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**INTERNAL REVENUE SERVICE
ADVISORY COUNCIL**

GENERAL REPORT

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NOVEMBER 16, 2011

GENERAL REPORT
OF THE
INTERNAL REVENUE SERVICE ADVISORY COUNCIL

The Internal Revenue Service Advisory Council (the “IRSAC”), the successor to the Commissioner’s Advisory Group established in 1953, serves as an advisory body to the Commissioner of Internal Revenue. The purpose of the IRSAC is to provide an organized public forum for Internal Revenue Service (the “IRS”) officials and representatives of the public to discuss relevant tax administration issues. The IRSAC reviews existing tax policy and recommends policies regarding both existing and emerging tax administration issues. In addition, the IRSAC suggests operational improvements, conveys the public’s perception of professional standards and best practices for tax professionals and IRS activities, offers constructive observations regarding current or proposed IRS policies, programs, and procedures, and advises the Commissioner and senior IRS executives on substantive tax administration issues.

The IRSAC has 28 members with substantial, disparate experience and diverse backgrounds. The members represent large and small firms from urban and rural settings across all regions of the United States. Members include representatives from the taxpaying public, educators, the tax professional and appraisal community, volunteer income tax community as well as small and large businesses. In addition to representing different industries and geographic regions of the United States, members also represent several occupations that interact with the IRS in a variety of ways. Current members include accountants, lawyers, enrolled agents, and academics. Each member has a unique

tax policy perspective and is committed to providing meaningful input and feedback to the IRS.

The IRSAC is organized into four subgroups - the Wage and Investment (W&I) Subgroup, the Small Business/Self-Employed (SBSE) Subgroup, the Large Business and International (LB&I) Subgroup, and the Office of Professional Responsibility (OPR) Subgroup. The members recognize the invaluable assistance, dedication and support provided by personnel from the IRS Office of National Public Liaison (NPL) and the operating divisions - Candice Cromling, Director, NPL; Carl Medley, Chief, Liaison Advisory Groups, NPL; Lorenza Wilds, IRSAC Program Manager, NPL; Rose J. Smith, NPL; Anna Millikan, NPL; Maria Jaramillo, NPL; Brian Ward, NPL; Johnnie Beale, W&I; Tonjua Menefee, SB/SE; and Kate Gregg, LB&I. The IRSAC members were honored and privileged for the opportunity to be able to work with each of these truly remarkable individuals!

Issues selected for inclusion in the annual report represent those to which IRSAC members have devoted particular attention during four working sessions and numerous conference calls throughout the year. The issues included in the IRSAC annual report are issues that members consider especially important and include issues that IRS personnel brought to our attention. Nearly all issues involved extensive research efforts.

We acknowledge the many challenges that the IRS has recently experienced and, knowing the demands of the IRS executives and operating division representatives, we sincerely appreciate the time and effort extended to the IRSAC during the year. The economic downturn in the United States and in the global community continues to be a

significant factor in some of the issues addressed by IRSAC, and this downturn is explicitly noted in some of the Subgroup reports.

The 2011 W&I Subgroup, chaired by Bonnie Speedy, prepared the attached report that reviews and makes recommendations for the possible simplification of Schedule D, new guidelines and notices for Installment Agreements and other collection tools, more clarity from the IRS at different stages of communication concerning the Refundable Adoption Credit, and changes to process and forms to increase compliance for the American Opportunity Tax Credit.

The 2011 LB&I Subgroup, chaired by David L. Bernard, prepared the attached report focusing on how the use of remote work concepts by the IRS can be expanded and improved to more efficiently deploy the Service's limited resources, identifying ways LB&I may gain greater commercial awareness, additional guidance regarding Schedule UTP, how distance learning methods employed by the IRS may be improved, insights regarding expanding usage of fast track settlement in order to facilitate earlier resolution of issues and to assist in managing the workload of IRS Appeals, and how the IRS could take advantage of the mandated research conducted within the academic community.

The 2011 SBSE Subgroup, chaired by David A. Lifson, focused on how to use technology to improve the examination process, use of Appeals Fast Track by SBSE, use of performance measures and behavioral effects/ACS, fairness and increasing compliance in worker classifications, increasing efficacy of online payment agreements and direct debit installment agreements, system and process enhancements including recommendations on effective use and advancement of personnel and improving the

Reasonable Cause Assistant with respect to penalty waivers.

The 2011 OPR Subgroup, chaired by Charles J. Muller, prepared the attached report focusing the authority to sign complaints and discipline practitioners remaining exclusively under OPR, coordination of administrative responsibility over discipline between OPR and the Return Preparer Office (RPO), expanding the guidance available to all tax practitioners concerning their ethical and professional obligations, rescission of changes to the final regulations permitting flexibility in the allocation of disciplinary authority within the IRS, adoption by OPR of the Uniform Standards of Professional Appraisal Practice, or equivalent, as one of the standards for judging appraiser conduct.

The 2008 and 2010/11 General Reports included recommendations within the SB/SE Subgroup Report for the IRS to consider a pilot program to offer tentative independent contractor status to compliant taxpayers that provide notice to the IRS. We commend the IRS for recently implementing the Voluntary Classification Settlement Program (VCSP), designed to increase tax compliance and reduce burden for employers by providing greater certainty for employers, workers and the government. Under the program, eligible employers can obtain substantial relief from federal payroll taxes they may have owed for the past, if they prospectively treat workers as employees. The VCSP is available to many businesses, tax-exempt organizations and government entities that currently treat workers or a class or group of workers as nonemployees or independent contractors.

The following discussion points were not assigned to a specific IRSAC subgroup but are being presented due to their broad-range importance throughout our system of tax

administration.

ISSUE: THE IRS MUST RECEIVE CONSISTENT, ADEQUATE AND APPROPRIATE FUNDING TO ACHIEVE THE PROPER ADMINISTRATIVE BALANCE BETWEEN SERVICE, COMPLIANCE AND TAX ENFORCEMENT

Executive Summary

The IRS must receive adequate funding commensurate with its ever-increasing responsibilities and workload to remain effective. The IRSAC is concerned that both taxpayers and the tax system will suffer without consistent and adequate levels of funding.

Background

The rapidly increasing responsibilities and workloads of the IRS continually surpass any corresponding increase in resources. The IRS has sought and continues to seek ways to improve taxpayer service while reducing taxpayer burden, add new and improved technology, and increase their visibility and tax enforcement efforts. The IRS has become expert in the art of “flexecution” (flexibility in the execution of their planned operations) while regularly called upon to redeploy precious resources to emerging areas of tax noncompliance throughout the world. The IRSAC commends these efforts and encourages them to continue performing these important tasks.

Limited resources are forcing the IRS to continually streamline its services. An example of this approach is the limited ability of taxpayers to interface with a local IRS representative when responding to a notice, when seeking resolution of an issue, or during the process of tax collection or the processing of offers in compromise. Instead,

taxpayers and representatives often encounter numerous erroneous notices and lengthy holding periods on the telephone followed by a non-discretionary approach that sometimes fails to comprehend the unique issues involved. Every taxpayer is not alike and the need for face-to-face interaction should not be overlooked or ignored in favor of budgetary concerns.

Limited resources are also forcing the IRS to streamline its enforcement efforts. An example of this approach is the 2011 Offshore Voluntary Disclosure Initiative (the “OVDI”). The IRS is to be highly commended for encouraging some 30,000 voluntary disclosures under the OVDI and a similar program, the 2009 Offshore Voluntary disclosure Program (the “OVDP”), while collecting what will likely, in the aggregate, far exceed \$3 billion in taxes, interest and penalties. These programs represented a streamlined “one size fits all”, non-discretionary approach to the voluntary disclosure by U.S. persons having previously undisclosed interests in foreign financial accounts and assets. Throughout, the IRS analyzed information received from taxpayers and practitioners and, on occasion, made changes in program processing. Some complained that their suggested changes were not implemented while others benefitted from changes following the implementation of each program. Although the IRS attempted to be responsive and understood the need for certain program modifications, we acknowledge that it is simply not possible to be responsive to every concern within a “one size fits all” approach. Unfortunately, many believe these programs did not properly provide enough discretion for the differences in culpability existing among those who came forward and among others who, for whatever reason, decided not to come into compliance.

Heightened tax enforcement efforts and increased penalties for non-compliance must be coupled with ongoing efforts to encourage taxpayers to voluntarily come into compliance. Further, the public must perceive that heightened future civil and criminal tax enforcement efforts will effectively ferret out a significant proportion of the remaining non-compliant taxpayer community. These efforts are resource intensive and require appropriate attention and funding to protect the integrity of the OVDP and the OVDI. The IRS has extremely capable personnel throughout who should be given the ability to utilize their experience in analyzing and resolving tax issues, rather than blindly processing paperwork.

The future is uncertain, at best, for eligible U.S. persons who failed to participate in the OVDP or the OVDI and have any remaining undisclosed interests in foreign financial accounts. There are perhaps millions of taxpayers who failed to take advantage of the certainty and perceived benefits afforded within the OVDP or the OVDI. The IRS should continue to pursue efforts designed to encourage these taxpayers to voluntarily come into compliance while perhaps recognizing that a “one size fits all” approach may not be fully appropriate.

Finally, the hiring of new IRS employees and retention of experienced employees is critical to the mission of the IRS. Due to competing views on the appropriate budget regarding the future funding of the IRS personnel, it is difficult for those IRS employees responsible for planning future hiring initiatives to prepare with any degree of certainty. It also can make it difficult to extend offers to desirable recruits and may result in offers to desirable recruits being delayed. The entire process is made even more difficult by the

fact that frequent changes to the Internal Revenue Code occur with little consideration to the staffing needs of the IRS.

IRSAC is concerned about the loss of experienced IRS employees due to retirement, reassignment and transfers out of the IRS, coupled with budget restraints imposed. This combination of events poses a significant concern for the operational efficiency in the area of taxpayer service and tax enforcement as well as the ability to replace personnel lost to attrition.

Recommendations

1. Congress should appropriately fund the IRS to assure continued success in service, compliance and enforcement. Without adequate funding, both taxpayers and the tax system will continue to suffer. IRS personnel must receive the appropriate tools and technology to perform effectively. Advances in private sector technology are outpacing a resource challenged IRS at a time when it is most important for the IRS to continue to improve its technology (and increase its full-time staff) if it is to operate effectively. The IRS will continue to face difficult decisions with respect to allocating limited resources between the compliance, enforcement and service functions. While IRSAC recognizes the extreme importance of service to taxpayers, we also recognize that increased compliance and enforcement efforts are critical to the proper functioning of our voluntary tax system and cannot be ignored due to budgetary constraints.
2. The IRSAC recommends that resource allocation decisions focus on ensuring that the service, compliance and enforcement efforts of the IRS are properly balanced.

Inappropriately allocated limited service or enforcement resources may serve only to foster future noncompliance. Encouraging future compliance is of parallel importance to punishing prior non-compliance. Tax administration is a constantly evolving process that must be able to react quickly, efficiently and effectively.

Conclusion

The IRSAC members are grateful for the opportunity to serve the Internal Revenue Service and taxpayers. It is readily apparent that the IRS is continually required to “do more with less” resources while operating in a complex, ever changing environment throughout the world. The IRS is to be highly commended for its historical and recent efforts and vast accomplishments on behalf of tax administration.

Finally, the IRSAC appreciates the invaluable assistance provided by the IRS executive and support personnel. Thank you for your dedicated service to the IRSAC and the IRS - it was an honor and privilege to get to know and work with each of you!

**INTERNAL REVENUE SERVICE
ADVISORY COUNCIL**

**WAGE AND INVESTMENT
SUBGROUP REPORT**

**BONNIE SPEEDY, SUBGROUP CHAIR
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NOVEMBER 16, 2011

INTRODUCTION/EXECUTIVE SUMMARY

The IRSAC Wage & Investment Subgroup (hereafter “Subgroup”) is comprised of a diverse group of tax professionals including Enrolled Agents, educators, Certified Public Accountants, and a national tax director of a large volunteer tax assistance program. This group brings a broad range of experience and perspective from both tax preparers’ and taxpayers’ views, and includes in depth experience in the issues faced by a wide range of W&I taxpayers. We have been honored to serve on the IRS Advisory Council and appreciate the opportunity to submit this report.

The Subgroup would like to thank W&I Commissioner Richard Byrd for his recognition of the value of the Subgroup as an integral part of his leadership team. The Subgroup has had the privilege of working with the professionals within the W&I Division of the IRS and found them to be extremely helpful in providing the information, resources, and IRS personnel necessary to develop our report. We also very much appreciate the support provided by our two designated liaisons who do a masterful job at navigating the IRS and ensuring we have the access and information needed to review our issues.

The Subgroup has researched and is reporting on the following four issues:

1. **Schedule D (Capital Gains and Losses) / Instructions and New Reporting Requirements**

The W&I Subgroup of IRSAC was asked to assist the IRS in reviewing the redesign of the 2011 Form 1040, Schedule D “Capital Gains and Losses” and associated instructions, for basis reporting that will be included in the information matching

program. The Subgroup was asked to provide recommendations on ways to best simplify the Schedule D redesign as well as ways to improve the instructions to provide information for basis reporting. The Subgroup was also asked to review and recommend ways to simplify the new Form 8949 that replaced Schedule D-1. The new forms and processes are well thought out and are significantly enhanced. We offer that additional modifications, such as clearer guidance and instructions and expanded reporting capability such as adding brokerages houses and a separate column for number of shares sold, will improve clarity of reporting and later reference by both the preparer and taxpayer, as well as matching by the IRS.

2. **Repeater Balance Due Taxpayers**

The W&I Subgroup of IRSAC was asked to provide input and feedback to assist the IRS with the Repeater Balance Due Taxpayers issue. The primary goal is to collect the balance of taxes due by helping taxpayers who are non-compliant and egregious repeaters to become compliant and stay compliant. Our recommendations provide suggestions for new guidelines for an Installment Agreement (IA), for redesigning the notices associated with Installment Agreements (CP521 and CP523) and for a review of other collection tools available.

3. **Refundable Adoption Credit**

The W&I Subgroup of IRSAC was asked to assist the IRS with the issue of documentation to support the Refundable Adoption Credit. Annually IRS receives and processes approximately 90,000 returns claiming the Adoption Credit. The Patient Protection and Affordable Care Act increased the Adoption Credit up to a limit of

\$13,170 per child and made the credit fully refundable for 2010 and 2011. Carryovers of expenses from prior years are also eligible for the refundable credit. With any new credit, there is a possibility of potentially fraudulent and questionable returns to be processed and substantial refunds improperly released. We offer options mostly focused on more specificity and clarity of communications. We suggest conformity will increase as the taxpayer understands all of the requirements especially related to documentation and definitions.

4. **American Opportunity Tax Credit**

The IRS has requested feedback from the Subgroup in three areas with regard to the American Opportunity Tax Credit (AOTC): (1) the language of the letters to AOTC claimants and educational institutions, (2) ideas for improving accuracy of AOTC claims particularly related to requiring the name of the educational institution on the Form 8863, and the Department of Education or other identification number on all completed Forms 1098-T and Forms 8863, and (3) the AOTC communication plan for students, parents, and educational institutions. TIGTA reports that taxpayers who erroneously claimed students who attended less than the required time for eligibility received approximately \$2 billion in AOTC. The Subgroup not only shares W&I's concern about the eligibility compliance issue, we as practitioners and educators, believe that additional recommendations concerning other aspects of the credit, such as (1) standardizing the amount of qualified tuition and related expenses reported on Form 1098-T to only allow for the reporting of payments received and (2) creating a column on Form 8863 that allows for reporting of educational expenses that are in addition to qualified tuition and

related expenses as reported on Form 1098-T. The Subgroup believes that these changes will allow for better computer matching, and will, therefore, increase overall accuracy.

**ISSUE ONE: SCHEDULE D (CAPITAL GAINS AND LOSSES) /
INSTRUCTIONS AND NEW REPORTING REQUIREMENTS**

Executive Summary

The W&I Subgroup of IRSAC was asked to assist the IRS in reviewing the redesign of the 2011 Form 1040, Schedule D “Capital Gains and Losses” and associated instructions, for basis reporting that will be included in the information matching program. The Subgroup was asked to provide recommendations on ways to best simplify the Schedule D redesign as well as ways to improve the instructions to provide information for basis reporting. The Subgroup was also asked to review and recommend ways to simplify the new Form 8949 that replaced Schedule D-1. The new forms and processes are well thought out and are significantly enhanced. We offer that additional modifications, such as clearer guidance and instructions and expanded reporting capability such as adding brokerage houses and a separate column for number of shares sold, will improve clarity of reporting and later reference by both the preparer and taxpayer, as well as matching by the IRS.

Background

In October 2010, the IRS issued final regulations under a law change that will require reporting of basis and other information by stock brokers and mutual fund companies for most stock purchased in 2011 and all stock purchased in 2012 and later years. The reporting will be to investors and the IRS using Form 1099-B “Proceeds from Broker and Barter Exchange Transactions.” The law change resulted in the redesign of 1099-B, Schedule D and D-1. The D-1 is no longer used and has been replaced by Form

8949 “Sales and Other Dispositions of Capital Assets.” Form 8949 will now contain all capital gain and loss transactions. The subtotals from this form will be carried over to Schedule D (Form 1040), where gain or loss will be calculated in aggregate. As other Schedules D are changed to follow this format, they will all use Form 8949, so that only one Form 8949 need exist for Modernized e-File and other purposes.

Short and long-term transactions will each be listed in the following categories:

- a. Transactions reported on Form 1099-B that show basis in box 3.
- b. Transactions reported on Form 1099-B that do not show basis in box 3.
- c. Transactions not reported on Form 1099-B, such as Form 1099-S transactions for sale of a vacation home, or the sale of a collectable.

A checkbox at the top of each page identifies the type of transaction reported (listed above). A taxpayer with more than one type of transaction must file a separate form for each type.

A new column was added in the description column for a transaction code that will be used to indicate various adjustments to gain or loss, such as wash sales, exclusions of Section 1202 gain, exclusions on small business stock gain, Section 83 income recognized, etc. The last column is used to indicate the amount of the adjustment to gain or loss.

Recommendations

1. Relocate the new transaction code column (b) on Form 8949 next to the new adjustments column (g). Having these two new columns side by side will make it easier to understand the nature and reason for the adjustment.

2. Include a statement on Form 8949 that refers the taxpayer to the list of transaction codes and their explanations in the form instruction and Publication 551 “Basis of Assets” for the completion of columns (b) and (g).
3. Update Parts I and II of Form 8949 checkboxes (A) and (B) to include the wording “Cost or other basis” instead of “shows basis” as currently listed in section (A) and “does not show basis” as currently listed in section (B), to be consistent with common terminology protocol.
4. Include an extra column on Form 8949 to show the number of shares sold. This will help facilitate the matching program.
5. Change the description column on Form 8949 to add the brokerage house name in column (a) in addition to “Description of property.”
6. Change the format of Form 8949 to a landscape format thereby including all the relevant information for data matching.
7. Add a statement on Schedule D at the end of line 7 “Net short-term capital gain or (loss),” Part I that says “Also include on Part III, line 16.” This will then be consistent with line 15 “Net long-term capital gain or (loss)” which is also included on Part III, line 16. The way it reads currently is that it leaves line 7 open ended.
8. Add a column on Schedule D to include net gain or loss per transaction.
9. Update Publication 551 “Basis of Assets” to include more specific information on the adjustments on Form 8949 in column (g) and include several examples.

10. Develop a web-based application that taxpayers can use as a training tool that would incorporate the new Forms 1099-B and 8949, and Schedule D.
11. Encourage the brokerage houses providing substitute Forms 1099-B to be consistent in reporting with the format of Form 8949. This will aid the taxpayer and preparer in uploading multiple transactions in a standard spreadsheet or other electronic format, thereby making reporting as error free as possible.

ISSUE TWO: REPEATER BALANCE DUE TAXPAYERS

Executive Summary

The W&I Subgroup of IRSAC was asked to provide input and feedback to assist the IRS with the Repeater Balance Due Taxpayers issue. The primary goal is to collect the balance of taxes due by helping taxpayers who are non-compliant and egregious repeaters to become compliant and stay compliant. Our recommendations provide suggestions for new guidelines for an Installment Agreement (IA), for redesigning the notices associated with Installment Agreements (CP521 and CP523), and for a review of other collection tools available.

Background

A prior study done by Wage and Investment (W&I), *Balance Due Taxpayers with High Risk of Becoming “Repeaters” Need Special Handling* dated June 2010, shows that one-third to one-half of balance due taxpayers have a subsequent balance due and/or nonfiler account within two years. Our own experience indicates too often taxpayers reduce the withholdings on their W-4 form or skip current year estimated payments so they have funds available to pay the installment agreement leaving them with a balance due on their current year taxes. In today’s economy, we are seeing earlier withdrawals from pensions, unemployment benefits and other income without proper withholdings. It is not uncommon in today's uncertain financial times for a taxpayer to accumulate several years of unpaid taxes. However, this creates a vicious circle where the taxpayer who is making payments for prior years now is also underpaying their current year’s taxes.

In general, taxpayers can enter into a streamlined installment agreement if the balance owed is less than \$25,000 and can be paid in five years or less. This dollar amount has been in place since 1999 and based on today's economy should be increased. In FY 2010, 94 percent of all installment agreements were streamlined installment agreements. The overall default rate for all installment agreements is 18.3 percent (non-streamline 23.2 percent and streamline 18 percent). Also, taxpayers who voluntarily make their payment by direct debit have a low default rate of 7.1 percent. If the dollar limit is raised, there will be more taxpayers qualifying for the streamlined installment agreement. Currently, if the balance due is more than \$25,000 then taxpayers must provide financial information, Form 433A or 433F, to qualify for an installment agreement. Also, if they owe taxes in the subsequent year, their installment agreement will default (in most situations) and a new installment agreement must be negotiated.

In FY 2010, the IRS sent out over 25 million reminder notices (CP521) to taxpayers who are on an installment agreement. After the taxpayer misses his/her second payment on an installment agreement, Letter 4458C, the Commissioner's skip payment notice, is sent. About one million of these notices have been sent so far for FY 2011. After missing their third payment, Notice CP523, Intent to Terminate your Installment Agreement, is sent.

After the Notice CP523 is sent, the installment agreement may be reinstated if the taxpayer contacts the Service either by phone or in writing. There is a \$45.00 reinstatement fee which may, in certain circumstances, be waived. IRS allows 30 days while research is done to see if payment was received or the taxpayer responds. If neither

the payment nor response is received, the case is sent to the Automated Collection System (ACS). Now the taxpayer is subject to liens on property and levy action on assets including bank accounts, salary, wages and even social security. The case may continue to be worked through ACS or it may be transferred to field Collection.

Recommendations

1. Increase the streamlined installment agreement to \$50,000 if repayment can be five years or less for all taxpayers.
2. Periodically review any revised limits on streamlined installment agreements to assure that they meet the needs of the IRS and taxpayers.
3. Require the following in cases of either a taxpayer who accumulated two periods of unpaid taxes, if within the streamline amount, or a taxpayer who has defaulted an Installment Agreement for a second time:
 - a) Direct debit installment agreements (DDIA), allowing one skip in a 12-month period, or
 - b) Direct payroll installment agreements (DPIA) for the unbanked taxpayer.
 - c) An approved request for reinstated IA automatically if taxpayer agrees to DDIA/DPIA. Failure to agree to DDIA/DPIA would not, in and of itself, automatically disqualify the reinstatement, which could still be granted on other facts and circumstances.
 - d) Use of the “lock-in” letter that specifies the maximum number of withholding allowances permitted for the employee. This allows the taxpayer to be in compliance, breaking the repeater balance due cycle.

4. Provide sufficient resources, including a dedicated telephone line, to effectively resolve any direct debit issues or problems in a prompt, timely manner.
5. Mail Letter 4458C the first time a payment is missed. Do not wait until the second missed payment.
6. Add a voucher to Letter 4458C for taxpayers to remit with their payments.
7. Add a statement on Notice CP521 that a payment has been missed and the amount needed to bring the account current. The amount should include the current monthly payment and all missed payments (similar to letters sent from credit card companies).
8. Add a Truth in Lending paragraph showing current interest and length of time to pay off based on monthly payment.

ISSUE THREE: REFUNDABLE ADOPTION CREDIT

Executive Summary

The W&I Subgroup of IRSAC was asked to assist the IRS with the issue of documentation to support the Refundable Adoption Credit. Annually IRS receives and processes approximately 90,000 returns claiming the Adoption Credit. The Patient Protection and Affordable Care Act increased the Adoption Credit up to a limit of \$13,170 per child and made the credit fully refundable for 2010 and 2011. Carryovers of expenses from prior years are also eligible for the refundable credit. With any new credit, there is a possibility of potentially fraudulent and questionable returns to be processed and substantial refunds improperly released. We offer options mostly focused on more specificity and clarity of communications. We suggest conformity will increase as the taxpayer understands all of the requirements especially related to documentation and definitions.

Background

The Adoption Credit is a large refundable credit of up to \$13,170, so the Service has determined that all returns claiming the credit must be filed by paper with the proper documents of a final or in process adoption included with the return. Through the third week of May 2011, approximately 87,000 returns were processed claiming the adoption credit; of those, about 61,000 were sent to Examination. Over 40 percent of the returns did not have the documentation attached. Approximately 53 percent of the returns claiming the credit were prepared by paid preparers and 42 percent were self-prepared. All returns with attached documents will be reviewed prior to processing the returns.

Delays are not in anyone's best interest, and processing must be completed quickly and efficiently as possible. The credit is in effect for the tax years 2010 and 2011. Lack of math error authority is a challenge; the IRS cannot process or disallow the credit just because the taxpayer does not send in documentation with the return. If no documentation is supplied with the return, the return is sent to exam. In the case of returns with other or multiple credits, only the Adoption Credit portion of the refund would be frozen if the documentation is missing or questionable. If any part of the 2010 Adoption Credit consists of a carryforward of unused credits from prior years it will also require that documentation from that prior year be included with the calculation of the credit.

Recommendations

1. Clearly identify what is a special needs adoption on the Form 8839 "Qualified Adoption Expenses" and its instructions. Line 5(a) should be added to highlight the difference between regular adoption and special needs adoption expenses.
2. Educate the taxpayer, the preparer community and third-party agencies about the necessity of including the documents required. Add the bullet point format from Form 886-H-Adopt-0 "Adoption Documentation Requirements" to the instructions for the Form 8839. IRS Summertime Tax Tip 2011-10 includes good concise information about the adoption credit and how to file for the credit.
3. Include a bold one line instruction near the top of the Form 8839 stating that documentation must be included to support the adoption credit claimed, including but not limited to the adoption final decree or court documents verifying the ongoing, not-final adoption.

4. Modify the Form 8839 instructions to boldly state that the documentation is required to be sent in paper form, along with the “paper filed” Form 1040, all other required forms and Form 8839. Prominently display the bullet points of required documentation from Form 886-H-Adopt-0. The current instructions do say in bold print that paper filing is required; the font size of the bold print needs to be increased for greater impact and to grab the reader’s attention.
5. Provide outreach with letters and announcements such as IRS Summertime Tax Tip 2011-10 to tax preparers and adoption agencies, etc., about the increased credit available and the increased documentation required to be filed, along with the reminder that the completed return will need to be paper filed.
6. Investigate how the documents necessary for the review and authorization of the return could be sent in electronic format and attached with an e-filed tax return.
7. Include in Exam correspondence to taxpayers a checkbox section to define exactly what was required that they did not include. The current letters are not specific and it is difficult for the taxpayer to tell which particular forms are missing. The automated process needs to have selectable checkbox lines that will indicate the documents that are required, but missing on the submitted return.

ISSUE FOUR: AMERICAN OPPORTUNITY TAX CREDIT

Executive Summary

The IRS has requested feedback from the Subgroup in three areas with regard to the American Opportunity Tax Credit (AOTC): (1) the language of the letters to AOTC claimants and educational institutions, (2) ideas for improving accuracy of AOTC claims particularly related to requiring the name of the educational institution on the Form 8863, and the Department of Education or other identification number on all completed Form 1098-T and Form 8863, and (3) the AOTC communication plan for students, parents, and educational institutions. TIGTA reports that taxpayers who erroneously claimed students who attended less than the required time for eligibility received approximately \$2 billion in AOTC. The Subgroup not only shares W&I's concern about the eligibility compliance issue, but we, as practitioners and educators, believe that additional recommendations concerning other aspects of the credit, such as (1) standardizing the amount of qualified tuition and related expenses reported on Form 1098-T to only allow for the reporting of payments received and (2) creating a column on Form 8863 that allows for reporting of educational expenses that are in addition to qualified tuition and related expenses as reported on Form 1098-T, will allow for better computer matching, and will therefore increase overall accuracy.

Background

To qualify for the American Opportunity Tax Credit (AOTC), the taxpayer must pay post-secondary educational expenses during the first four post-secondary education years for an eligible student that is the taxpayer, spouse, or dependent. An eligible student

is defined as one who attends an eligible educational institution at least half time during one academic period of the year, is not a graduate level student (unless the student was a non-graduate student during the same year), and does not have a felony drug conviction. The AOTC increases the availability of the credit to taxpayers with higher adjusted gross income, has a 40 percent refundable component up to \$1,000, and is available for the expenses of books, supplies, and equipment needed for education purposes.

A Form 1098-T “Tuition Statement” is required to be issued annually from the eligible educational institution to the student. Areas of concern on the 1098-T for W&I are (1) the checkboxes that report whether the student is at least a half-time student, (2) if the student is a graduate student, and (3) the reporting of either the payments received or amounts billed for the qualifying tuition and related expenses for the calendar year.

Form 1098-T is not required to be filed with the individual tax return and submission processing does not have math error authority for AOTC to deny claims based on third-party documentation. Therefore, IRS is unable to capture these erroneous credits as returns are processed. Compliance activities must occur after submission processing. Over 1.3 million students were identified as having received Form 1098-T that indicated they attended less than half time or were graduate students or both. Regardless of the information on Form 1098-T, taxpayers claimed these students and received approximately \$2 billion in erroneously paid AOTC.

As additional evidence of issues with education credit accuracy, the Treasury Inspector General for Tax Administration (TIGTA) reports “*Improvements are needed in the Administration of Education Credits and Reporting Requirements for Educational*

Institutions dated September 30, 2009, identified approximately 203,000 taxpayers who claimed the Hope Credit for the same student for the three consecutive tax years ending in TY 2006 (TYs 2004, 2005, and 2006). The amounts of the credits inappropriately claimed in TY 2006 averaged close to \$1,500 and totaled just over \$300 million. Over 58,000 of these taxpayers claimed the credit for the same student for four consecutive years.”

TIGTA further commented, “Since the Hope Credit is not a refundable credit, the amount of the credit realized is limited to tax owed (after applying most other credits).” According to TIGTA, “in a further analysis of the accounts of the taxpayers that claimed the credit in TY 2007 for a third year (it was) determined that 168,347 taxpayers inappropriately received credits totaling over \$206 million.” TIGTA found that without IRS having Math Error Authority for this credit, many taxpayers are successful in taking the credit for more than the allowable years of post-secondary education.

TIGTA also commented on the option of the eligible educational institution to report either amounts received or amounts billed for qualified tuition. “The only amount relevant for cash basis taxpayers, and the only amount beneficial to both the taxpayer and the IRS for computing the amount of credit allowed, is the amount paid by the taxpayer for qualified tuition and related expenses.”

Although the AOTC provisions are set to expire on December 31, 2012, analysis by both the IRS and TIGTA supports the need to communicate and find more effective processes for determining non-compliance with education credits. It is anticipated that education credits, whether AOTC, HOPE, Lifetime Learning, or another version may

well continue past 2012 into the future and that these recommendations could be helpful for future years.

Recommendations

1. Define “at least half time during one academic period.” This is currently defined as being a half time student for at least five months of the year. The definition may need to be revisited since many institutions now offer programs with “academic periods” with various lengths of time. Providing more examples that demonstrate “at least half time” using different academic periods would be useful.
2. Define the term “eligible institution” and create a webpage or link to a webpage that lists all eligible institutions that qualify for the AOTC. Also provide the web link in IRS Publication 970, Tax Benefits for Education.
3. Require that Form 1098-T report payments received during the year. With the change to only payments received being reported, the IRS will need transition rules so that amounts billed in the prior year do not get counted twice as amounts billed would be payments received in the subsequent year.
4. Inform taxpayers and academic institutions that “tuition in-kind” is not to be reported on Form 1098-T.
5. Provide guidance to taxpayers on prepaid tuition plan contributions and withdrawals. Include examples that demonstrate that contributions to prepaid plans are not eligible for education credits, while withdrawals used for tuition may be eligible.

6. Require eligible educational institutions to distribute two Forms 1098-T to any student that is both an undergraduate and graduate student in the same calendar year. Alternatively, the 1098-T could be redesigned to provide a box for undergraduate payments received and a box for graduate payments received, along with applicable checkboxes.
7. Redesign Form 8863 “Education Credits” to:
 - a. Require reporting the name of the eligible educational institutions and its federal identification number, and
 - b. Provide lines for separately reporting qualified tuition payments from Form 1098-T apart from reporting eligible educational expenses other than amounts reported on Form 1098-T. The separate line item reporting will provide better clarity for reporting and also aid the computer match function.
8. Communicate to students and parents that the taxpayer is ultimately responsible for amounts used on the tax return. Therefore, the taxpayer should maintain records of qualified educational expenses, and verify those against the Form 1098-T issued by the qualifying educational institution.
9. Communicate the definition of “at least half time” to students and parents, as well as educational institutions and tax professionals.
10. Provide guidance to educational institutions on the proper reporting procedures for Form 1098-T including addressing top errors.

11. Reinforce with students, parents, eligible educational institutions, tax preparers, and software providers that a student is eligible to take the AOTC on their own tax return only if the student is not a dependent of another taxpayer.
12. Reinforce with students, parents, eligible educational institutions, tax preparers, and software providers that the credit is available to the taxpayer who claims the student as a dependent even when the name on the form is not the taxpayer's.
13. Provide assistance and a telephone number for students to contact if they have not received Form 1098-T, after contacting their institution.
14. Develop a process and possibly a substitute Form 1098-T for use by students when an institution does not comply with the reporting requirements.
15. Revise letters CP-02U and CP-02T to:
 - a. Define "one academic period."
 - b. Clarify that if a Form 1098-T is not received, the taxpayer should request Form 1098-T from their educational institution. Currently, the CP-02T states that an updated Form 1098-T should be requested; since the taxpayer has not received an original 1098-T from their educational institution, requesting an updated 1098-T can be confusing.
 - c. Include a link to Department of Education (DOE) for defining and determining if the institution is an "eligible educational institution."
 - d. Define the types of "programs" that are eligible for the AOTC at educational institutions.

16. Revise letter CP-02S. Currently, the instructions to the institution state that if a student was an undergraduate through May and then began graduate school, the “check if a graduate student” box should be marked. This would seem to lead to errors and confusion by both the taxpayer and the IRS. Also, define “one academic period” in the CP-02S.
17. Develop a survey to be distributed to educational institutions that may help the IRS gain a better understanding of the issues that these institutions have with the proper completion of Form 1098-T. See Exhibit A: Survey to Educational Institutions.
18. Implement the W&I American Recovery and Reinvestment Act AOTC Communication Plan dated May 9, 2011, which addresses the IRS’s communication objectives. However, the terms “payment” and “credit” need to be clearly defined in the message.
19. Provide educational outreach to taxpayers, tax preparers, and educational institutions through the use of webinars, brochures, and tax tips. Interaction with the National Association of College and University Business Officers may also be beneficial.

EXHIBIT A: SURVEY TO EDUCATIONAL INSTITUTIONS

1. What type of institution are you?
 - a. 2 year
 - b. 4 year
 - c. 4 year plus graduate school
 - d. Technical/trade

2. What are the lengths of your academic periods?
 - a. 8 weeks
 - b. 10 weeks
 - c. 12 weeks
 - d. 16 weeks
 - e. Other

3. Do all your programs qualify for education tax credits? If not, how do you determine which qualify, and account for the separate tuition charges.

4. Do you have courses that can be taken by both undergraduate and graduate students for degree requirements? If so, how do you account for the separate tuition payments.

5. Do you require students to submit either a social security number or an individual taxpayer identification number?

6. Who prepares the Form1098-T for your institution?
 - a. In house Enterprise Resource System (ERP)
 - i. Datatel
 - ii. Banner
 - iii. Other (identify)

b. Outsourced

i. (identify)

7. Does your institution report tuition payments received or amounts billed on Form 1098-T “Tuition Statement?”
8. Does your institution have difficulty distinguishing what payments are from grants?
9. Does your institution have difficulty distinguishing what payments are from scholarships?
10. Do you communicate to students that they may qualify for educational tax credits? If yes, what is your communication process?
11. What are your biggest challenges with the preparation of Form 1098-T?

**INTERNAL REVENUE SERVICE
ADVISORY COUNCIL**

**SMALL BUSINESS/SELF-EMPLOYED
SUBGROUP REPORT**

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NOVEMBER 16, 2011

INTRODUCTION/EXECUTIVE SUMMARY

The IRSAC Small Business/Self-Employed Subgroup (hereafter “Subgroup”) consists of eight tax professionals from wide-ranging backgrounds. Its members include attorneys, certified public accountants, and enrolled agents serving the tax system in public practice, education and in private industry. The Subgroup’s membership reflects the broad range of taxpayers served by the SB/SE Division of the Internal Revenue Service (hereafter “SBSE”).

The Subgroup enjoys a close working relationship with the professionals within SBSE. The relationship has granted this subgroup the opportunity to consult with SBSE leadership on many issues over the past year. The Subgroup and SBSE consulted both formally and informally on all of the issues contained in this report.

The Subgroup respectfully recommends the following nine actions relating to the nine issues raised in this report:

1. **Empower Exam Managers as an Alternative to SBSE Fast Track Settlement Program**

The principles of the SBSE Fast Track Settlement pilot program should be implemented by giving examination managers broader authority and mediation training so they can be empowered to resolve disputes at the appropriate level within the examination process.

Worker classification uncertainty can be resolved cooperatively by providing taxpayers with opportunities to remove the uncertainty of worker classification through:

2. **Enhance Worker Classification Compliance with Increased Publicity for the Voluntary Classification Settlement Program**

Publicizing and embracing the recently announced Voluntary Worker Classification Settlement Program (VCSP) that allows employers to resolve past worker classification issues at a reduced cost by voluntarily reclassifying their workers, and

3. **Provide Tentative Independent Contractor Status for Appropriate Compliant Taxpayers that Provide Notice to the IRS**

Providing compliant taxpayers who have a reasonable basis to treat workers as independent contractors a forum for transparency within the IRS so they can manage their businesses with reduced uncertainty,

Wage reporting can be enhanced by:

4. **Update DeMinimis Fringe Guidance**

Updating *de minimis* fringe benefit examples to deal with changes in the business environment that have occurred over the past 20 years providing greater certainty to IRS examiners, employers and employees and reporting income,

Collection and examination efforts can be enhanced by:

5. **Revise IRS Streamlined Installment Agreement Program and Related Electronic Payment Systems Including Online and Direct Debit Programs to Improve Collection**

Taking unsecured debt into consideration to preserve the sustainability of a taxpayer's earnings to pay off all their debts,

6. **Enhance Collections by taking Unsecured Debt into Consideration**

Developing tools and techniques to expand the effectiveness of individuals working within the Automated Collection System process,

7. **Revise the IRS's Penalty Abatement Processes and the Reasonable Cause Assistant (RCA) to Provide Efficient and Consistent Treatment for Abatements**

Reviewing the penalty abatement process to reduce the chances that its automatic provisions could be a trap for the unwary and an excessive challenge for the under-informed taxpayer,

8. **Adopt Technology to make Taxpayer Examinations more Efficient and Less Burdensome to the Taxpayer**

Adopting and integrating technology such as electronic document submission, portals, its online schedulers, and automated audit tracking programs into the tax examination process to provide time and cost savings to both the Internal Revenue Service and the taxpayer, and

9. **Use Appropriate Performance Measures to Enhance Customer Service and Increase Collections**

Enhancing current evaluation standards to include standards that would promote voluntary taxpayer compliance.

**ISSUE ONE: EMPOWER EXAM MANAGERS AS AN ALTERNATIVE TO
SB/SE FAST TRACK SETTLEMENT PROGRAM**

Executive Summary

In August 2006, SB/SE introduced the Fast Track Settlement Program (SB/SE Fast Track) as a pilot program to SB/SE taxpayers in select cities. The program was continued indefinitely in December 2010 to SB/SE taxpayers in additional cities. As evidenced by the decline in the number of cases received in SB/SE Fast Track from FY2009 to FY2010, taxpayers are not finding use of the program beneficial to resolving IRS issues promptly. The IRS should consider closing the SB/SE Fast Track program because it includes so few cases and because of taxpayers' reluctance to participate in the program. Based on the experience of IRSAC members and others, taxpayers are reluctant to participate in the program because it causes unproductive delays, there is too little incentive for the IRS to compromise its stated position, and it often adversely affects taxpayers' future bargaining positions. As an alternative to this program, the IRS should consider giving examination managers broader authority and mediation training so they are empowered to resolve more disputes on a variety of grounds.

Background

SB/SE Fast Track is a pilot program available to SB/SE taxpayers in select cities designed to expedite case resolution at the earliest opportunity.¹ SB/SE Fast Track

¹ SB/SE Fast Track Settlement is currently available to taxpayers under examination in Chicago, Illinois; Houston, Texas; St. Paul, Minnesota; Philadelphia, Pennsylvania; Central New Jersey; and San Diego, Laguna Niguel, and Riverside, California. Announcement 2011-5, 2011-4 I.R.B. 430. Additional locations may be identified and added to the program by mutual agreement between SB/SE and the Office of Appeals.

under examination to work together with SB/SE and the Office of Appeals (Appeals) to resolve outstanding disputed issues while the case is still in SB/SE jurisdiction. The taxpayer, examining agent, or the SB/SE Group Manager may initiate the process to take part in SB/SE Fast Track at any time after an issue has been fully developed, preferably before the issuance of a 30-day letter or equivalent notice. During the process, an FTS Appeals Officer serves as a neutral party using dispute resolution techniques to facilitate settlement between the parties. The parties must agree to the resolution of the case in order to settle. If a settlement is not reached the Territory Manager must concur with this result.

Potential taxpayer benefits of SB/SE Fast Track could include: (i) the opportunity to resolve an issue at the lowest level before the formal Appeals process begins; (ii) obtaining an objective opinion of the issues from the Appeals Officer; and (iii) utilization of Appeals settlement authority to effect a settlement based on hazards of litigation. The taxpayer may withdraw from SB/SE Fast Track at any time if the process is unsatisfactory. Furthermore, if the parties fail to resolve any issue in SB/SE Fast Track, the taxpayer retains the option of requesting that the issue be heard through the traditional Appeals process.

Since its inception in 2006, SB/SE Fast Track received a total of 242 cases involving 572 tax returns. Of these cases, 124 were fully resolved (51 percent), 13 were partially resolved (5 percent), 59 were not resolved (totally unagreed) at the conclusion of the process (25 percent), and 46 were withdrawn or terminated by the taxpayer or the IRS

before the process was completed (19 percent).² The method of case resolution, *i.e.*, agreed, partially agreed, unagreed, or withdrawn, fluctuated with no identifiable trend. However, SB/SE Fast Track average cycle time, the time between the date the case is received in SB/SE Fast Track and the date the case is closed, steadily increased. In FY2010, the average SB/SE Fast Track cycle time was 86 days compared with an average of 58 days in FY2007.³ By comparison, the entire process is estimated to be completed within an average of 60 days.⁴ The trend shows a gradual increase over these four years, and the FY2011 average cycle time to date, based on cases closed through April 2011, increased to 104 days. Although the program was expanded to additional cities, the increase in the number of cases may be disproportionate to the increase in the cycle time. Thus, one of the most beneficial aspects of the program—efficient resolution of examination issues—seems not to have been realized.

Unfortunately, SB/SE taxpayers realize very few of the anticipated benefits of SB/SE Fast Track. SB/SE Fast Track could benefit both the IRS and SB/SE taxpayers if it provided a more expeditious and thereby less costly, resolution. A comparable Fast Track program has been more successful with LB&I taxpayers because the process assists in narrowing the scope of a large case to a smaller number of manageable issues to be resolved. We believe the reason for the perception of greater success in LB&I Fast Track lies in the nature of LB&I taxpayers' relationship with the IRS. LB&I taxpayers'

² These figures were calculated based on estimated totals provided by the Internal Revenue Service as of June 2011.

³ The cycle times are determined by excluding those cases terminated or withdrawn prior to conclusion by the taxpayer or the IRS.

⁴ I.R.M. 8.26.2.2.1

relationship with the IRS is generally continuous and more trusting than the usual relationship that SB/SE taxpayers have with the IRS. SB/SE taxpayers' interaction with the IRS is more transactional and much less frequent. However, SB/SE taxpayers generally represent smaller cases where the scope of the examination is already fairly narrow. As a result, SB/SE taxpayers cannot count a narrowed scope of issues as a benefit of Fast Track and any efficiency gained from the process will be comparatively low. Moreover, participation in SB/SE Fast Track leaves SB/SE taxpayers more vulnerable because they reveal their reasoning and tax position but gain nothing in exchange from the IRS. Generally, participating in SB/SE Fast Track and having to reveal the reasoning for their tax positions without the benefit of understanding more about the IRS' position puts SB/SE taxpayers at a disadvantage.

We believe that a far better approach would be to have managers act as impartial parties in reviewing the work of their agents, striving to reach a settlement with the taxpayer as expeditiously as possible. Managers are accessible, "on the ground" and have a very real opportunity to mediate differences of opinion. In particular, and without limitation, managers should be authorized to resolve examination issues using hazards of litigation (factual and/or legal), subject to similar established processes for cases in Appeals.⁵ This recommendation, if adopted, will require a change in the culture, from an adversarial relationship between the IRS agents and managers, on the one hand, and taxpayers on the other, to a customer-service-based organization focused on

⁵ Cf. I.R.M. 8.26.2.8.3, paragraph 2 (requiring the preparation of a brief Appeals Case Memorandum when issues are resolved using hazards of litigation).

cooperatively reaching the correct conclusion.

Recommendations

1. Close SB/SE Fast Track.
2. Train and empower examination managers to reduce or eliminate impediments to the resolution of SB/SE examination issues, and to resolve such issues at the lowest possible level by using mediation and other appropriate skills.

ISSUE TWO: ENHANCE WORKER CLASSIFICATION COMPLIANCE WITH VOLUNTARY DISCLOSURE

Executive Summary

The IRS Worker Classification Settlement Program (CSP) has helped to resolve many worker classification issues. We applaud the IRS for launching the Voluntary Worker Classification Settlement Program (VCSP) that allows employers to resolve past worker classification issues at a reduced cost by voluntarily reclassifying their workers.

Worker classification is a sensitive issue for business and the IRS. Many taxpayers are concerned about worker classification and until now have had no program for changing a worker's classification at a low tax cost. The VCSP will be well received and classify more workers as employees.

Background

No simple or objective test exists to distinguish whether a worker is an employee or an independent contractor. The tests used to determine whether a worker is an independent contractor or an employee are complex and subjectively applied. Significant tax consequences result from the classification of a worker as an employee or independent contractor.

Under the CSP, the examiner must first determine whether the employer is entitled to relief under the guidelines for determining the employment status of a worker as set forth in §530(a) of the 1978 Act, as amended by §269(c) of the Tax Equity and Fiscal Responsibility Act of 1982 ("Section 530"). Section 530 generally allows a service recipient to treat a worker as not being an employee for employment tax

purposes, regardless of the worker's actual status under the common-law test, unless the service recipient has no reasonable basis for such treatment or fails to meet certain requirements. Section 530 was permanently extended by the Tax Equity and Fiscal Responsibility Act of 1982.

If the service recipient is entitled to §530 relief, under CSP there is no assessment and the service recipient can continue to treat the workers in question as independent contractors. If the service recipient desires to begin treating the workers as employees, it can agree to do so in the future (no later than the beginning of the next year) without giving up its claim to §530 relief for earlier periods.

If the examiner determines that the service recipient is erroneously treating employees as independent contractors, a series of two graduated CSP settlement offers can occur. If the service recipient has met the reporting consistency requirement of §530 but clearly has no reasonable basis for its treatment of the workers as independent contractors or has been inconsistent in its treatment of the workers, the offer will be a full employment tax assessment under IRC §3509 (with the employer agreeing to reclassify the workers as employees on a prospective basis, ensuring future compliance).

In the event of a recharacterization of workers as employees from independent contractors under CSP or otherwise, no interest will be due on the additional liability arising as a result of the recharacterization if: (i) the employer agrees to the recharacterization with either the Examination Division or the Appellate Division of the IRS (following a timely Protest), and (ii) the additional FICA tax is paid in full before the date the current Form 941 would be due for the quarter within which there is an

agreement with the IRS as to the recharacterization. See Revenue Ruling 75-464 and IRC §6205. The foregoing represents a significant economic incentive for the employer to promptly agree to the recharacterization and satisfy the resulting liability.

Under present law, the determination of whether a worker is an employee or an independent contractor is generally made under a facts and circumstances test that seeks to determine whether the worker is subject to the control of the service recipient, not only as to the nature of the work performed, but the circumstances under which it is performed. Before a service recipient can know how to treat payments made to workers for services, they must first know the business relationship that exists between the service recipient and the person performing the services. The person performing the services may be: (a) A common-law employee, (b) A statutory employee, (c) A statutory nonemployee, or (d) An independent contractor.

Under common-laws rules, a worker may generally be subject to classification as an employee if the service recipient can control what will be done and how it will be done. An individual is generally treated as an independent contractor if the person for whom the services are performed has the right to control or direct only the result of the work and not the means and methods of accomplishing the result. In Rev. Rul. 87-41, the IRS developed a list of 20 factors that may be examined in determining whether an employer-employee relationship exists. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. In 1996, the IRS published a training manual for examiners, entitled “Independent Contractor or Employee? Training Materials” which grouped the common

factors in three categories: (1) behavioral control; (2) financial control, and (3) relationship of the parties. In recent years, the IRS has addressed these 3 categories by focusing on the existence of entrepreneur behavior, thereby focusing on the less subjective financial control category.

The Subgroup has observed that worker classification and employment tax issues will become increasingly controversial with pressure put on businesses with respect to the 2014 requirement for employer-provided health insurance. In addition, the IRS has an employment tax initiative in which it is targeting this issue. The longer misclassification as an independent contractor continues, the more onerous correction becomes. Congress has provided relief from reclassification in circumstances which meets certain requirements outlined in §530 of the Revenue Act of 1978 and decreased the amount of employment taxes that can be assessed, many businesses are still reluctant to address this issue. Because of the decreased taxes on assessment, employers have little incentive to approach the IRS with an offer to confirm an individual's treatment or resolve prior years. By opening up the CSP to taxpayers not currently under audit, the IRS will be reducing future audit issues and accelerating resolution of unpaid taxes.

Businesses should be encouraged to take whatever steps are necessary to properly classify workers. Such proper classification will likely result in more workers being classified as employees, in accelerated future tax payments through income and employment tax withholding, less unreported income and fewer inappropriate income tax deductions.

Under the VCSP, employers accepted into the program will pay an amount effectively equaling just over one percent of the wages paid to the reclassified workers for the past year (10 percent of the employment tax liability determined under the reduced rates of section 3509(a), which, in 2011, is 10.28 percent for compensation up to the OASDI wage base and 3.24 percent for additional compensation). No interest or penalties will be due, and the employers will not be audited on payroll taxes related to these workers for prior years.

Interested employers can apply for the program by filing Form 8952, Application for Voluntary Classification Settlement Program, at least 60 days before they want to begin treating the workers as employees. Taxpayers accepted into the VCSP will enter into a closing agreement with the IRS and will be subject to a special six-year statute of limitations for the first, second and third calendar years beginning after the date on which the taxpayer has agreed under the VCSP closing agreement.

Recommendation

1. Publicize the Voluntary Worker Classification Settlement Program to the business and tax professional communities.
 - a. To incentivize compliance, the IRS should consider sending letters to service recipients in industries having a history of noncompliance, offering a way to avoid penalties through an employment tax voluntary disclosure program. Service recipients should be encouraged to self-comply by receiving educational information regarding worker status and being given

the opportunity to correct prior classification errors outside the traditional examination process.

- b. To increase taxpayer's awareness of this issue, the IRS should publish the Top 10 employment tax issues discovered on audit. This should include meaningful examples setting forth potential liabilities for taxes and penalties, both upon audit and under the voluntary CSP. Examples of employees could include seasonal workers (such as retail help at holidays) and replacement workers for employees on long-term leave of absences.

**ISSUE THREE: PROVIDE TENTATIVE INDEPENDENT CONTRACTOR
STATUS FOR APPROPRIATE COMPLIANT TAXPAYERS THAT PROVIDE
NOTICE TO THE IRS**

Executive Summary

Worker classification is highly fact-specific. It is often difficult to know in advance how the facts will develop, especially at the beginning of an arrangement. Even when taxpayers act in good faith, sometimes a worker who is initially believed to be an independent contractor appears in hindsight to have actually been an employee. By giving compliant taxpayers who have a reasonable basis to be treated as an independent contractor the ability to make an irrevocable election of independent contractor status and the IRS the opportunity to review that election after a specified time (e.g., two years), the IRS will enhance compliance with the worker classification rules and may be able to better enforce worker status rules and taxpayers may be more confident that their good-faith determinations are not later second-guessed.

Background

Significant tax consequences result from the classification of a worker as an employee or independent contractor. These include employment tax liabilities, income tax withholding obligations, information reporting, the permissibility of certain deductions, and eligibility for employee benefit plans. Despite the significance of these issues, no simple or bright line test exists to distinguish whether a worker is an employee or an independent contractor. The determination is generally made under a facts-and-circumstances analysis that seeks to determine whether the worker is subject to the

control of the service recipient, not only as to the nature of the work performed, but also the circumstances under which it is performed. In Rev. Rul. 87-41, the IRS enumerated 20 factors that may be examined in determining whether an employer-employee relationship exists. The degree of importance of each factor varies depending on the occupation and the factual context in which the services are performed. In 1996, the IRS published a training manual for examiners, entitled “Independent Contractor or Employee? Training Materials” which grouped the common factors into three categories: (1) behavioral control, (2) financial control, and (3) relationship of the parties.

A Determination of Worker Status for Purposes of Federal Employment Taxes and Income Tax Withholding (Form SS-8) may be used by a business or worker to request a determination regarding a worker’s employment tax status as an employee or independent contractor. The information on the Form SS-8 is reviewed by a tax examiner in the SS-8 Program, and a determination is made based upon the common law test. Many taxpayers believe that IRS determinations are biased in favor of the conclusion that workers are employees. In addition, there is a concern that the SS-8 process increases audit exposure.

Pursuant to §530(a) of the Revenue Act of 1978, as amended by §269(c) of the Tax Equity and Fiscal Responsibility Act of 1982, a service recipient may treat a worker as not being an employee for employment tax purposes, regardless of the worker’s actual status under the common-law test, unless the service recipient has no reasonable basis for such treatment or fails to meet certain requirements. Section 530(b) prohibits the publication of regulations or revenue rulings by the IRS and Treasury Department with

respect to the employment status of any individual for purposes of employment taxes. For this purpose, “employment status” is defined as “the status of an individual, under the usual common law rules applicable in determining the employer-employee relationship, as an employee or as an independent contractor (or other individual who is not an employee).” Other forms of published guidance, such as revenue procedures, are not mentioned. Moreover, the IRS and Treasury may develop enforcement programs without issuing regulations or revenue rulings. A well-known example in the worker classification area is the Classification Settlement Program.

Finally, given the sustained high unemployment rate, companies should be encouraged to hire workers even if that means hiring them as independent contractors rather than as employees. Allowing taxpayers to self identify worker classification status for a period will enhance compliance and simplify enforcement by informing the IRS of these activities.

Recommendations

1. Create a pilot program to allow a service provider and service recipient to file an irrevocable election with the IRS to treat the service provider as an independent contractor, subject to the following conditions:
 - a. Prior to making the election, the service provider must be given notice of the potential consequences of independent contractor and employee status. The notice must be written in a manner calculated to be understood by the average worker and sufficiently accurate and comprehensive to reasonably

advise workers of their rights and obligations as independent contractors or employees.

- b. The service provider and service recipient must both elect to treat the service provider as an independent contractor.
 - c. In order to be able to make the election, the service provider and service recipient must be in compliance with all filing and payment requirements.
 - d. The IRS may retroactively revoke the election on account of fraud, if the taxpayer treats similarly situated individuals differently or if there is no reasonable basis for independent contractor status.
 - e. The service recipient must comply with all information reporting requirements (e.g., Form 1099-Misc) with respect to this individual for the period subject to the election.
2. Require facts regarding the relationship between the service provider and the service recipient to be submitted to the IRS after a specified number of years (e.g., two).
 3. Presume the taxpayers' election to be correct until the IRS reviews the facts and notifies the service recipient and service provider of a change in the service recipient's status.
 4. Any IRS adjustments to the taxpayers' status as a result of reviewing the facts will be prospective and no penalties will be assessed.

ISSUE FOUR: UPDATE THE DE MINIMIS FRINGE GUIDANCE

Executive Summary

Business practices have changed considerably since Treas. Reg. 1.132-6 was issued in 1989. To encourage employers to accurately calculate and comply with income and employment tax withholding and reporting requirements, employers need modern examples regarding what fringes provided to employees are and are not considered de minimis by the IRS. IRSAC commends the IRS on the release of Notice 2011-72 and the use of the de minimis fringe rules to exclude personal use of cell phones that an employer provides primarily for noncompensatory business purposes.

Most taxpayers are content to apply the tax law consistent with IRS interpretation. When an IRS interpretation is not available, however, taxpayers and IRS examiners must develop their own interpretations, and these interpretations differ between agents, resulting in inconsistent application of the law. Updated de minimis fringe examples would help IRS examiners, employers, and employees by reducing ambiguity.

Background

De minimis fringes are excluded from the recipient employee's gross income and wages for federal income tax withholding and employment tax purposes. A de minimis fringe is generally any property or service the value of which is (after taking into account the frequency with which similar fringes are provided by the employer to the employer's employees) so small as to make accounting for it unreasonable or administratively impracticable. Certain items, such as cash and cash equivalent fringes (e.g., fringes provided through a gift certificate or charge or credit card), cannot be de minimis fringes

(except for special rules that apply to occasional meal money and transit passes). With the exception of transit passes, as a general rule there is no guidance regarding what monetary values are deemed de minimis. Instead, taxpayers must review the facts and circumstances of each case and look to examples in the regulations to determine whether a fringe falls within the exception.

The current examples of de minimis fringes are: (1) occasional typing of personal letters by a company secretary; (2) occasional personal use of an employer's copying machine, provided that the employer exercises sufficient control and imposes significant restrictions on the personal use of the machine so that at least 85 percent of the use of the machine is for business purposes; (3) occasional cocktail parties, group meals, or picnics for employees and their guests; (4) traditional birthday or holiday gifts of property (not cash) with a low fair market value; (5) occasional theater or sporting event tickets; (6) coffee, doughnuts, and soft drinks; (7) local telephone calls; and (8) flowers, fruit, books, or similar property provided to employees under special circumstances (e.g., on account of illness, outstanding performance, or family crisis). If a fringe is not listed in an example, both the IRS and taxpayer must rely solely on an examination of the facts and circumstances of each case, which inevitably creates uncertainty, disputes, and inconsistent positions within the IRS and among similarly situated taxpayers.

The current examples of items which are not de minimis fringes are: (1) season tickets to sporting or theatrical events; (2) the commuting use of an employer-provided automobile or other vehicle more than one day a month; (3) membership in a private country club or athletic facility, regardless of the frequency with which the employee

uses it (4) employer-provided group-term life insurance on the life of the spouse or child of an employee; and (5) use of employer-owned or leased facilities (such as an apartment, hunting lodge, boat, etc.) for a weekend.

Among the items that are not addressed are (1) clothing (e.g., jackets, wind breakers, t-shirts, hats with the employer's logo) and other promotional items, such as luggage, brief cases, coffee mugs, key chains, pens, etc.; (2) goods and services offered to current and former employees by the employer in the ordinary course of its business that do not qualify as no-additional-cost services or qualified employee discounts; (3) sporting event tickets (e.g., box seats, regular seats, Super Bowl tickets); (4) employee assistance programs (EAPs); (5) wellness programs in which participation is not tracked due to privacy concerns; (6) small discounts and special promotions offered to employees by affiliated businesses, such as a firm's clients.

Recommendation

1. Provide updated and more comprehensive examples of items and services that the IRS deems de minimis fringes.

ISSUE FIVE: REVISE IRS STREAMLINED INSTALLMENT AGREEMENT PROGRAM AND RELATED ELECTRONIC PAYMENT SYSTEMS INCLUDING ONLINE AND DIRECT DEBIT PROGRAMS TO IMPROVE COLLECTION

Executive Summary

Since 1998 the IRS has had a program to grant streamlined installment agreements to individual taxpayers who owe less than \$25,000.⁶ During this time, the eligibility requirements for streamlined installment agreements have never been adjusted for inflation. \$25,000 in 1998 had the same buying power as \$33,970 in 2011.⁷ The current great recession has caused more taxpayers to owe taxes as a result of unemployment and underemployment, and many taxpayers have incurred tax liabilities because they have used their retirement assets to meet family expenses.

The IRS should revise its streamlined installment agreement program to include taxpayers with liabilities of less than \$50,000. In conjunction with the changes in dollar limits on installment agreements the IRS should begin a program of more aggressively promoting Direct Debit Installment Agreements and the availability of Online Payment Agreement.

Background

Since 1998 the Internal Revenue Manual has allowed taxpayers with individual liabilities of less than \$25,000 to enter into streamlined installment agreements.

⁶ IRM 5.14.5.2 (Revised 03-11-2011)

⁷ Dollar Times: www.dollartimes.com

Streamlined agreements benefit taxpayers because they may be processed quickly, without financial analysis or managerial approval. In addition, guaranteed agreements provide qualified taxpayers who have a one-time account delinquency the statutory right to an agreement if their taxes are \$10,000 or less and certain other conditions are met.⁸ Finally, a Full Pay Within 60 or 120 Day Agreement (Formerly Extension of Time to Pay) may be granted by W&I and SB/SE Campus Compliance and ACS employees to taxpayers who are able to pay by a certain date.⁹ Current IRS procedures allow collection employees, other than Collection Field Personnel, to grant Full Pay Agreements (formerly Extensions).

Streamlined Installment Agreements

Streamlined installment agreements may be approved for taxpayers if the aggregate unpaid balance of assessments is \$25,000 or less.¹⁰ The aggregate unpaid balance of such assessments must be fully paid in 60 months, or the agreement must be fully paid prior to the collection statute expiration date, whichever comes first.

Streamlined agreements may be granted for accounts in any status, including: a) Notice status accounts; b) Balance due status accounts; and c) Pre-assessed accounts, for the following types of taxpayers:

Individual Master File;

Business Master File (income tax only); and

⁸ IRC 6159(c)

⁹ See IRM 5.19.1.5.3

¹⁰ The unpaid balance of assessments includes tax, assessed penalty and interest, and all other assessments on the tax modules. It does not include accrued penalty and interest. If pre-assessed taxes are included, the pre-assessed liability plus unpaid balance of assessments must be \$25,000 or less.

Out of business, Business Master File (any type tax).¹¹

A lien determination is not required for a streamlined installment agreement but may be made at the discretion of the revenue officer and liens may be filed.¹² No managerial approval is required and these agreements may be secured in person, on-line at www.irs.gov, by telephone, or by correspondence. As with all agreements, the taxpayer must be compliance with all tax returns that are due prior to entering into the agreement.¹³ If the amount owed is greater than \$25,000, taxpayers are encouraged to pay such assessed amounts greater than \$25,000 prior to applying for a streamlined installment agreement to avoid the need for securing financial statements; and, ultimately qualify for a streamlined agreement. Penalties and interest continue to accrue throughout the duration of a streamlined installment agreement.

Streamlined installment agreements provide benefits to taxpayers and the IRS. Taxpayers avoid the need to provide an extensive financial statement with documentation. Taxpayers also avoid the need to bargain about the amount of payments and the duration of the agreement. The IRS benefits because it can efficiently resolve lower dollar liabilities without the need to review extensive financial data. By having a specific dollar criteria the Service can quickly and efficiently process lower dollar agreements. However, the \$25,000 limit has remained fixed since 1998 and has not been

¹¹ IRM 5.14.5.2 (Revised 03-11-2011)

¹²IRM 5.12.2.4 A lien determination is required by a specific date. If the case cannot be closed as a streamlined IA on or before the lien determination date, a lien determination must be made based on the facts of the case. The revenue office has the latitude to make a timely lien determination as a non-filing or deferral of the lien filing, then finish the negotiation and close the case to a streamlined Installment Agreement.

¹³ See IRM 5.14.1.3 and IRM 5.14.1.4.1

adjusted to account for current economic conditions and inflation. By increasing the dollar limit for streamlined agreements the IRS would expand the benefits of streamlined installment agreements to a larger universe of taxpayers. The expansion of eligibility would allow the IRS to more efficiently utilize its trained collection professionals to pursue higher employment tax obligations and larger income tax liabilities. More taxpayers with lower tax obligations would avoid providing extensive financial information and the uncertainty of bargaining about the installment amount and duration of agreements.

Although the IRS offers Online Installment Agreements (OPAs) for taxpayers meeting the guidelines for Streamlined Agreements it has not effectively promoted this option to practitioners and the public. OPAs offer greater efficiency for the IRS and the public. Taxpayers avoid extended telephone wait times and the IRS frees its telephone staffers for other duties. The Direct Debit Installment Agreement option (DDIA) has also not been effectively promoted to stakeholders. DDIA's have a lower default rate than regular installment agreements and therefore result in enhanced collections. The IRS should begin a coordinated campaign to alert stakeholders and the public to the availability of DDIA's and OPAs.

Recommendations

The IRS should implement the following changes to enhance streamlined installment agreements:

1. Increase the dollar limit to \$50,000.

2. Periodically review any revised limits on streamlined installment agreements to assure that they meet the needs of the Service and taxpayers.
3. The IRS should begin a coordinated campaign to alert stakeholders and the public to the availability of DDIA's and OPAs.

**ISSUE SIX: ENHANCE COLLECTIONS BY TAKING UNSECURED DEBT
INTO CONSIDERATION**

Executive Summary

When a taxpayer is unable to pay a tax debt in full, the IRS computes how much it believes the taxpayer can reasonably pay. As part of this computation, the IRS compares the taxpayer's income with the taxpayer's "allowable" expenses and requires the taxpayer to pay the excess, if any. In computing the taxpayer's "allowable" expenses, however, the IRS does not consider the taxpayer's obligation to make payments toward other unsecured debts for which he remains liable.¹⁴ As a result, taxpayers may be required to commit to making payments to the IRS in excess of what they can realistically afford, thereby prolonging unresolved delinquencies, creating hardships, and leaving the taxpayers less able to pay taxes due in future periods.¹⁵ Taxpayers may be sued by other creditors as a result of the preference of IRS payment over the unsecured obligations. Taxpayers might then be faced with the untenable choice of whether to pay an IRS installment payment or an unsecured creditor demanding payments, or possibly whether to file bankruptcy.

Current policy should allow collection employees greater discretion in allowing the taxpayer to make at least minimum monthly payments of unsecured debts.

¹⁴ IRM 5.15.1.10 (Revised 10-02-2009)

¹⁵ National Taxpayer Advocate's 2010 Annual Report to Congress

Background

When the IRS analyzes a taxpayer's ability to pay it generally does not allow payments of unsecured debt. The IRS will only allow an unsecured debt if the taxpayer meets the necessary expense test of health and welfare and/or production of income. Except for payments required for the production of income or for the health and welfare of the taxpayer and family, payments on unsecured debts will not be allowed if the tax liability, including projected accruals, can be paid in full.¹⁶

The IRS has not studied the impact of its unsecured debt policy on a taxpayer's ability to remain compliant on an installment agreement.¹⁷ Practitioners have observed that for most taxpayers the failure to make payments on unsecured debt can result in serious consequences. An unsecured creditor that was previously receiving regular payments will promptly assign the obligation to its collection department and the taxpayer will receive delinquency notices and collection calls. In the absence of a resolution with the creditor, the taxpayer may face a private collection company or a lawsuit. Some taxpayers will choose to miss IRS installment payments in order to meet the increased demands and harassment of unsecured creditors. In many instances the taxpayer eventually defaults the IRS installment agreement and files for bankruptcy.

A more flexible policy would allow IRS collection personnel to apply judgment with respect to the individual facts and circumstances of the taxpayer with respect to unsecured obligations. Such a policy would benefit both the IRS and the taxpayer since

¹⁶ IRM 5.15.1.10 (Revised 10-02-2009).

¹⁷ National Taxpayer Advocate's 2010 Annual Report to Congress

the taxpayer would be able to meet his obligations to the IRS and make minimum monthly payments to unsecured creditors. Allowing payments to be made in this manner would increase the taxpayer's chance of remaining in compliance with IRS payments during the duration of the installment agreement and avoid drastic financial remedies such as bankruptcy. Upon adoption of this change all collection employees should be trained in its proper application.

Recommendations

The IRS should implement the following changes to its policy on unsecured debt payments:

1. Allow IRS collection employees to review the individual facts and circumstances of each taxpayer to determine the necessity of continued payments for outstanding unsecured debts.
2. Allow the taxpayer to make minimum payments toward outstanding unsecured debts unless the IRS debt can be fully satisfied in 120 days or less.

**ISSUE SEVEN: REVISE THE IRS'S PENALTY ABATEMENT PROCESSES
AND THE REASONABLE CAUSE ASSISTANT (RCA) TO PROVIDE
EFFICIENT AND CONSISTENT TREATMENT FOR ABATEMENTS**

Executive Summary

The penalty abatement process for first time and reasonable cause abatement requests should be reviewed to determine what can be done to resolve such requests more efficiently and effectively. The Reasonable Cause Assistant (RCA) is used for processing many of such abatement requests but it is still a manual-input system. IRS personnel resources currently allocated to reading letters and forms could be streamlined by shifting First Time Abatement (FTA) and simple reasonable cause requests from IRS personnel to a computer readable format. In addition, a more efficient use of the RCA would encourage trained IRS employees to exercise discretion more consistently to override the computer-determined decisions on more difficult fact-based requests, either to the benefit of the taxpayer or to the IRS.¹⁸

Background

Generally, penalties imposed under Sections 6651 or 6656 and other penalty sections allowing reasonable cause exceptions, such as described in Section 6664, do not apply if it is established that the taxpayer's failure to comply was due to reasonable cause and not due to willful neglect.¹⁹ Reasonable cause determinations are required to be made on a case-by-case basis when taking all of the facts and circumstances into account.

¹⁸ The IRS also has a current IRM initiative to provide its employees with RCA abort function guidance.

¹⁹ I.R.C. §6664, Reg. 1.6664-4(a), I.R.C. §6651, Reg. 301.6651-1(c), I.R.C. §6656, Reg. 301.6656-1, IRM 20.1.5.6

For example, for failure to file, pay or deposit penalties imposed pursuant to Sections 6651 and 6656, reasonable cause relief is usually allowed when the taxpayer exercises ordinary business care and prudence in determining his tax obligations.

To assist in determining whether the taxpayer is entitled to reasonable cause relief in accordance with Sections 6651 or 6656, the IRS utilizes the RCA. The RCA is an IRS decision-support interactive software program developed to reach a reasonable cause abatement determination.²⁰ The RCA is designed to “ensure consistent and equitable administration of penalty relief consideration.”²¹

In areas where the RCA is available, generally the RCA is used to process both first time abatement requests and reasonable cause requests. In instances when penalty relief thresholds amounts are not exceeded, oral statements regarding abatements may also be considered.²²

The RCA first checks the taxpayer’s account history for abatements and overall compliance during the three tax years prior to the tax year at issue. The RCA provides an option for penalty relief for the Failure to File (FTF), Failure to Pay (FTP) and/or Failure to Deposit (FTD) penalties if the taxpayer has not previously been required to file a return or if no prior penalties (except the Estimated Tax Penalty) have been assessed on the same account in the prior three years. If the history is clear, the RCA generates a FTA letter indicating that the penalty is being waived based “solely on compliance history,” and warns that the taxpayer could be penalized for non-compliance in the future

²⁰ IRM 20.1.1.3.6.1 (12-11-2009)

²¹ IRM 20.1.1.3.6(3) (12-11-2009)

²² IRM 20.1.1.3.6.3. (2-22-2008)

if a similar situation should arise, and that future penalties will only be removed based on information that meets reasonable cause criteria.²³

However, a problem arises here when the taxpayer has requested an abatement based on reasonable cause: when the RCA automatically abates based on FTA (an administrative waiver), the reasonable cause issue does not get considered, and the FTA is used up for any current abatement request, one that could yet arise for the past three year period and, potentially, for the next three years as well.²⁴ The Taxpayer Advocate has also noted that the taxpayers should have a choice between whether the FTA or reasonable cause should be applied.

In the case of a reasonable cause abatement, employees are prompted by the RCA system to answer a series of questions that address what happened, when it happened, where it happened, who is responsible, the reasons the taxpayer could not comply, or conversely, how the taxpayer did try to comply.

The RCA makes a computer-generated recommendation whether to accept or deny a penalty relief request. Only 45 percent of the initial penalty abatement determinations made by the RCA were accurate, according to the IRS. RCA users can accept or reject these recommendations; however, in order for users to efficiently administer the tax law a high level of training is required. The human, manual override is critical to the success of this system. More consistent training in the areas of RCA input choices, “guided selection,” and override, “abort,” procedures, are recommended to

²³ IRM 20.1.1.3.6.1 (12-11-2009); Journal of Tax Practice and Procedure; by Charles P. Rettig, Enhancing Voluntary Compliance Through the Administration of Civil Tax Penalties, page 20., April-May, 2011.

²⁴ The Office of Service-Wide Penalties is considering extending the look-back three year period to an additional three year look-forward compliance period.

compensate for the high frequency of inaccurate computer-generated recommendations. Taxpayers and practitioners need clear, transparent and detailed guidance on the interpretation of penalties. Additionally, taxpayers and practitioners need to know that there are clear and standardized processes and procedures for requesting reasonable cause penalty abatement.

Taxpayer Choices for Requesting Abatement – Letter, Telephone Call, or Form 843

A taxpayer may currently request penalty abatement for reasonable cause by letter, telephone call, or Form 843. Currently, FTA and reasonable cause requests are manually processed.

The IRS Form 843 (Claim for Refund and Request for Abatement) is one way available to make a claim for abatement of penalty or interest on various taxes arising out of assessment made on a number of different tax returns. Checking Line 5(a) of the form allows the taxpayer to request a refund or abatement for reasonable cause penalties. However, the IRS Office of Service-wide Penalties does not advocate the use of Form 843 for FTAs or reasonable cause abatements unless they are accompanied by a request for abatement of tax or interest, since the form was not specifically designed for straightforward, reasonable cause abatements. When Form 843 is received for such an abatement request, it is processed manually, in the same manner as a letter request.

The instructions accompanying Form 843 allow the taxpayer to make a choice to file the form or not. “If you received an IRS notice notifying you of a change to an item on your tax return, or that you owe interest, a penalty or addition to tax, follow the instructions on the notice. You may not have to file Form 843.” Form 843 Instructions

provide it should be used for 1) a refund or abatement of interest or penalty in addition to tax due to reasonable cause or other reason (other than erroneous written advice provided by the IRS) allowed under the law; or 2) a refund or abatement of interest, penalties, or additions to tax caused by certain IRS errors or delays, or certain erroneous written advice from the IRS.²⁵ The instructions are confusing at best.

The process and mechanism by which a request for abatement may be submitted is unclear and not uniform. Although requests are required to be reviewed by the IRS based on all facts and circumstances in each situation, taxpayers and practitioners need better guidance regarding what basic questions should be addressed in a request. Most practitioners request abatements by written correspondence.

To assess in a uniform manner if the taxpayer is entitled to reasonable cause relief the IRS reviews requests for information addressing the following questions:²⁶

- 1) What happened and when did it happen?
- 2) What facts and circumstances prevented the taxpayer from filing a return, paying a tax, and/or otherwise complying with the law during the period of time the taxpayer was non-compliant?
- 3) How did the facts and circumstances result in the taxpayer not complying?
- 4) How did the taxpayer handle the remainder of their affairs during this time?
- 5) What attempt did the taxpayer make to comply once the facts and circumstances changed?

²⁵ Form 843 Instructions, page 1

²⁶ IRM 20.1.1.3.2(5)

After a determination for reasonable cause has been made, the employee uses the following brief explanations to decide which IRM Penalty Reason Codes to use with their penalty abatement adjustment:

- 1) Death, serious illness, or unavoidable absence of the taxpayer or a member of their immediate family;
- 2) Records inaccessible/unable to obtain records/records destroyed by fire or other casualty;
- 3) Death, serious illness, or unavoidable absence of the person responsible for filing and/or paying taxes (i.e., owner, corporate officer, partner, etc.) or a member of their immediate family;
- 4) Other – combination of mistakes; normal business care and prudence followed, but documentation shows non-compliance was due to circumstances beyond the taxpayer’s control.²⁷

While some practitioners may be aware of the criteria set forth above and make use of it in their letter-request for abatement, others may not. A more standardized system for such requests would put taxpayers and their representatives on a more even playing field.

A simple, possibly computer-readable, form with a “check the box” for FTA or listed reasonable cause exceptions should be developed to take a large number of the now manually inputted penalty abatement requests from IRS personnel currently processing such requests and to provide a more equitable determination to the taxpayer. The contemplated form could provide input boxes for the date of the event generating the penalty and the type of penalty abatement requested, and could require manual review

²⁷ IRM, Exhibit 20.1.1-3

only in the event of a reasonable cause request that requires further consideration of a written statement attached to the form. The form could also require supporting documentation to verify taxpayer assertions.

Although generating a new form may be costly, it is likely that the long-term cost savings gained by eliminating the need for a manual review of every penalty abatement request would benefit the IRS and the taxpayer alike.

Recommendation

1. Review the effectiveness of current penalty abatement practices and the RCA system and determine whether the use of a new form with directed inquiries as to FTA and reasonable cause abatement would provide the IRS with a more efficient and economical way to resolve simple abatement requests.
 - a. Until a form can be created and implemented, provide consistent training on inputting reasonable cause criteria to representatives and their supervisors for all call centers; and provide direction for discretionary overrides of the RCA on a case-by-case basis so that RCA use can be effective and fair to all taxpayers who apply for abatement of penalties, and to be consistent in the IRS's approach to the taxpayers' accounts.

ISSUE EIGHT: ADOPT TECHNOLOGY TO MAKE TAXPAYER EXAMINATIONS MORE EFFICIENT AND LESS BURDENSOME TO THE TAXPAYER

Executive Summary

In keeping with the overarching goal of the IRS to promote efficiency, effectiveness, fairness, and consistency throughout the examination process, whether during field audits, office audits, or correspondence audits, the IRS should modernize its current information exchange business process.

While we recognize privacy concerns and IRS efforts to conduct examinations and audits as effectively and efficiently as possible, the current rate of technological change emphasizes the need for the IRS to keep up with the pace of change by modernizing, updating, and improving its business practices. The use of current technology should save the IRS and the taxpayers being examined time and money. The IRS should consider the following for immediate improvements:

1. Provide taxpayers with up-front electronic and paper options for document submission during the examination;
2. Provide an individual portal for taxpayers in order to facilitate document sharing during the examination;
3. Provide an online scheduler to allow both the taxpayer and examiner to schedule calls or meetings with each other; and
4. Incorporate an audit tracking program.

Background

Currently, the examination process may take several months or years to be completed, only to discover that excessive amounts of time were consumed in unnecessary or duplicative document submissions, inaccurate data matching, math errors on the part of both the taxpayer and the examiner, and long intervals between successive communications between the taxpayer and the examiner. In order to more effectively and efficiently operate in today's environment, the IRS should make use of available technology. Improvements to the current process, which are not presently technologically driven, could be made by creating portals, schedulers, and audit tracking to promote efficiency, effectiveness, fairness, and consistency throughout the examination process during field audits, office audits, or correspondence audits.

An examination usually starts with the completion of the exam questionnaire, followed by document submission and the establishment of a schedule for meetings and/or calls. After these steps are completed, the results of the examination are sent to the taxpayer, who can agree to the examination findings or appeal the results. This process is often both inefficient and burdensome to both the IRS and the taxpayer. The use of an online preliminary questionnaire would reduce costs to the taxpayer and the IRS by eliminating the need for paper, envelopes, and postage, and would also reduce or eliminate the time devoted to mailings, delivery, completion, and return delivery.

A secure portal for document review can be used as a tool for cost savings, eliminating paper overload, excessive intervals between correspondence, and missed deadlines for document submission. These portals allow for reliable and efficient

tracking of submissions and reduce the inefficient use of time by all parties to determine what has been done and what is missing. An online scheduler gives the taxpayer and the examiner the flexibility to schedule calls and meetings at times that are convenient for both parties, thus eliminating schedule conflicts and unanswered calls that may occur when trying to schedule a meeting. Finally, an online process for audit tracking allows the taxpayer to obtain current information regarding the progression of the audit. This tool may also be used internally to track and monitor the length of time it takes to process exams and track the initiation, progression, and resolution of an exam. This would eliminate or reduce the time and costs associated with unproductive and inefficient communications.

We understand that taxpayer information must be protected due to the special statutory requirements for the privacy and security of documents being shared between the taxpayer and the IRS. However, these concerns could be resolved by the creation of portals allowing for secure document uploads. Internally, the IRS could create guidelines to determine the appropriate levels of access to taxpayer information, for example, which information is accessible by lower-level employees and which information is accessible by more senior employees and executives. The guidelines should be established with the goal of promoting efficiency and effectiveness in the examination process.²⁸

Although not without up-front costs, the long term savings from implementation of advanced levels of information technology within the examination process can

²⁸ Of course, any new information technology recourses and applications must also comply with existing guidelines established by the White House Office of Management and Budget (OMB). Such guidelines are currently set forth in OMB Circular A-130, Management of Federal Information Resources, which may be found at www.whitehouse.gov/sites/default/files/omb/assets/omb/circulars/a130/a130trans4.pdf.

reduce the time devoted to examinations by the IRS and taxpayers. These process improvements can in turn reduce the overall time to complete an examination, optimize document review, eliminate unnecessary correspondence, and allow taxpayer to track the progress of an examination.

We recognize that the IRS has taken some useful steps in the direction of adopting 21st century technology. The e-Services tool is a suite of web-based products that allow tax professionals to conduct business with the IRS electronically at any time of the day. In addition, recent public comments by an IRS official described a pilot encryption program, set to begin early in 2012, that will allow taxpayers and practitioners to communicate with the IRS through secure e-mail.²⁹ We commend the IRS for taking these steps, and encourage the IRS to make further advances in the use of technology in dealing with taxpayers and practitioners.

Recommendations

In order to achieve these objectives, we recommend that the IRS take the following actions:

1. Provide technology that allows the taxpayer to complete an online preliminary questionnaire at the beginning of the examination process, whereby the taxpayer can make selections on document submission, whether by mail, faxing, e-fax, or secure upload to a document portal.
2. Provide for document sharing between the examiner and the taxpayer by creating

²⁹ “Official Says IRS to Pilot E-Mail Encryption For Taxpayer Correspondence Next Year,” 91 DTR G-2 (May 11, 2011).

an individual portal for the taxpayer, whereby the taxpayer can upload the requested documents needed for a more efficient and productive process. The portal should be equipped to allow document review by the examiner and taxpayer, which will assist in the reduction of time-consuming correspondence and promote efficiency.

3. Provide an online scheduler to allow both the taxpayer and examiner to schedule calls or meetings, and allow for meetings either in person or via webcam.
4. Incorporate an audit tracking program, which gives the taxpayer the ability to track the examination's progress in real time.

**ISSUE NINE: USE APPROPRIATE PERFORMANCE MEASURES TO
ENHANCE CUSTOMER SERVICE AND INCREASE COLLECTIONS**

Executive Summary

The 2010 report issued by the National Taxpayers Advocate office recommended four improvements to the performance measures used to evaluate its organization. It concluded that the IRS's organizational measures provide incentives for leaders to promulgate policies that maximize processing speed and focuses on generating direct enforcement activities at the detriment of activities that could prevent delinquencies or promote voluntary compliance. IRSAC further reviewed the Critical Job Elements which appear in the Performance Plans for Revenue Officers, Internal Revenue Agents, Customer Service Representatives, and Taxpayer Service Specialist. When each of these elements are examined during the review process the IRS employee's performance is rated "Consistently" which means Exceeds Expectations, "Generally" which means Meets Expectations, or "More than occasionally" which means Fails to meet Expectations.

After review of the standards supporting each Critical Job Element we noted several areas where additional standards for review would provide incentives for IRS employees to enhance customer service, increase collections, and promote voluntary compliance. We recognize that performance evaluation standards for bargaining unit employees must be negotiated with the National Treasury Employees Union and suggest that IRS expeditiously begin negotiations to create more customer centered goals.

Background

By most published information the IRS in practice evaluates success by measuring and reviewing statistics that do not measure IRS actions with the taxpayer. As stated in the National Taxpayers Advocate's report "...the collection performance section of SB/SE's BPR (Business Performance Review) reports only:

- The number of liens, levies, seizures, unfiled return case closures called "Taxpayer delinquency investigations" (TDI), and unpaid tax case closures called "taxpayer delinquent accounts" (TDA);
- The percentage of TDI/TDA cases that are overage (i.e., have been open for 16 months or longer); and
- The percentage of field offers in compromise (OIC) closed within nine months, along with an indication of whether Collection is on target to meet its production goals."³⁰

Although these statistics indicate that there is obviously significant taxpayer interaction, the quality, consistency, and appropriateness of this interaction is not a significant measurement in evaluating IRS leadership. The National Taxpayers Advocate's report focused primarily on evaluation criteria for IRS leaders while IRSAC reviewed the evaluation criteria used for the following employees: Revenue Officers, Internal Revenue Agents, Customer Service Representatives, and Taxpayer Service

³⁰ See SB/SE, Business Performance Review (May 2010); IRM Exhibit 3.13.12-1 (Jan. 1, 2010) (defining TDI and TDA). The IRS has targets for TDA Closures, TDI Closures, Percentage Overage – TDA/TDI Taxpayer Combo, and Percent OIC Field Closures in 0-9 months. SB/SE, Business Performance Review (May 2010).

Specialist. We recommend additional criteria for the Performance Plans that evaluates appropriate use of discretion, customer satisfaction, timeliness, and effective use of tools to increase taxpayer voluntary compliance.

Performance Plan for Revenue Officer

The second Critical Job Element that is evaluated in the performance plan for a Revenue Officer is *II. Customer Satisfaction – Knowledge*. This area evaluates if the Revenue Officer is able to accurately identify and resolve issues with the correct interpretation of laws, rules, regulations and other information sources. The current performance plan has several evaluation criteria for 2.A. Taxpayer Rights. However, we feel the following additional elements should be added:

- Withholds enforced collection measures when appropriate
- Suggests that unsophisticated taxpayers seek the assistance of a low income taxpayer clinic or a qualified professional

The current performance review has several evaluation criteria for 2.B. Case Analysis. However, we feel the following additional element should be added:

- Analyzes financial information and varies from allowable expense standards when appropriate

The third Critical Job Element is *III. Customer Satisfaction – Application*. This area evaluates if the Revenue Officer's communications with the taxpayer is appropriate for the issue and encourages voluntary compliance. The current evaluation dictates three areas where this will be evaluated:

- Responsive, Courteous Service

- Communication, and
- Compliance

However, we feel the following additional elements should be added:

- Explain Taxpayer options in detail
- Withhold enforced collection measures when appropriate

Also evaluated in the *III. Customer Satisfaction – Application* critical element is 3.B. Communication. We feel the following additional elements should be added to the evaluation of this skill set:

- Thoroughly explains installment agreements, offers in compromise, and currently not collectible options to taxpayer

The fifth Critical Job Element that is evaluated is *V. Business Results – Efficiency*. This aims to evaluate if the Revenue Officer uses proper workload management and time utilization techniques. The current performance plan has several evaluation criteria for 5.A. Timely Actions. However, we feel the following additional element should be added:

- Promptly responds to taxpayer’s and representative’s communications

Performance Plan for Internal Revenue Agent

The third Critical Job Element that is evaluated in the performance plan for an Internal Revenue Agent is *III. Customer Satisfaction – Application*. This area evaluates if the Internal Revenue Agent communications to the customer are appropriate for the issue and encourages voluntary compliance. The current performance review has several

evaluation criteria for *Customer Satisfaction – Application*. However, we feel the following additional element should be added:

- Informs taxpayers of positions on their tax return that would reduce their liability

Additionally, within *III. Customer Satisfaction – Application* is the criteria 3.B. Customer Relations. Although the current performance review has several evaluation criteria for 3.B. Customer Relations we feel the following additional elements should be added:

- Informs taxpayers of positions on their tax return that would reduce their liability
- Suggests that unsophisticated taxpayers seek the assistance of a low income taxpayer clinic or a qualified professional

The fifth Critical Job Element is *V. Business Results - Efficiency*. This area evaluates if the Internal Revenue Agent’s use of proper workload management and time utilization techniques. The current performance review has several evaluation criteria for 5.C. Gathers Information and Develops Facts. However, we feel the following additional element should be added:

- Sets reasonable response deadlines for taxpayers

Performance Plan for Customer Service Representative

The third Critical Job Element that is evaluated in the performance plan for a Customer Service Representative is *III. Customer Satisfaction – Application*. This area evaluates if the Customer Service Representative communications to the customer are

appropriate for the issue and encourages voluntary compliance. The current performance review has several evaluation criteria for Customer Satisfaction – Application. However, we feel the following additional element should be added:

- Explain taxpayer options in detail

Additionally, within *III. Customer Satisfaction – Application* is the criteria 3.C.

Compliance Communication. Although the current performance review has several evaluation criteria for 3.C. Compliance Communication we feel the following additional elements should be added:

- Withholds enforced collection measures when appropriate
- Suggests that unsophisticated taxpayers seek the assistance of a low income taxpayer clinic or a qualified professional

Performance Plan for Taxpayer Service Specialist

The third Critical Job Element that is evaluated in the performance plan for a Taxpayer Service Specialist is *III. Customer Satisfaction – Application*. This area evaluates if the Taxpayer Service Specialists communications to the customer are appropriate for the issue and encourages voluntary compliance. The current performance review has several evaluation criteria for *III. Customer Satisfaction – Application*. However, we feel the following additional element should be added:

- Explain Taxpayer options in detail

Additionally, within *III. Customer Satisfaction – Application* is the criteria 3.C. Foster Taxpayer Relations and Rights. Although the current performance review has several

evaluation criteria for Foster Taxpayer Relations and Rights we feel the following additional elements should be added:

- Suggests that unsophisticated taxpayers seek the assistance of a low income taxpayer clinic or a qualified professional

Note: IRSAC performed a preliminary review of the Performance Plans of the stated IRS positions. However, we did not review the methodology for applying the Performance Plans. Specifically, we did not have the opportunity to review how the employees cases are selected to be included in the review, what data points are reviewed during the evaluation (i.e. # of taxpayer calls fielded, number of calls resolve in 1st attempt, etc.), and how these data points are selected.

Recommendations

After review of the standards supporting each Critical Job Element we noted several areas where additional standards for review would provide incentives for IRS employees to enhance customer service and increase collections. We recommend the following steps:

1. Increase incentives for IRS employees to promptly communicate with taxpayers, explain options and next steps to taxpayers in a manner they understand, protect their rights and facilitate their payment and compliance process.
2. Current Performance Plans have criteria related to taxpayer communications; however, we believe there must be greater weighting of these criteria in the overall performance evaluation.

3. Begin negotiations with National Treasury Employees to create an evaluation system that rewards taxpayer friendly actions by IRS contact employees.

**INTERNAL REVENUE SERVICE
ADVISORY COUNCIL**

**LARGE BUSINESS AND INTERNATIONAL
SUBGROUP REPORT**

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NOVEMBER 16, 2011

INTRODUCTION/EXECUTIVE SUMMARY

The IRSAC Large Business & International Subgroup (hereafter “Subgroup”) is comprised of seven tax professionals with diverse backgrounds including experience in large corporate tax departments, large public accounting and law firms, and academia. These diverse experiences make the Subgroup uniquely qualified to provide LB&I valuable insight on a broad range of issues. We have been honored to serve on the IRS Advisory Council and appreciate the opportunity to submit this report.

The Subgroup has had the opportunity to discuss several topics throughout the year with LB&I management. This report is a summary of those discussions and the Subgroup’s recommendations with respect to each topic. We would like to thank LB&I Commissioner Heather Malloy and the professionals on her staff for their time spent discussing these topics with the Subgroup and for their valuable input and feedback.

The Subgroup is reporting on the following six issues:

1. Remote Work

With respect to remote work, LB&I asked the Subgroup for its views on how the IRS’ use of remote work concepts can be expanded and improved to more efficiently deploy the Service’s limited resources. Significant cost and time savings can be gained through expanding the use of remote work in LB&I audits. The Subgroup believes LB&I could benefit greatly from working with large accounting firms to understand how those firms employ remote work concepts in performing audits of their largest multinational clients.

2. Commercial Awareness

LB&I asked for the Subgroup’s assistance in identifying ways LB&I may gain greater

commercial awareness, an issue has been addressed in prior years' reports. This year's report is largely a refinement of our previous discussions and contains several specific recommendations regarding education and training the Subgroup believes would increase commercial awareness within LB&I. These include employee initiated education, and both formal and informal training programs developed with the assistance of taxpayer groups.

3. **Schedule UTP**

The Schedule UTP discussions have been an extension of the Subgroup's work last year, including a follow up on last year's recommendations, a discussion of the guidance that has been issued this year through frequently asked questions ("FAQs"), and the Subgroup's suggestions for additional guidance in the form of new FAQs or clarifications of those already published. In particular, the Subgroup recommends that any future guidance be vetted in draft form with taxpayer groups to ensure such guidance aligns with the accounting rules and practices followed by taxpayers.

4. **Distance Learning**

Regarding distance learning, the Subgroup was asked to provide advice as to how distance learning methods employed by the Service may be improved. The report offers insights based on the advancements members have seen in the marketplace in the use and deployment of distance learning methodologies, and contains several specific recommended actions for LB&I to follow in the adoption and maintenance the latest distance learning methodologies and technologies.

5. **Fast Track Settlement**

With respect to the Fast Track Settlement process (“FTS”), LB&I requested our insights regarding expanding usage in order to facilitate earlier resolution of issues and to assist in managing the workload of IRS Appeals. The Service has had some success this year by focusing on increased communication with taxpayers regarding the benefits of FTS. However, the Subgroup believes that the FTS process should be redesigned and improved to gain greater acceptance within both the Service and the taxpayer community. Recommendations include adoption of a more regimented, step by step, framework for conducting mediation sessions and expanded authority for case managers within the context of FTS.

6. **Use of Academic Research**

Our report notes that the academic community produces a substantial amount of research on topics that are of little use outside of academia. This mandated research represents a potential free resource for the IRS. The Subgroup suggests that the IRS consider taking advantage of this research activity by providing suggestions to academia for research on topics of interest to the IRS.

ISSUE ONE: REMOTE WORK

Executive Summary

Expanding the use of “remote work” for IRS examinations and projects offers many benefits to both the IRS and taxpayers. The IRS has for many years used remote work concepts for deploying its international and engineering specialists on large examinations as an adjunct to a larger onsite examination. In 2006, the IRS expanded the use of remote/offsite examinations as an alternative to the full scope examination for a limited number of pre-identified significant issues. Targeted use of remote work concepts helps to better deploy IRS resources, especially for special projects requiring the use of limited resources.

The large public accounting firms have pioneered the use of remote work with clients in the performance of their audit function and the preparation of tax returns. There has been general acceptance of remote work provided the client/taxpayer is confident that data is transmitted, maintained and accessed in a secure manner.

Background

The Subgroup was asked to provide advice on what we are seeing in the marketplace as best practices regarding the use of remote work and our thoughts on what types of issues and areas would lend themselves to a remote examination. We were also asked to express our views regarding possible taxpayer concerns with respect to the use of remote examinations.

Our comments are focused on working remotely rather than telework arrangements with IRS employees. Although many of the processes and technology

requirements are similar, we would define teleworking as working “offsite” at almost any location, such as working from an IRS employee’s home office. On the other hand, remote work would generally involve an IRS team located in multiple locations or at a location different from the taxpayer, (e.g., all examination team members assigned to a specific taxpayer could be working from different locations in either IRS offices or other places). However, it may still be advisable to have certain key members of the examination team periodically or permanently at the taxpayer’s business site during the examination process.

Technology is available to enable the IRS to bring the right resources to the right place and at the right time. The large accounting firms have pioneered the processes, data security, technology and controls necessary to implement remote work as part of their audit examination of large, and in many cases multinational, clients. Accounting personnel from around the country (or from other countries) form audit teams that are connected through technology to provide these services. Similar to the IRS, the accounting firms handle extremely confidential financial and tax information and have developed the technology, processes and controls to ensure that their clients’ information is secure. Accounting firm audit clients are now accustomed to having a remote workforce with electronic access to the most confidential financial information. In addition, the accounting firms may also prepare a client’s tax returns in a number of remote locations using different individuals with the optimal skills and availability. In that the IRS would face similar and analogous issues, much could be learned from the experiences and best practices of the large accounting firms.

Advantages – Remote Work

In addition to the significant cost and time savings, there are a number of advantages to remote work. These include:

- Potentially more flexible work arrangements will be available and less travel will be required for IRS employees.
- Remote work expands the potential recruiting pool by facilitating employment in locations and situations where professionals normally would not be available to work for the IRS, for example at locations that do not have an IRS office.
- Employee relocation and travel expenses, as well as “bricks and mortar” office expenses, will be significantly reduced.
- More efficiency will translate into shorter cycle time in handling examinations and projects due to:
 - Better spreading out of the workload and quicker redeployment of resources,
 - Less travel time and costs, and
 - Increased ability to bring people with the right skills, expertise and availability to any examination or project independent of geographic boundaries.
- Remote work offers more diverse work experience to IRS personnel, e.g., a Boston employee can be included as part of the examination of a Texas energy company.

Accounting Firm Experience-Remote Work

A significant percentage of the professional, client-serving staff of the large accounting firms, including many partners, have dispensed with permanent physical offices in favor of “virtual” offices. This translates into large cost savings and a greater focus on serving clients. Many work from a client’s office, at a firm provided “visitor’s office” when traveling or in their home city, or from home. Many of the accounting firm facilities use a “hoteling” concept where partners and employees sign in and reserve a designated visiting office, a conference room or other facilities. Appropriate office supplies, equipment such as printers and fax machines, and administrative assistance are provided.

We believe that the following considerations are important to implementing a successful remote work environment:

- Technology is the key that enables remote work. Today’s remote worker must be supported by the technology that will enable him or her to work with multiple teams, geographies and taxpayers without being physically present.
- All necessary information must be organized, retrievable and available on-line.
- When working within a remote team, team members’ responsiveness and availability are paramount.

- A simple assignment system for visitor offices needs to be established. These visitor offices must be provided with appropriate supplies and technology (printer hook up, network access, etc.).
- A standard technology platform across the organization is required, and it must include significant security features limiting access to laptop computers and limiting the unauthorized copying of sensitive materials.
- Standardized processes and collaborative, project management software are needed to facilitate remote work examinations and projects. The project software should include secure data storage, a discussion board, work flow and scheduling software, team calendar and team member profiles, instant messaging for team members, check in/check out document management software that provides version control, and the ability to easily transfer large data packages. The software may also include a secure interface allowing taxpayers access to certain information.
- Supervisory personnel should have their own assigned “800 number” with the ability to convene conference calls, and the team or selected team members should be provided mobile internet access.
- It is important to have a voice mail system that automatically sends an email to the IRS employee notifying him of a message in his voice mailbox. The voice system might also have a secure capacity to reroute

calls to an IRS employee's private telephone number or to another number designated by the IRS employee.

- An “experts to call” and a skills network should be established for a rapid response to tax technical and procedural questions.
- Tax technical and industry knowledge should be available on line in a repository of information for employees similarly connected, (e.g., by industry focus, division, branch, etc.).

Recommendations

1. The IRS should consider significantly expanding the use of “remote work” for LB&I examinations and projects in order to obtain significant efficiency and cost savings benefits, as well as reduced disruption to taxpayers. The IRS may want to pilot this process with a number of taxpayers presently participating in the CAP program.
2. The commitment and effort necessary for the development and design of the processes, controls and technology cannot be overestimated; however the rewards of a successful deployment are enormous. The IRS as a first step should obtain as much information as possible from the large accounting firms, who have been operating in this manner for years, in order to obtain information on best practices and lessons learned.
3. In deploying the remote work paradigm, the IRS should work with taxpayers who have concerns. We believe that having an IRS point of contact within the remote team is important in gaining taxpayer acceptance. That person or persons may be

“on site” at the taxpayer’s location for all or portions of the examination. The use of remote IRS team members has been in use for years for specialists such as engineers and international tax personnel, and we believe that the transition to expand remote work will generally be well received by taxpayers.

ISSUE TWO: COMMERCIAL AWARENESS

Executive Summary

LB&I asked for the Subgroup’s assistance in identifying ways to gain greater “commercial awareness.”

The Subgroup has addressed this issue in the past, and recommended that the best path to acquiring greater commercial awareness was through education and training. The benefits of enhanced commercial awareness through education and training, for both LB&I and taxpayers, were discussed in prior Subgroup reports and are summarized below.

The Subgroup has identified various concrete steps that LB&I should take in order to establish the education and training programs necessary to increase commercial awareness.

Background and Analysis

The Subgroup has previously stated that the cornerstone of gaining commercial awareness is to create educational programs whereby professional associations, industry groups, and taxpayers (the “taxpayer community”) would become active in the training and development of LB&I. Commercial awareness would assist LB&I in becoming more “connected” to the taxpayer community, in order to gain a better understanding of matters from both a commercial and a tax perspective. An education or training program provided by outside stakeholders is the best way to acquire such “commercial awareness.”

There are mutual benefits of such educational programs for both LB&I and the taxpayer community. These educational programs would result in increased transparency through frequent and candid communication between LB&I and outside stakeholders, and provide LB&I with an expedited way to better understand the industries and business dynamics of LB&I taxpayers. For the taxpayer community, an understanding of LB&I's concerns (both substantive and administrative) could help to inform business decisions.

The Subgroup reiterates that a two-sided commitment to transparency and communication is critical. The taxpayer community would expect LB&I to approach the educational program with a commitment to reciprocity and engage in open dialogue on any issues of concern. The taxpayer community expects, at a minimum, an objective reaction to the topics being discussed and a "business-like" discussion regarding matters.

In addition, impartiality and proportionality by LB&I are necessary for the successful implementation of an educational program. The Subgroup envisions that certain issues discussed in an educational program will likely involve some degree of tax uncertainty. Accordingly, in order for an educational program to be worthwhile and successful, LB&I must act impartially, rather than as an advocate.

The end result of this process should be "win-win." Both LB&I and taxpayers have limited resources. Greater commercial awareness gained by LB&I through these educational programs should permit more efficient audits and more certainty for both LB&I and the taxpayer community.

The potential topics for educational programs are limitless, and could be tailored to LB&I's current and specific interests. For example, the taxpayer community may

provide education to LB&I regarding business practices, the business environment, the economy, or capital markets in general. On the other hand, educational programs could be more targeted and specific, and focus on particular transactions.

The Subgroup recognizes that certain topics may not be conducive to a broad, industry-wide discussion. Nuances and differences in fact patterns among transactions could make it difficult to reach a consensus regarding a presentation. In those situations, it may be useful to have both an industry meeting for a high-level review of the topic, and also separate “one-off” meetings with individual members of the industry.

It is noteworthy that LB&I currently has a formal type of educational program for commercial awareness in place in the Financial Services sector. All participants involved in this program have commented that it is a very useful and constructive endeavor. Engaging in this program of educational sessions on topics of mutual interest has resulted in easing administrative burdens on both sides, a more efficient use of audit resources, and promoting more certainty. The Subgroup applauds LB&I and the senior executives in the Financial Services industry for implementing this program. LB&I should continue to engage in this program in Financial Services, and it should use this program as a model to expand with similar programs across its other industry groups.

Although formal educational programs are useful and should be continued and expanded, LB&I should also take steps to implement more informal means of education in order to gain commercial awareness. Informal approaches would allow LB&I to become more “nimble”, which would permit LB&I to gain knowledge more quickly and potentially use that knowledge in a current audit cycle. For example, an informal

approach can be as simple as an LB&I Industry Director reaching out to various members of the taxpayer community to share industry knowledge. This knowledge can then be shared with agents in the field. If there are concerns about contacting members of the taxpayer community individually, LB&I should consider establishing informal working groups with rotating memberships within the various industries, so that all interested taxpayers and professional organizations could be represented. The benefits presented here are obvious. While a formal educational program is of course useful, it can be limited in its application. It is often planned well in advance and focuses on a specific topic. Informally, rather than being constrained by a planned schedule, LB&I could reach out anytime, as needed, to gain information on “real-time” topics as they arise.

Another informal approach to gaining commercial awareness can be gleaned from certain practices of the Organisation for Economic Co-operation and Development (OECD). In the past, the OECD has reached out to industry groups for drafting assistance in connection with various projects. This has resulted in the “secondment” of members of corporate tax departments and professional services firms to the OECD for purposes of contributing to those projects. LB&I should consider making similar requests with respect to their future initiatives.

In addition, LB&I should encourage its employees to develop commercial awareness on their own. This can be done in several ways with the benefit of assistance from outside stakeholders. For example, revenue agents could request internal policies (e.g., transfer pricing policies) of taxpayers they are assigned to audit in order to better understand industry practices. In the same vein, revenue agents could coordinate

meetings through the tax department with other functions of the taxpayer they are auditing (e.g., accounting policy, treasury, business unit), in order to gain general information or awareness, as opposed to a meeting regarding a specific audit issue or transaction. Also, in particular for financial products agents, LB&I could reach out to various exchanges, like the New York Stock Exchange or Chicago Mercantile Exchange, in order to have discussions regarding how the markets function or how trades are executed. Finally, professional organizations like the American Institute of Certified Public Accountants have published excellent materials that describe industry practices for a range of business segments.

In short, there are numerous ways in which LB&I may partner with the taxpayer community to gain commercial awareness. Furthermore, these taxpayer groups are in a unique position in which to impart commercial awareness. It is difficult to envision a better avenue for gaining commercial awareness about an industry than from the members of that particular industry itself.

Recommendations

1. As an initial matter, LB&I should make “commercial awareness” about a particular industry part of the job description for employees working within that respective industry.
2. LB&I should encourage employees to join and become active within industry groups and professional associations, which often offer discounted memberships for government employees.

3. LB&I should encourage employees to gain commercial awareness by reviewing the internal policies of the taxpayers they are auditing, as well as by reading published materials that describe the particular industry.
4. LB&I senior executives should identify the particular members of the taxpayer community from which they would like to gain greater commercial awareness. LB&I should then attempt to establish educational programs in union with those groups, using the established program in the Financial Services sector as a model.
5. In addition to the formal educational programs identified in recommendation four, LB&I should attempt to pursue and establish contacts for informal programs, including the possibility of secondments from corporate tax departments and professional services firms to work on projects and initiatives.
6. LB&I should develop means to share acquired commercial awareness throughout the organization. For example, it should leverage from the experience of agents that have worked Compliance Assurance Process cases and their “real-time” experiences. In addition, for purposes of disseminating information, LB&I should consider developing an internal blog that summarizes industry information and statistics, so that taxpayers that are outside industry norms could be identified.

ISSUE THREE: SCHEDULE UTP

Executive Summary

The requirement to disclose uncertain tax positions on Schedule UTP attached to Form 1120 is new for 2010 tax return filings. The Subgroup is concerned that some of the IRS guidance issued in the instructions to the schedule and in FAQs is not consistent with the manner in which unrecognized tax benefits are accounted for under U.S. GAAP or IFRS. With hindsight, we believe that this could have been avoided by having a more robust external review process of the Schedule UTP and FAQs prior to their initial issuance. Given the complexity of the accounting rules governing uncertain tax positions, this review would necessarily involve input from outside groups including accounting firms as well as this Subgroup, whose members have significant experience with uncertain tax positions. The Subgroup recommends that the IRS issue further guidance in the areas noted below.

Background

In 2010 the IRS announced that for tax years beginning after December 31, 2009, tax positions for which certain corporations with assets in excess of \$100 million have recorded a liability for unrecognized tax benefits under U.S. GAAP, IFRS or other country-specific accounting standards in their financial statements (or would otherwise have recorded such a liability but for an intent to litigate) must be disclosed on Schedule UTP. The IRS released on March 23, 2011 some additional guidance in the form of seven frequently asked questions (“FAQs”) and on July 19, 2011 released an additional eight FAQs; all fifteen are now posted on the IRS website. The Subgroup continues to

believe that the requirement to disclose UTPs is bad tax policy and has the potential to create a more adversarial climate in tax audits. In addition, the disclosure requirement is premised on the act of recording a reserve in a taxpayer's financial statements. However, there is no definition of the phrase "recording a reserve" in the tax or accounting literature since FIN 48 established the use of a benefit recognition approach for accounting for income tax positions rather than a reserve approach. Therefore, it is critical that clear guidance be issued so that taxpayers have clear instructions they may rely on in completing the Schedule UTP and so that the schedule will be appropriately interpreted by IRS auditors.

Recommendations

1. The Subgroup has detailed suggestions in Exhibit A, items one to five regarding clarifications needed in some of the examples in the instructions to Schedule UTP and in the FAQs, in order to make all these consistent with income tax accounting rules or to provide further explanations.
2. **The Subgroup made other comments in the 2010 IRSAC report which were not addressed in the FAQs, but we continue to believe these comments are relevant. For your convenience we include these comments in Exhibit A, verbatim as items six to nine, except for item six where we have added further explanation.**
3. The Subgroup recommended in the 2010 report to eliminate the requirement to disclose a position for which no liability for an uncertain tax position was recorded because the taxpayer intends to litigate. We continue to recommend this,

but if this is not adopted we believe that further guidance is necessary to clarify what constitutes a position with the intent to litigate. We note that the decision on whether to book such a liability is not based on willingness to litigate. It is based on an assessment of the correctness of the position. If the position is correct, the taxpayer does not establish a liability, regardless of the position of the IRS. Given that the willingness to litigate is not a critical part of the analysis undertaken in establishing liabilities for uncertain tax positions, it is necessary that specific guidance be issued.

EXHIBIT A: RECOMMENDATIONS ON UTP REPORTING

As noted in the main body of our comments, there is no concept of recording a “reserve” for uncertain tax positions in U.S. GAAP or IFRS. In our recommendations below we use the term “reserve” to avoid confusion as we reference its use in the Schedule UTP and FAQs.

1. Use of Part I versus Part II. UTP FAQ two addresses the situation when a corporation records a reserve in its audited financial statements for 2010 and then later eliminates the reserve in subsequent interim financial statements issued prior to the filing of the 2010 tax return. The answer provides that the reserve would need to be disclosed if the interim financial statements are unaudited and would not if those interim statements were audited. The Subgroup recommends that the IRS be specific as to what constitutes an audit for this purpose. For example, many companies file Forms 10Q with the SEC. Such forms which are issued on a quarterly basis (other than year end) are generally not audited but may be reviewed by an outside attest firm. Does the IRS intend to treat such reviewed statements as audited for purposes of this FAQ?
2. Definition of reserve.
 - a. The instructions to the schedule provide: “A corporation or a related party records a reserve for a U.S. federal income tax position when a reserve for U.S. federal income tax, interest or penalties with respect to that position is recorded in audited financial statements of the corporation or a related party.” FAQ six acknowledges that the term reserve is not a defined

accounting term and provides that a reserve is recorded when an uncertain tax position is stated anywhere in financial statements and may be indicated by several types of journal entries which include: i. an increase in a current or non-current liability for income taxes or a reduction in a current or non-current receivable for income taxes or ii. a reduction in a deferred tax asset or an increase in a deferred tax liability. This description is that used in the Summary page of FIN 48 and refers to how the reserve should be presented on the financial statements. It does not discuss the journal entries that must be made to record the reserve. The subgroup notes that the distinction between how the reserve is recorded in a journal entry(s) and how it is presented on the audited financial statements, could cause confusion especially for those taxpayers not using U.S. GAAP and suggest instead the following language: A reserve for an uncertain tax position is recorded when there is a difference between the tax benefit of a tax position taken in a tax return and amount of benefit recognized in the financial statements. Tax reserves may be recorded on the books through a variety of journal entries including the following:

- DR Income tax expense and CR Income tax reserve
- DR Equity and CR Income tax reserve (in case of prior period adjustment)
- DR Goodwill and CR Income tax reserve (in case of purchase price accounting)

The presentation and classification of that reserve on the audited financial statements vary depending on the accounting standards being used and the facts.

Such reserves may be classified on the audited balance sheet as either current or non-current income tax liabilities (or a reduction of a current or noncurrent tax receivable). In some cases the reserves are presented gross but in other cases they may be netted against a deferred tax asset such as a net operating loss carryforward to which they relate.

- b. We also recommend that the guidance address questions relating to acquisitions and dispositions, such as when a corporation acquires a target:
 - i. Is the reserve that is included in the books of a target company considered a “reserve” that the acquirer must disclose in the year of acquisition since it is part of the purchase price accounting done by acquirer?
 - ii. Is the additional reserve that acquirer records for pre-acquisition uncertain tax positions not previously recorded by target a “reserve” even though it is booked through goodwill and not profit and loss?

3. Interest and penalties.

- a. FAQ four provides that interest and penalties should not be included in the quantification of the related UTP in determining the ranking and determination of the major status of UTPs disclosed, if the amount of

interest or penalties relating to a tax position is not separately identified in the books and records associated with that position. However, the accounting rules allow taxpayers several alternative ways in which to account for interest and penalties relating to tax contingencies, including classifying the interest and penalties as part of the tax reserve or classifying it as a non-tax reserve. See No. FIN 48 (ASC 740-10). The Subgroup recommends that the IRS provide a follow-up to FAQ four to cover the case when interest and penalties are not recorded as part of the tax reserve but are separately identified with respect to a particular tax position.

- b. The instructions to the Schedule UTP provide that subsequent increases or decreases to a reserve that was previously disclosed do not require disclosures in subsequent years. FAQ 11 further provides that post-2009 accruals of interest that are part of a reserve for a tax position taken on a pre-2010 return should not be reported on Schedule UTP, consistent with the transition rule in the instructions for Schedule UTP. The Subgroup recommends that additional guidance be issued to clarify that such treatment also applies to accruals of interest on reserves recorded for post-2009 tax return positions as well to clarify the treatment of penalties recorded with respect to both pre and post-2009 tax positions.
4. Position taken on a return. The instructions to the Schedule UTP provide that a tax position taken on a U.S. federal income tax return must be disclosed when a

reserve has been recorded (or was not recorded because of expectation to litigate) with respect to that position. FAQ 12 provides that a corporation must disclose any such position that would result in an adjustment to any line item on any schedule or form attached to the Form 1120 but includes no specific examples. The Subgroup notes that this would result in disclosure of positions that would have no current federal income tax impact. For example, a reserve is established on the financial statements of a controlled foreign corporation (“CFC”) related to a position taken on the CFC’s tax return in a foreign country. That position would result in a change in earnings and profits and foreign tax of that CFC reported on Form 5471 but would result in no change in U.S. federal income tax liability unless there is a remittance (or deemed remittance under subpart F) from that CFC. Large multinational corporations may have hundreds of CFCs many of which may have recorded reserves for uncertain tax positions on their local country financial statements. If all such reserves are reported on the Schedule UTP there will be myriad of items reported with no current U.S. federal income tax impact. In fact, the realization of such uncertain tax positions when the CFC makes a remittance will result in a decrease in U.S. federal income tax whereas the purpose of the Schedule UTP is to disclose items which would result in additional tax. As another example, a corporation establishes a reserve for a position taken on a state income tax return which would result in a change in the state income tax deduction taken on its federal income tax return. The Subgroup recommends that the guidance in FAQ 12 be supplemented to provide that

positions that would result in an adjustment to any line item on any schedule or form attached to the Form 1120 should be reported only if the associated tax reserves are related to U.S. federal income tax. In addition, the Subgroup recommends that the FAQ be clarified through examples such as the ones that are noted above.

5. Use of net operating loss or credit carryforwards. FAQ ten clarifies example nine in the instructions regarding the need to disclose a position that results in a net operating loss (“NOL”) or credit carryforward for which a reserve is recorded in the year in which the NOL or credit arose. The FAQ concludes that the position should only be disclosed in the year in which it arose and not in the carryforward year in which the NOL or credit is used on the tax return. While we agree with the overall conclusion, the example in the FAQ is not consistent with income tax accounting rules. The FAQ posits the case where a corporation claims an item of deduction, loss or credit on its 2010 return which results in an NOL or credit that cannot be used in 2010 and is carried forward. Per the FAQ the corporation records a reserve for such item twice, first in 2010 and again in 2012 when the item is used on the corporation’s tax return. But under the accounting rules, absent other intervening circumstances no reserve would be recorded in 2012 for the position taken on the 2010 return since the reserve was previously recorded in 2010. The example implies that by mere passage of time the reserve initially recorded in 2010 would be adjusted. However, the reserve recorded in 2010 would be adjusted in subsequent years, including the year in which it is used, only

if something occurred causing such adjustment such as issuance of new guidance relating to the position for which the reserve was established. Because the IRS's guidance regarding tax attribute carryforwards is solely governed by the examples in the FAQs and schedule instructions, the Subgroup is concerned that the facts in FAQ ten will not be applicable to any taxpayers. Accordingly, the Subgroup recommends that the example in FAQ ten be revised to comport with actual income tax accounting precepts for NOL and credit carryforwards as follows:

Question: A corporation claims an item of deduction, loss, or credit on its 2010 tax return and that tax return contains an NOL or a credit. The NOL or credit cannot be used in 2010 and is carried forward. The corporation records a reserve with respect to the tax position that is reflected on an audited financial statement in 2010. The NOL carryforward or credit carryforward is used to reduce the tax liability reported on the 2012 tax return. In 2012 new guidance is issued with respect to the tax position and as a result of that guidance the corporation adjusts the reserve with respect to that tax position that is reflected on an audited financial statement in 2012. How should that item be reported on Schedule UTP?

Answer: A corporation must report a tax position taken on its 2010 tax return on Schedule UTP if a reserve is recorded in an audited financial statement with respect to the tax position. As stated in example 9 of the Schedule UTP Instructions, claiming an item of deduction, loss, or credit is a tax position. Since the corporation recorded a reserve for that tax position in 2010, the corporation should report that tax position on Schedule UTP filed with its 2010 tax return.

This reporting in 2010 is the only reporting required. We recognize that example 9 of the 2010 Schedule UTP instructions caused confusion with respect to this issue. Even though the future use of the NOL or credit carryforward is a tax position for which the corporation recorded a reserve, the IRS will not require reporting with respect to the future use of NOLs or credit carryforwards since the reserve was already recorded and disclosed in the 2010 Schedule UTP. The corporation therefore should not report the use of the NOL or credit carryforward on the Schedule UTP filed with its 2012 tax return.

As noted above, the Subgroup made other comments in the 2010 IRSAC report which have not been addressed, but we continue to believe these comments are relevant. Items six to nine below are taken verbatim from the 2010 report, except for item six where we have added further explanation.

6. Temporary items. The Schedule UTP includes codes so that tax positions are marked as either temporary or permanent. The final instructions provide that: “A corporation or a related party records a reserve for a U.S. federal tax position when a reserve for income tax, interest or penalties with respect to that position is recorded . . .” When a tax reserve for an uncertain temporary difference is recorded under U.S. GAAP or IFRS a corresponding deferred tax asset in exactly the same amount is also recorded. A net financial statement impact arises only where there is a material temporary difference on which a reserve for interest

the reserve in the 2011 financial statements must be reported on Part II of the Schedule UTP filed with the 2011 tax return. No disclosures are required with respect to the additional interest recorded in each of years 2012 through 2014.

7. Year in which position should be reported. The draft general instructions on page one stated that a tax position is required to be reported on a Schedule UTP for a year if, at least 60 days before filing the tax return, a reserve has been recorded with respect to that position. Page two of the draft instructions further stated that if the decision to set up the reserve was made within 60 days of filing a tax return, then the position must be reported on Part I of the Schedule UTP for the current year or on Part II of the Schedule UTP for the next tax year. We initially recommended that the option to disclose a tax position on Part I of the current tax return, where determination was made within 60 days of filing the return, be referenced on page one of the general instructions. However, Announcement 2010-75 provides that the instructions clarify that a tax position is reported on Schedule UTP once (1) a reserve for a tax position is recorded and (2) a tax position is taken on a return regardless of the order in which those two events occur. On page one of the instructions, under reporting current year and prior year tax positions, the instructions provide: “Do not report a tax position on Schedule UTP before the tax year in which the tax position is taken on a tax return by the corporation.”

The examples in the instructions appear to confuse the reporting issue. In Example six, regarding a temporary item, a taxpayer establishes a reserve in 2010

due to uncertainty as to whether an expenditure should be deducted in 2010 or amortized over five years. The taxpayer did not provide reserves in any of the years 2011 to 2014 with respect to the issue. The instructions conclude that the taxpayer has taken a position in its tax return in each of the years 2010 through 2014, but should disclose the position on Schedule UTP for 2010 only, since it did not record a reserve for this position in 2011 to 2014.

In Example seven, regarding a permanent item, a taxpayer establishes a reserve in 2010 for an amortized deduction to be claimed over five years due to uncertainty of whether any deduction or amortization may be allowable. The instructions conclude that the corporation has taken a position in its return in each of the years 2010 through 2014 and that the tax position must be disclosed on a Schedule UTP for each of the years 2010 through 2014. It further notes that the result would be the same if, instead of recording the reserve in 2010 for all of the tax positions taken in each of the five years, the corporation records a reserve in each year that specifically relates to the tax position taken on the return for that year.

The only distinction between Examples six and seven is that Example six deals with a temporary item, whereas Example seven deals with a permanent item. If the intention is that the timing of taking the tax position on the return triggers the disclosure, not the timing of the reserve, that should be specifically stated.

8. Unable to obtain information. The Schedule UTP provides a box to check in Part I and Part II if the taxpayer was unable to obtain information from related parties sufficient to determine if a tax position is an uncertain tax position. We recommend that the instructions provide further explanation of when this box should be checked. The instructions could state: “For example, it is intended to be used when a taxpayer’s controlling shareholder prepares the income tax reserves but does not inform the taxpayer.”
9. Unit of account. Page one of the general instructions of the draft Schedule UTP stated: “A tax position is based on the unit of account in the audited financial statements in which the reserve is recorded. A tax position taken in a tax return means a tax position that would result in an adjustment to a line item on that tax return if the position were not sustained. A line item on a tax return may be affected by multiple units of account, in which case each unit of account must be reported separately on Schedule UTP.” The final sentence was changed in the final instructions to read: “If multiple tax positions affect a single line item on a tax return, report each tax position separately on Schedule UTP.” We recommend that “item” be replaced by “item(s)” each place it appears so that it is clear that a unit of account may impact more than one line item on a return.

ISSUE FOUR: DISTANCE LEARNING

Executive Summary

The Subgroup was asked to provide advice and observations on what we are seeing in the marketplace regarding the use and deployment of distance learning. The use of distance learning has been expanding as new technologies and teaching methodologies have enabled students who are not physically present in a traditional educational setting (such as a classroom) to participate in a learning experience that in some cases has significant advantages over the lecture-style classroom format. Many educators have come to the conclusion that courses properly developed and taught on line can be easier for the students to understand and retain.

The Internal Revenue Manual defines distance learning as:

Distance Learning - Covers a wide set of applications and processes such as web based learning, computer-based learning, virtual classrooms, and digital collaboration. It includes the delivery of content via Internet, Intranet/Extranet (LAN/WAN), audio-based and video-based, satellite broadcast, interactive TV, and CD-ROM (Internal Revenue Manual 6.410.1.1.1D (03-12-2009)).

Background

The learning and education function of the IRS is governed by the Leadership Development Executive Council (LDEC) whose purpose is to provide strategic oversight for critical training issues, leadership development and succession planning (Internal Revenue Manual 6.410.1.1.5 (04-24-2009)). The implementation and administration of

the learning and education function is the responsibility of the IRS Human Capital Office, Leadership, Education, and Delivery Services (LEADS). The mission of the LEADS organization is to provide overall governance and guidance to the education community, set education policy and standards, and maintain and administer policy and guidelines for IRS learning and education (Internal Revenue Manual 6.410.1.1.6 (03-12-2009)).

The IRS employs the Enterprise Learning Management System (ELMS) as the official system for recording and tracking training data. ELMS is a web-based application that managers, employees, and the learning and education community access from their computers to manage training and employee development. Employees can also access and launch web-based training directly from ELMS.

One of the learning and education goals of the IRS is to promote distance learning. The applicable section of the Internal Revenue Manual provides *“Since classroom training has a limited capacity to address individual employee training needs, the Service must continue to promote the development and delivery of courses through non-traditional training methods such as e-learning as an alternative to classroom training, which will contribute to the IRS goal of becoming a learning organization. The IRS has an e-learning strategy that will utilize technology to promote the acquisition and sharing of knowledge and expertise efficiently and effectively –thereby supporting critical business outcomes and the subsequent creation of a learning organization.”*

The IRS has identified the benefits for a transition to e-learning as:

- Fewer hours dedicated to instructor preparation and delivery
- More consistency in training

- Just-in-time, just enough training
- Potential for prescriptive, customized training
- Competency development accelerated
- Travel time reduced
- Expanded opportunities for training to a wider audience at no additional cost
- Fewer training funds used for training-related travel, which frees up funds for development of more learning solutions and opportunities

The Subgroup believes that additional advantages of online or computer-based learning include:

- Students may have the option to select learning materials that meet their level of knowledge and interest.
- Students can study anywhere they have access to a computer and Internet connection.
- Self-paced learning modules allow students to work at their own pace.
- Virtual classroom software can be used to bring small groups together for real-time discussions.
- Bulletin boards, chat rooms, and discussion threads can also be used to promote group interaction.
- E-learning can accommodate different learning styles and facilitate learning through a variety of activities.
- Class work can be scheduled around work and family.

- Students can test out of or skim over materials already mastered, and thus concentrate efforts in mastering areas containing new information and/or skills.
- Students can stop during a course to check reference materials, take a break, etc., and resume where they left off.
- Students can playback lectures, etc., that they need to review or better understand.
- E-learning can also develop knowledge of the Internet and computer skills.
- Distance learning can leverage the time of the best teachers and make them available to a large audience.

Recommendations

1. The IRS should continue its process of expanding the development and use of distance learning, and consider the redeployment of existing courses in a distance learning format.
2. Often course materials of a technical nature become obsolete as developments in the tax law occur. The IRS should assign someone who specializes in the technical area which is the subject matter of the training course to be responsible for ensuring the content is up to date. This practice is used successfully within the public accounting profession.
3. Members of the LEADS organization responsible for course design and teaching should become members of tax education organizations (such as the American

Taxation Association (ATA) and the Association of American Law Schools, Section of Taxation) where they can participate in the various conferences dealing with the latest distance learning technologies and teaching methodologies. In this manner, the IRS members would be exposed to the best distance learning practices that are occurring in our universities and law schools.

4. The leadership of the ATA has indicated that they would welcome the opportunity to meet with members of LEADS. The IRS should follow through on this offer to obtain the ATA's input on distance learning trends, best practices and pitfalls.

ISSUE FIVE: FAST TRACK SETTLEMENT

Executive Summary

The Fast Track Settlement Procedure (“FTS” or “the process”) was established in 2003 with a goal of expediting the resolution of cases and offering taxpayers another alternative dispute resolution procedure. The process is essentially a mediation, with an Appeals Office Official (“AOO”) serving as a neutral participant using dispute resolution techniques to facilitate settlement between the examination team and the taxpayer.

The IRS is concerned about the relatively low level of FTS usage. The number of issues referred to and resolved in FTS has consistently been a small fraction of the total number of unagreed issues arising in audits. Meanwhile, the workload in the IRS Appeals Office is very high, and some cases take several years to resolve in the Appeals Office.

The IRS is trying to address this problem through increased communication regarding FTS throughout the organization. While this internal focus is helpful, the Subgroup does not believe communication alone will bring FTS usage to desired levels. Rather, we believe that the IRS should determine the reasons the process is not being used in more cases, modify the process to address those underlying reasons, and then market the improved FTS process to both the IRS and the taxpayer and tax advisor communities.

Background and Analysis

Revenue Procedure 2003-40 provides taxpayers with the detailed information regarding the FTS process, including case eligibility, the application process, and the settlement process. Internal guidance is provided in the Internal Revenue Manual in

section 4.51.4. The advertised advantages of the FTS process are the potential for a resolution within 120 days, no need for a formal Appeals protest, and the retention of all traditional appeals rights in the event resolution is not achieved.

The recent internal focus on increased communication about the FTS process has been positive in that there has been some increased usage of the process, but usage is not near the levels desired. The Subgroup believes there are many reasons why the process has not become a preferred alternative dispute resolution technique, as discussed below.

First, despite the increased communication regarding the FTS process, there is still a general lack of understanding of the process within segments of the IRS field, as well as within the taxpayer and tax advisor communities. Also, many taxpayers are concerned that the process will not successfully resolve their issues, and that as part of the process they will be giving an advantage to the IRS by outlining their possible litigating position.

Second, the IRS exam team and taxpayers often enter into the process attempting to obtain a 100 percent win or concession, but the process is not intended to produce that result. The FTS sessions often involve several members of the examination team, the case manager, perhaps a territory manager, IRS counsel and a technical advisor. Taxpayers often bring several members of their internal staff as well as outside advisors. Sessions can bog down with too many vocal participants, and become a debate about the relevant facts as opposed to a presentation of each side's technical position. Also, taxpayers may not always have their ultimate decision maker attend the session, and case managers are hesitant to consider hazards of litigation in considering the possible resolutions suggested

by the AOO. As a result the process fails to achieve resolution in about 15 percent of cases, and can leave affected taxpayers and tax advisors with the view that the process was a waste of time. This negative view then spreads across the taxpayer and tax advisor communities.

Recommendations

The Subgroup believes that it is critical to first address problems inherent in the present FTS process and then market the revised process both within the IRS and to the taxpayer and tax advisor communities.

While the Subgroup has highlighted two salient issues with the current FTS process, we expect the wider taxpayer and tax advisor communities to have additional concerns about the current FTS process. Therefore, as an initial step, the Subgroup recommends the IRS solicit input from the public before beginning to revise the process. Input from the ABA, AICPA and TEI would likely point out other issues that should be addressed when revising the process.

Meanwhile, the Subgroup has the following recommendations with respect to the process, including the requirements for acceptance of issues into the FTS process, the framework of the FTS sessions, and for the marketing of a revised process.

1. First the unwillingness to compromise or to make a decision is potentially fatal to the FTS process. Thus the Subgroup recommends that, as a condition for acceptance of an issue into the process, the case manager and the taxpayer's decision maker (e.g., V-P of Tax) should be required to jointly sign a statement to the effect that both parties are willing to compromise (i.e., to settle the issue at

something between the return position and the proposed adjustment). This would “set the tone” for the FTS session, clearly identify the decision makers on both sides, and put the onus on the decision makers to control the expectations of their representatives in the FTS session.

2. The Subgroup recommends that the parties develop a mutually agreed statement of fact as a precondition to entering into FTS. Issues involving two different viewpoints of the salient facts are not likely to be resolved through mediation.
3. The Subgroup also believes changes should be made to the manner in which the FTS sessions are conducted, as follows.
 - We recommend that the FTS session begin with the AOO stating his or her understanding of the issue and the relevant facts. After an appropriate discussion time, the field and the taxpayer would be required to acknowledge their agreement with the AOO’s summary before proceeding further.
 - The AOO would then summarize his or her understanding of both parties’ technical arguments and obtain sign-off from both sides. The FTS session would then proceed with each party stating the merits of its technical position.
 - After both sides have had adequate time to express their positions, the AOO would excuse all IRS and taxpayer representatives except for the two decision makers before mediation commences.

4. Solely for purposes of the Fast Track process we recommend that the Case Manager be required to consider hazards of litigation and furthermore be granted settlement authority for Fast Track issues.
5. The Subgroup recommends that the revised FTS process include a post-process critique. The AOO would document the taxpayer's and the field's feedback relative to the process. The purpose would be to clearly identify the elements of the process that are working and those that are not working. This feedback should be monitored by a national office "champion" of the FTS program charged with the responsibility to periodically update the process through the IRM and published guidance.
6. Finally, with respect to marketing, the Subgroup recommends the IRS develop a set of marketing initiatives aimed at educating taxpayers and tax advisors regarding the improved FTS process through speeches and presentations made by senior IRS officials to industry groups, the ABA, AICPA and TEI. Facts relating to the FTS process could also be published periodically in the tax press, including the number of cases accepted into FTS, the success rate, and the types of issues being resolved in FTS. The IRS may also consider preparing marketing materials including promotional materials accessible on the IRS website and articles for publication in the tax press outlining improvements in the process and its potential benefits to taxpayers. Such initiatives would improve the awareness and understanding of the improved process and its benefits, thereby increasing taxpayer participation in the FTS process.

ISSUE SIX: USE OF ACADEMIC RESEARCH

Executive Summary

The IRS should consider providing the tax academic community with suggested topics for academic research that would be of interest to the Service. While the IRS would benefit from unbiased, cost-free research for its use, professors would have the satisfaction of spending their research efforts on topics that matter.

Background

The three primary responsibilities of the academic faculty of higher educational institutions are to teach, to do advanced research and publish in their areas of specialty, and to serve the public through, for example, providing information and advice to governments. Professors of accounting, economics and taxation perform quantitative research involving the gathering and analysis of data, empirical studies, and legal tax research. Generally, their research and publications are unbiased, independent and objective, as they are subject to extensive peer review and comment. One of the most difficult challenges for professors is in the selection of research topics that provide relevant information to parties outside the academic community. Members of the tax academic community belong to a number of organizations—for example, the American Taxation Association (ATA) represents professors who teach undergraduate and graduate tax courses and members of the Association of American Law Schools, Section of Taxation (AALS) teach tax at the law school level.

The mission of the Research, Analysis, and Statistics Division of the Internal Revenue Service is to provide strategic research, analysis, studies, and support to internal

and external stakeholders. The Division fulfills its mission through the operation of five groups: the National Research Program Office, the Office of Research, the Office of Program Evaluation and Risk Analysis, the Office of Servicewide Policy, Directives and Electronic Research, and the Statistics of Income Division. Some of their publications include IRS prepared research papers published on the IRS website (<http://www.irs.gov/taxstats/article/0,,id=242261,00.html>), the *Statistics of Income (SOI) Bulletin*, The IRS Data Book, and IRS Research Bulletins which contains papers presented at the annual IRS Research Conference.

Recommendations

1. The IRS should establish a process whereby the IRS suggests to the tax academic community research topics that would be of interest and helpful to the Service. For example, in the announcement calling for papers to be presented at the annual IRS Research Conference, the IRS could suggest topics of interest involving tax administration, policy and proposals for legislation.
2. IRS officials often speak at meetings of organizations such as the ATA and the AALS. During those presentations, the speakers could suggest areas of interest for potential research.
3. The Research, Analysis, and Statistics Division should work with organizations such as the ATA and AALS to determine ways to disseminate to the tax academic community potential research topics.

**INTERNAL REVENUE SERVICE
ADVISORY COUNCIL**

**OFFICE OF PROFESSIONAL RESPONSIBILITY
SUBGROUP REPORT**

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NOVEMBER 16, 2011

INTRODUCTION/EXECUTIVE SUMMARY

The IRSAC OPR Subgroup (hereafter "Subgroup") is comprised of a diverse group of tax professionals, including lawyers, a CPA and an appraiser. Three members of the Subgroup are completing their fourth year on the Subgroup and they all greatly appreciate the opportunity they have had to work together and with the staff of the Office of Professional Responsibility. This year has been very rewarding from a professional standpoint because of the significant changes resulting from the promulgation of the final Regulations under Circular 230.

The Subgroup has always enjoyed a very good working relationship with the Director of the Office of Professional Responsibility and this year was no exception as all the personnel from the Office of Professional Responsibility were extremely cooperative and forthcoming.

IRSAC was asked to provide feedback and recommendations on the following five topics included in this report. Please find following a brief summary regarding each of these five issues, followed by a more complete analysis of each of the issues.

1. Exclusive Authority over Discipline

The Circular 230 regulations ("Regulations") were issued in proposed form on August 23, 2010. The final version of the Regulations, which became effective August 2, 2011, includes significant changes to which there was no opportunity to comment because these changes were not included in the Proposed Regulations. These include changes to §§10.20, 10.50, 10.60 and 10.62, wherein the Commissioner retained authority to delegate the power to sign disciplinary complaints under §10.62 to other

offices of the Internal Revenue Service. These changes were made to provide "flexibility" to adjust disciplinary responsibility between offices of the Internal Revenue Service. For example, under §10.62, as it existed before the final Regulations, only the Director of the Office of Professional Responsibility was authorized to sign a complaint against a practitioner charging disreputable conduct or other violation of Circular 230. Under the final Regulations, §10.62 has been changed to provide that "any authorized representative of the Internal Revenue Service" may sign such a complaint.

As a matter of sound tax administration policy, we believe that the authority to sign complaints and discipline practitioners should remain exclusively under the Office of Professional Responsibility.

2. Coordination of Administrative Responsibility over Discipline

OPR and RPO are in the process of reconciling the PTIN and the E-File processes to reduce duplication, eliminate conflicts, and improve efficiency. Under this new regime, it is anticipated that certain E-file violations will be referred to RPO for an initial review. RPO, where appropriate, will refer all alleged *ethical* violations to OPR.

RPO and OPR are developing protocols respecting the referral of all disciplinary matters to OPR. Under the new protocols, RPO will refer certain specified types of practitioner misconduct cases to OPR. For example, OPR will process and determine appeals from denials of initial PTINs and denials and renewals for compliance and deficient CPE issues. OPR will also receive and process Circular 230 conduct referrals from RPO, Business Operating Divisions (BoD's), Treasury Inspector General for Tax

Administration (TIGTA), Criminal Investigations (CI), Department of Justice (DOJ), and other federal and state agencies.

We strongly support these allocations of responsibility which we understand have been approved by the Commissioner. We also concur that coordination should also continue in the ongoing reconciliation between the E-File Program and RPO. We believe that these functions and the CAF function should be consolidated in a single office.

3. **Additional Guidance to Tax Practitioners**

With the extension of the Office of Professional Responsibility's disciplinary authority to paid tax return preparers, the practitioner population subject to discipline has increased by the over 500,000 unlicensed individuals who have registered as tax return preparers, as well as innumerable individuals who qualify as non-signing preparers under Treas. Reg. §301.7701-15(b)(2).³¹ Many of these newly designated practitioners may be unfamiliar with the ethical and professional obligations under Treasury Circular 230 and the Internal Revenue Code. As noted in the letter dated May 26, 2011, addressed to The Honorable William Wilkins and attached as Exhibit B, many practitioners now subject to OPR's jurisdiction are not familiar with administrative proceedings.

We believe that the Internal Revenue Service should expand the guidance available to all tax practitioners concerning their ethical and professional obligations. We also believe that the Office of Professional Responsibility should provide information to

³¹ Circular 230 § 10.8(c) applies the standards of conduct in Circular 230 Subpart B to “[a]ny individual who for compensation prepares, or assists in the preparation of, all or a substantial portion of a document pertaining to any taxpayer’s tax liability for submission to the Internal Revenue Service,” regardless of whether that individual is a registered tax return preparer or falls under another category of “practitioner” under Circular 230 § 10.2(a) (5).

practitioners subject to a disciplinary proceeding under Circular 230 concerning the notice and review procedures under the enforcement provisions of Treasury Circular 230.

4. **Recision of Changes to the Final Regulations**

As indicated previously, certain changes were made to the final Regulations which were intended to permit the Commissioner flexibility to allocate disciplinary authority under Circular 230 to other offices of the Internal Revenue Service. These changes were made without the opportunity for public participation and comment. This may have violated the Administrative Procedures Act (APA), as well as existing Executive Orders which encourage the opportunity for public participation and comment. Furthermore, the American Bar Association, Tax Section, and the American College of Tax Counsel have written comments which call into question the delegation of disciplinary authority to the offices of the Internal Revenue Service that enforce the Internal Revenue Code. In light of actions already in progress within the Service, the changes made in the final Regulations appear to be unnecessary. We believe that sound tax administration policy requires that OPR have exclusive authority to review alleged ethical violations and impose discipline for those violations. We therefore recommend that the changes made to §§10.20, 10.50, 10.60 and 10.62 in the final Regulations be rescinded.

5. **Suggested Adoption of USPAP by OPR in Judging Appraiser Conduct**

Under the “Summary of Comments and Explanation of Revisions” section of the final Regulations relating to Treasury Circular 230, various provisions relate to appraiser conduct. Appraisers have only recently been included in Treasury Circular 230 and there is very little in the way of documented evidence or guidance on this subject. The OPR

subcommittee proposes that IRSAC recommends to OPR that it adopt the Uniform Standards of Professional Appraisal Practice (“USPAP”), or equivalent, as one of the standards for judging appraiser conduct.

ISSUE ONE: EXCLUSIVE AUTHORITY OVER DISCIPLINE

Executive Summary

The Circular 230 regulations ("Regulations") were issued in proposed form on August 23, 2010. The final version of the Regulations, which became effective August 2, 2011, includes significant changes with respect to which there was no opportunity to comment because these changes were not included in the Proposed Regulations. These include changes to §§10.20, 10.50, 10.60 and 10.62, wherein the Commissioner retained authority to delegate the power to sign disciplinary complaints under §10.62 to other offices of the Internal Revenue Service. These changes were made to provide "flexibility" to adjust disciplinary responsibility between offices of the Internal Revenue Service. For example, under §10.62, as it existed before the final Regulations, only the Director of the Office of Professional Responsibility was authorized to sign a complaint against a practitioner charging disreputable conduct or other violation of Circular 230. Under the final Regulations, §10.62 has been changed to provide that "any authorized representative of the Internal Revenue Service" may sign such a complaint.

As a matter of sound tax administration policy, we believe that the authority to sign complaints and discipline practitioners should remain exclusively under the Office of Professional Responsibility.

Background

Circular 230, which is found in Title 31 of the US Code, governs practice before the Internal Revenue Service. These Regulations define who may practice before the Internal Revenue Service. The Regulations also proscribe ethical standards required of

such persons. Finally, Circular 230 provides the procedural rules which govern the discipline of practitioners who violate the standards. These include the authority to seek suspension or disbarment from practice through a notice and adjudication process.

Heretofore, the Director of the Office of Professional Responsibility (“OPR”) has had exclusive authority to institute disciplinary procedures by issuing a "complaint" alleging violations of Circular 230. Under the final Regulations, certain provisions of Circular 230, namely §§10.20, 10.50, 10.60 and 10.62, were revised to provide "flexibility" so that the Commissioner could delegate the power to sign a complaint to discipline practitioners to other employees of the Internal Revenue Service. The Preamble to the final Regulations acknowledges, however, that OPR "is central to the IRS' goal of maintaining high standards of ethical conduct for all practitioners and must operate independently from IRS functions enforcing Title 26 requirements."³² Notwithstanding the statement in the Preamble, the Commissioner, if he or she chose to, could delegate authority to sign complaints to any operational division within the Internal Revenue Service. We believe such delegation would be highly undesirable.

We believe that it is crucial that the Office of Professional Responsibility remain totally independent of the personnel and offices within the Internal Revenue Service that enforce the Internal Revenue Code (Title 26 of the US Code). OPR must also be seen to be independent and objective. Our belief is based on the same factors that encourage the independence of Appeals, but on an even greater scale. The prospect of disciplinary proceedings being instituted by the same offices that enforce the Internal Revenue Code

³² 2011-27 I.R.B. 3.

has the wrong appearance and may stifle practitioners from advocating zealously on behalf of their clients when interacting with Internal Revenue Service representatives.

The authority to discipline a practitioner must, therefore, be exercised independently and objectively, because the Circular 230 sanctions could result in denying a practitioner the ability to engage in his or her chosen profession resulting in substantial collateral harm. Such enormous power must be exercised in a manner that is independent of the Internal Revenue Service's primary mission of collecting the proper amount of tax from taxpayers. The IRSAC strongly believes that independence of OPR is crucial to the objectivity required in the administration of discipline. Referrals to OPR should be based on conduct that is contrary to "generally understood standards of practitioner service and professionalism" rather than as punishment for a single act of aggressive or other misconduct.³³

Accordingly, we believe that the independence of OPR is crucial to objectivity and to the appearance of objectivity required for the effective administration of discipline.

Recommendation

Circular 230 should be revised to provide that OPR shall have exclusive authority over the administration of practitioner discipline under Circular 230 and shall remain independent and separate from IRS offices enforcing the Internal Revenue Code.

³³ Compare, IRM 20.1.6.11.3.6 and 20.1.6.11.3.14

**ISSUE TWO: COORDINATION OF ADMINISTRATIVE RESPONSIBILITY
OVER DISCIPLINE**

Executive Summary

OPR and RPO are in the process of reconciling the PTIN and the E-File processes to reduce duplication, eliminate conflicts, and improve efficiency. Under this new regime, it is anticipated that certain E-file violations will be referred to RPO for an initial review. RPO, where appropriate, will refer all alleged *ethical* violations to OPR.

RPO and OPR are developing protocols respecting the referral of all disciplinary matters to OPR. Under the new protocols, RPO will refer certain specified types of practitioner misconduct cases to OPR. For example, OPR will process and determine appeals from denials of initial PTINs and denials and renewals for compliance and deficient CPE issues. OPR will also receive and process Circular 230 conduct referrals from RPO, BoD's TIGTA, CI, DOJ, and other federal and state agencies.

We strongly support these allocations of responsibility which we understand have been approved by the Commissioner. We also concur that coordination should also continue in the ongoing reconciliation between the E-File Program and RPO. We believe that these functions and the CAF function should be consolidated in a single office.

Background

Expansion of Authority

The final Circular 230 regulations greatly expand the authority of the Internal Revenue Service to regulate the preparation and filing of tax returns. The new §10.2(a) expands the definition of practitioner to include those who prepare tax returns and

provide tax advice for compensation. Section 10.34 provides authority to ensure that tax returns and tax advice meet certain minimum certainty and disclosure requirements.

Sections 10.51(a) (16) and (17) provide authority to sanction those who "willfully" fail to file returns on magnetic or other required electronic media and compensated preparers who "willfully" prepare all or substantially all of or sign a tax return or claim for refund where the preparer does not possess a current or otherwise valid PTIN or other required identifying number.

Identifying Ethical Violations

The Service recognizes that Circular 230 sets forth ethical standards which are generally meant to apply to "willful" misconduct. Willful misconduct is generally described as "the intentional violation of a known legal duty."³⁴ Willful misconduct is therefore distinguishable from misconduct which is merely negligent, mistaken or inadvertent. The Internal Revenue Manual recognizes this distinction by requiring that Code Section 6694(a) referrals to OPR be based upon a "pattern" of misconduct.³⁵ A "pattern" of misconduct is the legally recognized sign or indicator of willfulness. Thus, Circular 230 is not intended to be utilized as an enforcement tool for isolated acts of incompetence or disreputable conduct. Instead, it is intended to more broadly protect the tax system from those practitioners who have demonstrated a clear pattern of failing to meet generally recognized standards of professional conduct.

³⁴ *United States v. Pomponio*, 97 S.Ct. 22, 23 (1976)

³⁵ *Id.* fn. 1

Reconciliation of the Expanded Authority

The current challenge for the Internal Revenue Service is the "reconciliation" of these expanded powers with existing IRS processes. The Service should seek to ensure uniformity and efficiency in the administration of the PTIN and E-File requirements and eliminate duplication and burden. Thus, the first challenge is to coordinate the entry of practitioners into the system. We note that practitioners may now enter through three doors: through RPO by obtaining a PTIN; through the E Filing program by obtaining an EFIN, and through the CAF function by the submission of a Power of Attorney, Form 2848.

We understand that the Service is presently addressing these concerns. A GAO Report (link: <http://www.gao.gov/Products/GAO-11-344>) recommends that the IRS consider use of the PTIN as the authorizing number for E-file and eliminate use of the EFIN. The Service has established a multi function "Reconciliation Team" to review and reconcile the PTIN and the E-Filing regimes so that a preparer will not have to duplicate the requirements that apply to both, such as the requirement to obtain fingerprints, a criminal background check and a check on personal tax compliance.

The E-Filing and PTIN processes are to remain separate until the RPO office is fully staffed and "stands-up." At that point, it is anticipated that a person who obtains a PTIN will be automatically eligible to E-File.

Existing E-file rules contain a long list of items that are considered "violations" of the E-file rules which can result in the imposition of various "sanctions," including loss

of E-file privileges.³⁶ Some of these violations are “technical violations” while others involve ethical misconduct within the scope of Circular 230. Violations that do not involve professional misconduct, such as violations by E-File transmitters or other E-Filers who are not paid tax preparers, and technical electronic filing violations or security violations such as returned mail will not be referred to RPO. It is anticipated that such violations will be handled according to the existing process. In those instances, the review process will be through E-File management and ultimately to Appeals under the existing procedures which are set forth in Publications 3112 and 1345.

It is anticipated that E-file violations involving ethical misconduct will be referred to RPO for an initial review and, where appropriate, will be referred on to OPR for possible disciplinary action and implementation of the Circular 230 adjudication process. Ultimately, only cases requiring adjudication under Circular 230 (i.e., ethical violations) will be referred by E-File to RPO. RPO will process those referrals and, as appropriate, transmit those matters to OPR for adjudication of the alleged violations.

Referrals to OPR

We are informed that OPR and RPO are in the process of developing protocols respecting the referral of disciplinary matters to OPR. Attached hereto as Exhibit A is a chart which reflects the preliminary allocation of responsibility between these offices. The chart reflects, in pertinent part, that RPO will oversee the vendor PTIN operation, process enrollment applications and confirm such things as CPE requirements and requirements for renewals. OPR will receive referrals from RPO and process and

³⁶ See Internal Revenue Manual 3.42.10, *Authorized IRS E-file Providers*, Publications 3112 and 1345

determine appeals from denials of initial PTINs, denials and renewals for compliance and deficient CPE issues. OPR will also receive and process Circular 230 conduct referrals from RPO, BoD's TIGTA, CI, DOJ, and other federal and state agencies. We strongly support these allocations of responsibility which we understand have been approved by the Commissioner.

Recommendation

We concur that coordination should also occur between the RPO and the E-File Program. We think that these offices should be consolidated. We also believe that the CAF function should be consolidated with RPO. We also strongly support the requirement that all ethical violations be referred to OPR for evaluation and, where appropriate, the institution of disciplinary proceedings under Circular 230.

ISSUE THREE: GUIDANCE RESPECTING THE NOTICE AND REVIEW

PROCEDURES UNDER THE ENFORCEMENT PROVISIONS OF

CIRCULAR 230, SUBPART B

Executive Summary

With the extension of the Office of Professional Responsibility's disciplinary authority to paid tax return preparers, the practitioner population subject to discipline has increased by the over 500,000 unlicensed individuals who have registered as tax return preparers, as well as innumerable individuals who qualify as non-signing preparers under Treas. Reg. §301.7701-15(b)(2).³⁷ Many of these newly designated practitioners may be unfamiliar with the ethical and professional obligations under Treasury Circular 230 and the Internal Revenue Code. As noted in the letter dated May 26, 2011, addressed to The Honorable William Wilkins and attached as Exhibit B, many practitioners now subject to OPR's jurisdiction are not familiar with administrative proceedings.

We believe that the Internal Revenue Service should expand the guidance available to all tax practitioners concerning their ethical and professional obligations. We also believe that the Office of Professional Responsibility should provide information to practitioners subject to a disciplinary proceeding under Circular 230 concerning the notice and review procedures under the enforcement provisions of Treasury Circular 230.

³⁷ Circular 230 §10.8(c) applies the standards of conduct in Circular 230 Subpart B to “[a]ny individual who for compensation prepares, or assists in the preparation of, all or a substantial portion of a document pertaining to any taxpayer’s tax liability for submission to the Internal Revenue Service,” regardless of whether that individual is a registered tax return preparer or falls under another category of “practitioner” under Circular 230 §10.2(a) (5).

Background

Tax practitioners have ethical obligations to their clients under Treasury Circular 230, as well as obligations to the tax system under the Internal Revenue Code. Taxpayer confidence in the tax system and sound tax administration are enhanced when tax practitioners understand and fulfill their ethical and professional obligations. The first step toward promoting compliance with these obligations is to ensure that affected professionals are aware of and understand them.

The changes to Circular 230 that became effective August 2, 2011, have greatly expanded the reach of the conduct rules in Subpart B to apply to registered tax return preparers and to individuals meeting the definition of a “tax return preparer” under Treasury Regulation §301.7701-15.³⁸ Approximately 500,000 individuals who are not attorneys, certified public accountants, or enrolled agents with the Internal Revenue Service have registered as tax return preparers. These individuals are less likely to understand the obligations imposed by Circular 230 and by the Code. Even some licensed practitioners who understand their ethical obligations under general rules of conduct applicable to their profession may not be fully aware of these obligations if they do not regularly engage in tax practice.

Tax practitioners’ awareness of their ethical and professional obligations under the Internal Revenue Code and Circular 230 would be enhanced by providing a publication that enumerates in reasonable detail the various obligations of practitioners under Circular 230 and of “tax return preparers” under the Internal Revenue Code. The

³⁸ Circular 230 §10.2(a) (8).

Service regularly provides this type of guidance to taxpayers and tax preparers in its publications. For example, comprehensive information for individual taxpayers is available in Publication 17, *Your Federal Income Tax*, published in both *.html* and *.pdf* format at the www.IRS.gov website.

Similarly, tax practitioners' understanding of the procedures under Circular 230 Subpart D for responding to an allegation against them could be promoted by providing a publication that describes in reasonable detail the practitioner's due process and appeal rights, as well as potential sanctions if the practitioner is ultimately found to have violated Circular 230. Again, the Service provides similar procedural information to taxpayers in Publication 1, *Your Rights as a Taxpayer*.

In providing the recommended publications described above, it is critical that practitioners be aware of their existence and be able to easily locate them at the www.IRS.gov website. At the *Tax Information for Tax Professionals* section on the Service's website, there are 25 links in the main body of the page. The link to Circular 230 is the 20th link, and the Section 7216 Information Center is the 21st, too far down the page to attract the viewer's attention. And while the terms "Circular 230" and "Section 7216" may be familiar to some attorneys, CPAs, and enrolled agents, they may have little meaning to a newly registered tax return preparer. A majority of tax practitioners would be far more likely to locate (and therefore read) important guidance concerning ethical and professional obligations if the links to the guidance were located near the top of the page and used titles that more readily identified the subject matter to less experienced or

unlicensed practitioners (*e.g.*, “Ethical and Professional Obligations of Tax Professionals”).

The Service provides practitioners with information concerning tax matters via continuing professional education programs, and these programs have addressed practitioners’ obligations. The Service should continue to employ these programs to promote practitioners’ awareness and understanding of their ethical and professional obligations.

Recommendations

We reaffirm the request by IRSAC that Chief Counsel provide additional guidance respecting the notice and review procedures under the enforcement provisions of Circular 230, Subpart D. We offer the following specific recommendations:

1. We recommend that the Service issue a publication describing the obligations of a practitioner under Circular 230 and those of a preparer under the Internal Revenue Code. The publication should describe in reasonable detail both ethical responsibilities and administrative obligations, including due diligence, PTIN requirements, tax return preparation and signing, tax advice (and the limitations on tax advice by registered tax return preparers), confidentiality, conflicts, of interest, contingent fees, client records, solicitation, and the responsibilities under §§6060, 6107, 6109, and 6695. The publication should also describe in general terms the possible sanctions under the Internal Revenue Code or Circular 230 for violating these standards.

2. We recommend that the publication described in paragraph 1 be made available in *.html* format on the www.irs.gov website in the section *Tax Information for Tax Professionals* via a single link. The link to the *.html* document should clearly convey the subject matter of the publication, such as “Ethical and Professional Obligations of Tax Professionals,” and the link should be placed in a location near the top of the *Tax Information for Tax Professionals* section. A *.pdf* version of this publication should also be downloadable from the *.html* page.
3. We recommend that the Service allow tax professionals to “subscribe” to changes in the publication described in paragraph 1 via RSS feed or other means.
4. We recommend that the Service issue a separate publication describing the procedures for a proceeding under Subpart D or Circular 230 and related due process rights, including the right to notice, time periods for responding to allegations, the right to representation, the right to submit evidence relevant to the proceeding, administrative hearings, administrative appeals, appeal rights to U.S. District Court, and the potential sanctions if the practitioner is ultimately found to have violated Circular 230. This publication should accompany any notice of an allegation sent to the practitioner and any complaint served on the practitioner under Circular 230 §10.63.
5. We recommend that the Service address the ethical and professional obligations of practitioners in one or more web-based continuing education sessions in its various CPE programs.

ISSUE FOUR: RESCISSION OF CHANGES TO THE FINAL REGULATIONS

Executive Summary

As indicated previously, certain changes were made to the final Regulations which were intended to permit the Commissioner flexibility to allocate disciplinary authority under Circular 230 to other offices of the Internal Revenue Service. These changes were made without the opportunity for public participation and comment. This may have violated the Administrative Procedures Act (APA), as well as existing Executive Orders which encourage the opportunity for public participation and comment. Furthermore, the American Bar Association, Tax Section, and the American College of Tax Counsel have written comments which call into question the delegation of disciplinary authority to the offices of the Internal Revenue Service that enforce the Internal Revenue Code. In light of actions already in progress within the Service, the changes made in the final Regulations appear to be unnecessary. We believe that sound tax administration policy requires that OPR have exclusive authority to review alleged ethical violations and impose discipline for those violations. We therefore recommend that the changes made to §§10.20, 10.50, 10.60 and 10.62 in the final Regulations be rescinded.

Background

The Regulations were issued in proposed form on August 23, 2010. The final version of the Regulations effective August 2, 2011, includes significant changes with respect to which there was no opportunity to comment because these changes were not included in the proposed regulations. These include changes to §§10.20, 10.50, 10.60

and 10.62, wherein the Commissioner retained authority to delegate the power to sign disciplinary complaints under §10.62 to other offices of the Internal Revenue Service.

The manner of the adoption of the final Regulations without the opportunity for public participation and comment violates public policy and appears to violate the APA and an existing Executive Order. APA §§553(b) and (c) require publication of notice containing the substance of the proposed rule as well as an opportunity to comment.³⁹ Executive Order 13563 (Improving Regulation and Regulatory Review), issued January 18, 2011, states in pertinent part that "Our regulatory system...must allow for public participation and the open exchange of ideas." To this end, Section 2 of the Executive Order provides:

Sec. 2. Public Participation.

(a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a

³⁹ 5 USC §553

meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.

We note that the American Bar Association, Tax Section, has recommended that "disciplinary authority not be shifted to the new RPO or to any other office within the Service."⁴⁰ The Tax Section comments include the following reasons for the recommendation:

For many years, tax practitioners have relied on the independence and care exercised by OPR in handling discipline of all practitioners authorized to practice before the Service before the advent of the new return preparer registration process. In order to ensure both the actual and the perceived integrity and independence of the disciplinary process, we respectfully recommend that the Service delegate authority to OPR to exercise all disciplinary authority under the final Regulations.

The American College of Tax Counsel ("ACTC") has also commented on the changes in the final Regulations. The ACTC comments include the following:

Prior to the issuance of the final Regulations, the specific references to OPR in Circular 230 ensured that practitioner disciplinary powers were exercised only by OPR. We recognize the need to coordinate the responsibilities of OPR with the new return preparer office ("RPO") established to administer the return preparer initiative. We respectfully submit, however, that removing references to OPR in Subparts C and D

⁴⁰ <http://taxprof.typepad.com/files/aba-comments.pdf>

[§§10.50, 10.60 and 10.62] of the Regulations creates doubt as to whether OPR (or a similarly independent body) will continue to regulate practitioner conduct and be responsible for disciplinary proceedings.⁴¹

The ACTC also stated that:

...we believe that 'it is very important to maintain the independence and impartiality of the Director of OPR, both in substance and in appearance to the greatest extent feasible. We strongly believe that the Director of OPR should be supervised [by] a person who is wholly independent of the Internal Revenue Service. ... We believe that the conflict that now exists between the Commissioner's frequent role as the taxpayer's adversary and his role as regulator of the conduct of the taxpayer's representative is obvious and invites the perception that proceedings may be brought in the latter context to influence the former.'⁴²

To assure continued integrity and independence of the disciplinary process, ACTC recommends that a new §10.83 be added to the Regulations. This proposed §10.83 would state the following:

The initial delegation of responsibility for all practitioner disciplinary matters, functions, and proceedings shall be to the Director of the Office of Professional Responsibility. The Commissioner may reallocate responsibility for some or all of such matters, functions, and proceedings

⁴¹ <http://www.actconline.org/pdf/ACTCLtrtoCommSchulman.pdf>

⁴² Id.

to another person or office, but only if such person or office has a level of independence from the Internal Revenue Service's Title 26 compliance and enforcement functions that is similar to (or greater than) that currently possessed by the Director of the Office of Professional Responsibility.

Clearly, there was no opportunity for public comment or participation in the changes made to Circular 230, §§10.20, 10.50, 10.60 and 10.62. Here it is also clear that the experts in the relevant disciplines and the affected stakeholders in the private sector have now expressed fundamental and substantive reasons for opposition to the changes.

It appears that the Service is in the course of implementing changes which are designed to preserve the independence of OPR and its exclusive authority over discipline. We support this action. Because of these actions by the Service, it therefore appears that the changes in the final Regulations were unnecessary. Because the changes appear to be unnecessary, we do not agree that the changes should be retained or that a new §10.83 be added to assure the independence of any office administering discipline.

Recommendation

For the above reasons, we believe that the changes to the final Regulations were unnecessary and contrary to sound tax administration. We, therefore, recommend that the changes to Circular 230, §§10.20, 10.50, 10.60 and 10.62 be rescinded.

ISSUE FIVE: SUGGESTED ADOPTION OF USPAP BY OPR IN JUDGING

APPRAISER CONDUCT

Executive Summary

Under the “Summary of Comments and Explanation of Revisions” section of the final Regulations relating to Treasury Circular 230, various provisions relate to appraiser conduct. Appraisers have only recently been included in IRS Circular 230 and there is very little in the way of documented guidance on this subject. IRSAC recommends to OPR that it adopt the Uniform Standards of Professional Appraisal Practice (“USPAP”), or equivalent, as one of the standards for judging appraiser conduct.

Background

In published guidance in the charitable contributions area, the Treasury Department and IRS refer to “generally accepted appraisal standards” in determining what constitutes a “qualified appraisal” and indicate that appraisals will be treated as having been conducted in accordance with generally accepted appraisal standards if “consistent with the substance and principals of the Uniform Standards of Professional Appraisal Practice (USPAP).”⁴³ We believe that having USPAP as an objective and widely accepted standard as a key component of OPR’s due process would be mutually beneficial to both OPR and the appraisal community. USPAP could serve as a guide for both judging conduct and professional practice remediation. In addition, in a proceeding

⁴³ Prop. Reg. §1.170A-17(a)(2) and IRS Notice 2006-96 – Guidance Regarding Appraisal Requirements for Noncash Charitable Contributions.

before an administrative law judge, the ability to reference an objective and widely accepted standard would be of great benefit.

Recommendation

We recommend that OPR utilize USPAP or equivalent, as a frame of reference in making determinations regarding appraiser due diligence.

EXHIBIT A: SUMMARY OF OPR/RPO ROLES AND RESPONSIBILITIES UNDER CIRCULAR 230

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> • PTIN Registration – Return Preparers • Enrollments– EA’s, ERPA’s, and Actuaries • Renewals 	<ul style="list-style-type: none"> • Oversee vendor PTIN operation • Process enrollment applications • Oversee compliance and suitability determinations • Confirm CE requirements met for renewals • Maintain practitioner on-line database • Liaison with CAF re: representation (PoA) issues 	<ul style="list-style-type: none"> • Maintain database of enjoined/convicted practitioners and feed to PTIN vendor monthly • Process and determine appeals from denials of initial PTIN, denials of renewals for compliance AND deficient CPE issues • Final Agency Determinations re: PTIN ISSUANCE
<ul style="list-style-type: none"> • Testing – Return Preparer • Special Enrollment Exam (OPE) • Aire Exam (ERPA) • Actuary Exams (Joint Board) • Fingerprinting / Background Checks – RTRP’s 	<ul style="list-style-type: none"> • Oversee vendor relationships • Hear appeals from protest to vendors on questions and other test issues • Annual review of RTP and SEE test questions for accuracy, currency and relevance • Former employee SEE waivers • Preliminary determinations re: PTIN/Enrollment denials/terminations 	<ul style="list-style-type: none"> • Provide annual guidance and review for ethics questions on exams • Process and determine appeals from Notices of proposed denials/terminations of PTIN, Enrolled status • Process and determine appeals from former employees re: limited enrollment • Process and determine appeals of PTIN/enrollment denial based on felony convictions
<ul style="list-style-type: none"> • Complaints 	<ul style="list-style-type: none"> • Receive and Process complaints from taxpayers • Conduct preliminary case building /gathering of information necessary to make determination whether to investigate further or to pass to OPR for additional disciplinary action • Log all referrals into centralized database for tracking • Communicate with referral source to provide appropriate updates on referral actions 	<ul style="list-style-type: none"> • Receive and process referrals from RPO • Issue pre-allegation/letters; allegation letters as appropriate • Hold conferences and recommend discipline- issue reprimands • Negotiate case resolution with practitioners • Prepare complaint and administrative file for unresolved cases • Transmit admin file to GLS and provide hearing support

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> • Validate Professional Designations • Monitor Supervised PTIN Holders 	<ul style="list-style-type: none"> • Liaison with CAF re: professional designations on PoA's • Communicate with Supervisory PTIN holders • Refer violations to TIGTA or OPR 	<ul style="list-style-type: none"> • Receive and process referrals from RPO re: Supervisory PTIN holders for Cir 230 violations as per "REFERRALS"
<ul style="list-style-type: none"> • Referrals 	<ul style="list-style-type: none"> • Receive referrals from BODs (for specific issues) • Conduct preliminary case building /gathering of information necessary to make determination whether to investigate further or to pass to OPR for additional disciplinary action • Log all referrals into centralized database for tracking • Communicate with referral source to provide appropriate updates on referral actions 	<ul style="list-style-type: none"> • Receive and process Cir 230 conduct referrals from RPO, BoD's, TIGTA, CI, DoJ, other federal and state agencies • Issue pre-allegation/letters; allegation letters as appropriate • Hold conferences and recommend discipline- issue reprimands • Negotiate case resolution with practitioners and prepare settlement docs • Prepare complaint and administrative file for unresolved cases • Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support • Prepare administrative file for Appeals to Appellate Authority and assist with briefing
<ul style="list-style-type: none"> • Continuing Professional Education – RPO's and Enrolled Persons • Continuing Education Vendors 	<ul style="list-style-type: none"> • Receive and process data for renewals and vendor programs • Deny PTIN/enrollment status if deficient CE credits • Deny vendor CPE program status in appropriate circumstances 	<ul style="list-style-type: none"> • Process and determine appeals of denials of PTIN/Enrollment status for deficient CPE • Process and determine appeals of denials Vendor CPE status

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> • State Licensing • Federal and State Court Actions – Felonies and Injunctions 	<ul style="list-style-type: none"> • N/A 	<ul style="list-style-type: none"> • Research state databases for disciplined practitioners • Monitor DoJ inventory for permanent injunctions and convictions involving Title 26 • Obtain and review case materials to confirm status • Prepare Expedited Suspension complaint and letter to practitioner • Hold conference if requested • Issue final determination with recourse rights to 10.60 procedure • Draft 10.60 complaint and prepare administrative file for administrative hearing- on practitioner timely request • Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support Prepare administrative file for Appeals to Appellate Authority and assist with briefing
<ul style="list-style-type: none"> • Contemptuous Conduct • RTRP Deceptive Advertising • Undue Influence/Threats/Coercion • Return of Records • Failure to Sign Return • Failure to Use PTIN • Failure to E-file • Representing without Authorization 	<ul style="list-style-type: none"> • Receive and Process complaints and referrals • Conduct preliminary case building /gathering of information necessary to make determination whether to investigate further or to pass to OPR for additional disciplinary action • Log all referrals into centralized database for tracking • Communicate with referral source to provide appropriate updates on referral actions • Attempt resolution of issues with Practitioner. • Refer cases to OPR as necessary for disciplinary 	<ul style="list-style-type: none"> • Receive and process referrals from RPO • Issue pre-allegation letters; allegation letters as appropriate • Hold conferences and recommend discipline- issue reprimands • Negotiate case resolution with practitioners • Prepare complaint and administrative file for unresolved cases • Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support • Prepare administrative file for Appeals to Appellate Authority and assist with briefing

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> • Contingent Fees • Incompetence and Disreputable Conduct (10.51) • False And Misleading Information to IRS • Refund Splitting/Stealing • Aiding and Abetting Practice By Disciplined Practitioner • Penalties Asserted (6694, 6701, etc.) • Willful Evasion of Payment • Aiding and Abetting Evasion • Written Opinions (10.35, 10.37) • Principal Authority – Opinions and Preparation (10.36) 		<ul style="list-style-type: none"> • Receive and process Cir 230 conduct referrals from RPO, BoD's, TIGTA, CI, DoJ, other federal and state agencies • Issue pre-allegation letters; allegation letters as appropriate • Hold conferences and recommend discipline- issue reprimands • Negotiate case resolution with practitioners and prepare settlement docs • Prepare complaint and administrative file for unresolved cases • Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support • Prepare administrative file for Appeals to Appellate Authority and assist with briefing

Additional Notes

- **Violations subject to sanction - §10.52(a)(1) and (2):** *(a) A practitioner may be sanctioned under §10.50 if the practitioner — (1) Willfully violates any of the regulations (other than §10.33) contained in this part; or (2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§ 10.34, 10.35, 10.36 or 10.37*
- **Receipt of information concerning practitioner - §10.53(a):** *(a) Officer or employee of the Internal Revenue Service. If an officer or employee of the Internal Revenue Service has reason to believe a practitioner has violated any provision of this part, the officer or employee will promptly make a written report of the suspected violation. The report will explain the facts and reasons upon which the officer's or employee's belief rests and must be submitted to the office(s) of the Internal Revenue Service responsible for administering or enforcing this part*
- **Practice:** All matters connected with a presentation to the IRS relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the IRS. Preparing or filing documents, corresponding and communicating with the IRS, rendering written advice, and representing a client at conferences, hearings and meetings. Legacy Cir 230
Practitioners: Practice = Tax Return Preparation

EXHIBIT B

**Internal Revenue Service Advisory Council
2011 Member Biographies**

Donna K. Baker

Ms. Baker, CPA, has worked in the accounting field for over 24 years and is the owner of Donna Baker & Associates, CPA and Tax Pro Filers, in Adrian, MI. In addition, she is an Associate Professor of Accounting and Chair of Accounting Department at Siena Heights University in Adrian, MI, where she teaches Intermediate Accounting, AIS, Forensic Accounting, Auditing, Taxation, etc. Her CPA firm currently prepares 650 tax returns per year focusing on C Corps, S Corps, partnerships, agricultural, non-profits and small to mid size business returns. Her firm also provides services in auditing, business consulting, strategic tax planning, forensic examination, financial statement preparation and payroll. Ms. Baker started Tax Pro Filers as a sabbatical project that was modeled after large tax preparation chains, such as H&R Block & Jackson Hewitt. She currently has three locations and prepares 4000 tax returns per year. She is a member of AICPA, NATP, and the Michigan Association of Certified Public Accountants and the Lenawee County VITA Coalition. Ms. Baker holds a MBA Professional Accounting/Information Systems from Michigan State University and a BA – Accounting from Siena Heights University. **(W&I Subgroup)**

David Bernard

Mr. Bernard, CPA, retired as the Vice President for Taxes and Real Estate for Kimberly-Clark Corporation in Neenah, Wisconsin. Mr. Bernard joined Kimberly-Clark in 1974 and has held various positions within the Tax Department, including chief tax officer for the last twelve years. In 2005, his responsibilities were expanded to include the North American real estate management. His responsibilities included tax management, including tax strategies, risk management and talent development, and real estate. Mr. Bernard served as the Tax Executives Institute's ("TEI's") 2006-2007 International President and presently serves on the National Advisory Board for the Michigan Technological University School of Business and is a member of that Board's Executive Committee. He is a CPA, and he holds a BSBA from Michigan Technological

University and an MBA from the University of Wisconsin-Oshkosh. **(LB&I Subgroup Chair)**

Michael Casey

Mr. Casey, MAAT, CPP, EA, ATP, is an accountant with West, Christensen, PC in Flagstaff, Arizona. Mr. Casey has over twenty years experience in accounting and taxation, specializing in all aspects of individual, business, non-profit and payroll taxation. His responsibilities include a wide variety of tax planning and consulting services and have extensive experience in corporate, individual and payroll tax compliance, and in representing clients before the IRS. He has been a national speaker for the American Payroll Association and has published and written numerous articles for APA and Accounts Payable journals on the subject of IRS audits. In addition, he is an associate professor for Coconino Community College and teaches the individual and business tax classes. He also serves as APA's Chapter Government Liaison Officer. Mr. Casey holds a BA in Accounting from the University of Cardiff, Wales, U.K. **(W&I Subgroup)**

Teresa Douglass

Ms. Douglass is a practicing CPA and attorney with MHC Certified Public Accountants, LLC and MHC Law Group, LLC in Mexico, Missouri. She has over 20 years of experience in tax practice that includes tax planning, estate planning, tax return preparation and representation of taxpayers in IRS matters. Ms. Douglass is a member of the AICPA, Missouri Society of Certified Public Accountants, ABA Tax Section, ABA Real Property, Trust and Estate Section, and Missouri Bar Probate and Trust Committee and Elder Law Committee. She is also admitted to practice before the US Tax Court. Ms. Douglass has a BS in Accounting and a JD from the University of Missouri-Kansas City and an LLM in taxation from the University of Florida. **(OPR Subgroup)**

Ann Esarco

Dr. Esarco, CPA, EA, is a Professor at McHenry County College in Crystal Lake, Illinois. She has owned and operated her own accounting and taxpayer representation firm, AJE Associates, PC, since 1982. She partnered with McHenry County College and the Center for Economic Progress to form a VITA tax site. In addition, she was awarded a grant from the Illinois Community College Board to design and implement a program that would award a Tax Practitioner Certificate to qualifying students.

She has written numerous articles and books such, as “IRS Now Considering Your Economic Reality,” “Taxpayer Advocate,” The Wall Street Journal. Dr. Esarco holds a Ph.D. in Education from Capella University, Minneapolis, MN, a MS – Taxation from Northern Illinois University, DeKalb, IL, and a BS – Accounting/Management from St. Mary of the Woods College, Indiana. **(W&I Subgroup)**

William Frazier

Mr. Frazier is Principal and owner of HFBE, Inc. in Dallas, TX. He has thirty years of experience in business valuation and corporate finance and is a Senior Member of the American Society of Appraisers (ASA). He has testified in several U.S. Tax Court cases, including *Beatrice Dunn*, *McCord*, *Jelke* and *Hendrix*. He has written numerous articles on the subject of business appraisal and is the developer of the Nonmarketable Investment Company Evaluation Method which appears as a chapter in the valuation textbook “Cost of Capital: Applications and Examples.” He is a member of the Editorial Advisory Board of *Trusts & Estates*. Mr. Frazier has a BS in Commerce from Spring Hill College and a Master of International Management from the Thunderbird School of Global Management. **(OPR Subgroup)**

David F. Golden

Mr. Golden, LL.M, JD, CPA, has worked in the tax field for over 26 years and is a partner with the law firm of Troutman Sanders LLP, in Atlanta, Georgia. His responsibilities includes, planning, compliance, transactions, and civil tax controversies. He is involved in a variety of matters relating to state and federal taxation of corporations, partnerships, individuals, tax exempt entities and industrial development bonds. He also provides a full range of trust and estate planning services. In addition, he prepared comments on behalf of the American Association of Attorney-Certified Public Accounts (AAA-CPA), on proposed regulations to the Section 6694 Tax Return Preparer Penalty Rules and have spoken extensively regarding Circular 230 and its impact on tax lawyers and certified public accountants. He is a member of the American Bar Association (ABA) and a member of AAA-CPA. Mr. Golden holds an LL.M from Emory University a JD from the University of Georgia and a BS from Ohio State University. **(OPR Subgroup)**

Ernest V. Hicks

Mr. Hicks, EA, CMA, is the President of Hicks and Hicks Enterprises in Anaheim, CA. His practice includes tax preparation and tax planning for individuals and small businesses. Mr. Hicks also specializes in preparing returns for corporations, partnerships, LLC, and fiduciary returns. Mr. Hicks spent over 20 years in industry, where his responsibilities included cost and general accounting for small and midsize construction and manufacturing firms to Regional Controller for a division of Schlumberger. In addition, he is a member of the National Association of Enrolled Agents (NAEA), the California Society of Enrolled Agents and Institute of Management Accountants (IMA) and holds the certification, Certified Management Accountant (CMA). Mr. Hicks holds a Business Administration degree from Idaho State University, and an MBA from Pepperdine University. **(W&I Subgroup)**

Sanford D. Kelsey, III

Mr. Kelsey, JD, LL.M., CPA, has worked in the tax field for over 18 years including in government, industry, and private practice and is currently a Senior Tax Attorney for FedEx Corporation, in Memphis, TN. His responsibilities include advising stakeholders of FedEx's various subsidiaries on federal, state and local, and international tax matters. He has also advised clients on administrative and legislative initiatives. In addition, his experience includes counseling clients on tax matters regarding structuring transactions and providing representation during tax contests. He has served as tax counsel on projects involving multi-discipline clients and has provided technical support for the clients' tax departments. Mr. Kelsey currently serves as an articles editor on the Editorial Board and Publication Committee of The Tax Lawyer – SALTE, an American Bar Association (ABA) Publication. He is also a member of the ABA, the Florida Bar Association and the Tennessee Society of Certified Public Accountants. Mr. Kelsey is a CPA (TN-inactive) and holds an LL.M. from Georgetown University Law Center, a J.D. from Indiana University School of Law and a BBA from Tennessee State University. **(SBSE Subgroup)**

Marc Korab

Mr. Korab, JD, LL.M., is a Senior Vice President – Corporate Tax for Citigroup Inc., in New York, NY. Mr. Korab's responsibilities include providing tax counsel and advice to the corporation on a variety of matters, with a

focus on representing Citigroup before the IRS in its Federal tax audits. Prior to joining Citigroup, he practiced law with the New York office of the law firm DLA Piper US LLP, representing taxpayers in complex federal, state, and local tax controversies and litigations. Mr. Korab holds an LL.M. from Georgetown University Law Center, a JD from Rutgers School of Law, and a BA from Rutgers College. He is a member of the New York, New Jersey, and District of Columbia Bars. **(LB&I Subgroup)**

Richard G. Larsen

Mr. Larsen, JD, CPA, is a Distinguished Professor of Accounting at George Mason University, School of Management in Fairfax, VA. He teaches courses on Taxation and Managerial Decision Making and on Taxes and Business Strategy. This fall he will be teaching executive education courses that will include, among others, the topic of tax risk management for executives and board members and the topic of accounting for income taxes including FIN 48 disclosures. Prior to joining George Mason University he was a partner in the National Tax Department of Ernst & Young for 35 years (29 years as a partner). At the time of retirement, he was a member of the Tax Accounting and Risk Advisory Services group specializing in accounting for income taxes (including FIN 48 disclosures) and tax risk management (he was the global director of this area). He is a member of AICPA, ABA, National Association of Corporate Directors and the American Accounting Association and he is presently on the Board of Directors of Tax Analysts and the Bureau of National Affairs Accounting Advisory Board. Mr. Larsen holds a JD from George Washington University, National Law Center, Washington, D.C. and a BBA from George Washington University, Washington, DC. **(LB&I Subgroup)**

David Lifson

David Lifson, CPA, is a partner with Crowe Horwath LLP. He is a former president of the New York State Society of CPAs and is the recipient of the American Institute of CPAs 2009 Arthur J. Dixon Memorial Award, the accounting profession's highest award in the area of taxation. Mr. Lifson is a tax specialist who helps businesses and individuals manage their tax responsibilities and business operations. Experienced in both domestic and international matters, he spends much of his time monitoring ongoing tax and related operating issues for

clients, and helping them manage changes to their personal or business circumstances. Industries served are broad, including communications; food/beverage manufacturing, distribution and resale; import/export; marketing/advertising; professional firms; real estate; software/IT; securities and commodities brokerage; trading and international shipping. He has written numerous articles, testified before Congress, is a frequent lecturer and panelist and regularly appears in the media, representing the American Institute of CPAs and the NYSSCPA. Mr. Lifson holds a BSBA (summa cum laude) from Babson College, Wellesley, MA. **(SBSE Subgroup Chair)**

Janice Lucchesi

Ms. Lucchesi, CPA, currently serves as Vice President of Tax for Akzo Nobel Inc, in Chicago, IL. Ms. Lucchesi joined Akzo Nobel in 1993 and her responsibilities include directing the tax affairs of the companies in North America and coordinating transactions with international tax impact with the foreign parent. Prior to joining Akzo Nobel Inc., Ms. Lucchesi was a Senior Manager with Ernst and Young. Ms. Lucchesi has served as a member of the Executive Committee of the Organization for International Investment, the International Fiscal Association, and the Tax Executive Institute. She is member of the Advisory Board of the George Washington Law School/IRS Annual Institute on Current Issues in International Taxation and the University of Chicago Tax Conference Planning Committee. She is a CPA, and holds a BA degree in economics and sociology from Rice University and a Master of Management degree from Northwestern University. **(LB&I Subgroup)**

Robert McKenzie

Mr. McKenzie is a Partner of the law firm of Arnstein & Lehr LLP of Chicago, Illinois, concentrating his practice in representation before the Internal Revenue Service and state tax agencies. He has lectured extensively on the subject of taxation. He has presented courses on representation before CPA's, attorneys and Enrolled Agents nationwide. Prior to entering private practice, Mr. McKenzie was employed by the Internal Revenue Service, Collection Division, in Chicago, Illinois from 1972 to 1978. He was Vice Chair Professional Services of the ABA Tax Section (2003 – 2005). He is past Chairman of the Chicago Bar Association Federal Tax Committee. Mr. McKenzie is the author of "Representation Before The

Collection Division Of The IRS And Coauthor
Representing The Audited Taxpayer Before The IRS” and
“Representation Before The United States Tax Court.” Mr.
McKenzie has received an AV rating from Martindale and
Hubbell and has been selected for listing by Law and
Leading Attorneys and Super Lawyers. He has been
elected to the American College of Tax Counsel and serves
on its Board of Regents. Mr. McKenzie received his JD
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Charles J. Muller, III

Mr. Muller, LLM, JD, has worked in the tax field for over
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litigation; federal criminal tax litigation including related
white collar crime representation; property tax disputes and
litigation; representation of attorneys and accountants in
malpractice cases and discipline proceedings;
representation of taxpayers before the IRS appeals offices;
and representation of taxpayers during civil and criminal
IRS examinations. Mr. Muller has chaired the American
Bar Association Committee on Civil and Criminal Penalties
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Attorney General’s Marshall Award for Outstanding Legal
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He is a lecturer and presenter on various topics to
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a JD and BA from St. Mary’s University. **(OPR Subgroup
Chair)**

William E. Philbrick

Mr. Philbrick, CPA/ABV, CVA, CFF, is a Senior Vice
President with Greenberg, Rosenblatt, Kull, & Bitsoli, P.C.,
in Worcester, MA. He has over 28 years experience in
taxation and his responsibilities include individual and
corporate taxation and tax planning at both the Federal and
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extensive experience in mergers and acquisitions, and has

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(W&I Subgroup)

Ameek Ponda

Mr. Ponda, JD, LLM, is a partner with Sullivan & Worcester LLP, in Boston, Massachusetts, and also a member of the firm's management committee. Mr. Ponda joined Sullivan & Worcester in 1992 and his responsibilities include domestic and international taxation, with an emphasis on mergers & acquisitions and REIT transactions. In addition, Mr. Ponda is an adjunct professor with the Boston University School of Law Graduate Tax Program, where he has taught courses in Business Tax Planning, Corporate Reorganizations, International Taxation, RICs & REITs, and Financial Products. He is also a Lecturer on Law with Harvard Law School, where he teaches Partnership Taxation. A frequent speaker on taxation topics, he is the author of numerous articles, including "REITs Abroad" and "Economic Inconsistencies in the Taxation of Currency Swaps." Born in Bombay and fluent in Hindi and Urdu, Mr. Ponda is a charter member and former secretary of The Indus Entrepreneurs - Boston, and on the Advisory Board to the South Asian Bar Association of Greater Boston. He is also a member of the American Law Institute and the International Fiscal Association. Mr. Ponda holds a BA from Harvard College,

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Charles Rettig

Mr. Rettig, JD, LLM, is a Principal with Hochman, Salkin, Rettig, Toscher & Perez, P.C. in Beverly Hills, CA. Mr. Rettig specializes in federal and state tax controversies as well as tax, business, charitable and estate planning, and family wealth transfers. He is on the National Board of Advisors for the Graduate Tax Program (LL.M. in Taxation) at New York University School of Law; a Member of the Advisory Board of the California Franchise Tax Board; a Member of the Advisory Council of the California State Board of Equalization; an elected Regent and Fellow of the American College of Tax Counsel; a Member of the Advisory Board of the Graduate School of Taxation at Golden Gate University; a Past-Member of the Board of Trustees for the California CPA Education Foundation; Past-Chair of the Taxation Sections of the California State Bar and the Beverly Hills Bar Association; Past-Chair of the ABA Committee on Civil and Criminal Tax Penalties; and a Member of the Board of Advisors for the CCH Journal of Tax Practice and Procedure. He is a frequent lecturer before national, state and local professional organizations and has authored articles in many national, state and local professional publications. In addition, he writes regular columns for CCH Journal of Tax Practice and Procedure and for Tax Analysts-Tax Notes on matters involving tax controversy and procedure. Mr. Rettig holds a LLM in Taxation from New York University, a JD (cum laude) from Pepperdine University and a BA in Economics from the University of California at Los Angeles. He is a member of the California, Hawai'i and Arizona (inactive) Bars. (**Chairman IRSAC**)

Christopher Riley

Mr. Riley, CPA, is the Director, State Government Relations for Archer Daniels Midland Co., in Decatur, Illinois. Mr. Riley joined Archer Daniels Midland Co., in 1995 and served as Director of Tax Audits from 2006 to 2009. He was previously employed as a Senior Tax Associate with Deloitte & Touche in New York City. As Director of Tax Audits, his responsibilities included managing Federal Audits of Consolidated, Excise Tax, Employment Tax, Foundation and Partnership Returns, including its participation in the IRS's Compliance Assurance Process (CAP) program. In addition, he is a

member of Tax Executives Institute and previously served as Chair of its IRS Administrative Affairs Committee. He is a CPA, and holds a BA degree in Mathematics Education from Eastern Illinois University, Charleston, IL and an MBA with an emphasis in accounting, and an MST in Taxation from the University of Illinois, Champaign, IL.
(Vice Chairman IRSAC & LB&I Subgroup)

Bonnie Speedy

Ms. Speedy is the National Director of AARP Tax-Aide at the AARP Foundation in Washington, D.C. Ms. Speedy is a professional manager, coordinator and trainer with many years of professional experience in areas dealing with: strategic planning, policy development and application, grant-funded programs, accounting, the application of monitoring of federal regulations dealing with tax law, pensions and 501 (c) organizations with grant-funded programs. In addition, she directs all aspects of AARP Tax-Aide, serving over two million taxpayers a year, including program outcomes, policy development, implementation strategies, evaluation of effectiveness and communication to program volunteers. Ms. Speedy holds a Bachelor of Science degree from the University of Maryland and attained Certified Pension Consultant status.
(W&I Subgroup Chair)

Joni Terens

Ms. Terens, EA, is the President of Accurate Bookkeeping & Tax Service Inc., in Tustin, CA. Her responsibilities include tax preparation and tax planning for individuals and businesses. She also specializes in taxpayer representation before the Internal Revenue Service and state taxing agencies. Ms. Terens teaches IRS Small Business Seminars, VITA classes and FEMA workshops. In addition, she has taught IRS Exit seminars at local military bases and specializes in tax issues for the military. She is the chairperson of the Southern California IRS/CSEA Practitioner Seminar. Ms. Terens holds an A.A. Degree in Accounting from Saddleback College, Mission Viejo, CA.
(W&I Subgroup)

Madeleine Townes

Ms. Townes, JD, is a licensed attorney specializing in corporate and individual tax. Ms. Townes worked as a Tax Manager with NYK Logistics (Americas) Inc., in Memphis, TN. Her responsibilities there included filing Canadian income taxes, filing property, income, and miscellaneous taxes for the Corporation. She was also responsible for

obtaining Business Licenses for local offices in 26 states. She is experienced in the design and delivery on innovative, bottom-line change management programs through account reconciliations that generate over \$80 million annually through the restructuring of internal operations business processes consistent with short/long term organizational objectives. In addition, she provides visionary leadership in turning under-performing operations and start-up opportunities through team leadership, building key alliances, and implementing quality control management systems. Ms. Townes holds a JD from The University of Memphis, Cecil C. Humphreys School of Law and a Bachelor of Science Degree in Business Administration (Emphasis-Accounting) from Fisk University in Nashville, TN. **(SBSE Subgroup)**

Neil D. Traubenberg

Mr. Traubenberg, JD, recently worked as Vice President-Corporate Tax for Sun Microsystems, in Broomfield, Colorado. He has over 35 years experience in taxation that included an international restructuring strategy that integrates subsidiaries attained through acquisition with existing Sun subsidiaries. In addition, he managed a valuation allowance in excess of \$1.8 billion and was responsible for all federal, state and foreign tax matters of corporation and multiple subsidiaries located in the United States, Europe, and Asia. He regularly attended audit committee meetings to advise on tax matters of the company and oversaw the implementation of the Sarbanes-Oxley tax process review that resulted in no material weaknesses or significant deficiencies. Mr. Traubenberg is a lecturer on various topics to professional organizations, most recently focusing on matters related to FIN 48, International Financial Reporting Standards (IFRS), and new IRS Schedule UTP. He is a member of the ABA-Tax Section, MAPI and was Tax Executive Institute (TEI), International President from 2009-2010. Mr. Traubenberg holds a JD and a BS from Case Western Reserve University. **(LB&I Subgroup)**

Cyndi Trostin

Ms. Trostin, J.D., LL.M., is a practicing attorney with Glick & Trostin, LLC in Chicago, Illinois. Having more than 25 years of experience in federal taxation, Ms. Trostin combines private practice with teaching, research and consulting. Her fields of expertise include IRS Tax controversy (audits, appeals, offers-in-compromise),

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Deborah Walker

Ms. Walker, CPA, is a partner with Deloitte Tax LLP, in Washington, DC. She is a leader of the Washington National Tax Global Employer Services practice. She specializes in numerous employee benefit and executive compensation issues, including qualified and nonqualified deferred compensation arrangements, employment taxes, and health and other welfare benefits plans. She also assists clients in resolving liabilities for unpaid taxes. Prior to joining Deloitte Tax LLP, Ms. Walker was Deputy to the Benefits Tax Counsel at the Office of Tax Policy at the United States Treasury Department and was formerly a partner-in-charge of the KPMG MidAtlantic Compensation and Benefits Practice, providing consulting services to individuals and corporate clients, and partner in the KPMG Washington National Tax Practice. In addition, she is an active member of the American Institute of Certified Public Accounts and has authored and co-authored numerous articles on compensation and employee benefits issues. Ms. Walker holds a Masters of Business Administration, University of North Carolina, Chapel Hill, North Carolina and a BA in Economics from Alfred University, Alfred NY. **(SBSE Subgroup)**

Cecily V. M. Welch

Ms. Welch, CPA, PFS, CFP®, is a Senior Tax Manager with S.J. Gorowitz Accounting and Tax Services, Inc., in Alpharetta, GA. She has over 16 years experience performing analysis of financial information to identify weaknesses, form recommendations, and implement solutions. She has a wide range of knowledge regarding tax compliance and planning for partnerships, corporations, individuals, trusts, estates, and gifting. In addition, she is the tax subject matter expert for multiple financial professionals including bankers, attorneys and investment

brokers. She developed action steps and measurement tools for implementing the strategic plan of the firm. Ms. Welch has lectured frequently to professional organizations and has experience in domestic and international financial audits. Ms. Welch is a member of AICPA and is active in the Georgia Society of CPA's – Tax Section and Estate Planning Section. She is currently treasurer on the board of VOX Teen Communications, Inc. and formally served on the CityDance Ensemble, Inc. and Choices Matter Development Foundation, Inc. boards. Ms. Welch holds a MBA from the University of Wisconsin and a BS in Accounting from North Carolina A&T State University. **(SBSE Subgroup)**

Peter S. Wilson

Mr. Wilson, JD, CPA, is RSM McGladrey's National Managing Director for Tax Quality and Risk Management in Raleigh, NC. He is responsible for quality assurance, risk management, and professional standards for the firm's \$450+ million tax practice. He has over 25 years experience as a practicing attorney and CPA. He chaired the task force that developed the ABA Tax Section comments on Circular 230 §10.34(a) (2009). He served as a member of the AICPA's §6694 Task Force (2008) and its Task Force on Tax Penalty Reform (2009 and 2010), as well as the ABA Tax Section working groups that developed comments on non-shelter amendments to Circular 230 (2006), and on monetary penalties for Circular 230 violations (2007). In addition, he authored RSM McGladrey's comments on the tax return preparer registration regulations under §6109 and the related amendments to Circular 230 (2010). He is a member of the ABA, Tax Section, Standards of Tax Practice Committee, and Civil and Criminal Penalties Committee, and the AICPA, Tax Division. Mr. Wilson holds a JD from Albany Law School, Albany, NY, a B.S. from the LeMoyne College, Syracuse, NY, and an M.B.A. from Rensselaer Polytechnic Institute, Troy, NY. **(OPR Subgroup)**

Brian Yacker

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Exempt Organizations Committee of the American Bar Association, the Exempt Organizations Committee of the California State Bar Association, and he is also a member of the AAA-CPA (and serves on their Finance Committee and Audit Committee). He also annually conducts a multitude of exempt organizations presentations and has published numerous technical texts addressing tax and legal issues for exempt organizations. Mr. Yacker has a BS in Finance from McIntire School of Commerce, University of Virginia, and JD from the Indiana University School of Law. **(OPR Subgroup)**