How will Practice Before the IRS Change and Other Practitioner Concerns Raised by COVID-19

A significant question for both practitioners and taxpayers is how COVID-19 will change tax practice before the Internal Revenue Service (IRS). Many practitioners and clients have been concerned by what appears to be a partial shutdown of IRS services. The changes made by the IRS seem to be a step back from the Taxpayers First Act, which promised a new and more modern IRS, and as stimulus payments have been dispersed, the question arises: “What now?”

IRS Partial Shutdown Because of COVID-19

In March 2020, the IRS, in response to the COVID-19 pandemic, began closing all Taxpayer Assistance Centers. This was followed by shutting down IRS call centers and return processing centers.

Soon thereafter, the IRS issued a "mission-critical" directive indicating that because of the crisis, the IRS would only focus on a limited number of essential functions. This directive also included holding all mail that would normally go to IRS Processing Centers. On its website, the IRS encouraged practitioners and taxpayers "to use electronic options to support social distancing and speed the processing of tax returns, refunds and payments."

On a very positive note, IRS employees were recently authorized to use secure email as a form of communicating with practitioners. In the past, email was used very sparingly and most written communication with the IRS was by regular mail or facsimile.

The IRS's directives come into direct juxtaposition with the Taxpayer's First Act of 2019, which was signed into law in July 2019. This law seeks to modernize the IRS and required the IRS to create a comprehensive customer service plan and to reorganize to improve efficiency, enhance cyber security and better meet taxpayer needs. The IRS was to submit its plans for reorganization and improved customer service during fiscal year 2020. The virus seems to have temporarily derailed this plan and has resulted in little to no customer service for those seeking help.

On April 1, 2020, the IRS launched the People First Initiative to provide relief to taxpayers during the COVID-19 crisis. The changes include relief such as postponing payments, limiting enforcement actions and extending deadlines.

POSTED:

May 13, 2020

RELATED PRACTICES:

[Corporate Law](https://www.reinhartlaw.com/practices/corporate-law)
https://www.reinhartlaw.com/practices/corporate-law

[Tax](https://www.reinhartlaw.com/practices/tax)
https://www.reinhartlaw.com/practices/tax

RELATED PEOPLE:

[Michael G. Goller](https://www.reinhartlaw.com/people/michael-goller)
https://www.reinhartlaw.com/people/michael-goller

However, the initiative does not open IRS call centers or provide for a direct way to communicate with the IRS.

With the phone lines down and deadlines changing, it is critical that practitioners frequently check the IRS website for updated guidance.

Ethical Concerns

Attorney and CPA malpractice insurance carriers, along with the American Bar Association, indicate that far more malpractice claims arise during times of economic recession. For example, these claims doubled from 2005 to 2009 during the Great Recession. Because it takes time to discover negligence, there is often a delay in claims. Economic downturns also have a way of revealing fraudulent schemes and substandard work product. Further, when liquidity dries up because of an economic slowdown, tax shelters and tax avoidance schemes often come to light.

As the economy slows, taxpayers may engage in behavior designed to avoid paying tax. Further, the COVID-19 world is changing at a rapid pace, impacting deadlines, responsiveness and services. As such, practitioners must be vigilant and, to avoid malpractice and ethical issues, practitioners should consider the following:

- Frequently check the IRS website for updates and guidance. The IRS has used its website as a primary means of providing guidance.
- Track, check and double check all deadlines. The IRS and most states changed many key tax deadlines, and practitioners need to be aware of these changes.
- Consider using reminders to check on the status of filings and update deadlines if necessary.
- Protect firm data. Both the IRS and the American Institute of Certified Public Accountants have issued guidance indicating that a practitioner has a duty to keep client data secure. In times of crisis, data theft is likely to increase. Further, with more communications being electronic and not face-to-face, the likelihood of a data breach increases.
- Communicate frequently with clients. This should include updating them about the status of filings or cases. Also, talk to clients about changes in the law and business activities they are engaging in to ensure they are receiving the correct services and support.

- Document! Practitioners should document communications with clients and any significant actions taken on behalf of a client.
- Pay special attention to conflicts of interest issues. Conflicts are a primary source of malpractice and ethical claims.
- Watch out for overly aggressive tax positions. When times are tough, there is a temptation to take more aggressive tax positions.
- Make sure you can properly address the needs of new clients.
- Document all tax losses. No one plans to lose money, but when a loss occurs, make sure it can be claimed and supported. The new Net Operating Loss Carryback Rules create opportunities, but know that many of those carrybacks will be audited.

Finally, the COVID-19 pandemic crosses not only national borders but also practice areas. It is unlikely that any one person is an expert on tax issues, insurance coverage matters, loan and borrowing questions and the myriad of other issues and concerns raised by the pandemic. Practitioners need to communicate, pool resources and ideas, and watch for the many "traps for the unwary."

The IRS is at the Center of COVID-19 Relief

The IRS has been at the center of COVID-19 relief legislation, and the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security (CARES Act) both contain several tax-relief provisions for businesses and individuals. As a result of these laws, the IRS is tasked with issuing new guidance, processing individual stimulus payments and processing refund claims.

The majority of the guidance issued by the IRS for COVID-19-related tax law changes has been in the form of press releases on its Newsroom Page and Frequently Asked Questions (FAQs). Press releases and FAQs not published in the Internal Revenue Bulletin do not constitute authority for the purposes of the accuracy related penalty under Internal Revenue Code (IRC) § 6662 or the preparer penalty under IRC § 6694. What constitutes authority is specifically addressed in Treasury Regulation § 1.6662-4(d)(3)(iii).

While it seems unlikely the IRS would argue that a taxpayer cannot rely on the IRS's own FAQs and other informal guidance, this possibility has raised anxiety among some practitioners. IRS Circular 230 imposes a duty on practitioners to inform clients of law or guidance changes. Because FAQs and other informal guidance can change at any time, practitioners must be aware of any changes that may arise in this guidance. If practitioners discover a change, there is a duty to inform the client and correct the filing.

Possible Changes to the IRS

Many clients and practitioners have raised concerns about the IRS's ability to juggle COVID-19-related matters with its regular duties. Over the last decade, the IRS's funding has been cut by 25 percent and its staff has been reduced by a third. As result, from 2010 to 2017, the number of individual audits decreased by 42 percent. The funding cuts forced the IRS to close or consolidate tax-processing centers. The IRS's five year plan, started in 2019, closed the Covington, Kentucky, facility in 2019 and is scheduled to close the Fresno, California, facility in 2021 followed by the Austin, Texas, facility in 2024. The virus has, however, interrupted ongoing plans to close the Fresno facility, including slowing the progress of moving jobs and issuing buyouts and early retirements for employees.

Changes, however, may be forthcoming. For the first time in a decade, President Trump has proposed significantly increasing the IRS's funding for fiscal year 2020, partly because of the Taxpayer's First Act. The proposed increase in funding also includes $362 million for enforcement purposes.

In addition, the CARES Act provided the IRS with $500 million to implement the stimulus payments through fiscal year 2021. This included an additional $37.2 million in enforcement funding. The House Appropriations subcommittee has also indicated they would be tracking the budget to determine whether additional funding would be necessary for virus-related responsibilities. IRS Commissioner Charles Rettig has been consistently vocal about the need for additional funding in order to improve the IRS.

Additional funding will allow the IRS to increase staff and, in turn, the number of audits as well as aid the IRS in reorganizing and launching new initiatives under the Taxpayer's First Act.

As a result of COVID-19, the IRS has engaged in what could be called a temporary restructuring. The IRS is examining and realigning resources to meet its COVID-19 duties and to determine how to best utilize its staff. In order to meet its needs, the IRS is considering reassignments. The Chief of the Criminal Investigation Division (CID) recently noted that agents from CID can expect to be reassigned to investigate fraud associated with stimulus payments and small business loans (*i.e.*, Payroll Protection Program Loans). These changes will create new concerns for practitioners.

The IRS has also began to call back employees and put together a plan to reopen. However, the IRS still faces several challenges to reopening. First and foremost is personal protective equipment for its employees. In an email released to the media, the IRS asked its returning employees to provide their own face masks. Reopening may also require employees to have their temperature taken and to adjust working spaces to accommodate CDC guidelines. Due to a lack of hiring, the IRS's workforce is also on the older side. As such, there are increased concerns about the health of those workers.

It is still unclear what functions IRS employees will be assigned to perform. What is clear is that it will take the IRS significant time to return to normal and handle the backlog that has amassed over the last two months.

What Will the IRS Look Like Post COVID-19?

A post-COVID-19 IRS will certainly be different. The extended hiatus from processing returns coupled with law changes prompted by the pandemic has created a significant backlog for the IRS. Some predict it will take the several months for the IRS to dig itself out of the backlog and return to normal.

Any increased funding for the IRS will mean additional hiring and increased audits. It is expected that a significant number of these audits will be focused on low-hanging fruit such as mismatches between self-reported income and the information forms reporting income (Form W-2 and Form 1099). Audit topics will also be expanded to include COVID-19-related provisions and any fraud associated with those provisions.

However, the form of audits will change. We expect to see more audits conducted by mail or office/correspondence audits. In its 2020 budget, the IRS set a goal of 162,000 office/correspondence audits compared to in-person audits which were estimated at around 38,000.

A post-COVID-19 IRS will likely also be more tech savvy. We have already seen a sample of the enhanced technology the IRS will begin to utilize with the stimulus payment tracking tool, "Get My Payment." We have also seen the IRS increase its utilization of its website to transmit information and to use email as a more common means of communicating with practitioners. A significant portion of IRS funding increases are earmarked to be used to upgrade antiquated technological infrastructure.

If you have any questions about how changes within the IRS will impact your business or your clients, please contact your Reinhart attorney.