Comments Concerning Proposed Changes to Form 656, Offer-in-Compromise

The following comments relate to the proposed changes to an Internal Revenue Service package labeled “Form 656, Offer-in-Compromise”, which consists of Forms 656, 656-A, 433-A and 433-B and instructions with respect to the forms and to submitting an offer-in-compromise. Hereinafter it will be referred to as “the Form 656 Package.” The comments are the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These comments were prepared by individual members of the Committee on Low Income Taxpayers and the Administrative Practice Committee of the Section of Taxation. Principal responsibility was exercised by Elizabeth Atkinson, Mary Gillum, Diana Leyden, Robert Nadler and Melissa Welch. The Comments were reviewed by Jerome Borison of the Section’s Committee on Government Submissions, Fred Witt, Council Director for the Committee on Low Income Taxpayers and Loretta Argrett Council Director for the Administrative Practice Committee.

Although some members of the Section of Taxation who participated in preparing these comments may have clients who would be affected by the federal tax principles addressed by these comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the proposed regulations or the specific subject matter of these comments.

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I. EXECUTIVE SUMMARY

While our comments focus upon the Offer-in-Compromise package of forms and instructions, we have a more fundamental concern. We believe that the proposed changes to the Form 656 package and our comments reflect the need to create a working group to more fully explore how the offer-in-compromise process may be impacting taxpayer rights and how to better communicate to taxpayers what procedures the Internal Revenue Service (“the Service”) uses in addition to the offer-in-compromise procedure. For example, working in more effective ways to educate taxpayers and practitioners as to when it is better to consider the alternatives of filing for bankruptcy or requesting currently not collectible status than to submit an offer could help both taxpayers and the Service. We urge the Service to set up a working group or open a dialogue with tax practitioners through groups like the two ABA Section of Taxation committees whose individual members are offering these comments. Such a group or dialogue could address such issues and reduce the burden on both the Service and taxpayers with respect to working out how to pay tax liabilities.

The proposed changes to Form 656, the form for submitting an offer-in-compromise, and its instructions fall into three categories: (1) changes to the Form 656; (2) substantive changes in the program explained in instructions to the form; and (3) explanatory changes in the instructions to the form. Our comments will address each of these categories.

a. Changes to the Form 656:

One substantial and substantive change reflected in this new form is to require a preparer to sign the Form 656, which contains one jurat. We have two fundamental concerns about this. First, we do not understand how the offer process is expected to change with the addition of this jurat. Second, it is not clear who falls within the definition of “preparer”.

With respect to our first concern, it is not obvious from the Form and its instructions why this signature line was added. (It is also not clear to us why if such a jurat is added to the Form 656 the same jurat is not also added to the Forms 433-A and 433-B.) We assume that the Service is concerned with negligence and fraud in the preparation of offers by paid preparers and is seeking a mechanism to deter such offers. Poorly prepared offers or offers prepared only to delay collection put a strain on the Service’s limited resources and impact the many taxpayers and preparers who are diligent and try very hard to submit thorough and well-documented offers. However, inclusion of the jurat goes beyond attempting to collect information on who is preparing offers and suggests a regime of sanctions. Because a widespread problem with poor quality of submissions is a different problem than fraud or negligence, we have several specific concerns about adding the jurat and its language.
With respect to our second concern, we do not understand the scope of preparers required to sign Form 656 nor do we understand the due diligence required of a preparer with respect to an offer in compromise submission. We strongly believe that without a clear explanation of what constitutes due diligence by a person who assists a taxpayer in preparing an offer-in-compromise, the jurat requirement will have a chilling effect on volunteers and staff who work for low income taxpayer clinics providing legal representation to low income taxpayers submitting offers. We recommend that no preparer jurat be required until due diligence standards are issued with a comment opportunity. Furthermore, if after more consideration the Service determines that a jurat is appropriate, then we recommend that (1) consideration be given to adding it to both the Forms 433 as well as the Form 656, (2) its language be modified to the language used in Appeals protests and (3) low-income taxpayer clinic personnel and preparers providing services pro bono be exempted from the requirement that they sign as preparers.

Another issue raised by the proposed Form 656 is certain preconditions that a taxpayer must agree to before being able to submit an offer in compromise. One such condition requires a taxpayer to waive his or her right to receive notice of potential third party contacts. Typically a taxpayer has two rights- the right to receive notice that a third party is being contacted by the Service about the taxpayer’s tax matters and the right to see a list of such third parties who were contacted. Sometimes, such in the case of when a taxpayer requests a Taxpayer Assistance Order by the Taxpayer Advocate, a waiver of the taxpayer’s right to be notified that the Service is contacting third parties is done to expedite the process. However, the Taxpayer Advocate does not require the taxpayer to waive his or her right to see a list of the third parties contacted. It is not clear if the waiver in the Form 656 applies to both of these rights and, unlike the case with a TAO, it is unclear why the Service believes either or both rights must be waived. We are therefore concerned about the potential for the abridgement of taxpayers’ rights. Another requirement provides that if the taxpayer defaults, then he or she by signing the Form 656 automatically consents to immediate collection by levy without further notice. If this means that the taxpayer is waiving his or her rights to a collection due process notice and hearing, then there is another serious abridgement of specifically enacted taxpayer rights.

b. Substantive changes explained in the instructions:

We find the proposed instructions confusing in that the Form 656 indicates that a taxpayer must provide his or her financial information for the past six months, but the specific instructions on the Forms 433-A and B request that documentation for only the past three months.
c. Explanatory changes:

We applaud the Service for attempting to clarify the process of submitting an offer-in-compromise and explaining the steps that taxpayers should take to assure that an offer can be processed. In light of the new user fee required for most offers, we think it is a good step by the Service to inform taxpayers of their obligations in completing a processible offer-in-compromise. We have prepared specific recommendations for such further clarification.

II. WITH RESPECT TO THE PREPARER JURAT, IT IS NOT CLEAR THE SERVICE HAS STATUTORY AUTHORITY TO REQUIRE IT, THE JURAT DOES NOT REFLECT THE LEVEL OF DUE DILIGENCE THE SERVICE BELIEVES A PREPARER SHOULD EXERCISE, IT IS OVERBROAD AND IT WILL HAVE A CHILLING EFFECT ON LOW-INCOME TAX CLINIC VOLUNTEERS AND STAFF.

It is not obvious from the Form and its instructions why this signature line was added. (It is also not clear to us why if such a jurat is added to the Form 656 the same jurat is not also added to the Forms 433-A and 433-B.) We assume that the Service has become alarmed that many poor quality offers are prepared by paid preparers and is frustrated as to how to deter such offers. Poorly prepared offers or offers prepared only to delay collection put an incredible strain on the Service’s resources and impact the many taxpayers and preparers who are diligent and try very hard to submit thorough and well-documented offers. We, and many of our colleagues, have witnessed first hand offers submitted by persons paid by taxpayers to assist in preparing the Form 433-A and Form 656 and are appalled at the complete lack of compliance with the instructions and regulations. If the inclusion of the jurat is an attempt to collect information from such preparers, then we applaud the attempt. However, we have several specific concerns about adding the jurat and its language.

However, as a preliminary matter we are concerned the Service lacks clear statutory and regulatory authority to require all preparers to sign the Form 656, since it is not an income tax return. Paid preparers of income tax returns are required to sign the tax return. IRC Section 7701(a)(36). The Offer in Compromise is not an income tax return. Thus, it is unclear whether the Service has statutory authority to require persons who assist in the preparation of a Form 656 to sign it. Furthermore, it is not clear what sanctions the Service believes it can impose on preparers who do not sign the forms or who, despite the jurat,

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1 We are also concerned that by adding and requiring the Form 656 to be signed by a preparer the form look more like a “tax return” and by doing so could impact on the attorney-client privilege rules. Currently, some courts have held that when an attorney prepares a tax return, he or she is acting more like an accountant. Thus, confidential information the attorney obtains from a client, which might otherwise be covered by the evidentiary privilege, would not be protected.
continue to submit poorly prepared offers. Without clearly announced sanctions, the deterrence effect that the Service seeks to create will not happen.

In its current form, the jurat does not clearly reflect the level of due diligence that the Service believes should be exercised by a preparer. Preparers who are subject to Circular 230 have a duty of due diligence, which essentially means that the preparer has a duty to inquire of his or her client about the facts set forth in the Form 656 and may not merely accept answers which are on their face contradictory to other information on the form or information the preparer received in the course of representing the taxpayer. Other individuals or companies who are not subject to the Circular 230 rules may not be subject to these standards and signing the jurat may not have the same meaning. Further, the knowledge or belief that a preparer has concerning the form is based on the information that her client submits. There are many unanswered questions about the scope of a preparer’s due diligence in the context of preparation of an offer, which is very different from a usual tax return. For example: can the preparer rely on the taxpayer’s statements? And what constitutes sufficient due diligence in determining values shown for assets?, etc. Until the Service more clearly defines and articulates the level of due diligence that should be exercised by preparers, we recommend that a jurat not be added.

It is also not clear who is considered a preparer for purposes of signing the jurat. Is the jurat on the Form 656 to be signed only by “income tax return preparers” as defined in Section 7701(a)(36) or by all preparers of Form 656 whether family members, unpaid volunteers, employees of Low Income Taxpayer Clinics or other non-compensated persons? Finally, there are neither instructions to clarify the requirement for the preparer information nor the consequences of failing to follow this requirement.

Unpaid volunteers such as those working in the VITA program, and low-income taxpayer clinic personnel are excluded from the definition of “paid preparer” and thus are not required to sign income tax returns. The volunteers often indicate that the return was prepared by such a program; for instance, by marking “VITA” in the preparer line. Paid preparers are required to sign returns regardless of whether or not they are “federally authorized tax practitioners” subject to regulation under Circular 230.

Our position is that imposing a requirement for unpaid user volunteers to sign, under penalties of perjury, offer in compromise forms that they prepare or assist in preparing will have a chilling effect on the willingness of volunteers to undertake pro bono representation. Low Income Taxpayer Clinics already face difficulty in recruiting volunteers. The preparation of offers in compromise is time-consuming and complex. Low-income taxpayers as a group have low literacy rates and, therefore, volunteers generally need to spend time to explain Service procedures and instructions and then probe to determine that the taxpayer has understood the question and then to elicit a sufficient response. Requiring the preparer to conduct additional due diligence beyond eliciting information and
preparing the form is a heavy burden to impose on a volunteer. Whereas a higher income taxpayer could bear the expense of an appraisal of assets to ensure proper valuation for an offer in compromise, a low-income taxpayer cannot. If a volunteer believes that he or she may be sanctioned civilly or criminally for inaccuracies on these forms, then he or she may be unwilling to volunteer.

Furthermore, considerations of malpractice insurance may dictate that the risks associated with preparing an offer are not worth the cost. The aggravation and cost of a potential investigation are sufficient deterrent, even to those who would doubtless be exonerated. Paid preparers can factor the increased costs into their fee structure. Volunteers cannot do that.

If after consideration of these issues the Service determines that a jurat is permitted and necessary, then we recommend that a separate jurat for a preparer be included and that the jurat be similar to the declaration of an agent or representative in a typical appeals protest and perhaps add that the preparer is not assisting with an offer that is made primarily for the purposes of delay or is frivolous. In its current form, the jurat is overbroad. Our recommendation is that if a jurat is to be signed by a preparer, there should be a separate jurat above the preparer line in the following form of the declaration typically used when a representative prepares an appeals protest:

The foregoing Form 656 was prepared by me and was prepared on the basis of facts and information obtained from the taxpayer(s), and while I do not know or have my own knowledge that the facts set forth are true, the facts are believed to be true. I have not assisted in preparing the Form 656 for the primary purposes of delaying collection action and it is my belief that the offer is not frivolous.

III. IT IS NOT CLEAR WHY A TAXPAYER SHOULD BE REQUIRED TO WAIVE NOTICE OF THIRD PARTY CONTACT INFORMATION, AND THERE IS A REAL CONCERN THAT DOING SO IS AN UNDUE ABRIDGEMENT OF TAXPAYERS' RIGHTS.

We recognize that it is routinely necessary to contact third parties in the process of investigating offers. Providing notice of the potential for third-party contact on the offer form itself is efficient and helpful to taxpayers. However, it is not clear to us whether the current language in the Form 656 applies only to the waiver of a taxpayer’s right to be notified that the Service is contacting third parties or also to the taxpayer’s right to obtain a list of the third parties so contacted. It is also not clear what about an offer in compromise generally would support a blanket exemption of third-party contacts on offers from the data collection and notice requirements mandated under IRC Section 7602(c)(2). There was sufficient Congressional concern about third party contacts to lead to the enactment of Code Section 7602 as part of RRA 1998. Requiring such a
waiver is an abridgement of taxpayer rights and without a clear demonstration that such waiver helps the taxpayer, we believe the waiver should not be generally required.

IV. THE PRECONDITION THAT A TAXPAYER WAIVE HIS OR HER RIGHT TO NOTICE AFTER DEFAULT IS A SERIOUS ABRIDGEMENT OF TAXPAYER RIGHTS.

In the RAA 98, Congress legislated that taxpayers receive notice and an opportunity for hearing prior to levy. This is an important protection for taxpayers. However, item 8(n) of Form 656 requires, as a condition of an offer, that the taxpayer waive the right to "notice of any kind" following default of an offer. In our collective experience, a frequent reason for offer default is inability to pay the offer amount, either because financing falls through, the taxpayer loses her job and cannot make payments, or other reasons beyond the taxpayer's control. In such circumstances, it is unconscionable to enforce collection in the absence of notice and an opportunity to resolve the tax liability through collection alternatives. Upon default, we believe a taxpayer should retain his or her right to any collection due process hearings that may be available, as well as the possibility that Appeals may retain jurisdiction.

V. GENERAL COMMENTS ON THE FORM 656 PACKAGE CHANGES.

As an initial comment, while we realize that the package is a work in process, we recommend that the drafters give more consideration to the flow of the package, the order of the forms and instructions, and the duplication or redundancy of certain existing provisions when new pages are added.

We favor clear explanations to help taxpayers understand the offer process. The language of the new form, however, adopts a negative tone that may be intimidating to taxpayers with legitimate offer cases. We suggest that a listing of collection alternatives with a comparative chart may be more helpful to taxpayers in determining when an offer is an appropriate option. For instance, the instructions do not mention audit reconsideration as an alternative to a "doubt as to liability" offer or installment agreements or "currently not collectible" status as alternatives to a doubt as to collectibility offer. The offer package should also explain in clear language the consequences of not following the offer instructions (such as having the offer returned as nonprocessable and forfeiting the user fee).

It also would be helpful to list in a chart format the pros and cons of submitting an offer, including the future compliance provisions, extension of the collection statute of limitations, waiver of past refunds, inability to contest the liability, etc. This would be effective in countering the popular perception of offers as a simple and easy settlement for less than the full amount owed. Additionally, the instructions should explain that the offer is not a mechanism for
penalty or interest waiver and cite the appropriate means for requesting penalty or interest waiver.

VI. SPECIFIC CHANGES AND SPECIFIC COMMENTS AND RECOMMENDATIONS

A. Table of contents, first unnumbered page. We believe this is a good addition to the package. This will assist taxpayers and preparers in locating material in the package and aid in reducing the amount of time required to prepare the offer.

B. Checklist page to assist taxpayers in understanding whether they qualify for submitting an offer in compromise, page i. The concept of a checklist to assist taxpayers and representatives in determining eligibility before they invest much time in reading and preparing the forms is a good idea. However, in our experience, offers are frequently returned if an individual taxpayer normally has an obligation to make estimated tax payments and has not made such payments for the periods with due dates prior to submitting the offer. Question #2 refers to unfiled tax returns. If the Service’s rule is that a taxpayer must pay estimated taxes, then it is not clear that the current wording of question #2 conveys this. While tax professionals might conclude that tax returns include Estimated Tax payment forms, most pro se taxpayers would not. If the Service does not require that individual taxpayers pay all estimated tax payments before filing an offer, then that too should be explained.

Also, the second bolded paragraph is awkwardly worded and is confusing. After giving the taxpayer three questions to answer to determine if he is eligible to submit an offer, two more conditions are added. We recommend making it one comprehensive checklist.

Finally, in question #3, the third line the first word should be “immediately” instead of “immediate.”

C. What we need to process your offer, page ii We think that the addition of this section is a good idea, but the layout of the page and the language is not as clear as it could be. Using a checklist approach like the first page might make it easier. The instructions to Form 1023 provide a good example of how instructive and effective a checklist can be.

Also, as we have noted in other specific comments, we are concerned that this page and others that refer to doubt as to collectibility do not explain the circumstances for applying for doubt as to collectibility with special circumstances. Such an offer is permitted under the rules of the Internal Revenue Manual (see IRM §5.8.11.1) but the conditions or
parameters for requesting such consideration is not explained on this page or in other parts of the Form 656 Package.

Further, since the Forms 433-A and 433-B require additional documents to what are listed on this page, it would be helpful to have a checklist of supporting documentation that is needed. While the required documentation is stated with the line items on Forms 433-A and 433-B, a comprehensive checklist would be helpful.

D. What you need to know before submitting an offer in compromise, numbered pages 1 and 2  In the first block, captioned “What is an Offer in Compromise”, it does not explain an offer based on doubt as to collectibility based on special circumstances. In the second block, captioned “Form 656 Offer in Compromise and Substitute Forms” the language needs to be modified for a lower literacy level. ESL or low English proficiency taxpayers may not understand terms “affirm” and "verbatim". Further, the instructions do not indicate at this point how to affirm that a substitute form is verbatim (although later on it seems that what is required is that the taxpayer initial each page.) In the third block captioned “Am I eligible for consideration of an Offer in Compromise” there is not any mention of the doubt as to collectibility with special circumstances category and we urge that it be listed and explained.

Also, page 2 may be superfluous after the addition of the new page i.

E. What you should do if you want to submit an offer in compromise, pages 3-7 We repeat our suggestion about explaining more clearly the option for doubt as to collectibility based on special circumstances. The reference in the first full paragraph of the second column to special circumstances is too vague and does not give enough direction to the taxpayer. While it lists some things that may show special circumstances it does not give the taxpayer or representative an overarching idea of what the category of special circumstances is aimed at. In the explanation of financial information, bottom box, second column, it directs the taxpayer to submit information that shows his or her financial position for six months. This is contrary to the Forms 433-A and 433-B which in direct the taxpayer to submit three months of records. This is also a change from the usual practice of the Service to require three months worth of documents. If this is a change, then we believe that is will be even more difficult for low-income taxpayers to submit offers and urge that it not be adopted. If it is adopted as a change in procedure, then the Forms 433-A and 433-B should be modified to be consistent.

We recommend that instructions and examples of alternatives to usual types of documentation that the Service would accept should be added and would greatly assist low-income taxpayers in complying with Forms
433-A and 433-B. We also recommend that instructions be clarified as to what information is required to be submitted by non-liable spouses or other persons who may live with the taxpayer submitting an offer and are contributing to household expenses.

Also, taxpayers who are on installment agreements must continue to make the payments under the installment agreement in order to have the offer in compromise processed. We think the taxpayer should be directed that such payments could be reflected as expenses on the Forms 433.

F. Terms and Definitions, numbered page 8. We think this is a very helpful addition.

G. New Form 656
As an initial comment, we think that the order of the package is confusing. Instructions for the Form 656, 656-A, 433-A and 433-B are scattered throughout the package. We suggest that the package be ordered to first, list the checklists pertaining to a taxpayer’s eligibility to submit an offer, second, should be what is required generally and how the offer is processed, then list the forms and finally the instructions and worksheets.

1. Addition of place to note when OIC is received and when it is returned. We think this is a good addition and will clarify for both the Service and the taxpayer when such actions are taken.
2. Addition of box labeled “Amended Return” next to the form title. We think this should read “Amended Offer” or Amended Form 656 and not amended return 3.
3. Line 3, requesting EIN included in the offer. We think there needs to be a space to write in the EIN.
4. Item 5. In the case of a trust fund recovery penalty, it is not clear to a taxpayer that EIN should be included on Line 3 versus Line 4. We recommend that this be clarified.
5. Item 6. We recommend that this section make it clearer that a taxpayer can submit an offer based on doubt as to collectibility for less than the realizable collection potential if special circumstances are explained. Also, it should be noted that the taxpayer may check more than one box.
6. Rewording and emphasis added to paragraphs of Item 8. We believe that the rewording of paragraph g makes this rule clearer, but we are concerned with the level of the language used. We think it should be written at a lower literacy level.
7. Item 8, Elimination of old paragraph n, explaining the suspension or waiver of the SOL. This new form eliminated old paragraph “n” that explained the suspension or waiver of the statute of limitations on collection. We recommend that it be returned to the form.
8. **Item 8, end of paragraph (n)-** Additional, italicized paragraph explaining the addition of interest on defaulted offers. This is a helpful clarification.

9. **Item 8, Emphasis added by bolding the text of the paragraph explaining third party contact, paragraph p.** We think that this is a good addition because it informs the taxpayer of action that the Service may take and that the taxpayer may not be notified before such action is taken.
   However, we are concerned about the waiver of the right to receive notice of who has been contacted. See section III above.

10. **Item 8, Addition of a paragraph, new paragraph q, stating that the offer includes all tax liabilities assessed against the taxpayer(s) as of the time the offer is submitted.** We think that this is too vague as it does not clearly explain to the taxpayer what “all tax liabilities” refers to. For example, if a taxpayer and his wife have a joint liability that is the basis of the offer, but the taxpayer has a separate employment tax liability for which the wife is not liable, would the Service require the taxpayer to list both the employment tax and joint income tax liability? If he did not, because he did not consider it a liability of his wife, but signed the return would the inclusion of the language in new paragraph q be the basis for returning an offer if the Service learns about the employment tax liability? We recommend that clearer language explain the need to possibly submit multiple offer forms and how to compute the amount offered when there are multiple offers.

11. **Item 9.** We recommend that an explanation of what is meant by an effective tax administration offer is needed. Page 1, Item 6 of the form directs a taxpayer to filing an ETA offer to complete Item 9, but Item 9 does not refer to ETA.

12. **Item 10, Item requesting an explanation of the source of funds.** It is not clear to us why the Service wants to collect this information. Taxpayers, who plan on soliciting a gift of money or loan from a relative, may not want to state this if at the time of submitting the offer they have not received a commitment from a donor to get the gift or the borrower to get a loan. Is it important to notify the Service if the source of funds changes?

H. **Inclusion of Form 656-A, Income Certification for Offer in Compromise Application Fee** This is a vast improvement over the prior worksheet. We think the step-by-step instructions make it much clearer.

I. **Instructions for Completing Form 656, numbered page 13**
   1. **Instructions for Item 7.** This new language eliminated the language explaining that a taxpayer did not have to make a deposit, but if she did it was held in a non-interest bearing account. We recommend reinserting this language.
   2. **Instructions for new item 11.** We recommend that the term “preparer” be fully defined.
J. **What your need to know about the application fee before submitting an offer in compromise, page 14** First, we recommend that the fact that taxpayers may qualify for an exception appear closer to the top of the form. Next, we think there ought to be a clarification about when an OIC user fee can be refunded. Under the regulations, §300.3, it is implied that a fee will be refunded if the offer is not accepted as processible. We recommend that be clearly stated in this part of the package. Also we recommend that the section should explain that the fee is deposited in a non-interest bearing account and does not earn interest while being held if it is later applied. Finally, we recommend that the taxpayer be informed that the Service may request additional information after the offer is accepted for processing, that the taxpayer may be required to submit such information in a short amount of time, and that failure to timely comply with a request for the additional information may result in a rejection of the offer and the forfeiture of the user fee.

K. *Offer in Compromise Worksheet*. We like the addition of this worksheet, but think that it should be placed directly behind the Form 656-A.

L. OIC Summary Checklist. We like this new addition as well, but suggest that there be placed in a separate paragraph in bold font the following:

**A failure to pay the application fee will result in the offer being returned.**