How Will Practice Before the IRS Change?

and other practitioner concerns raised by COVID-19

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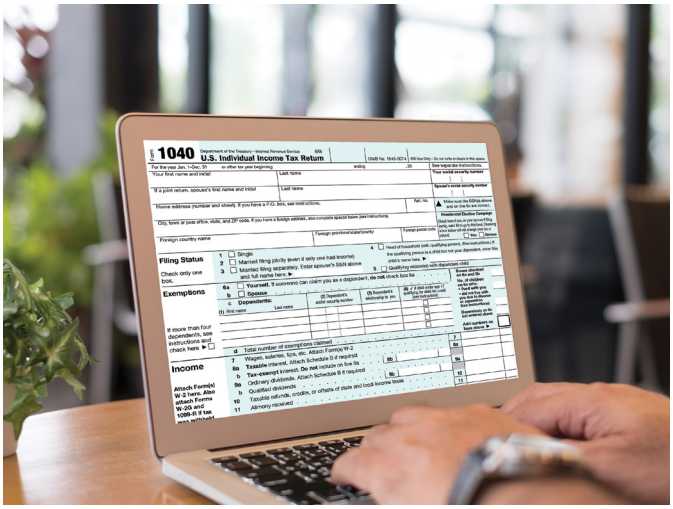
Practitioners and taxpayers alike are wondering how COVID-19 will change tax practice before the Internal Revenue Service (IRS). As the IRS has started to reopen with some additional funding, practitioners and clients question how the agency will handle the backlog created by the pandemic and what the IRS will look like post-pandemic. Practitioners should prepare for delays, stay up to date on changes and keep in mind their ethical duties.

The IRS began reopening summer 2020

In March the IRS, in response to the COVID-19 pandemic, shut down all Taxpayer Assistance centers, IRS call centers and return-processing centers. During this shutdown, the IRS focused only on "mission-critical" essential functions.

In late April, the IRS began the first phase of reopening by asking for volunteers to return to work with incentive pay. That incentive pay ended on June 6, as the IRS began its reopening plan. The IRS reopened facilities in Kentucky, Texas and Utah on June 1, followed by Georgia, Tennessee, Michigan and Missouri on June 15. The IRS also began reopening operations in Ohio, Indiana, California and Oregon on June 29. All remaining facilities opened by July 13 for workers whose jobs could not be performed remotely. The IRS's initial goal was to get facilities — including processing centers, notice-printing facilities and call center operations — online.

As of June, the Taxpayer Assistance centers were still closed, but the IRS had opened extremely limited phone assistance. 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." The People First Initiative, which was launched in April, continued to provide relief to taxpayers until July 15. The changes included relief such as postponing payments, limiting enforcement actions and extending deadlines.

As IRS employees returned, it was not entirely clear what functions those employees would be assigned to perform. Things are still far from clear. What is clear, however, is that the agency will still need significant time to return to normal and handle the backlog of work that has amassed throughout the pandemic. The IRS estimated that the Kentucky, Texas and Utah facilities alone had nearly 5 million unopened tax returns as of mid-May and some 5 million unopened pieces of mail, ranging from general correspondence to tax payments. IRS Commissioner Charles Rettig testified before the U.S. Senate Committee on Finance on June 30 that the total backlog stood at about 12.3 million unopened pieces of mail. The commissioner indicated that return processing, refunds and customer service have been ranked as the top priorities to address the backlog.

The ability to process the backlog was and may continue to be slowed by the requirements put in place to prevent the spread of COVID-19. The IRS's initial requirements included prior approval for many of the employees to enter the office, for employees to have their temperature taken upon entering, and for adjustments to working spaces to accommodate CDC social distancing guidelines. In addition, the age of IRS employees is on the older side due to a lack of hiring, and as such, there are increased concerns about the health of those workers. In the event a worker contracts COVID-19, IRS protocols require that the affected areas be closed and thoroughly cleaned before operations can resume.

The IRS's new COVID-19 duties and guidance

In addition to handling the massive backlog, the IRS also has new duties. The agency was at the center of COVID-19 relief legislation, such as the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security (CARES Act). Both laws contain several tax-relief provisions for businesses and individuals. As a result of these laws, the IRS was tasked with issuing new guidance, processing individual stimulus payments and processing refund claims. And as of the end of June, these duties were far from over. In his June 30 testimony, Commissioner Rettig indicated the IRS is still working to resolve issues and provide guidance surrounding the COVID-19 legislation.

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 website's Newsroom and Frequently Asked Questions (FAQs) pages. 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 agency'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.

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. The IRS Criminal Investigations Division has already reported an increase in fraudulent activity as a result of some of the CARES Act provisions.

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

- 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 all client communications and any significant actions taken on behalf of a client.

- Pay special attention to conflict-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.
- The Central Authorization File offices are reopening, but practitioners may experience delays in processing Form 2848 and Form 8821.
- 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 may be audited.

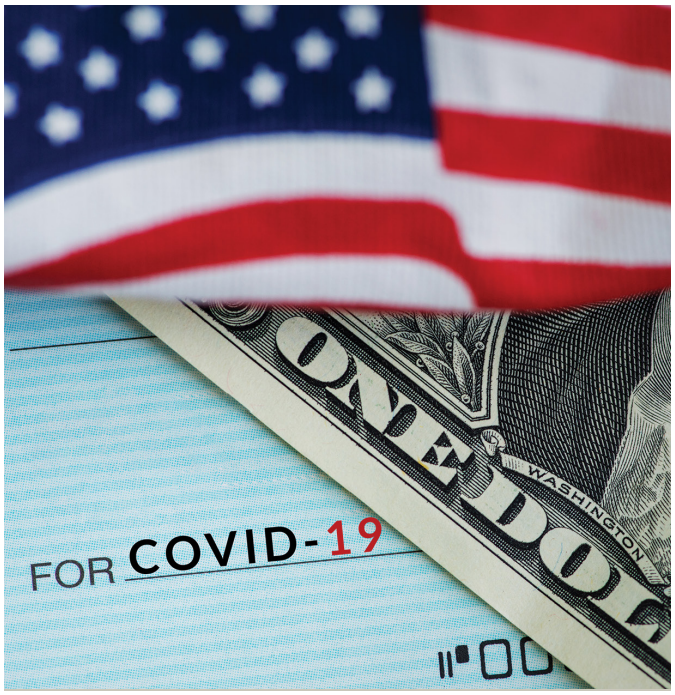
Finally, the COVID-19 pandemic crosses not only national borders but also practice areas. It is unlikely that any one person is an expert on tax issues, insurance coverage matters, loan and borrowing questions, and the myriad of other issues and concerns raised by the pandemic. Practitioners need to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

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 agency's funding has been cut by 25%, and its staff has been reduced by a third. As a result, from 2010 to 2017 the number of individual audits decreased by 42%. 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 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, the president has proposed significantly increasing the IRS's funding, partly because of the Taxpayers First Act. The proposed increase in funding for fiscal year 2020 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 it would be tracking the budget to determine whether additional funding would be necessary for virus-related responsibilities. Commissioner



Charles Rettig has been consistently vocal about the need for additional funding in order to improve the IRS. Moreover, rumors surrounding the next pandemic response bill indicate that the IRS will receive additional funding if a second wave of economic impact payments are sent out. The Senate Committee on Finance, during its June 30 hearing, continually expressed its desire to help the IRS with resources and funding.

Additional funding will allow the IRS to increase staff and, in turn, the number of audits. It will also aid the IRS in reorganizing and launching new initiatives under the Taxpayers First Act, which was signed into law in July 2019. This law seeks to modernize the IRS and requires the agency to create a comprehensive customer service plan and to reorganize to improve efficiency, enhance cybersecurity and better meet taxpayer needs. The IRS was to submit its plans for reorganization and improved customer service during fiscal year 2020. However, the virus seems to have temporarily derailed this plan. While it is due to the Senate Committee on Finance on Sept. 30, Commissioner Rettig indicated that the Restructuring Report will not be completed until November or December of 2020. Members of the committee have urged the committee to require briefings on the progress of this report.

As a result of COVID-19, the IRS has engaged in what could be called a temporary restructuring. The agency 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

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fraud associated with stimulus payments and small business loans (such as Paycheck Protection Program loans). These changes will create new concerns for practitioners.

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 have created a significant backlog for the IRS. Some predict it will take several months for the agency to recover from 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).

The IRS has also publicly indicated that its examination function is gearing up to audit hundreds of high-income individuals. These high-income audits were launched in a phased approach between July 15 and Sept. 30 and will be worked through the IRS Large Business and International Division (LB&I). The audits will include not only high-income individuals but also related entities. These audits were triggered by the Treasury Inspector General's report (No. 2020-10-015) released on May 29, which found that during tax years 2014, 2015 and 2016, nearly 900,000 high-earning individuals did not file taxes and went without audit, owing the government some $46 billion. The Senate Committee on Finance has called for decisive action to end this practice. The Commissioner noted that the IRS plans to increase scrutiny on these taxpayers through its new Fraud Enforcement Office. This office was created in early 2020 and is headed by a former IRS criminal investigator.

The IRS Tax Exempt and Government Entities Division also announced increased audits of private foundations, which are linked to global high-wealth enterprises. Audit topics will also be expanded to include COVID-19-related provisions and any fraud associated with those provisions.

Finally, as the IRS Commissioner announced during his June 30 testimony to the Senate Committee on Finance, after July a new round of audits focusing on conservation easements would begin. This comes after several wins for the IRS before the U.S. Tax Court and new legislation proposed by U.S. Sen. Steve Daines, R-Mont., to end the alleged abuse of conservation easements.

The form of tax audits will also likely 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, while in-person audits were estimated at around 38,000.

A post-COVID-19 IRS will likely also be more tech savvy. The pandemic forced the IRS to move employees to telework where possible. As part of this, IRS employees were 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 has also increased its use of data analytics and information sharing between departments. In addition, a significant portion of IRS funding increases are earmarked to upgrade the agency's antiquated technological infrastructure. 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 utilization of its website to transmit information and to use email as a more common means of communicating with practitioners. During the June 30 hearing, Commissioner Rettig testified at length about the technological improvements anticipated for the IRS, including repurposing existing tools, increasing teleworking functions and considering options for fax filings. He stated that the future of the IRS is technology.

Summary

The COVID-19 pandemic has resulted in changes to tax laws, the IRS and the way practitioners will practice. As 2020 wraps up, practitioners should continue to stay up to date on COVID-19-related changes — and be prepared for an evolving IRS.

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