National Society of Tax Professionals

Presents

Representing Your Client
Before the Examination Division of the Internal Revenue Service

Developed, Written and Presented by:

Isaac R. McRae, MST, EA, NTPI Fellow
A special thank you to my colleagues, Paul and Noel for assisting me in the review, editing and formatting of my first tax representation course document.

Seminar materials and seminar presentations are intended to stimulate thought and discussion and to provide attendees with useful ideas and guidance in the areas of federal tax representation and administration. These materials as well as the comments of the instructor do not constitute and should not be treated as tax advice regarding the use of any particular tax representation procedure, tax planning technique or device or suggestion or any of the tax consequences associated with them.

Although the author has made every effort to ensure the accuracy of the materials and the seminar presentation, neither the author, the presenter nor the National Society of Tax Professionals assumes any responsibility for any individual’s reliance on the written or oral information presented during the presentation. Each attendee should verify independently all statements made in the materials and during the seminar presentation before applying them to a particular fact pattern and should determine independently the tax and other consequences of using any particular device, technique or suggestion before recommending the same to a client or implementing the same on a client’s case or on his or her own behalf.

Copyright © Isaac R. McRae, EA 2016. All Rights Reserved.

These materials may not be reproduced without the express written permission of Isaac R. McRae, EA
# Table of Contents

I. **Tax Representation**
   A. History of Taxpayer Representation
   B. Definition of a Taxpayer Representative
   C. Description, Qualifications and Types of Taxpayer Representative

II. **Taxpayer Audit**
   A. Definition of Taxpayer Audit
   B. Audit Selection Criteria
   C. Types of Audits
   D. Types of Auditors

III. **Auditor’s Process**
    A. Notice of Examination
    B. Information Document Request (IDR)
    C. Location of Audit
    D. Auditor’s Resources

IV. **Representative’s Process**
    A. Client Interview
    B. Client Engagement Letter
    C. Client Documents
    D. Representative’s Resources

V. **Examination of the Return**
   A. Auditor’s Review of Client’s Records
   B. Lack of Client Records
   C. Disagreement with Auditor
   D. Criminal Investigation
   E. Auditor’s Report
   F. Appeals Process (30 day letter)
   G. Audit Reconsideration
   H. Tax Court (90 day Letter)
I. Tax Representation

A. History of Taxpayer Representation

1. The history of the Enrolled Agent profession dates back to 1884. The position was created as a response to questionable and fraudulent claims for losses during the Civil War.

2. During the time these claims were being filed it was determined more claims for horses were made then there were actual horses lost in the War. As a result of these claims, Congress passed legislation to regulate those persons representing citizens before the Treasury Department.

3. The legislation Congress authorized is known as the Enabling Act of 1884, or General Deficiency Appropriation Bill (H.R. 2735), also known as the “Horse Act of 1884,” which was signed into law by President Chester A. Arthur on July 7, 1884.

4. This act gave the Secretary of the Treasury the authority to regulate who can represent these individuals therefore making the Enrolled Agent the first to be appointed as representatives.

5. After the Civil War, many citizens faced difficulties in settling claims with the government for property confiscated for use in the war effort. As a result, Congress endowed enrolled agents with the power of advocacy to prepare claims against the government. From 1884 through the early 20th century, this statute remained largely unchanged.

6. When the Revenue Act of 1913 was passed, signed into law by President Woodrow Wilson on October 3, 1913, the scope of the enrolled agent was expanded to include claims for monetary relief for citizens whose taxes had become inequitable. As income, estate, gift and other sources of tax collections became more complex, the role of the enrolled agent increased to include the preparation of the many tax forms that were required.
7. As a result of this complexity, audits became more prevalent and the enrolled agent role evolved into taxpayer representation, promulgating a series of statutes which were combined into a single Treasury Department Circular in February 19, 1921, known as Circular 230, to address “the laws and regulations governing the recognition of agents, attorneys, and other persons representing claimants before the Treasury Department and offices thereof.” Unlike enrolled agents of today, the first enrolled agents were appointed with little or no qualifications other than a minimal background in bookkeeping.

- In 1994, the initials E.A. were finally designated by the Treasury Department, as that of Enrolled Agent.

- The PATH Act enacted 12/18/15 included legislation to further clarify the Enrolled Agents designation. Section 410. Clarification of enrolled agent credentials. The provision permits enrolled agents approved by the IRS to use the designation “enrolled agent,” “EA,” or “E.A.”

8. The provision is effective on the date of enactment. Because the standards for practice as an Attorney were so lax, they and CPA's, as they became evolved, were required to take and pass the enrolled agents exam, in order to practice before the IRS until 1936. Since 1965, with the strict State guidelines and regulations for members of the Bar & CPA's, the Treasury department automatically recognizes members of the Bar and legitimate CPA's.

a. In 1763, Delaware created the first bar exam with other American colonies soon following suit.

b. The CPA designation was first established in law in New York State on April 17, 1896.

B. Definition of a Taxpayer Representative

2. A taxpayer representative must be an individual authorized to practice before the Internal Revenue Service and/or state taxing authority. A taxpayer representative must have specific credentials allowing them to practice.
3. All U.S. taxpayers who are subjects of income tax examinations by the Internal Revenue Service or state tax agencies are allowed to have an authorized taxpayer representative. In order to represent a taxpayer before the Examination Division of the IRS, a Form 2848 must be on file with the Internal Revenue Service.

4. Taxpayer representatives may be enrolled or unenrolled. The type of credential a taxpayer representative maintains determines the level of representation before the IRS and state tax agencies.

5. An enrolled taxpayer representative is an individual who stands in the shoes of a taxpayer during an Internal Revenue Service or state income tax audit.

6. An enrolled taxpayer representative may represent taxpayers at all levels of the Internal Revenue Service.

   **TAX PROFESSIONAL NOTE:** The unenrolled taxpayer representative has *limited* representation rights.

   "Privilege and the Enrolled Agent". The IRS Restructuring and Reform Act of 1998 allows federally authorized practitioners (those bound by Circular 230) a limited client privilege.

7. This privilege allows confidentiality between the taxpayer and the Enrolled Agent under certain conditions. The privilege applies to situations where the taxpayer is being represented in cases involving audits and collection matters. It is *not* applicable to the preparation and filing of a tax return.

8. The privilege does not apply to state tax matters, although a number of states have an accountant-client privilege.

   **TAX PROFESSIONAL NOTE:** The Commonwealth of Virginia does *not* have an accountant-client privilege.”

   It is important to note there are differences between someone who is a Third Party Appointee and one who holds a Power of Attorney.

   The following table summarizes a few of the differences between appointees and representatives:
## Differences between Appointees and Representatives

<table>
<thead>
<tr>
<th>A Third Party Appointee (Form 8821):</th>
<th>A Power of Attorney (Form 2848):</th>
</tr>
</thead>
<tbody>
<tr>
<td>May be an individual or a business entity</td>
<td>Must be an individual authorized to represent the taxpayer before the IRS. See items a - r in part II of Form 2848.</td>
</tr>
<tr>
<td>May inspect tax information</td>
<td>May inspect tax information</td>
</tr>
<tr>
<td>May receive written information</td>
<td>May receive tax information</td>
</tr>
<tr>
<td>May <strong>not</strong> negotiate or advocate on behalf of the taxpayer</td>
<td>May negotiate or advocate on behalf of the taxpayer</td>
</tr>
<tr>
<td>May <strong>not</strong> execute waivers, consents, etc., on behalf of the taxpayer</td>
<td>May execute waivers, consents, etc., on behalf of the taxpayer</td>
</tr>
<tr>
<td>May <strong>not</strong> redelegate the authority to receive the taxpayer’s return or return information to another individual or entity</td>
<td>May redelegate his/her authority to represent the taxpayer, but only if specifically authorized by the taxpayer to do so on Line 5 of Form 2848</td>
</tr>
</tbody>
</table>
C. Descriptions, Qualifications and Types of Taxpayer Representatives

1. The most qualified taxpayer representatives are Enrolled Agents, Attorney’s and CPA’S. These taxpayer representatives have unlimited representation rights. The description, qualifications and limitations of all taxpayer representatives are listed below as defined by Treasury Department Circular No. 230 (Rev. 6-2014), Regulations Governing Practice before the Internal Revenue Service.

2. § 10.3 of Circular 230 designates who may practice before the IRS as the following individuals:

   (a) **Attorneys.** Any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the attorney is currently qualified as an attorney and is authorized to represent the party or parties. Notwithstanding the preceding sentence, attorneys who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under §10.37, but their rendering of this advice is practice before the Internal Revenue Service.

   (b) **Certified public accountants.** Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the certified public accountant is currently qualified as a certified public accountant and is authorized to represent the party or parties. Notwithstanding the preceding sentence, certified public accountants who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under §10.37, but their rendering of this advice is practice before the Internal Revenue Service.

   (c) **Enrolled agents.** Any individual enrolled as an agent pursuant to this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service.
(d) Enrolled actuaries.

(1) Any individual who is enrolled as an actuary by the Joint Board for the Enrollment of Actuaries pursuant to 29 U.S.C. 1242 who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration stating that he or she is currently qualified as an enrolled actuary and is authorized to represent the party or parties on whose behalf he or she acts.

(2) Practice as an enrolled actuary is limited to representation with respect to issues involving the following statutory provisions in title 26 of the United States Code:

- §401 (relating to qualification of employee plans),
- §403(a) (relating to whether an annuity plan meets the requirements of section 404(a) (2)),
- §404 (relating to deductibility of employer contributions),
- §405 (relating to qualification of bond purchase plans),
- §412 (relating to funding requirements for certain employee plans),
- §413 (relating to application of qualification requirements to collectively bargained plans and to plans maintained by more than one employer),
- §414 (relating to definitions and special rules with respect to the employee plan area),
- §419 (relating to treatment of funded welfare benefits),
- §419A (relating to qualified asset accounts),
- §420 (relating to transfers of excess pension assets to retiree health accounts),
- §4971 (relating to excise taxes payable as a result of an accumulated funding deficiency under section 412),
- §4972 (relating to tax on nondeductible contributions to qualified employer plans),
- §4976 (relating to taxes with respect to funded welfare benefit plans),
- §4980 (relating to tax on reversion of qualified plan assets to employer),
• §6057 (relating to annual registration of plans),
• §6058 (relating to information required in connection with certain plans of deferred compensation),
• §6059 (relating to periodic report of actuary),
• §6652(e) (relating to the failure to file annual registration and other notifications by pension plan),
• §6652(f) (relating to the failure to file information required in connection with certain plans of deferred compensation),
• §6692 (relating to the failure to file actuarial report),
• §7805(b) (relating to the extent to which an Internal Revenue Service ruling or determination letter coming under the statutory provisions listed here will be applied without retroactive effect); and 29 U.S.C. §1083 (relating to the waiver of funding for nonqualified plans).

(3) An individual who practices before the Internal Revenue Service pursuant to paragraph (d) (1) of this section is subject to the provisions of this part in the same manner as attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, and registered tax return preparers.

(e) Enrolled retirement plan agents.

(1) Any individual enrolled as a retirement plan agent pursuant to this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service.

(2) Practice as an enrolled retirement plan agent is limited to representation with respect to issues involving the following programs:

• Employee Plans Determination Letter program;
• Employee Plans Compliance Resolution System;
• Employee Plans Master and Prototype and Volume Submitter program.

In addition, enrolled retirement plan agents are generally permitted to represent taxpayers with respect to IRS forms under the 5300 and 5500 series which are filed by retirement plans and plan sponsors, but not with respect to actuarial forms or schedules.
(3) An individual who practices before the Internal Revenue Service pursuant to paragraph (e) (1) of this section is subject to the provisions of this part in the same manner as attorneys, certified public accountants, enrolled agents, enrolled actuaries, and registered tax return preparers.

(f) Registered tax return preparers.

(1) Any individual who is designated as a registered tax return preparer pursuant to §10.4(c) of this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service.

(2) Practice as a registered tax return preparer is limited to preparing and signing tax returns and claims for refund, and other documents for submission to the Internal Revenue Service. A registered tax return preparer may prepare all or substantially all of a tax return or claim for refund of tax. The Internal Revenue Service will prescribe by forms, instructions, or other appropriate guidance the tax returns and claims for refund that a registered tax return preparer may prepare and sign.

(3) A registered tax return preparer may represent taxpayers before revenue agents, customer service representatives, or similar officers and employees of the Internal Revenue Service (including the Taxpayer Advocate Service) during an examination if the registered tax return preparer signed the tax return or claim for refund for the taxable year or period under examination.

Unless otherwise prescribed by regulation or notice, this right does not permit such individual to represent the taxpayer, regardless of the circumstances requiring representation, before appeals officers, revenue officers, Counsel or similar officers or employees of the Internal Revenue Service or the Treasury Department.

A registered tax return preparer’s authorization to practice under this part also does not include the authority to provide tax advice to a client or another person except as necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the Internal Revenue Service.
(4) An individual who practices before the Internal Revenue Service pursuant to paragraph (f) (1) of this section is subject to the provisions of this part in the same manner as attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, and enrolled actuaries.

(g) Others. Any individual qualifying under paragraph §10.5(e) or §10.7 is eligible to practice before the Internal Revenue Service to the extent provided in those sections.

(h) Government officers and employees, and others. An individual, who is an officer or employee of the executive, legislative, or judicial branch of the United States Government; an officer or employee of the District of Columbia; a Member of Congress; or a Resident Commissioner may not practice before the Internal Revenue Service if such practice violates 18 U.S.C. §§ 203 or 205.

(i) State officers and employees. No officer or employee of any State, or subdivision of any State, whose duties require him or her to pass upon, investigate, or deal with tax matters for such State or subdivision, may practice before the Internal Revenue Service, if such employment may disclose facts or information applicable to Federal tax matters.

(j) Effective/applicability date. Paragraphs (a), (b), and (g) of this section are applicable beginning June 12, 2014. Paragraphs (c) through (f), (h), and (i) of this section are applicable beginning August 2, 2011.

TAX PROFESSIONAL AWARENESS: Circular 230 contains no reference to individuals who received a record of completion for completing the Annual Filing Season Program. The Annual Filing Season Program was created after the last revision of Circular 230. Effective January 1, 2016, individuals who completed this program have limited representation rights. Their rights are limited to their tax preparation clients and only for the years in which they received a record of completion.

Additionally, the individuals listed under Circular 230, §10.7 (c) have limited practice and consist of the following:
(k) Limited practice —

(1) *In general.* Subject to the limitations in paragraph (c)(2) of this section, an individual who is not a practitioner may represent a taxpayer before the Internal Revenue Service in the circumstances described in this paragraph (c)(1), even if the taxpayer is not present, provided the individual presents satisfactory identification and proof of his or her authority to represent the taxpayer. The circumstances described in this paragraph (c)(1) are as follows:

(i) **An individual** may represent a member of his or her immediate family.

(ii) A **regular full-time employee** of an individual employer may represent the employer.

(iii) A **general partner or a regular full-time employee** of a partnership may represent the partnership.

(iv) A **bona fide officer or a regular full-time employee** of a corporation (including a parent, subsidiary, or other affiliated corporation), association, or organized group may represent the corporation, association, or organized group.

(v) A **regular full-time employee of a trust, receivership, guardianship, or estate** may represent the trust, receivership, guardianship, or estate.

(vi) **An officer or a regular employee of a governmental unit, agency, or authority** may represent the governmental unit, agency, or authority in the course of his or her official duties.

(vii) **An individual may represent any individual or entity, who is outside the United States,** before personnel of the Internal Revenue Service when such representation takes place outside the United States.
II. TAXPAYER AUDIT

A. Definition of Taxpayer Audit

1. An income tax audit is defined as “the examination of a business or individual tax return by the Internal Revenue Service (IRS) or state tax authority.”

2. The purpose of an examination is to determine if a taxpayer has correctly filed tax reports according to the tax laws. Being selected for an examination does not imply the taxpayer is violating the law but merely ascertaining the correctness of the reports filed and the tax computed.

3. Being audited doesn’t automatically result in a taxpayer owing additional taxes to the Internal Revenue Service.

4. Completion of an audit may result in additional tax due and possible interest and penalty or no change in tax or a refund to the taxpayer.

The authority for IRS to review, inspect or examine is granted under IRC § 7602 Examination of books and witnesses

(a) Authority to summon, etc. For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized.

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

(b) Purpose may include inquiry into offense

The purposes for which the Secretary may take any action described in paragraph (1), (2), or (3) of subsection (a) include the purpose of inquiring into any offense connected with the administration or enforcement of the internal revenue laws.

c) Notice of contact of third parties

(1) General notice
An officer or employee of the Internal Revenue Service may not contact any person other than the taxpayer with respect to the determination or collection of the tax liability of such taxpayer without providing reasonable notice in advance to the taxpayer that contacts with persons other than the taxpayer may be made.

(2) Notice of specific contacts
The Secretary shall periodically provide to a taxpayer a record of persons contacted during such period by the Secretary with respect to the determination or collection of the tax liability of such taxpayer. Such record shall also be provided upon request of the taxpayer.

(3) Exceptions
This subsection shall not apply—

(A) to any contact which the taxpayer has authorized;

(B) if the Secretary determines for good cause shown that such notice would jeopardize collection of any tax or such notice may involve reprisal against any person; or

(C) with respect to any pending criminal investigation.

d) No administrative summons when there is Justice Department referral

(1) Limitation of authority
No summons may be issued under this title, and the Secretary may not begin any action under section 7604 to enforce any summons, with respect to any person if a Justice Department referral is in effect with respect to such person.
(2) Justice Department referral in effect

For purposes of this subsection—

(A) In general

A Justice Department referral is in effect with respect to any person if—

(i) the Secretary has recommended to the Attorney General a grand jury investigation of, or the criminal prosecution of, such person for any offense connected with the administration or enforcement of the internal revenue laws, or

(ii) any request is made under section 6103(h)(3)(B) for the disclosure of any return or return information (within the meaning of section 6103(b)) relating to such person.

(B) Termination

A Justice Department referral shall cease to be in effect with respect to a person when—

(i) the Attorney General notifies the Secretary, in writing, that—

(I) he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws,

(II) he will not authorize a grand jury investigation of such person with respect to such an offense, or

(III) he will discontinue such a grand jury investigation

(ii) a final disposition has been made of any criminal proceeding pertaining to the enforcement of the internal revenue laws which was instituted by the Attorney General against such person, or

(iii) the Attorney General notifies the Secretary, in writing, that he will not prosecute such person for any offense connected with the administration or enforcement of the internal revenue laws relating to the request described in subparagraph (A)(ii).
(3) Taxable years, etc., treated separately. For purposes of this subsection, each taxable period (or, if there is no taxable period, each taxable event) and each tax imposed by a separate chapter of this title shall be treated separately.

(e) Limitation on examination on unreported income
The Secretary shall not use financial status or economic reality examination techniques to determine the existence of unreported income of any taxpayer unless the Secretary has a reasonable indication that there is a likelihood of such unreported income.

B. Audit Selection Criteria

1. The Internal Revenue Service has developed several methods to select returns for examination. Computer scoring, information document matching, “John Doe” summonses, related examinations and certain other methods that foster compliance.

2. Computer Scoring – This is the most common method for audit selection. IRS develops certain criteria which generates a “scoring system” for returns. Upon the selection of a tax return IRS personnel will review the returns and select some for audit. The computer scoring process is identified as the “Discriminant Function System” (DIF) and the “Unreported Income Function DIF” (UIDIF).

3. Information Document Matching – Payers of certain types of income are required to report to IRS income paid or distributed. W-2 Wages, 1099-Misc, 1099-Int, and 1099-Div are a few examples. IRS matches this information with the income reported on the tax return and when there is a discrepancy selects the return for examination.

4. “John Doe” Summonses – IRS may obtain information from summonses issued to banks, credit card companies or business looking for participants of abusive tax avoidance transactions.

5. Related Examinations — Returns may be selected for audit when they involve issues or transactions with other taxpayers, such as business partners or investors, whose returns were selected for examination.
6. **Other** — Area offices may identify returns for examination in connection with local compliance projects. These projects require higher level management approval and deal with areas such as local compliance initiatives, return preparers or specific market segments.

7. Unless fraud has been detected, the IRS does not have an unlimited time to select a return for examination. In general the IRS will initiate an audit within 18 months from the due date of a return.

8. The statute of limitations on how far back the IRS can audit is called the “Assessment Statute Expiration Date” or (ASED). In most cases the IRS will not go back more than 3 years. The statute of limitations starts on the original due date of the tax return. In some case the IRS can go back 6 years.

### C. Types of Audits

1. An IRS examination may be conducted by mail or an in person interview at the IRS office, taxpayer’s office or representative’s office. The type of audit generally determines the location where the audit will be conducted.

2. **Correspondence Audit** — The correspondence audit is generally the least threatening IRS tax audit for the tax payer. It comes in the form of a letter called a CP 2000 “Notice of Underreported Income” or a Letter 566. Both letters are a product of the information document matching audit selection comparing information submitted by third parties with the information reported on taxpayer’s income tax return.

3. The CP 2000 notice generally reports income not reported on the filed tax return. It is important to note that CP 2000 notice is issued by the Automated Under Reporting Campus of the IRS and a human being has not reviewed the return.

   The Letter 566 generally request documentation for verifying specific information reported on the tax return. Upon receipt of the notice or letter, the taxpayer is required to respond within a “30 day” period.

4. **Office Audit** — The office audit requires the taxpayer and/or authorized representative to appear at a local or regional IRS office. The audit issues are generally more complex than those involved in a correspondence audit.
5. **Field Audit** – Field audits are generally conducted at a taxpayer’s home, place of business, accountant’s or representative’s office. A field audit is time consuming and the most complex type of audit.

**D. Types of Auditors**

1. **Tax examiners** generally perform correspondence audits. They usually deal with the simplest tax returns which are those filed by individual taxpayers who claim few deductions and those filed by small businesses. At the entry level, many tax examiners do clerical tasks, such as reviewing tax returns and entering them into a computer system for processing.

   Tax examiners also may contact individual taxpayers in order to resolve any outstanding problems with their returns. Much of a tax examiner’s job involves making sure that tax credits and deductions claimed by taxpayers are lawful. If a taxpayer owes additional taxes, tax examiners adjust the total amount by assessing fees, interest, and penalties and then notify the taxpayer of the total amount owed.

2. **Tax Compliance Officers** generally perform office examinations. They involve the same issues with correspondence audits, but will also include tax issues which were determined to be inappropriate, or beyond the experience level, of the Tax Examiner.

3. **Revenue agents** generally perform field audits which are the most complex and time consuming examinations conducted by IRS. They specialize in tax-related accounting for the U.S. Internal Revenue Service (IRS) and for equivalent agencies in state and local governments. Like tax examiners, they review returns for accuracy. However, revenue agents handle complicated tax returns of large businesses and corporations.

   Many experienced revenue agents specialize in a particular area. For example, they may focus exclusively on multinational businesses. Regardless of their specialty, revenue agents must keep up to date with changes in the lengthy and complex tax laws and regulation.
III) AUDITOR’S PROCESS

A. Notice of Examination

The office or field examination usually begins when you are notified that your return has been selected. Taxpayer will receive a Letter 3572 or Letter 2205 identifying the tax year(s), form number and the person to contact. The IRS will tell you:

a. What you need to do,
b. The issues to be reviewed,
c. What to bring to the examination,
d. What to expect at the examination,
e. Who may come to the examination and
f. What will happen if you do not show up.

TAX PROFESSIONAL NOTE: The Letter will also reference the Information Document Request (IDR).

TAX PROFESSIONAL AWARENESS: The IRS must follow the tax laws set forth by Congress in the Internal Revenue Code. The IRS also follows Treasury Regulations, other rules, and procedures that were written to administer the tax laws and court decisions.

B. Information Document Request

The examination notice is usually accompanied by Form 4564, Information Document Request (IDR). The IDR list all the items that the Auditor requests the taxpayer to bring to the audit examination.

"IRS Announces New IDR Enforcement Process" November 6, 2013 | Skadden, Arps, Slate, Meagher & Flom LLP | Armando Gomez, David Robison, Paul M. McLaughlin

On November 4, 2013, the Internal Revenue Service released an internal directive that completes a two-part process of reshaping the dynamics between taxpayers and IRS examiners during the information-gathering phase of an audit. The directive, issued by the Commissioner of the IRS’s Large Business and International Division (LB&I) to its employees (the Directive), describes a mandatory enforcement process designed to enhance the ability of the IRS to gather information from taxpayers under examination.
The Directive is part of a larger effort by the IRS in recent years to alter the traditional audit process. Together with an earlier directive on the requirements for issuing Information Document Requests (IDRs), the IRS has completely changed its approach to issuing and enforcing IDRs. Because the new enforcement process is mandatory and has no exceptions, the Directive places an even greater premium on understanding LB&I as an organization and the rules of engagement to which it adheres.

**Requirements for Issuing IDRs**

LB&I examiners and specialists use IDRs to obtain information and documents substantiating positions reflected on the tax return under examination. The new requirements for issuing IDRs announced earlier this year require that each IDR be transparent in its aim, be discussed with the taxpayer before it is finalized and, if possible, reflect an agreed-upon response date. The Directive reiterates these requirements and attaches a 13-point list of requirements for issuing IDRs.

Under these new requirements:

- All IDRs must identify and focus on a single issue. Each IDR must be written using clear and concise language, and must be customized to the taxpayer or industry.

- Before preparing an IDR, the examiner must explain to the taxpayer how the information requested is related to the issue under examination and why that information is necessary.

- After having this initial discussion with the taxpayer, the examiner may determine what information will ultimately be requested in the IDR.

- The examiner must then issue a draft of the IDR and discuss with the taxpayer both the contents of the draft and the timeframe for responding to the IDR.

- If agreement on a response date cannot be reached, the examiner will set a reasonable response date, which becomes a hard deadline for the taxpayer (the IDR Deadline).

- The IDR also must identify a date by which the examiner will have reviewed the IDR response and inform the taxpayer whether the information received satisfies the request.
The Directive provides that any IDR that does not meet the above criteria must be reissued to conform with it and include a new response date. The enforcement process set forth below does not apply until the above criteria have been met.

**Mandatory IDR Enforcement Process**

Effective January 2, 2014, if the information requested in an IDR is not received by the response date, the LB&I examiner or specialist is required to follow the enforcement process set forth in the Directive. This process is mandatory and has no exceptions. There are three stages in this enforcement process:

- **Delinquency Notice.** If the taxpayer misses the IDR Deadline, then the examiner must issue a delinquency notice within 10 calendar days of the missed IDR Deadline. The examiner must discuss this delinquency notice with the taxpayer and ensure that the taxpayer understands the steps that will follow if the taxpayer fails to comply by the response date to the delinquency notice, which generally will not be more than 15 calendar days unless the territory manager approves a longer extension.

- **Pre-Summons Letter.** If the taxpayer does not respond in full to the IDR by the date specified in the delinquency notice, then the territory manager will issue a pre-summons letter within 14 calendar days. The territory manager must discuss the pre-summons letter with the taxpayer, and the letter should be issued to an official at the taxpayer who is one management level above the official to whom the delinquency notice was issued. The pre-summons letter, which is prepared with assistance from IRS counsel, will advise the taxpayer that a summons will be issued if the taxpayer fails to comply by the response date to the pre-summons letter, which generally will not be more than 10 calendar days unless the director of field operations approves a longer extension.

- **Summons.** If the taxpayer does not respond in full to the IDR by the date specified in the pre-summons letter, then the examiner will work with IRS counsel to prepare and issue a summons to the taxpayer.
The IRS has wide latitude to obtain records from taxpayers as part of the examination process. And because taxpayers bear the burden of substantiating positions reported on their tax returns, absent a valid claim of privilege, taxpayers generally are required to comply with IRS requests. If a taxpayer fails to comply with a summons, then the government can commence a proceeding in a U.S. district court to enforce the summons.

If the government establishes a *prima facie* case for enforcement, then the court will enforce the summons *unless* the taxpayer can disprove the elements of the *prima facie* case or can demonstrate that enforcement of the summons would be an abuse of the judicial process. As a general matter, by far the bulk of successful defenses to summons enforcement are based on arguments that certain documents or information sought by the summons are protected from disclosure by reason of privilege or work product protection.

**Observations:**

The mandatory enforcement process established under the Directive is part of an overall effort by IRS leadership to make the examination process more efficient and transparent. For this effort to be effective, IRS examiners and taxpayers will need to effectively communicate and collaborate *before* IDRs are issued so that the IDRs are properly focused and provide adequate time for the taxpayer to respond in full. That is the only opportunity for the taxpayer to negotiate the scope of the IDR and the timeline for producing responsive information. Active engagement by the taxpayer and the taxpayer’s representatives at this stage stands to have a critical impact on the ease and success of the examination.
In contrast, once the IDR has been issued and the IDR Deadline has been set, it does not appear under the Directive that \textit{either} the examiner or the taxpayer have any real opportunity to adjust the scope or timeline for the IDR response. The Directive makes clear that only in rare instances will an IDR Deadline be changed after the IDR has been issued in final form. Therefore, once an IDR has been issued, the taxpayer’s \textit{only} recourse is to focus on execution because the Directive makes it incumbent upon the taxpayer to respond timely to the IDR in full to avoid a summons.

How the process works in practice will depend largely on how the IRS exercises its discretion in the first two required consultations with taxpayers on the potential subject of an IDR, and on the specific drafting of an IDR. If there are collaborative, substantive discussions between taxpayers and examiners at these stages, \textit{then} the process should yield productive IDRs and responses. There should be few disputes about whether a response satisfies an IDR. \textit{If}, on the other hand, there is no meaningful taxpayer input during the early stages, or if a taxpayer’s ultimate response to the IDR is not evaluated in light of those discussions, \textit{then} the new procedures could yield many more disputes, as disagreements over the appropriate scope of information gathering are escalated even to judicial proceedings. Representatives will be best equipped to keep the IDR process confined to requests and responses, \textit{not} extending to the mandated enforcement steps, \textit{if} they are able to forge relationships with the IRS examination teams.

\textbf{C. Location of Examination}

The examination can take place in the taxpayer’s home, place of business, an Internal Revenue office, or the office of the attorney, accountant, or enrolled agent. If the time, place, or method is not convenient, the examiner will try to work out something more suitable. However, the IRS makes the final determination of when, where, and how the examination will take place.

\textbf{D. Auditor’s Resources}

The auditor relies on a variety of information resources to help understand the type of challenges faced in auditing an individual or business taxpayer. Whether a office or field examination the auditor must determine if the taxpayer is in compliance.
1. **Internal Revenue Manuel (IRM)**

   According to CCH (formerly known as Commerce Clearing House, Inc.):

   a) The IRS Internal Revenue Manual is the official source of instructions to IRS personnel relating to the organization, administration and operation of the IRS.

   b) The IRM contains directions IRS employees need to carry out their responsibilities in administering IRS obligations, such as detailed procedures for processing and examining tax returns.

   c) Procedures set forth in the IRM are not mandatory and are not binding on the IRS. The provisions are not issued pursuant to a mandate or delegation of authority by Congress and do not have the effect of a rule of law. Nonetheless, IRM offers insights into IRS procedures, and many tax practitioners use the IRM for guidance.

   d) In the Internal Revenue Manual, the IRS states:

   The IRM is the primary, official source of "instructions to staff" that relate to the administration and operation of the IRS. It details the policies, delegations of authorities, procedures, instructions and guidelines for daily operations for all IRS organizations. The IRM ensures that employees have the approved policy and guidance they need to carry out their responsibilities in administering the tax laws or other agency obligations.

   **TAX PROFESSIONAL NOTE:** The Internal Revenue Manual itself is not the law. The general rule is that neither the taxpayer nor the IRS is bound by the Internal Revenue Manual. See, e.g., *United States v. Horne* and *First Federal Savings & Loan Ass'n v. Goldman*.

2. **The Market Segment Specialization Program (MSSP).**

   The MSSP audit guides, issued by the Treasury Department, derive from a list of "areas of focus," industries and types of businesses that the IRS has determined need highly specialized information and guidance in order to prepare tax returns fully and adequately.

   **TAX PROFESSIONAL EDUCATION FACT:** The IRS used this program to help develop Audit Technique Guides
3. **Audit Techniques Guides (ATGs)**

   a) Audit Techniques Guides (ATGs) help IRS examiners during audits by providing insight into issues and accounting methods unique to specific industries. While ATGs are designed to provide guidance for IRS employees, they’re also useful to small business owners and tax professionals who prepare returns.

   b) ATGs explain industry-specific examination techniques and include common, as well as, unique industry issues, business practices and terminology. Guidance is also provided on the examination of income, interview techniques and evaluation of evidence. So they may be helpful for business and tax planning purposes.

4. **Internal Revenue Code (IRC)**

    The *Internal Revenue Code* (IRC), formally the *Internal Revenue Code of 1986*, is the domestic portion of federal statutory tax law in the United States, published in various volumes of the *United States Statutes at Large*, and separately as *Title 26 of the United States Code* (USC). It is organized topically, into subtitles and sections, covering income tax (see *Income tax in the United States*), payroll taxes, estate taxes, gift taxes, and excise taxes; as well as procedure and administration. Its implementing agency is the *Internal Revenue Service*.


    a. *Treasury Regulations* are the tax regulations issued by the United States Internal Revenue Service (IRS), a bureau of the United States Department of the Treasury. These regulations are the Treasury Department’s official interpretations of the *Internal Revenue Code* and are one source of U.S. federal income tax law.

    b. Section 7805 of the *Internal Revenue Code* gives the United States Secretary of the Treasury the power to create the necessary rules and regulations for enforcing the Internal Revenue Code. These regulations, including but not limited to the “Income Tax Regulations,” are located in Title 26 of the *Code of Federal Regulations*, or “C.F.R.”
c. Each regulation is generally organized to correspond to the Internal Revenue Code section interpreted by that regulation. Citations to the Treasury Regulations may appear in different formats. For instance, the definition of gross income in the regulations may be cited to as “26 C.F.R. 1.61-1” or as “Treas. Reg. 1.61-1.” Both citations refer to the same regulation, which interprets Internal Revenue Code section 61, "Gross income defined."

6. Court Cases

The IRS will generally abide by court case decisions issued by the United States Supreme Court.

IV) Representative’s Process

A. Client Interview

1. The most important step for you as a representative is to interview your client. I place my client into two categories. First is an existing client and second a prospective client. An existing client is one in which I have prepared the return and therefore a relationship exist and I will represent at an audit.

2. The prospective client is one that has been referred or has contacted my office to represent them. These are clients I know nothing about and must ascertain whether I wish to represent them at an audit. During the initial interview I must determine whether they possess the type of characteristics I feel comfortable with and wish to do business with.

As a practitioner it is my decision to not represent clients I feel are unscrupulous, irresponsible or engage in illegal or immoral activities.

B. Client Engagement

1. Once the representative has decided to represent a taxpayer before IRS an IRS Form 2848, Power of Attorney and Declaration of Representative is required to be completed. For married taxpayers a separate Form 2848 is required for each taxpayer.

2. Form 2848 lists the taxpayers name and address, identifying ID, representative’s name and address and the tax type, tax form number and tax year. In completing the Form 2848 the representative should only list the tax type and year(s) under examination.

TAX PROFESSIONAL NOTE: The representative should not prepare a broad base Form 2848 with any tax years outside the scope of the examination.
3. In addition the representative should prepare a client engagement letter. The engagement letter is the contract between the representative and taxpayer(s) and is used to describe the services rendered, the fee for the services and the conditions for continuing and cancellation of service.

C. Client Documents

1. Following the engagement of the client and the receipt of the client’s initial retainer deposit (highly recommended) the representative should gather the books and records of the taxpayer as requested by IRS.

2. The representative must inspect and review the client’s documents as if they are the IRS auditor. After the review the representative must provide a list of any missing documents needed to fully represent the client and provide the client with a timeframe to deliver.

3. In some cases the taxpayer will not have all or most of the documents. When this occurs the representative will need to develop a strategy to effectively represent the client. In these cases an audit can be a salvage job. Advising the client of the potential outcome due to their lack of records is strongly recommended.

4. Once the review of the client’s documents has been completed the representative can contact the auditor to schedule the audit appointment.

D. Representative’s Resources

1. All of the resources listed under Auditor’s Resources can be used by the representative. It is highly recommended to utilize the Auditor’s resources to gain insight into the inner-workings of the IRS examination process.

2. The following representative’s resources are recommended to be used.
   - **IRS Publication 1**, Your Rights as a Taxpayer
   - **IRS Publication 556**, Examination of Returns, Appeals Rights, and Claims for Refunds
   - **IRS Publication 3498-A**, The Examination Process (Audits by Mail)
3. The representative has court cases at all levels as a resource. Though the IRS generally concedes to case decided by the Supreme Court, Tax Court cases and lower court cases are also great resources available to the representative. In addition Private Letter Rulings issued to the taxpayer, are also a good reference of law.

4. In addition to IRS Publications and Court Cases Circular 230 should be reviewed. Treasury Department, Circular No. 230, Regulations Governing Practice before the Internal Revenue Service provides useful guidance to help the practitioner understand their role in representing their client.

Specific sections to review and understand include:

Subpart B — Duties and Restrictions Relating to Practice Before the Internal Revenue Service

1. § 10.20 Information to be furnished.
   (a) To the Internal Revenue Service.
   (1) A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

2. § 10.51 Incompetence and disreputable conduct.
   (a) Incompetence and disreputable conduct. Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

   (4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term “information.”
(15) **Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code**, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

The Internal Revenue Code as a resource:

**Internal Revenue Code**: Using the statute, the representative must be familiar to rights and responsibilities as provide by Congress.

**§ 6103. Confidentiality and disclosure of returns and return information**

(a) General rule

Returns and return information shall be confidential, and except as authorized by this title—

(1) no officer or employee of the United States,

(2) no officer or employee of any State, any local law enforcement agency receiving information under subsection (i)(7)(A), any local child support enforcement agency, or any local agency administering a program listed in subsection (l)(7)(D) who has or had access to returns or return information under this section or section 6104(c), and

(3) no other person (or officer or employee thereof) who has or had access to returns or return information under subsection (e)(1)(D)(iii), paragraph (6), (10), (12), (16), (19), (20), or (21) of subsection (l), paragraph (2) or (4)(B) of subsection (m), or subsection (n), shall disclose any return or return information obtained by him in any manner in connection with his service as such an officer or an employee or otherwise or under the provisions of this section. For purposes of this subsection, the term “officer or employee” includes a former officer or employee.

Another Code Section that representative should know is

**§ 7431. - Civil damages for unauthorized inspection or disclosure of returns and return information**

**§ 7431 (a)** In general addresses provisions dealing with:

(1) Inspection or disclosure by employee of United States
If any officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103, such taxpayer may bring a civil action for damages against the United States in a district court of the United States.

Another Code section of importance is § 7521(c) permits a representative authorized by a taxpayer to represent that taxpayer at any interview. A taxpayer may not be required to accompany a representative in the absence of an administrative summons.

Another resource for representative’s is the Internal Revenue Manual (IRM)

- **4.11.55.2.3 (04-20-2010)**
  Privileged Communications

  1. IRC section 7525 creates a statutory confidentiality privilege for communications from a taxpayer to any “federally authorized tax practitioner.

  2. Although this communications privilege is partly defined by reference to, and is no broader than, the attorney-client privilege, it is clearly a different privilege, created solely by statute, and defined as much by the statutory language as by reference to the common law attorney-client privilege.

  3. The confidentiality protection applies to communications that would be considered privileged if they were between the taxpayer and an attorney and that relate to non-criminal:

     a. Tax matters before the IRS, or
     b. Tax proceedings brought in federal court by or against the United States.

  4. **FEDERALLY AUTHORIZED TAX PRACTITIONER** - Any person described in Circular 230 who is an attorney, certified public accountant, enrolled agent, enrolled actuary, or appraiser.
Another IRM section of importance is:

- **4.11.55.2.3.1-(04-20-2010)**  
  **Confidentiality Privilege Does Not Apply**

1. The confidentiality privilege does NOT apply to the following:
   
   A. Communications made *prior* to the enactment date (7/22/1998);
   
   B. Information disclosed to a tax practitioner for the purpose of preparing a return;
   
   C. Written communications between the tax practitioner and a director, shareholder, officer, employee, agent, or representative of a corporation that promotes the direct or indirect participation of the corporation in any tax shelter as defined in IRC section 6662(d)(2)(C)(iii);
   
   D. Information that is also available from non-privileged sources;
   
   E. Communication between the taxpayer's tax practitioner and a third-party who provides information about the taxpayer to the practitioner (US vs. Ackert, 169 F. 3d 136 (2d Cir. 1999)).

Other important information for representatives

**Enforcement of Summons**

There are two significant popular misconceptions about IRS summonses. In the first place, the IRS is **not** required to have probable cause in order to issue a summons.

Second, IRS summonses are not actually self-enforcing. In other words, for the IRS to enforce a summons, it must first seek an order from a Federal District Court of competent jurisdiction.

**TAX PROFESSIONALS NOTE**: To secure judicial enforcement of a summons, the U.S. Supreme Court requires the IRS to establish that (1) the investigation will be conducted pursuant to a legitimate purpose; (2) the inquiry may be relevant to that purpose; **(3) the information sought is not already in the IRS' possession**; and (4) the administrative steps required under the Internal Revenue Code have been followed.
V) Examination of the Return

A. Auditor’s Review of Client Records

1. Once the audit begins the examiner will ask for the documentation listed on the IDR. The auditor’s approach is generally based on whether it is an individual income tax audit or business tax audit. The information on the IDR should contain information related to the examination year.

2. Frequently, in my experience the IDR may list documents outside the examination year. In many cases the IDR may request the taxpayer to provide additional tax returns. I recommend only providing to auditor documents relating to the examination year listed on the notice of examination and practitioner’s power of attorney.

3. As a practitioner I recommend you provide specific documents as instructed by the auditor. I also recommend you to keep the auditor focused on the examination and to narrow the scope of the audit. Do not give the auditor a pile of information they can randomly look thru.

4. In examinations the auditor will ask questions relating to transactions that may look questionable. If you do not know answer, simply write down the question and let he auditor know you will have an answer within 24 hours.

5. Auditors are generally looking for taxpayers to substantiate the items claimed on the return. As the audit progresses and the taxpayer(s) books and records substantiate the major items on the return, the auditor may be satisfied and end the audit.

B. Lack of Client Records

1. When the taxpayer does not have all the requested books and records the audit can be quite ugly for the taxpayer. I consider this a salvage job. Taxpayers whose businesses consist of mainly cash transactions generally do not keep good records. These taxpayers generally need to reconstruct their books and records. When this occurs there is a need to use reasonable estimates based upon the type of business. Auditors do have leeway in providing allowances for certain deductions.

2. There are times when a taxpayer does not have any books and records. In these cases the only information is the information reported to the IRS. The taxpayer has income deposits and cash withdrawals. Without any documentation to substantiate the items on the tax return the auditor may disallow all deductions on the tax return. When this happens the practitioner may consider using the “Cohan Rule”.
George M. Cohan, Petitioner, v. Commissioner of Internal Revenue, Respondent, (Mar. 03, 1930)

The Cohan rule recognizes that all businesspeople must spend at least some money to stay in business and so must have had at least some deductible expenses, even if they don’t have adequate records to back them up.

**TAX PROFESSIONAL NOTE:** The Cohan rule has been superseded by section 274(d) of the Internal Revenue Code, which now governs the deductibility of entertainment and travel expenses.

Taxpayers may still use the “Cohan Rule” with the exception of those areas requiring adherence to the meticulous record keeping requirements.

C. Disagreement with Auditor

1. During the examination there are times when the auditor and representative may disagree on the treatment of income and/or deductions. In some instances the auditor and the representative may bump heads and have personal differences.

2. There are also times when the auditor feels the representative is procrastinating and delaying the audit as well as the practitioner feeling the auditor is unfair and making unreasonable demands and not providing sufficient time for responses.

3. This can be a dilemma for the practitioner. In situations where you are in disagreement on an item you may ask for technical advice.

4. A technical advice memorandum, or TAM, is guidance furnished by the Office of Chief Counsel upon the request of an IRS director or an area director, or by the appeals officer, in response to technical or procedural questions that develop during a proceeding.

5. A request for a TAM generally stems from an examination of a taxpayer's return, a consideration of a taxpayer's claim for a refund or credit, or any other matter involving a specific taxpayer under the jurisdiction of the territory manager or the area director, appeals. Technical Advice Memoranda are issued only on closed transactions and provide the interpretation of proper application of tax laws, tax treaties, regulations, revenue rulings or other precedents.
6. The advice rendered represents a final determination of the position of the IRS, but only with respect to the specific issue in the specific case in which the advice is issued.

7. Technical Advice Memoranda are generally made public after all information has been removed that could identify the taxpayer whose circumstances triggered a specific memorandum.

8. In situations where the auditor goes behind the representative’s back and contacts the taxpayer directly (by pass) you may file a complaint with the manager. The auditor must follow certain procedures before by passing the representative.

- According to the Internal revenue Manual

4.11.55.3.3 (04-20-2010)

Procedures for By-Passing a Representative

1. If the representative delays or refuses to provide the information requested after repeated attempts, then a by-pass request should be prepared for the territory manager’s signature.

2. The decision to seek a by-pass rests with the employee and group manager: In taking such an action, the following items must be considered:

A. It is imperative that the case file be properly documented with the efforts made by the employee to obtain the information and the actions (or lack thereof) of the representative. It is suggested that when the employee first suspects uncooperative behavior all appointments and document requests should be confirmed in writing.

B. As previously mentioned, prior to initiating the by-pass procedures, the group manager should contact the representative in writing and advise him of his responsibilities under Circular 230 and explain the consequences of his continued conduct.

C. The permission to by-pass must be obtained from the territory manager. A letter to the representative from the territory manager should be prepared. Letter 4020-C, Final Bypass Letter, should be used for this purpose. The letter should outline the facts and circumstances which constitute the basis for the by-pass. The letter is prepared by the employee with the assistance of the area return preparer coordinator, as needed. This letter should be routed through the examiner’s group manager and the
area return preparer coordinator to the territory manager for signature.

D. The employee may not circumvent the representative until the territory manager approves the by-pass by signing and issuing the letter in (C) above to the representative.

3. The by-pass permits the employee to contact the taxpayer directly. The practitioner can continue to represent the taxpayer, if accompanied by the taxpayer. The representative will be afforded the courtesy of being advised of the time and place for future appointments with the taxpayer.

TAX PROFESIONAL NOTE: IRS Employees will not use by-pass procedures routinely or simply to interview the taxpayer.

REPRESENTATIVE ALERT: When the conflict between the examiner and representative is highly toxic, the representative may request a change of auditors.

D. Criminal Investigation
1. I have a favorite phase that states “you don’t really know your client until they have been audited”. During the course of an examination if the auditor asks questions which seems strange or when a second auditor is involved during the examination and that auditor displays a gold badge, a signal should go to your head and you should ask if your client is the subject of a criminal investigation.

2. If the answer is yes the representative should immediately suspend the examination.

3. If the representative continues then anything said prior to and after learning the taxpayer is under criminal investigation may be used against the taxpayer. At this point the representative should inform the client they need to hire an attorney.

**REPRESENTATIVE ALERT:** The representative has no confidentiality or privilege in criminal matters unless hired by the taxpayers Attorney. Information obtained prior to being hired by taxpayers Attorney is not confidential and/or privileged.
E. Auditor’s Report

1. The auditor’s report is issued upon the completion of the examination. The examination report Form 4549-A (Income Tax Examination Changes) is generally attached to Letter 950. The Letter 950 generally informs the representative as to:
   
a. What to do if you agree with the proposed changes,

   b. What to do if you are unable to pay,

   c. What to do if you do not agree with the proposed changes,

   d. What to expect from the appeals office and where to send your response.

Once the examination report is received the representative should carefully review the report and discuss the report with the client. The representative should check all the auditor’s calculations in the event of errors.

The representative should make all efforts to discuss questionable inclusions of income and disallowances of deductions with the examiner. Any additional documents the client locates should be submitted. The auditor can make subsequent adjustments to examination report.

When the final examination report is received:

a. If you agree with the results then the taxpayer can sign the report.

b. If you do not agree with the changes then you may request a meeting or telephone conference with the supervisor.

c. If you still do not agree after the meeting with the supervisor you can request a conference with the Appeals Office if the total proposed changes to tax and penalties is $25,000 or less.

d. If more than $25,000, then you must submit a formal request.
F. Appeals Process (30 Day Letter)

1. The Appeals Office is an independent office within the IRS and most disputes considered by the Appeals Office are resolved informally and promptly.

   The IRS has developed **Publication 5**, Your Appeal Rights and How To Prepare a Protest If You Don’t Agree.

   **REPRESENTATIVE ALERT:** It is important to remember the appeal must be submitted within the timeframe specified on the examination letter.

2. This publication will tell you how to prepare your appeal. It will show you the format and what needs to be included in your protest. It is important that the representative identify all the issues and provide supporting documentation.

3. If your appeal is unsuccessful then the Appeals Office will send the representative another letter that will tell how to obtain Tax Court Review.

G. Audit Reconsideration

1. An Audit Reconsideration is a process used by the Internal Revenue Service to help you when you disagree with the results of an IRS audit of your tax return, or a return created for you by the IRS because you did not file a tax return as authorized by the Internal Revenue Code 6020(b).

   • Reasons for a Request
     You may request audit reconsideration if you:
   • Did not appear for your audit
   • Moved and did not receive correspondence from the IRS
   • Have additional information to present that you did not provide during your original audit
   • Disagree with the assessment from the audit

   **Publication 3598, The Audit Reconsideration Process**

2. An audit reconsideration request can be made any time after an examination assessment has been made on your account and the tax remains unpaid.
H. Tax Court (90 Day Letter)

Once the examination and the appeals process has concluded the taxpayer will receive a **CP 3219A**, Notice of Deficiency for tax due.

What you need to do as the representative:

- Read the Notice carefully – it explains the *proposed* increase or decrease in your client’s tax. Note: The amounts shown as due on the Notice may not match the amounts in the previous notice because *not* all items can be challenged in tax court.

- **If** you agree with the changes *then* sign the enclosed **Form 5564**, Notice of Deficiency - Waiver, and mail to the address shown on the notice.

- **If** you don’t agree with the changes *then* the taxpayer has the right to challenge the proposed changes by filing a petition with the U.S. Tax Court *no later than* the date listed on the notice. The Tax Court can't consider the case if the petition is filed late.

- **If** you don’t agree with the changes and have additional information *then* mail the information to the address listed on the notice. The IRS review won't extend the time you have to file a petition with the U.S. Tax Court.

If you miss your appeals deadline or if you do not wish to use the Appeals Office or disagree with its findings then, you may be able to take your case to the U.S. Tax Court, U.S. Court of Federal Claims, or the U.S. District Court where you live.

If you take your case to court, *then* the IRS will have the burden of proving certain facts if you kept adequate records to show your tax liability, cooperated with the IRS, and meet certain other conditions.

If the court agrees with you on most issues in your case and finds that our position was largely unjustified, *then* you may be able to recover some of your administrative and litigation costs. You will not be eligible to recover these costs *unless* you tried to resolve your case administratively, including going through the appeals system, and you gave the IRS the information necessary to resolve the case.