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wrobinson@fbtlaw.com

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ABA DAY IN WASHINGTON  
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GOVERNMENTAL AFFAIRS OFFICE

DIRECTOR  
Thomas M. Susman  
(202) 662-1765  
susmant@staff.abanet.org

DEPUTY DIRECTOR  
Denise A. Cardman  
cardmand@staff.abanet.org

SENIOR LEGISLATIVE COUNSEL  
R. Larson Frisby  
frisbyr@staff.abanet.org

Lillian B. Gaskin  
gaskinl@staff.abanet.org

LEGISLATIVE COUNSEL  
Ann Carmichael  
carmicha@staff.abanet.org

Kristi Gaines  
gainesk@staff.abanet.org

Kirra L. Jarratt  
jarratk@staff.abanet.org

E. Bruce Nicholson  
nicholsonb@staff.abanet.org

LEGISLATIVE COUNSEL/DIRECTOR  
GRASSROOTS OPERATIONS  
Julie M. Strandlie  
jstrandlie@staff.abanet.org

LEGISLATIVE COUNSEL/  
DIRECTOR OF STATE LEGISLATION  
Kenneth J. Goldsmith  
goldsmithk@staff.abanet.org

INTELLECTUAL PROPERTY  
LAW CONSULTANT  
Hayden Gregory  
gregoryh@staff.abanet.org

LEGISLATIVE COORDINATOR  
Jared D. Hess  
hessj@staff.abanet.org

May 28, 2010

Internal Revenue Service  
1111 Constitution Avenue, N.W.  
Washington, D.C. 20224-0001

Re: IRS Proposals Requiring Disclosure of Uncertain Tax Positions;  
CC: PA: LPD: PR (Announcement 2010-9, 2010-7 I.R.B. 408,  
Announcement 2010-17, 2010-13 I.R.B. 515, and Announcement 2010-30,  
2010-19 I.R.B. 668)

Ladies and Gentlemen:

On behalf of the American Bar Association (ABA), I write to express our concerns regarding the proposals contained in IRS Announcement 2010-9, 2010-7 I.R.B. 408, Announcement 2010-17, 2010-13 I.R.B. 515, and Announcement 2010-30, 2010-19 I.R.B. 668 (collectively, the Announcements). The Announcements would require disclosure of uncertain tax positions through the required filing of Schedule UTP by certain business taxpayers.

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. The ABA's membership of nearly 400,000 spans all 50 states and other jurisdictions and includes attorneys engaged in legal matters in various settings. The ABA is dedicated to the rule of law, the efficient administration of justice and the preservation of fundamental legal rights. These comments, representing the views of the ABA, are in addition to the May 28, 2010 comments that are being submitted by the ABA Section of Taxation later today, which reflect the views of the Section only.

We are concerned that the disclosure proposals set forth in the Announcements, by requiring identification of specific uncertain tax positions and elaboration of the taxpayer's views and assessments of those positions, will undermine the protections afforded by the attorney-client privilege and attorney work product doctrine, as well as the related 26 U.S.C. section 7525 tax practitioner's privilege. (The comments in this letter, however, are limited to the protections afforded to advice and work product of attorneys.) These privileges and protections are of fundamental importance to our legal system and are designed to ensure access to effective legal advice and representation, which in turn promotes legal compliance. As Justice Jackson stated in his concurrence in *Hickman v. Taylor*, 329 U.S. 495, 510 (1947):

The primary effect of the practice advocated here [of permitting discovery of attorney work product] would be on the legal profession itself. But it too

often is overlooked that the lawyer and the law office are indispensable parts of our administration of justice. Law-abiding people can go nowhere else to learn the ever changing and constantly multiplying rules by which they must behave and to obtain redress for their wrongs. The welfare and tone of the legal profession is therefore of prime consequence to society, which would feel the consequences of such a practice . . . secondarily but certainly.

The Announcements would require taxpayers to identify information that inherently is based on the advice of counsel and tax preparers and to share the mental impressions of their legal and tax advisers. These requirements are directly contrary to the protections so clearly recognized by the United States Supreme Court. As the Supreme Court stated with respect to the attorney-client privilege in *Upjohn v. United States*, 449 U.S. 383, 392 (1981), the loss of the protection of this privilege inevitably would “threaten to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.” See also *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996) (the “valuable service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into . . . informants”). With respect to the attorney work product doctrine, the Court in *Hickman* (at p. 510) stated that “it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.” These protections also have been recognized by Congress in Rule 26 of the Federal Rules of Civil Procedure. Not only would the disclosure proposals in the Announcements require taxpayers to share this protected information with the Service, a potential adversary, but they could expose taxpayers to total loss of the protections through broader subject-matter waiver as a result of such disclosure.

For all these reasons, the ABA urges the Service to withdraw the disclosure proposals in the Announcements and instead rely on existing methods of obtaining information.

We note the Service’s reliance in the Announcements on *United States v. Arthur Young*, 465 U.S. 805 (1984), as a justification for requesting information on uncertain tax positions. We believe that reliance is misplaced. *Arthur Young* in fact stands for the proposition that tax information that might be useful to the Service in administering the tax laws is subject to these important privileges and protections. *Arthur Young* at p. 816 (taxpayer information “is subject to the traditional privileges and limitations”). The decision in *Arthur Young* in favor of the Service goes to the question whether tax information prepared by and in the possession of the taxpayer’s auditors was subject to the protections. Because of the important policy considerations surrounding effective tax administration, the Court declined to judicially create an auditor privilege, but its decision in no way impinged upon the privilege protection available to the taxpayer.

The Announcements also cite FASB Interpretation No. 48, *Accounting for Uncertainty in Income Taxes, an Interpretation of FASB Statement No. 109*, now codified as FASB ASC 740-10 (FIN 48), as justification for requesting the information on uncertain tax positions on the basis that taxpayers already are subject to a requirement to disclose their uncertain tax positions. This reliance on FIN 48 is also misplaced. FIN 48 requires taxpayers to disclose in their financial statements prepared in accordance with U.S. generally accepted accounting principles their aggregate uncertain tax positions and to include an annual tabular reconciliation, again in the aggregate, of changes in that accounting item. This aggregation principle is made clear in the illustrative disclosure in paragraph A33 of FIN 48 and in FASB’s explanation in paragraph B64 that the requirement is not prejudicial because “requiring disclosures at the aggregate level does not reveal information about individual tax

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positions.” This aggregated disclosure is far different than the detailed disclosure the Service proposes to require, which clearly would be prejudicial to the taxpayer’s position. Moreover, apart from the issue of aggregation, the disclosures required by the Announcements would exceed those called for under FIN 48.

In conclusion, for the reasons stated above, we urge the Service to withdraw the disclosure proposals set forth in the Announcements because, among other reasons, they are inimical to the fundamental protections afforded by the attorney-client privilege, the 26 U.S.C. section 7525 tax practitioner’s privilege, and the attorney work product doctrine.

Thank you for considering the views of the ABA on these important issues. If you have any questions regarding the ABA’s position, please contact me at (202) 662-1765 or Stanley Keller, Chair of the ABA Task Force on Attorney-Client Privilege’s Audit Subcommittee, at (617) 239-0217.

Very truly yours,

A handwritten signature in black ink, appearing to read "Thomas M. Susman", with a long horizontal flourish extending to the right.

Thomas M. Susman

cc: William Ide, III, Chair, ABA Task Force on Attorney-Client Privilege  
Stanley Keller, Chair, Audit Subcommittee, ABA Task Force on Attorney-Client Privilege