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33rd Annual Managing Tax Audits and Appeals Seminar

September 12-13, 2019



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IRS Appeals

David Fischer
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Agenda

- IRS Appeals Part One: Overview of the Appeals Process
 - IRS Appeals Principles
 - 30-Day Letter
 - Protest
 - Rebuttal
 - Pre-Conference
 - Appeals Conference
- IRS Appeals Part Two: Recent Developments at Appeals
 - Andrew Keyso, Deputy Chief, Independent Office of Appeals

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IRS Appeals

I expect you all to be independent,
innovative, critical thinkers who will
do exactly as I say!



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IRS Appeals Principles

- IRS Office of Appeals was first formed in 1927 as an independent settlement forum
- The Taxpayer First Act (July 1, 2019) reaffirmed the mission of IRS Appeals, as the Independent Office of Appeals
- The sole purpose of IRS Appeals is “to resolve Federal tax controversies without litigation on a basis which:
 - is fair and impartial to both the Government and the taxpayer,
 - promotes a consistent application and interpretation of, and voluntary compliance with, the Federal tax laws, and
 - enhances public confidence in the integrity and efficiency of the Internal Revenue Service.”

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IRS Appeals Principles

- IRS Appeals has a duty to determine the correct application of the law (Treas. Reg. § 601.106(f))
- IRS Appeals considers “hazards of litigation” in resolving cases
- IRS Appeals does not consider costs of litigation (no nuisance settlements)
- *Ex parte* rules apply, prohibiting IRS Appeals from discussing the case with Exam (outside of the presence of the taxpayer) “to the extent such communications appear to compromise the independence of appeals officers” (Rev. Proc. 2012-18)

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Taxpayer's Right to an IRS Appeal

- The Taxpayer First Act provides that the right to IRS Appeals is “generally available to all taxpayers”
 - IRS Appeals may be denied in certain situations, such as if the case is designated for litigation. For denials, the IRS must:
 - provide a “detailed description of the facts involved, the basis for the decision to deny the request, and a detailed explanation of how the basis of such decision applies to such facts”;
 - tell the taxpayer how to contest the denial; and
 - submit an annual report to Congress regarding any such denials
- *Facebook, Inc. v. IRS*, (N.D. Cal. May 2018):
 - Court: “Facebook does not have an enforceable right to take its tax case to IRS Appeals or to compel the IRS to do so”
 - Lacking an enforceable right, Facebook lacked standing, and the court granted the IRS’s motion to dismiss the case with prejudice

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Notice of Proposed Adjustment

- Exam will issue Form 5701 Notice of Proposed Adjustment and Form 886-A Explanation of Items for unagreed issues (referred to collectively as a NOPA)
- The NOPA should:
 - Provide the issue statement, adjustment table, facts (including AOF response), law, taxpayer’s position, government’s argument, and conclusion;
 - Clearly present the issue(s), the proposed adjustment amount(s), and the reasons for the adjustment(s);
 - Indicate agreed to facts or distinguish the government’s and the taxpayer’s factual positions;
 - Substantiate the IRS’s position based on the tax law;
 - Include the pertinent legal arguments and current legal citations; and
 - Address the taxpayer’s position objectively.

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Acknowledgment of Facts (AOF) (IRM 4.46.4.9)

- IRS is required to prepare a statement of facts on Form 886-A as part of its consideration of each issue
- IRS is also expected to issue a pro-forma Information Document Request (IDR) to seek a written AOF from the taxpayer and to incorporate any additional facts in the write-up
- IRM provides instructions to Exam if the taxpayer:
 - Agrees with the facts,
 - Provides additional facts,
 - Identifies disputed facts, or
 - Does not respond to the AOF IDR.
- Taxpayer is not required to respond to AOF (Exam instructed not to issue summons)

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Responding to NOPA and AOF

- The taxpayer is not required to respond to AOF
- The taxpayer may respond with acknowledgement, denial, or new facts
 - Taxpayers may claim that responses are provided pursuant to Federal Rules of Evidence 408, which excludes settlement materials from evidence in subsequent litigation
- Taxpayer may respond to NOPA with simple disagreement (check disagreed and sign)
 - Not required to provide position at this time
 - May decide strategically to provide additional facts, law, or analysis

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30-Day Letter

- If sufficient time remains on the statute of limitations, the IRS will issue a “Revenue Agent’s Report” (RAR), also known as a “30-Day Letter,” proposing adjustments reflected in the NOPAs from the examination (included with the 30-Day Letter)
 - IRS Appeals will accept the case only if 365 days remain on the statute of limitations. In practice, the statute of limitations is extended prior to issuance of the 30-Day Letter
 - Exam may issue 30-Day Letter if 240 days remain on the statute of limitations, to allow time to extend the statute of limitations per IRS Appeals’ requirements and to issue Notice of Deficiency if no Protest is filed
- 30-Day Letter is a compilation of unagreed NOPAs, with a calculation of the tax due based on the aggregate of all adjustments
 - Will state taxpayer’s rights to go to IRS Appeals and the 30-day requirement to file a Protest
- “Hot” interest, 2 points higher than normal, begins 30 days after 30-Day Letter for corporate underpayments over \$100,000

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Responding to the 30-Day Letter

- The 30-Day Letter is the “ticket to IRS Appeals” – on receipt of a 30-Day Letter the taxpayer may, at the taxpayer’s election, request consideration by IRS Appeals
- Request for consideration by IRS Appeals normally is made by “Protest”
 - Under IRS Appeals Policy, IRS Appeals will not consider “new” facts; the Protest is the taxpayer’s last chance to present facts to be considered by Exam (in its rebuttal) before the case is submitted to IRS Appeals
- Prior 30-Day Letter forms stated response was due 30 days from date of letter, newer forms state a specific date for response, not always exactly 30 days
 - Extensions may be granted under reasonable circumstances. IRM 4.10.8.11.8. Practice is mixed
- If the taxpayer does not protest, Exam will issue a Notice of Deficiency (90-Day Letter)

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Protest Requirements

- Protest may be comprehensive or skeletal, as long as it contains:
 - A statement that the taxpayer wants to appeal the examiner's findings to IRS Appeals;
 - The taxpayer's name, address, and daytime telephone number;
 - A copy of the 30-Day Letter;
 - The tax periods or years involved;
 - An itemized schedule of the adjustments with which the taxpayer does not agree;
 - A statement of facts supporting the taxpayer's position on any contested factual issue;
 - A statement outlining the law or other authority, if any, upon which the taxpayer is relying; and
 - A declaration under penalties of perjury of the truth of the facts in the Protest.
- See IRM 4.10.8.12.9; Publication 5: Your Appeal Rights. How to Prepare a Protest if You Do Not Agree.

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Exam Rebuttal / Transfer to IRS Appeals

- Exam may prepare a rebuttal if Exam believes there is something in the formal written protest that does not change the determination, but requires further comment or explanation
 - Exam is not required to prepare a rebuttal, but if it does, the *ex parte* guidelines require Exam to provide a copy to the taxpayer
 - There is no set time period for completion of the rebuttal
- After the rebuttal, or if Exam does not prepare a rebuttal, the examiner will transfer jurisdiction and the case file to IRS Appeals (Exam refers to as "closing the case to IRS Appeals")
 - LB&I has announced intention to establish a policy concerning how long it should take to close a case to IRS Appeals after the 30-Day Letter date
 - Responds to GAO Report GAO-18-659: Opportunities Exist to Improve Monitoring and Transparency of Appeal Resolution Timeliness, September 21, 2018

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Appeals Pre-Conference

- Cases closed to IRS Appeals are assigned to an Appeals Officer or Appeals Team Case Leader (ATCL)
- The ATCL will reach out to the taxpayer, introduce himself or herself, establish a schedule for the first conference, and may request other information
- The IRM suggests that the Appeals conference is to be held within 90 days of filing the Protest. In practice, first contact is made within 90 days and the Appeals conference is scheduled in the next 90 days
- For LB&I cases, the Appeals conference is preceded (usually on the same day) by a Pre-Conference with Exam
 - A Pre-Conference is required for cases assigned to an ATCL
 - Exam will present its defense of the adjustments and answer questions from IRS Appeals in the presence of the taxpayer (to avoid violation of the *ex parte* rules)

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Appeals Conference

- The Appeals conference may proceed as the Appeals Officer and taxpayer choose
 - The conference is a discussion, Federal Rules of Evidence do not apply, taxpayers are not required to present witnesses
 - Taxpayers may bring witnesses if they choose
 - Taxpayers often open by presenting a summary of their position
 - Best practice is to respond directly and carefully to concerns raised by the Appeals Officer
- The Appeals Officer will ask questions and will ask for clarification of factual and legal positions
- The Appeals conference may extend over several days, and it is common to break for a few weeks to respond to questions, then reconvene in person or by telephone

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Appeals Conference

- Historically, Exam participated in the Pre-Conference and did not participate in the Appeals conference
- Reflected *ex parte* rules, prohibiting communications with Exam outside of presence of taxpayer
- Pilot program:
 - ATCLs request representatives of Exam to participate in Appeals conference discussions until settlement discussions begin – Taxpayers may consent to Exam staying longer while IRS Appeals uses mediation techniques
 - Originally about 1/3 of ATCLs participate
 - Extended on voluntary basis through May 2020

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Appeals Conference

- Almost all LB&I Appeals conferences are in-person conferences
- For other taxpayers, most Appeals conferences are via telephone
 - The taxpayer may request or the Appeals Officer may suggest an in-person conference
 - Factors considered include: the depth of the record, the weight of the taxpayer's credibility, a taxpayer's special needs, the inclusion of multiple participants, the use of Post Appeals Mediation or Rapid Appeals Process
 - Availability of in-person conferences has been subject of much public discussion
- Virtual conferences are an alternative to telephone conferences
 - Appeals Officers are to “[o]ffer a taxpayer requesting an in-person conference a virtual conference as an alternative when the technology for a virtual conference is available”

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IRS Appeals Settlement Authority

- Generally, IRS Appeals has authority to fully or partially concede an issue based on litigation hazards, even if contrary to an IRS Ruling, TAM, or other guidance (IRM 8.6.3.3)
- Generally, IRS Appeals' settlement authority is vested in the Appeals Officer or ATCL
- In 2017, the requirement was added for the ATCL Manager to concur in settlements by an ATCL
- Like the IRS in general, IRS Appeals is centralizing some analysis and decision-making
 - IRS Appeals makes wide use of Technical Specialists and subject matter experts
 - The Appeals Settlement Guidelines are published on the IRS website (without the key analysis or recommendations): <https://www.irs.gov/compliance/appeals/appeals-settlement-guidelines-asg>
- There is some practitioner concern that Appeals Officer/ATCL settlement authority was eroding. This may be reversed by the Taxpayer First Act

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IRS Appeals After Case Filed in Tax Court

- IRS Appeals is available for cases docketed in Tax Court
- IRS Appeals process occurs prior to trial
- Case is referred to IRS Appeals 30 days after Answer
- IRS Appeals has jurisdiction until the case is returned to District Counsel
- District Counsel can request to participate, at IRS Appeals' discretion
- Tax Court preparation can occur simultaneously, in practice depends on progress at IRS Appeals
- Returned to Tax Court if no progress made toward settlement, or if case appears on trial calendar (in practice, can keep off trial calendar while making progress)

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Post-Appeals Mediation

- Rev. Proc. 2009-44; Rev. Proc. 2014-63
- Non-binding mediation process following unsuccessful efforts at IRS Appeals settlement
 - Designed to be used where limited issues remain unresolved
- Available to all LB&I taxpayers
 - Unavailable if Fast Track used at Exam
- Appeals Officer as mediator, taxpayer may use non-IRS co-mediator at taxpayer expense

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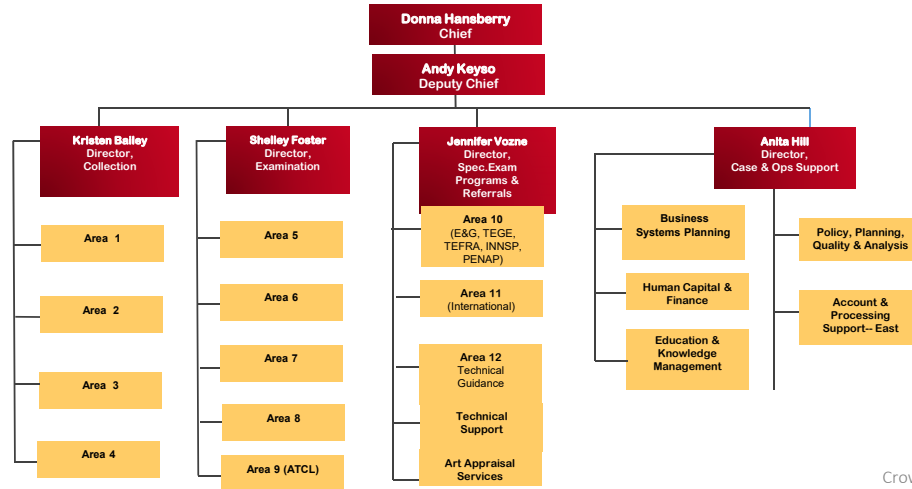


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Andrew Keyso
Deputy Chief,
Independent Office of Appeals

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IRS Appeals' Organization



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IRS Appeals Receipts by Type

WORKSTREAM	FY 2017	FY 2018	JUL FY 2019
Collection Due Process (CDP)	37,667	35,168	29,505
Offers in Compromise (OIC)	9,564	8,864	5,676
Innocent Spouse	3,407	2,657	1,378
Penalty Appeals	10,652	8,190	4,726
Coordinated Industry Cases	88	65	35
Industry Cases	955	885	657
Examination	30,657	27,290	20,203
Other	10,584	9,311	6,927
TOTAL	103,574	92,430	69,057

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Taxpayer First Act of 2019

Appeals-related provisions:

- Changed name to IRS Independent Office of Appeals
- Codified mission statement
- Codified right to an appeal of most IRS determinations
- Codified IRS Appeals' right to legal advice from Chief Counsel
- Guaranteed access to certain contents of administrative case file at least 10 days prior to conference for specified taxpayers
- Required reporting of cases designated for litigation by Chief Counsel

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ATCL Conferencing Initiative – Pilot

- IRS Appeals developed a pilot to test Compliance attendance at conferences in large cases
- Participating ATCLs invite Compliance to participate in all of their conferences
 - Approximately 1/3rd of ATCLs are participating in pilot
 - Taxpayers cannot opt out
 - Compliance does not attend settlement negotiations
 - Pilot was extended for an additional year
- External participants will be surveyed by an outside contractor
- IRS Appeals to post an outline of practices used in the pilot to www.irs.gov

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Human Capital Investments

- IRS Appeals experienced significant staff reductions over past 10 years
- Most extensive hiring effort in recent years is currently underway
- Training has been developed for new employees
- Tax Cuts & Jobs Act training is also being provided to current employees
- IRS Appeals remains dedicated to providing the highest level of customer service through a skilled workforce

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Question – Answer session



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Legislative & Political Update

116th Congress & 2020 Elections

September 13, 2019

Jim Flood, Partner

Scott Douglas, Senior Policy Director

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Agenda

- Overview of 116th Congress (2019-2020)
- 116th Congress: Tax-Related Measures
 - Taxpayer First Act (IRS Reform)
 - Tax Extenders
 - IRS Funding
- Trump Administration: Capital Gains Tax Cut (depends on the week)
- The 2020 Election
 - Overview of the Presidential Election
 - The Candidates' Positions on Key Health Care Issues
 - Overview of Congressional Elections
- Questions/Answers
- Conclusion

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Overview of 116th Congress

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Overview of 116th Congress

The House of Representatives (435 Members)

- 235 Democrats
- 199 Republicans
- 1 Independent
- 218 votes normally needed to pass bills (217 with current vacancies)—a simple majority of the total members in House
- Democrats currently have 18 more votes than needed to pass bills

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Overview of 116th Congress

The House of Representatives (435 Members)

- Key Democratic Caucuses
 - Congressional Progressive Caucus—the progressive faction
 - Medicare for All Caucus—progressives focused on health care
 - New Democrat Coalition—moderate centrist Democrats
 - Blue Dog Coalition—centrists focused on fiscal responsibility
 - Blue Collar Caucus—working class focus – flip Dems who voted Trump
- Key Republican Caucuses
 - The Freedom Caucus—conservative caucus, counterpart to Tea Party
 - The Tuesday Group—moderate Republicans
 - Republican Main Street Partnership—moderate Republicans
 - Republican Study Committee—conservative Republicans

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Overview of 116th Congress

The U.S. Senate (100 Members)

- 53 Republicans
- 45 Democrats
- 2 Independents that caucus with Democrats
- 51 votes needed to confirm Trump Administration nominees
- 60 votes needed to beat filibuster
- 60 votes = 53 Rs + 7 Ds
- Republicans cannot pass most legislation without Democrats

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116th Congress: Tax-Related Measures

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Tax Legislation in the 116th Congress

Taxpayer First Act (IRS Reform)

- Passed Congress – June 14, 2019
- Signed into Law – July 1, 2019
- Establishes an “Independent Office of Appeals” at IRS
- Requires the IRS to create a comprehensive strategy around customer service
- Directs IRS to create an internet platform for filing Form 1099
- Requires electronic filing for certain filers and lowers threshold for requiring electronic returns
- Increases the minimum failure to file penalty

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Tax Legislation in the 116th Congress

Tax Extenders

- Passed House on June 20, 2019
- Senate Passage expected in the fall & Final passage by year-end
- Includes:
 - Renewable energy credits
 - Employer credit for paid family leave
 - Relief for taxpayers impacted by natural disasters (retroactive to 1/1/18)

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Tax Legislation in the 116th Congress

IRS Funding

- Bipartisan support for a “cap adjustment” to increase funding for enforcement
- President Trump and Congress reached a broad budget caps deal that passed Congress on August 1, 2019
- Budget deal paves the way for appropriations work in the fall
- Initial appropriations action will be short-term CR by 9/30.
- Increased IRS funding will be considered in longer-term appropriations bill that will follow.

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The 2020 Elections

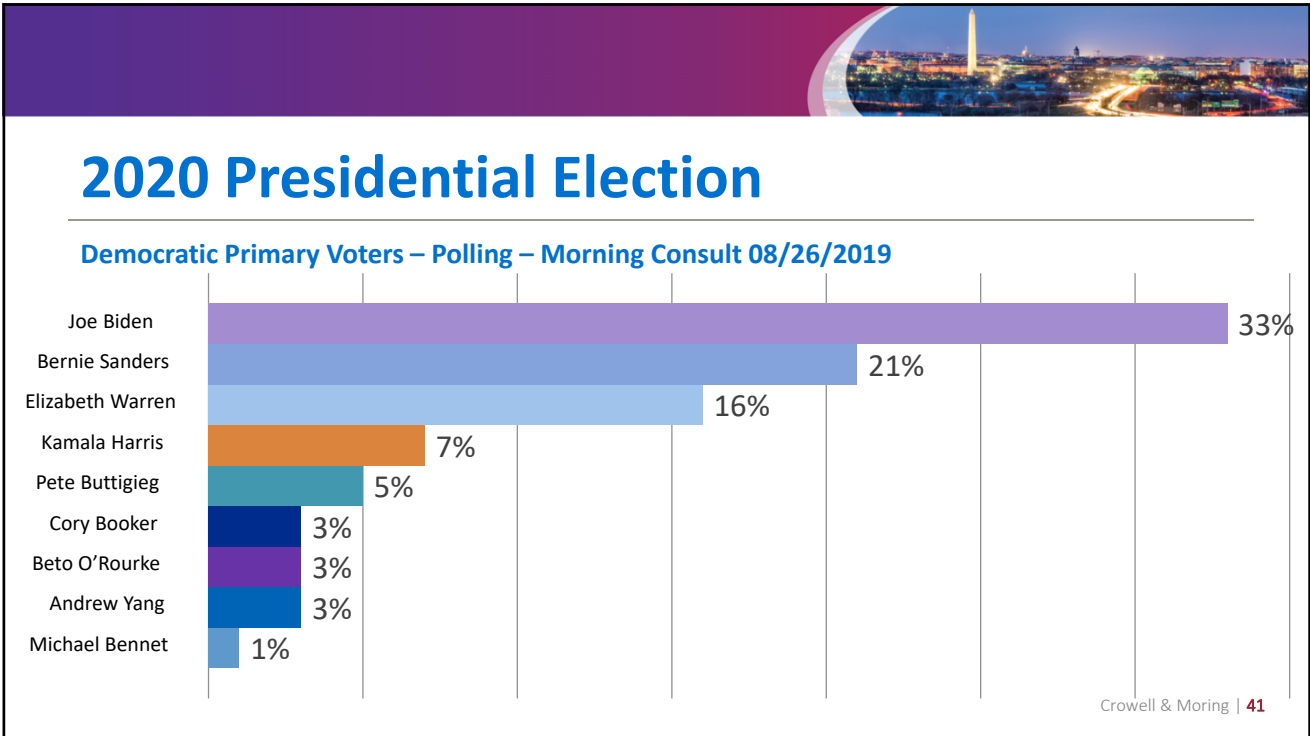
President
US Senate
US House



2020 Presidential Election

The Democratic Field

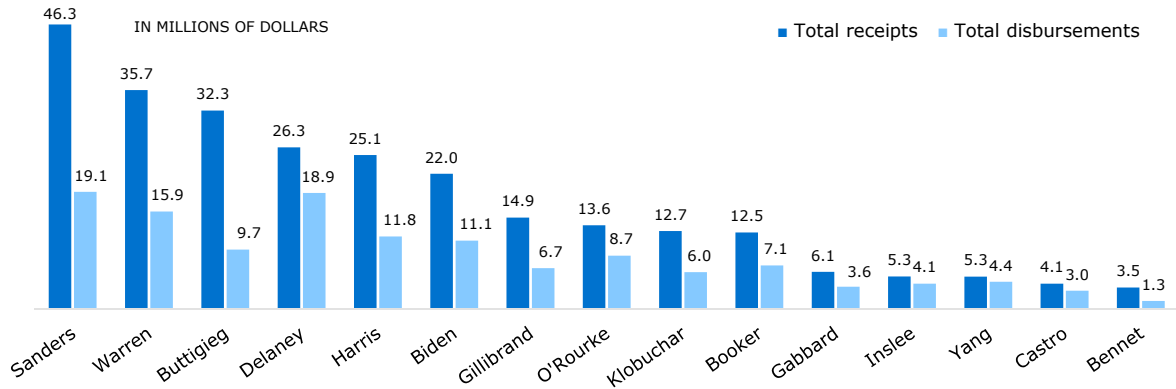
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| <ol style="list-style-type: none"> 1. Michael Bennet – Senator from CO 2. Joe Biden – Former VP and Senator from DE 3. Cory Booker – Senator from NJ 4. Steve Bullock – Governor of MT 5. Pete Buttigieg—Mayor of South Bend, IN 6. Julián Castro—Former HUD Secretary 7. Bill de Blasio – Mayor of NYC 8. John Delaney—Former Representative from MD 9. Tulsi Gabbard—Representative from HI 10. Kirsten Gillibrand—Senator from NY 11. Kamala Harris—Senator from CA 12. John Hickenlooper – Governor of CO 13. Jay Inslee – Governor of WA | <ol style="list-style-type: none"> 14. Amy Klobuchar—Senator from MN 15. Wayne Messam – Mayor of Miramar, FL 16. Seth Moulton—Representative from MA 17. Beto O’Rourke – Former Representative from TX 18. Tim Ryan – Representative from OH 19. Bernie Sanders – Senator from VT 20. Joe Sestak – Former Representative from PA 21. Tom Steyer – Former Hedge Fund Exec 22. Eric Swalwell – Representative from CA 23. Elizabeth Warren—Senator from MA 24. Marianne Williamson—Spiritual Guru, Entrepreneur 25. Andrew Yang—Founder , Venture for America |
|--|--|



-
- 2020 Presidential Election**
- Democratic Caucuses/Primaries**
- Iowa Caucuses – 02/20/2020
 - New Hampshire Primary – 02/11/2020
 - Nevada Democratic Caucuses – 02/25/2020
 - South Carolina Democratic Primary – 02/29/2020
 - Super Tuesday – 03/03/2020
 - Alabama
 - Arkansas
 - California
 - Colorado
 - Massachusetts
 - Minnesota
 - North Carolina
 - Oklahoma
 - Tennessee
 - Texas
 - Utah
 - Vermont
 - Virginia
 - Maine
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2020 Democratic Fundraising

Total receipts at the end Q2 (June 30, 2019)



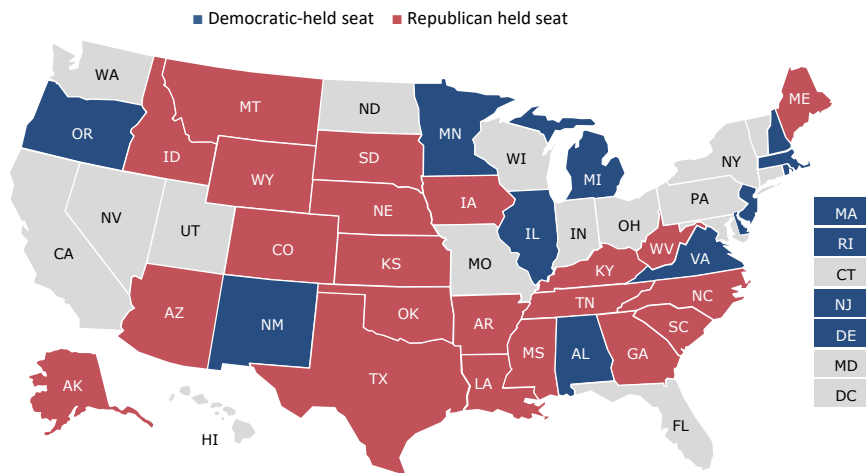
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2020 Senate Races

- The Current U.S. Senate
 - 53 Republicans, 47 Democrats (with 2 Independents)
- 35 Senate Seats Up for 2020 Re-election (incl. AZ, GA special)
 - 23 Republicans
 - 12 Democrats
- Key Presidential States with 2020 Senate Elections – Arizona (McSally-R), Iowa (Ernst-R), Texas (Cornyn-R), Virginia (Warner –D), North Carolina (Tillis-R) and Michigan (Peters-D)

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2020 Senate Election Map

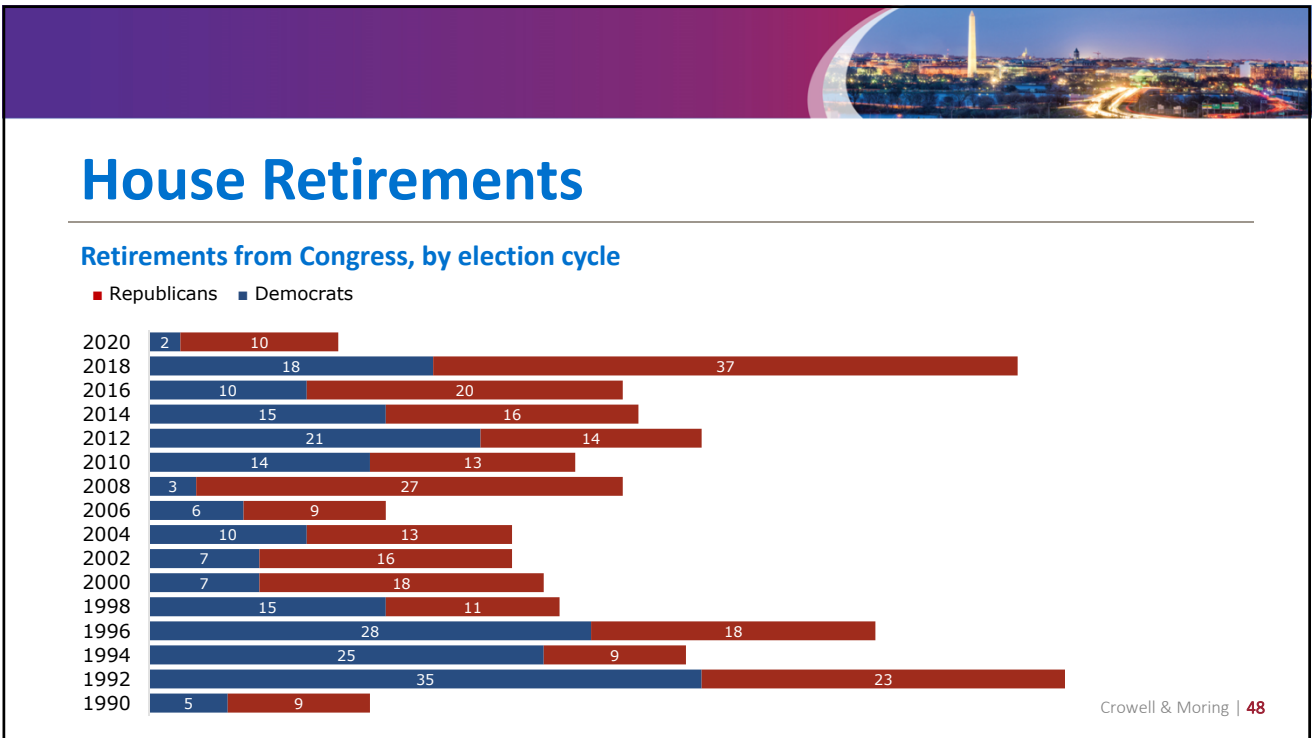
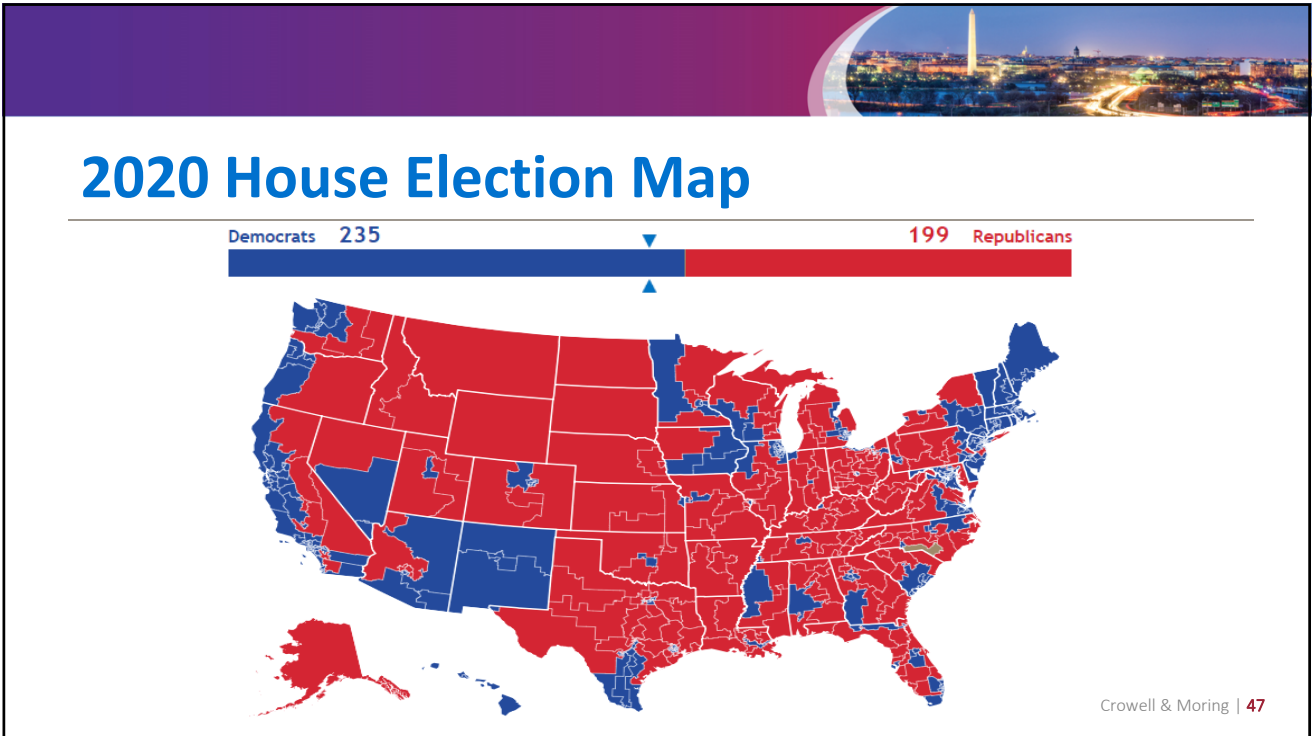


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Update on 2020 House Races

- The Current U.S. House
 - 235 Democrats (218 Needed to Pass Bills)
 - 199 Republicans
 - 1 Independent
- All 435 House Seats Up for Re-election in 2020
- What to watch for in House 2020 Election – expansion of number of liberal House Democrats? More female and diverse members of Congress? Do Democrats overplay their hand and produce Republican backlash?

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Final Thoughts on 2020 Elections

- President Trump
- President Democrat
- Republican Senate
- Democratic Senate
- Republican House
- Democratic House
- Potential Implications for Tax in 2021 and Beyond

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Questions?

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Scott Douglas, sdouglas@crowell.com

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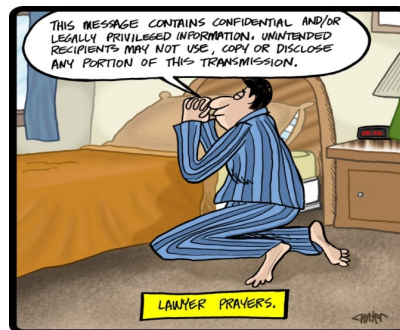
Privilege Issues in IRS audits

Robert Willmore
Teresa Abney

Types of Privilege

Privilege issues commonly encountered in IRS audits

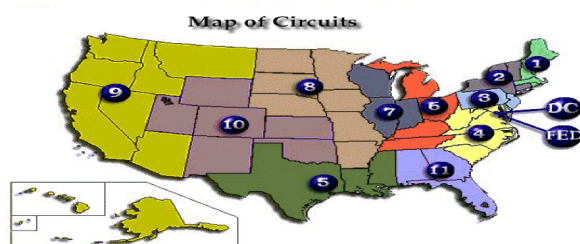
- Attorney-Client Privilege
- Work Product Doctrine
- Federally Authorized Tax Practitioner Privilege (IRC § 7525)



Privilege

Overview

- Privilege issues are highly fact intensive and must be analyzed on a case-by-case basis
- Applicable rules vary by jurisdiction



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Privilege

Why claim privilege?

- Encourages full analysis of issues in confidence
- Avoids unfair disclosures
 - Audit / Appeals / Litigation strategy
 - “Roadmap” to analysis of issues at stake
 - Other issues not under examination
- Avoid “he said, she said” debates about preliminary discussions
 - Privileged documents often examine and assess contrary positions
- IRS often claims deliberative process or other privileges when the “shoe is on the other foot”

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Attorney-Client Privilege



Attorney-Client Privilege

Elements

- A communication
- Between an attorney and his or her client
- Made and kept in confidence
- For the purpose of seeking, obtaining, or providing legal advice



Attorney-Client Privilege

What does it get you?

- Absolute protection against disclosure provided the privilege is properly claimed and protected
- Protects against disclosure of an attorney-client communication; it does not protect against disclosure of underlying facts

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Attorney-Client Privilege

Waiver

- Attorney-client privilege can be easily waived
- Privilege can be waived even if you do not intend to waive
- Common ways to waive privilege:
 - Disclosure to third party (i.e., violating the “made and kept in confidence” element)
 - Subject matter waiver (i.e., putting the communication at issue)

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Attorney-Client Privilege

Exceptions to “kept in confidence” requirement

- In limited circumstances, a disclosure to a third party may not waive the attorney-client privilege
- Exceptions:
 - Joint defense privilege
 - Common interest doctrine
 - *Kovel* doctrine

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Attorney-Client Privilege

In-House Counsel

- Attorney-client privilege applies to legal communications with in-house counsel
- But just because the person is an attorney does not mean the communication is privileged
- Communications that are deemed business advice or tax preparation work are not privileged

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Attorney-Client Privilege

Employees

- The privilege belongs to the company, not its employees
- But the privilege typically will protect legal communications by outside and in-house attorneys with the employees
- In some circumstances where an employee's conduct is at issue it may be necessary for the attorney to provide an *Upjohn* warning (a/k/a the corporate *Miranda* warning)



"Again? I read you your Miranda rights last night."

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Attorney-Client Privilege

Tax return preparation work is not privileged

- Courts look closely at any communications regarding advice related to the preparation of tax returns
- This can include communications regarding what needs to be reported on tax returns
- The line between what is and is not privileged sometimes is very gray and judges do not always agree where to draw that line



"Found meat is income."

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Federally Authorized Tax Practitioner Privilege (IRC § 7525)



Federally Authorized Tax Practitioner Privilege

26 U.S.C. § 7525

- Applies to confidential communications relating to tax advice between a federally authorized tax practitioner and his or her client
- Same waiver principles apply as apply to attorney-client communications; advice must be kept confidential
- Privilege applies only to non-criminal tax matters before the IRS and DOJ
 - Does not apply to other agencies (i.e., SEC), in private litigation, or to state tax exams
 - Does not apply to any written communications in connection with promotion of a tax shelter

Work Product Doctrine



Work Product Doctrine

The Basics

- Work product doctrine protects
 - documents and tangible things
 - prepared in anticipation of litigation
 - by a party or that party's representative
- Work product doctrine also protects against the disclosure of attorney mental impressions, including communications that would reveal those impressions
- The doctrine does not protect against the disclosure of preexisting facts contained within the work product
- It is not an absolute protection like the attorney-client privilege, it can be pierced in limited circumstances
- Claiming work product protection may trigger the need to issue a litigation hold



Work Product Doctrine

“In anticipation of litigation”

- U.S. Courts of Appeal split on meaning of “in anticipation of litigation” where document is created for both litigation and business purposes
 - “Primary motivation purpose” test (5th Circuit)
 - “Because of” test (D.C., 2d, 3d, 4th, 6th, 7th, 8th, 9th Circuits)
 - Textron’s variation on the “because of” test (1st Circuit)

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Work Product Doctrine

Waiver

- Waiver principles are more forgiving than for the attorney-client privilege or the federally authorized tax practitioner privilege
- Work product protection allows the work product to be shared with third parties if the disclosure is not inconsistent with the adversarial process
- However, if the work product is disclosed to an adversary or a possible conduit to an adversary, the protection likely is waived
- Waiver issues often arises in the context of disclosures of work product to a company’s independent auditor

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Disclosure and Waiver Issues



Intentional Disclosure

In limited circumstances, intentional disclosure does not operate as subject matter waiver

- Under Federal Rule of Evidence 502(a), when a disclosure is made in a federal proceeding or to federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a federal or state proceeding only if:
 - (1) the waiver is intentional;
 - (2) the disclosed and undisclosed communications or information concern the same subject matter; and
 - (3) they ought in fairness to be considered together.



Unintentional Disclosure

Inadvertent disclosure may not result in waiver

- Under Federal Rule of Evidence 502(b), if a disclosure is in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
 - the disclosure is inadvertent,
 - the holder of the privilege or protection took reasonable steps to prevent disclosure, and
 - holder promptly took reasonable steps to rectify the error

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Implied Waiver

Often a significant concern in penalty cases

- Two recent Tax Court decisions of concern:
 - *Ad Investment 2000 Fund LLC v. Comm’r*, 142 T.C. No. 13 (2014)
 - *Eaton Corp. v. Comm’r*, Dkt. No. 5576-2 (Tax Court, 2015)
- Second Circuit Court of Appeals overturned a broad privilege waiver decision:
 - *Schaeffler v. United States*, 806 F.3d 34 (2d Cir. 2015)

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Tips For Protecting Privilege



Tips for Protecting Privilege

Some tips for avoiding waiver and protecting privilege

- If a position is likely to be disputed, have in-house or outside counsel perform the legal analysis and provide a litigation assessment
- E-mails
 - Keep e-mails to one topic
 - Mark the e-mail as privileged and confidential
 - Be careful about forwarding emails; if possible, avoid using large distribution lists
- Make sure privileged documents are properly marked and segregated
- If a privilege claim is contested, have an attorney review the relevant materials to confirm the privilege claim and prepare a privilege log; privilege claims unsupported by a privilege log are more likely to fail

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