


Cybersecurity and Privacy
Imperatives for WICPA
Business & Industry Spring Conference
Sarah A. Sargent | CIPP/US, CIPP/E, CIPM
March 16, 2022
GODFREY::KAHN... MILWAUKEE | MADISON | GREEN BAY | APPLETON | WASHINGTON, D.C.

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Today's Agenda



- ▶ The Current Threat Landscape
- ▶ Best Practices Pre- and Post-Breach
- ▶ Potential Legal Obligations After a Breach
- ▶ Privacy Imperatives to Be Aware Of

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The Current Threat Landscape

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Russian Invasion of Ukraine Heightens Cyber Attack Risk

CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY

Russia-based ransomware group Conti issues warning to Kremlin foes

Conti ransomware gang's internal chats leaked online after declaring support for Russian invasion

Conti ransomware gang dismantles infrastructure amid Ukraine row

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Why Should Companies Care?

- ▶ For the first time in over five years, manufacturing companies were the most-attacked industry –23.2% of attacks in 2021
- ▶ This trend is expected to continue as many companies do not believe they are not a valuable target

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Why Should Companies Care?

- ▶ Significant Financial Costs of a Breach
 - ▷ Ransom
 - ▷ Lost business
 - ▷ Detection and mitigation
 - ▷ Notification obligations
 - ▷ Post breach response
- ▶ Global average total cost of a data breach: \$4.24m

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Key Statistics (2016-2020)

- ▶ Most Frequent Claims (SMEs)
 1. Ransomware (~1500, \$179,000 avg)
 2. Hacker (~450, \$430,000 avg)
 3. BEC (~400, \$123,000 avg)
 4. Phishing (~275, \$13,000 avg)
 5. Human Error (~250, \$72,000 avg)



Source: 2021 Intelligence Cyber Claims Report GODFREY+KAHN

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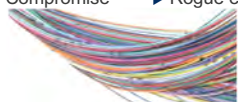
Companies Can Be Vulnerable

Attack Vectors

- ▶ Physical Security
- ▶ Phishing
- ▶ Social Engineering
- ▶ Vendor Compromise

Attack Types

- ▶ Ransomware
- ▶ Email Compromise
- ▶ Wire Fraud
- ▶ Rogue employees



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Ransomware

- ▶ Malicious software
- ▶ Locks down a system and files making them inaccessible unless a ransom payment is made
- ▶ Can be accomplished through security vulnerabilities or phishing schemes



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Business Email Compromise

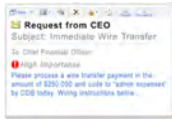
- ▶ Threat actor breaks into your email account
- ▶ Has access to entire inbox, can create rules to direct emails to folders so you have no idea
- ▶ Can send emails through your account without your knowledge
- ▶ Can be accomplished through security vulnerabilities or phishing schemes

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Wire Fraud

- ▶ Fraudulent wire instructions are communicated to parties through a business email compromise or phishing scheme
- ▶ A party unknowingly sends money to a threat actor



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Best Practices Pre- and Post-Breach

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Best Practices Pre-Breach

- ▶ Be Prepared!
 - ▷ Written Information Security Plan (WISP)
 - ▷ Incident Response Plan
 - ▶ Tabletop Exercises
 - ▷ Engage data security and privacy counsel




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Best Practices Pre-Breach

- ▶ Data Minimization
 - ▷ If you don't need it, don't collect it
- ▶ Limit Access
 - ▷ Only those with a need to know should have access
- ▶ Emphasize Awareness
 - ▷ Employee Training




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Best Practices Pre-Breach

- ▶ Use technological measures to reduce the attack surface and mitigate common risks
 - ▷ Two-factor authentication
 - ▷ Encryption
 - ▷ Password managers like LastPass or strong passwords that vary across accounts

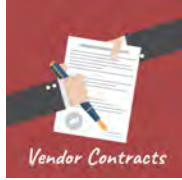


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Best Practices Pre-Breach

- ▶ Conduct vendor due diligence and use strong data security contractual provisions
 - ▷ Understand the measures a vendor uses to secure and keep private sensitive information
 - ▷ It is not sufficient to conduct due diligence at the outset, and never thereafter
 - ▷ Contractual provisions relating to reasonable security measures, data breach notification, reimbursement for notification expenses, and audit rights



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Best Practices Post-Breach

- ▶ Follow Incident Response Plan
- ▶ Take Action to Mitigate Harm if Possible
- ▶ Contact Insurer
- ▶ Contact Counsel
- ▶ Consider Attorney Client Protections when Working with Forensic Provider

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Potential Legal Obligations After A Breach

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Breach Notification Laws

- ▶ Each state has its own data breach notification laws
- ▶ The definition of personal information may vary across states
- ▶ Each state will have its own standard for when notification is required
 - ▷ Access vs. Acquisition
 - ▷ Risk of harm
- ▶ Some states require notification of the state's Attorney General

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Wisconsin's Data Breach Notification Law—Wis. Stat. § 134.98

▶ Personal Information means an individual's last name and the individual's first name or first initial, in combination with and linked to any of the following elements, if the element is not publicly available information and is not encrypted, redacted, or altered in a manner that renders the element unreadable:



- The individual's Social Security number.
- The individual's driver's license number or state identification number.
- The number of the individual's financial account number, including a credit or debit card account number, or any security code, access code, or password that would permit access to the individual's financial account.
- The individual's DNA profile.
- The individual's unique biometric data, including fingerprint, voice print, retina or iris image, or any other unique physical representation.

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Wisconsin's Data Breach Notification Law—Wis. Stat. § 134.98

- ▶ Notice is not required if "the acquisition of personal information does not create a material risk of identity theft or fraud to the subject of the personal information."
- ▶ Notice to be provided within a reasonable time, not to exceed 45 days after learning of the incident.



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Breach Notification Laws

- ▶ You will need to do an analysis of every state's law in which an affected individual resides



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Privacy Imperatives To Be Aware Of

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What Are Privacy Laws?



- ▶ Laws that govern how a business may collect, use, and store personally identifiable information.
- ▶ Includes requirements for what a business must tell individuals about the collection of their information.
- ▶ In the U.S., these laws vary by state or sector.

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What is Personally Identifiable Information?



- ▶ There are different definitions used depending on the law or regulation.
- ▶ Generally, it is any information that can be used to identify an individual.
- ▶ For example:
 - ▷ SSN, name, address, driver's license number, passport number, financial account information

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Do Privacy Laws Apply to Your Business?

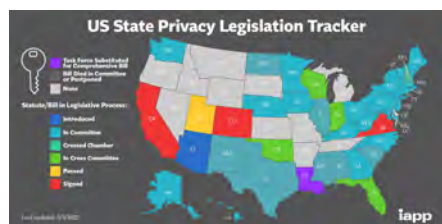


- ▶ In the U.S., currently three states have generally applicable laws on the books.
- ▶ Each state has their own applicability requirements.
- ▶ If you have international sales or employees, foreign privacy laws may apply, such as the EU's General Data Protection Regulation.

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Data Privacy is a Constantly Evolving Area of Governance in the U.S.



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U.S. Privacy Laws

VCDPA	CCPA	CPRA	CPA
Effective 1/1/23	Effective 1/1/20	Effective 1/1/23	Effective 7/1/23
Applies to businesses that:	Applies to businesses that:	Applies to businesses that:	Applies to businesses that:
<ul style="list-style-type: none"> Control/process PI of ≥25K consumers and derive 50% of gross revenue from sale of PI. Control/process PI of ≥100K consumers per year 	<ul style="list-style-type: none"> >\$25M annual revenue. Buy/sell/share PI of ≥50k households or CA residents. Derive 50%+ of annual revenue from selling PI of CA residents 	<ul style="list-style-type: none"> >\$25M annual revenue. Buy/sell/share PI of ≥100K CA consumers or households, or Derive 50%+ of annual revenue from selling or sharing PI of CA residents 	<ul style="list-style-type: none"> Control/Process PI of ≥100K consumers per Year. Derive revenue or receive discounts from the sale of PI and control/process data of ≥25K consumers

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Enforcement of U.S. Privacy Laws

VCDPA	CCPA	CPRA	CPA
Attorney General enforcement with 30-day cure period	Attorney General enforcement with 30-day cure period	Adds California Privacy Protection Agency enforcement	Attorney General enforcement with 60-day cure period
Penalties include injunction and up to \$7500 for each violation	Penalties include injunction and up to \$2500/ \$7500 for each violation	Removes cure period	Penalties include \$20,000 per violation
	Private right of action for data breaches caused by poor security		

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Best Practices for Monitoring Privacy Laws



- ▶ Watch for developments in states where you do business
- ▶ Understand what data you do have that may be subject to these laws
- ▶ Work with legal counsel to understand obligations

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Thank You!



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Supply Chain Review

Diana Barnett, President
Infinity Consulting & Training Essentials
3/16/22

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Agenda

- ▶ Covid-19 Impact on Global Supply Chain & Workforce
- ▶ The State of Supply Chain 2022
- ▶ The Trends that will Shape the Future of Supply Chain
- ▶ Analyst Views on the Balance of 2022 & the Start 2023
- ▶ Questions

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COVID-19 Impact on Global Supply Chain

- ▶ According to the Bureau of Labor Statistics (BLS), 4.3 million U.S. workers left their jobs as of August 2021.
 - ▶ The workforce will not return to the pre-covid structure
 - ▶ Workers are deciding to leave
 - ▶ Entrepreneurial endeavors are at an all time high
- ▶ This 3 percent decrease in the U.S. work force is especially impacting the supply of truckers and warehouse workers which particularly impacts the supply chain.

www.natareview.com

3

COVID-19 Impact on Global Supply Chain

- ▶ Since the emergence of the coronavirus in early 2020, supply chains across the world drastically slowed down due to
 - ▶ Disrupted shipping lanes,
 - ▶ Labor and material shortages
 - ▶ Fluctuating demand. ...
- ▶ Global markets face many unknowns as the supply chain returns to normal.

SCM Oct 21, 2021

4

COVID-19 Impact on Global Supply Chain

- ▶ Employment outlook, **76% of respondents reported** that the COVID-19 pandemic has impacted the nature of their job
 - ▶ What they do,
 - ▶ Where they work,
 - ▶ How they go about the tasks required).
- ▶ 31% say that it has been extremely or very difficult to adjust to the changes.

Aug 16, 2021

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COVID-19 Impact on Global Supply Chain

- ▶ Despite the positive impacts of ongoing safety measures and the development of effective vaccines, global supply chains are continuing to face unprecedented logistical challenges
- ▶ Companies are also increasingly prioritizing social and environmental performance for supplier engagement and supplier capacity building.
- ▶ Companies unable to book with ocean carriers are chartering vessels themselves. Those unhappy with their online sales

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COVID-19 Impact on Global Supply Chain

- ▶ Buyer-supplier relations have also been altered. For example, alarmed by the shortage of semiconductors, Ford and General Motors have formed strategic agreements with chipmakers.
- ▶ Business lines are blurring – bold companies are not waiting for supply lines to untangle themselves.
- ▶ Retailers short on storage space are buying warehouses.
- ▶ Shippers that can't find containers are making their own.

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The State of Supply Chain 2022

- This year will require supply chains to continue to be innovative, flexible, and to adapt unlike any other period.
- The anticipation of inflation, the political challenges, and the pending health of global landscape will continue to add disruptions to supply chains.
- "Business leaders are telling us that their boards and executive committees have supply chain disruption fatigue and want to know when the pain will end." Stan Aronow

InsightsSupplyChain Jan 2022

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The State of Supply Chain 2022

- ▶ Experts predict continued disruptions in the short term, with challenges around cargo ships, labor shortages, and supply and demand imbalances.
- ▶ According to a survey from the Wall Street Journal, about 45% of economists believed that it would take until the **second half of 2022** for there to be improvement. Jan 19, 2022
- ▶ It is unlikely that we will return to a normal Supply Chain in 2022

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The State of Supply Chain Management

January 09, 2021:
Hauliers are unloading Hal (2021) costum containers at Angeles and Los port comp

January 09, 2022:
There are *'just'* 351 days until Christmas 2022, but the owner of Rustic Antiques in Millers Falls already started shopping for the holiday season.

Level-set.
Where are we now?
What companies are doing.

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Four Trends That Will Shape The Future

- ▶ Over the past 2 years, the risks and shortfalls in our global supply chains have been the focus of discussions in major briefings.
- ▶ Supply chains are now recognized as central to business survival, success, and growth, rather than an opportunity to just reduce costs.
- ▶ The expectations over the next 12 months comes down to 4 main themes. **Resiliency, Sustainability, Visibility and Technology**

Richard Howells

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Four Trends That Will Shape The Future

Resiliency – As supply chain risks continue to flare up

- ▶ For the past 20 months, the word that everybody is using to describe what is needed has been resiliency.
- ▶ Experts predict continued disruptions with challenges around cargo ships, labor shortages, and supply and demand imbalances.
- ▶ According to a survey from the Wall Street Journal, about 45% of economists believed that it would take until the second half of 2022 for there to be improvement.

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Four Trends That Will Shape The Future



Resiliency cont'd

- ▶ To increase resiliency across global supply chains companies will need to rebalance on-shore, near-shore and off-shore strategies for manufacturing locations.
- ▶ Organizations will have to keep identifying alternate sourcing strategies to reduce dependencies on individual suppliers in low-cost regions.
- ▶ Inventory optimization strategies will be crucial in helping decision-makers identify key materials, intermediates, and products, and determine how much and where to store them across the supply chain.
- ▶ Organizations need to improve and increase visibility with suppliers, logistics service providers, contract manufacturers and other key trading partners.

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Four Trends That Will Shape The Future

Sustainability is the challenge of the 2020s

- ▶ Climate change, circular economy, ESG and sustainability have all become business priorities. Our global supply chains sit right in the middle of these challenges, both as a major contributor to the problems, and as focus on taking action to address the problems.
- ▶ The gap between sustainable mission statements and the ability to carry them out. Finding from an Oxford Economics survey of worldwide supply chain decision makers across industries:
 - ▶ 88% have created a clear mission statement around but only 52% have put those words into action and reduced their shipping miles.
 - ▶ Less than half said they had significant visibility into their own sourcing of sustainable products.
 - ▶ Only 21% had complete visibility into their supplier sourcing of sustainable products.

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Four Trends That Will Shape The Future

Visibility

- ▶ The old saying goes, "you can't manage what you can't measure". To achieve agility to changes the supply chain network will need information for informed decisions.
- ▶ In 2022 organizations will increase prioritize improving visibility to collect, consolidate and consume data in real time from across the supply chain.
 - ▶ With increased data, organizations can determine how products, equipment or vehicles are performing, measure carbon emissions, see if they require maintenance, and so much more.
 - ▶ With the improved demand and customer data available from sentiment analysis, and social media, and environmental data as traffic and weather patterns, and we have a real-time, 360-degree view of the supply chain.

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Four Trends That Will Shape The Future

Technology provides the data and tools

- ▶ Industry 4.0 is expected to ramp up in 2022 as machine learning and AI use volumes of IoT-based and social media data from people, devices, assets, products, and vehicles across the supply chain to automate decisions and processes.
- ▶ Technology will also help alleviate worker shortages and improve retention by improving the productivity and decision making of existing employees and attracting new talent with state-of-the-art tools.
- ▶ Meantime, predictive analytics will empower employees to make more informed, real-time decisions, and drive new business models.

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Supply Chain Challenges to Overcome 2022 - 2023

- It is unlikely that we will return to a normal Supply Chain in 2022
- Time alone will not solve the Great Supply Chain Disruption.
- It will require investment, technology and a refashioning of the incentives at play across global business.
- It will take more ships, additional warehouses and an influx of truck drivers.

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Supply Chain Challenges to Overcome 2022 - 2023

- Spending on technology will likely continue to climb in 2022 - 2023 considering the operational efficiency it provides and its other time-tested benefits
- Organizations will need to invest in upskilling and reskilling your current workforce to promote internal mobility and combat labor shortages.
- Focusing on managing customer expectations realistically — account for delays and shortages using innovative technologies like predictive analytics.






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Supply Chain Challenges to Overcome 2022 - 2023

- "It's unlikely to happen in 2022," said Phil Levy, chief economist at Flexport a freight forwarding company based in San Francisco. "My crystal ball gets murky further out."
- For those who keep tabs on the global supply chain, the very concept of a return to normalcy has given way to a begrudging acceptance that a new normal may be unfolding.
- Many months, and perhaps years, are likely to transpire before the chaos subsides.

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Supply Chain Challenges to Overcome 2022 - 2023

-  The Workforce
-  Planning
-  Transportation & Logistics
-  Technology / Data Visibility
-  Distribution / Warehousing

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Questions Related to the Supply Chain Review

1. Supply Chain Disruptions are predicted to last into 2023 and potentially beyond?
T or F
2. Organizations will continue to be sustainable through 2022 if they
 - a) Hire extensive staff to meet supply chain challenges
 - b) Develop better visibility to their data for decision making
 - c) Depart plan execution based on 2021 outcomes
3. Organizational workforces will level set to a new norm after the storm of Supply Chain Disruptions?
T or F
4. The challenges for organizations related to shipping /products will improve once
 - a) Organizations decide to purchase their equipment for shipping
 - b) The government provide relief for companies using shipping vendors
 - c) Organizations develop better strategies for planning shipping requirements and inventory management
5. Organizations will fail if they do not strategically develop a plan to forecast requirements and build inventory and capacity buffers?
T or F

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Resources

<https://www.natlawreview.com/article/how-covid-19-impacting-global-supply-chains-how-companies-can-cope>

<https://www.forbes.com/sites/sap/2022/01/19/2022-global-supply-chains-four-trends-that-will-shape-the-future/?sh=5f53065f3ef4>

<https://www.gartner.com/en/articles/supply-chain-pressures-will-dominate-2022-but-equilibrium-is-coming>

Bureau of Labor Statistics (BLS), 2021

<https://www.gartner.com/smarterwithgartner/6-strategies-for-a-more-resilient-supply-chain>


<https://www.forbes.com/sites/forbestechcouncil/2021/12/29/four-supply-chain-predictions-for-2022/?sh=660e32e1136e>

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Hot Tax Practice, Procedure, and Ethics Issues for the Industry Practitioner

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Contents

- Setting the Stage
- IRS Proposed Funding
- Industry Traps for the Unwary
- Application of Ethical Rules That Affect Industry CPAs

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Setting the Stage

- Commissioner Rettig told the Senate Finance Committee on April 13, 2021, that the gross tax gap (actual tax due less tax paid on time) was \$441 Billion for years 2011 to 2013. However, he noted that this ignores virtual currencies, foreign sourced income or illegal sourced income.
- The Commissioner also noted that The top 1% of taxpayers account for \$175 Billion of added unpaid tax.

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Setting the Stage cont.

- He concluded that the Actual Tax Gap could reach \$1 Trillion per year.

Source: Fox Business New 4/13/21

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IRS Proposed Funding

- The President has asked for an additional \$80 Billion of IRS funding over FY 2022 to 2031
- Highest growth in funding would be in the early years
- Would more than double IRS staffing
- Enforcement would account for \$60 Billion of the \$80 Billion

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Industry Traps for the Unwary

Trap → Malpractice

Malpractice = A Possible Ethical Violation

Solution: Know the Traps and Apply the Ethical Rules

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Trap #1 - Research Credit and the Funded Research Trap



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Introduction (cont.)


- The four tests:
 - Elimination of Uncertainty for each New or Improved Business Component Test
 - Technological in Nature Test--discover information that is technological
 - Process of Experimentation Test--Experiment in the "scientific" sense
 - Business Component Test--needs some level of functional improvement to a new or improved Business Component



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Contract and Funded Research (Opposite Sides of the Same Coin)

- In cases of research, where the taxpayer does the research but does not have the risk of loss (i.e., funded research)--does not qualify for the credit. Treas. Reg. § 41(d)(4)(H).
- In cases of contract research where the taxpayer pays for the research, need to be able to show that payment is not contingent on the result. Treas. Reg. § 1.41-2(e)(2).
 - Have a contract and make it part of the audit record



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Funded Research

- Watch out for funded research
 - Who is really at risk--amounts paid for the product or the success of the research are not treated as funding research. Treas. Reg. § 1.41-4A(d)(1).
 - Documentation is often difficult in the context of manufacturing. IRS regulations state all "agreements" between the taxpayer and other persons are to be considered when determining if research is funded. Treas. Reg. § 1.41-4A(d).
 - Who keeps the right to the research? Treas. Reg. § 1.41-4A(d)(2).

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Funded Research (cont.)

- Purchase Order/Terms and Conditions/Master Purchase Agreement "Trap".
 - Possible Soutlion
 - A taxpayer retains the right to use the research results without making payments to the payer (the U.S. Government) who obtained the right to use and disclose the technical data from the taxpayers research. Lockheed Martin Corp. v. U.S., 210 F.2d 1338 (Fed. Cir. 2008)
 - Look at the contract, purchase order, terms and conditions or Master Purchase Agreement

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Wisconsin Dept. of Revenue Issues

- Wisconsin credit for research--looks to the federal credit requirements
- Wisconsin sales and use tax exemption for qualified research. Wis. Stats. § 77.54(57d)(b).

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Trap #2 - Per Diem Payments and the Accountable Plan Trap

- Without an accountable plan the IRS contends that all legitimate expenses are meals (50% deductible) or, they disallow the deduction in full.

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Trap #3 - Company Airplane Traps

- Partnership or corporate structure
 - Personal Entertainment v. Non-Personal Entertainment
- SIFL or §274-10(e)
- Schedule C Structure - CCA 202117012 (4/30/21)
- Depreciation and the Section 280F trap
- Entertainment Facility trap (see below)

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Trap #4 - The Entertainment Facility Trap

- Any entertainment use can taint the whole facility
- Some relief for transportation entertainment facilities

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Trap #5 - Failure to Keep Adequate Records Trap

- Code Section 6001
- Switching the Burden of Proof

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Trap #6 - Failure to Cooperate Trap

- Consider if you are eligible to switch the burden of proof to the IRS
 - Cooperation is important
 - Adequate records are important
- Noncooperation leads to admissions
- Ethical rule directly on point

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Trap #7 - Employment Tax Audit Issues

- New Audit Program
- Three Main Issues -
 - Fringe benefit issues
 - Employee/Independent Contractor
 - Deduction issues

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Fringe Benefit Issues

- Executive compensation issues in general
- Vehicle and tool *per diem* issues
- IRS is looking at the issue of whether employees are attempting to turn "wages" into nontaxable *per diem* allowances
 - Carefully scrutinize what expenses can be included in a *per diem*

Comment: Contractors who have a large amount of unreimbursed business expenses are asking for increased *per diems* due to the nondeductibility of these expenses.

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Interest-Free Adjustments

- Generally, for employment tax (i.e., Form 941 obligations), if the adjustment to the Form 941 (i.e., the tax deficiency) is
 - paid on or before the due date of the 941 for the period in which the error is "ascertained,"
 - the amount of the underpayment shall be paid without interest being charged.
- An error is ascertained when resolved at examination or with appeals.

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- If, however, the case is not resolved at Appeals and the taxpayer receives a notice and demand for payment from the IRS, the adjustment will not be interest free.
- In addition, the taxpayer will not be allowed an interest free adjustment where a prior audit found that additional tax was due with respect to the same issue.

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Trap #8 - Valuation Report Mistakes

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Traps for the Unwary When Obtaining Valuation/ Appraisal Reports

- *Exelon v. Comm'r*, 906 F.3d 513 (7th Cir. 2018)
 - SILO tax shelter
 - Appraisal of power plant found to lack credibility because the attorney interfered with the integrity and independence of the appraiser by providing wording and conclusions the lawyer expected to see so that the lawyer could issue a tax opinion
 - Loss on (1) valuation issue; and (2) reasonable cause defense to a penalty
- Need an appraiser who understands the process
- Be careful about "educating" an appraiser
- Assume whatever is sent to the expert will be made available to the IRS

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Valuation Checklist

The Cover Letter - Summary

- Who is the retaining party and other intended users?
- Use the Correct Definition of Fair Market Value ("FMV"), FMV for a gift, Treas. Reg. Section 25.2512-1 defines fair market value as **[T]he price at which property would change hands between a willing buyer and a willing seller, Neither being under any compulsion to buy or sell and both having reasonable knowledge of the Relevant facts**

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Valuation Checklist (cont.)

- The "as of" or date
- Purpose of the valuation and intended use (e.g. estate and gift tax purposes)
- Type of asset and interest being valued (i.e. a minority interest . . .)
- Control Rights - in any
- Access to Liquidity
- The Scope of Work
- Information Considered
- Methodologies Utilized
- Fair Market Value Conclusion

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Valuation Checklist (cont.)

The Report- Body

- Standard of value - Define FMV again
- Purpose of the valuation
- What is being valued?
- Prior transactions if any
- Rights, preferences, and privileges of interest being valued
- Economic overview / market conditions
- Company specific information
- Methodologies used to determine FMV (Holding Company v. Active Business).

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Valuation Checklist (cont.)


- Discounts. Do not rely only on case law. Berg Estate v. Comm'r, T.C. Memo 1991-279
- Explain the weight given to each methodology used. Otherwise if one methodology is rejected, the whole report may fail. True Estate v. Comm'r T.C.Memo 2001-167 aff'd., 390 F.3d 1210 (10th Cir 2004)
- Tax Affecting Earnings if an S Corp. or Partnership. Calculation both ways. Recent Cases, Kress, Estate of Jones. If do not tax affect, can the marketability discount be increased.

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Valuation Checklist (cont.)

- Justify the discount rate being used in the calculation
- **Statement of qualifications that meets Tax Court Rule 143**
- Exhibits showing calculations
- What is the FMV of the interest being valued?
- Signed certification

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**Application of Ethical Rules To
The Industry CPA**

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Sources of Ethical Rules

- IRS Circular 230
- AICPA Statements on Standards for Tax Services
- ABA Model Rules of Professional Conduct ("MRPC"), as adopted by each state.
- ABA Formal Opinions
- Tax Court Rules
- Internal Revenue Code

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**Circular 230 and Ethical Issues
Facing the Tax Practitioner**



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**Requirements for Written Tax Advice
Section 10.37(a) (Revised June 9, 2014)**

- The Practitioner must
 - Base written advice on reasonable factual and legal assumption
 - Including assumptions as to future events
 - Reasonably consider all relevant facts and circumstances the practitioner knows or reasonably should know
 - Use reasonable efforts to identify and ascertain the facts relevant to written advice on each federal tax matter




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**Requirements for Written Tax Advice
Section 10.37(a) (Revised June 9, 2014)**

- Not rely upon representations, statements, findings or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance upon them would be unreasonable
- Relate applicable law and authorities to the facts; and not, in evaluating a federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit


Further, reliance upon a representation, statement, finding or agreement is specifically unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based is incorrect, incomplete or inconsistent



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Reliance on Others Section 10.37(b)
Revised June 9, 2014


- The practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances
- Reliance is specifically not reasonable when
 - The practitioner knows or reasonably should know that the opinion of the other person should not be relied upon;
 - The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or
 - The practitioner knows or reasonably should know that the other person has a conflict of interest in violation with Circular 230
 - e.g., the conflict has not been properly waived

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Standard of Review
Have I Complied with the Rule?


In evaluating whether a practitioner's written tax advice complies with Section 10.37, the IRS will apply a "reasonable practitioner" standard, considering all facts and circumstances, including, but not limited to the scope of the engagement and the type and specificity of the advice sought by the client

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Due Diligence
Section 10.22 (Revised June 9, 2014)

- Practitioner Must Exercise Due Diligence
 - Every practitioner must exercise due diligence when practicing before the IRS
 - This includes exercising diligence in preparing documents relating to IRS matters and verifying the correctness of oral and written presentations made to both the IRS and one's client with regard to any matter administered by the IRS
 - A practitioner's duty to be diligent is a very broad concept
 - A lack of diligence would seem to exist in most instances of deficient practice-related conduct

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Due Diligence *Section 10.22 (Revised June 9, 2014)*

- The concept of diligence seems to require more than the mere belief that a presentation is correct the moment it is submitted to the IRS or a client
 - The implied approval of past incorrect statements would seem to be a violation of Section 10.22
 - If a practitioner fails to correct an incorrect statement made to the IRS or a client, knowing full well that the recipient continues to rely on that statement
 - A failure to correct the error is inconsistent with the practitioner's obligation to be diligent

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Reliance on Others



A practitioner will be presumed to have exercised due care if the practitioner relies on the work product of another person so long as the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking into account the nature of the relationship between the practitioner and the other person

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Diligence as to Accuracy §10.22

- Trap for the unwary – FBAR (FinCin 114) and foreign bank accounts




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Conflicts of Interest
Section 10.29

- A major cause of malpractice claims for Tax Practitioners



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A Conflict of Interest Exists If

- The representation of one client will be directly adverse to another client; or
- There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or third person, or by the personal interest of the practitioner


Comment: Virtually same Rule as MRPC 1.7

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Conflict Waivers



- The client must provide a written consent waiving the conflict within 30 days of giving verbal consent
- The written waiver must be retained for at least three years after the conclusion of the representation of any affected client

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Obtain a Waiver

- Where a conflict exists, a practitioner may still handle the matter if the practitioner reasonably believes that he/she will be able to provide competent and diligent representation to each affected client, the representation will not otherwise violate the law and each affected client waives the conflict in an informed consent at the time the conflict is discovered by the practitioner

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Competence – Section 10.35 (Revised June 9, 2014)

- A practitioner must possess the necessary competence to engage in practice before the IRS
- Competent practice requires knowledge, skill, thoroughness and the preparation necessary for the matter at issue
- A practitioner may become competent through various methods such as consulting with experts or studying the relevant law

Comment: Sections 10.35 and 10.36 together mean that managers have a duty to ensure that their subordinates have the requisite knowledge and skill and that they appropriately use that knowledge and skill

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AICPA Rules

- AICPA Code of Professional Conduct, Section 50, Article V, Due Care
- “... Members should be diligent in discharging responsibilities to clients, employers and the public. Diligence imposes the responsibility to render services promptly and carefully, to be thorough, and to observe applicable technical and ethical standards ...”


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Prompt Disposition of Matters and Responses to Requests for Information §10.20 and §10.23

- If the IRS makes a proper request for records or information, a practitioner must promptly respond to the request unless the practitioner reasonably has the good-faith belief that the information is privileged
- A practitioner may not unreasonably delay the prompt disposition of any matter before the IRS



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Prompt Disposition of Matters and Responses to Requests for Information §10.20 and §10.23

- The practitioner must make a reasonable inquiry of the practitioner's client as to who has possession or control of the requested information
 - However, a practitioner need not make inquiry of any other persons or verify information provided by the client

Comment: Consider these rules when responding to a "wealth squad" IDR, a detailed LB&I IDR or a very broad discovery request.

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Prompt Disposition of Matters and Responses to Requests for Information §§10.20 and 10.23

- Where the documents or information requested by the IRS are not in the possession of the practitioner or client, the practitioner must promptly provide the IRS employee seeking the information with any information the practitioner has about who has possession or control of the requested information

Comment This rule certainly seems to raise Section 7525 and attorney-client concerns

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Questions?

Thank You!

This presentation provides information of a general nature. None of the information contained herein is intended as legal advice or opinion relative to specific matters, facts, situations or issues. Additional facts and information or future developments may affect the subjects addressed in this presentation. You should consult with a lawyer about your particular circumstances before acting on any of this information because it may not be applicable to you or your situation.

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