal penalty for qualified distributions, and temporarily suspending limitations on charitable deductions for qualified hurricane relief made before the end of 2017.