FROM THE **CHAIR**

by Richard M. Lipton, Chicago, IL

I want to share with the members of the Tax Section three important matters. The first involves the future role of the Tax Section in the ABA Annual Meeting; on this matter, I need your input. The second involves your membership in the Tax Section and what we are trying to do to make it more valuable. The third concerns the rules regulating practice before the Internal Revenue Service, which is a matter of importance to all practitioners and the tax system.

ANNUAL MEETING

The Council of the Tax Section is considering whether or not to change the number of meetings it holds every year and the time of those meetings. In addition, the ABA is also considering a report that proposes changes in the fee structures and the format of the Annual Meeting of the ABA. I want your input on this issue as part of Council's consideration.

We have long been proud of our meetings. Each year approximately 2,000 tax lawyers attend our May Meeting in Washington, and more than 1,200 usually attend our Midyear meeting. At these meetings, numerous committees and subcommittees offer the finest CLE available as well as the opportunity to network with peers and socialize with friends new and old. The Tax Section consistently experiences lower attendance at the ABA Annual Meeting, and most of the registration fee for the Annual Meeting goes to the ABA (and not the Tax Section), while the registration fee for the Midyear and May Meetings goes to directly to the Tax Section. As a result, the Tax Section (and most other sections) incurs a significant loss at the Annual Meeting.

In 2000, we did not hold our committee meetings at the Annual Meeting; instead, a fall meeting was held in Los Angeles. We are also scheduled to hold separate fall meetings (in L.A.) in 2002 and 2006. These changes were planned before the Annual Meeting Task Force appointed by ABA President Robert Hirshon issued its preliminary report, which we anticipate will be adopted by the ABA. Under this proposal, the registration fee for the Annual Meeting will be reduced, its length will be shortened, and all sections will be urged to hold their CLE programs over the same 3-day period. Each section will have the option to charge its members separately for CLE programs they attend.

RICHARD M. **LIPTON**

There are many aspects of this proposal that are admirable. However, when the cost of CLE (which is a major part of a Tax Section meeting) is added to the ABA registration fee, there may or may not be a substantial reduction in the cost for our members to attend the Annual Meeting. Moreover, by limiting the days available for section meetings, the number of meeting and sleeping rooms available in our hotel may also be limited, which could require the Tax Section to reduce the number of its CLE programs. It appears likely that other sections will scale back their CLE programming at the Annual Meeting in response to this proposal.

The Council will be considering when and how many times a year the Tax Section should meet and whether we should hold committee meetings in conjunction with the Annual Meeting in San Francisco in 2003. Some of the alternatives include: (1) keeping the three meetings per year as they are, (2) holding three meetings a year but not as part of the Annual Meeting, (3) holding two Tax Section meetings per year in May and the Fall, or (4) holding two meetings in May and January, while treating the Annual Meeting as the third meeting per year on a committee-by-committee "opt in" basis. We have been conducting a poll of recent meeting attendees on these questions. In addition, I would like to hear from as many Tax Section members as possible on this issue. Please feel free to send me an e-mail with your thoughts to Rlipton@mwe.com.

MEMBER VALUE

One of my first acts as Chair was to appoint a special task force, which was led by Dick Shaw and Susan Serota, to determine what actions the Tax Section should take to increase the value of membership in the Tax Section for all of our members. Dick and Susan submitted a comprehensive report to the Council in August, and it was unanimously approved. I wanted to tell you about several aspects of this report.

First, the Tax Section will be undertaking a thorough survey of a representative sampling of our members in order to determine what we can do for you. We will be seeking information concerning what you find useful—meetings, CLE programs, technology-based initiatives, our Comm-Online program with LEXIS, and other aspects of your membership in the Tax Section.

Second, the Tax Section will be forming a permanent Long Range Planning committee, which will initially be chaired by my successor, Herb Beller, to review the Tax Section's goals and what steps should be taken to achieve them. Third, we will be seeking ways to get younger tax lawyers involved in the Tax Section and to encourage new members to become involved in committee programs and activities. Fourth, the Tax Section will continue to seek to have a diverse group of individuals actively involved in the Tax Section at all levels.

We are all thankful for the hard work that Dick and Susan put into their report. It is an important step forward for the Tax Section. I hope that you will take the time to respond to the survey if you receive one. And I trust that the steps we undertake will make membership in the Tax Section as valuable as possible to all of our members.

CIRCULAR 230 REPORT

In August the Tax Section submitted a second set of comments concerning the definition of a "tax shelter" in Circular 230, which contains the rules governing practice before the IRS. These comments were prepared by a group of Tax Section members who devoted long hours to the task. Rick Ballard, chair of the Committee on Special Projects, put in a Herculean effort as the leader of the group, as did current and former officers and Council members, George Howell, Paul Sax, Bill Wilkins, Richard Lipton, Bill Paul and Phil Mann.

The comments were submitted in reference to proposed revisions of Circular 230 issued on January 12, 2001. The January 12 proposed regulations provide generally that a tax shelter opinion must address all material issues in the transaction if either (1) the opinion reaches a conclusion that it is more likely than not that the proposed treatment of the tax shelter is the proper treatment, or (2) the practitioner knows that a third party promoter will use the opinion in marketing the tax shelter to taxpayers. Tax shelters are defined by reference to section 6662 as transactions with a "significant purpose" of avoidance of Federal income tax, with exceptions for municipal bond issues and qualified retirement plans.

The Section previously commented that the definition of a tax shelter in the proposed regulations is too broad. See the Section's comments dated April 30, 2001. The Section proposed that this definition be replaced with a definition that emphasized "the principal purpose" of the transaction relating to the written advice. Other practitioners also objected to the breadth of the definition of a tax shelter in the proposed regulations. Upon further reflection, the Section concluded that refinement of these definitions was needed to address valid concerns raised by practitioners while continuing to take into account the government's interests. To achieve the appropriate balance, the Section developed alternative tests for determining whether written advice provided by a practitioner relates to a tax shelter and, therefore, should be subject to heightened practitioner diligence under Circular 230. Additional comments were submitted on August 13, 2001.

The Section proposed in its August submission that a tax shelter is a transaction that satisfies any one of three alternative tests. The three alternative tests are:

(1) The transaction is a "listed transaction" subject to disclosure on corporate returns under Treas. Reg. section 1.6011-4T(b)(2);

(2) The principal purpose of the transaction is to avoid or evade federal income tax; or

(3) A significant purpose of the transaction is to avoid or evade federal income tax; and:

  (a) The practitioner has reason to believe or actual knowledge that the taxpayer has participated in the transaction under conditions of confidentiality;

  (b) The practitioner has reason to believe or actual knowledge that the taxpayer has obtained contractual protection against the possibility that the intended tax benefits will not be sustained;

  (c) The practitioner receives a fee (other than a fee based on a reasonable stated hourly rate) that is contingent on the taxpayer's participation in the transaction or is measured by the actual or estimated tax benefits of the transaction;

  (d) The practitioner has reason to believe or actual knowledge that the opinion will be used by a party other than the practitioner or the practitioner's firm to market or promote the transaction to taxpayers; or

  (e) The transaction is "actively marketed or promoted as a tax shelter" by the practitioner (or the practitioner's firm).

The second and third tests are subject to an exception for transactions clearly consistent with the purposes of the applicable provisions of the Internal Revenue Code and transactions reviewed by the Service prior to implementation by the taxpayer. An opinion with respect to a tax shelter as thus defined must address all issues as to which the Service would have a reasonable basis for denial of claimed tax benefits.

Numerous members of the Section spent many hours developing this proposal, which we believe is a major step forward in the attempt to require full disclosure by practitioners involved with tax shelter transactions. The final product was the result of a vigorous debate in which many points of view were expressed, with Council reaching a near-unanimous conclusion that this

proposal represented a major step forward. Completion of the project was due in no small part to Rick Ballard's efforts, which cannot be overstated. The Section is grateful to him and the rest of the working group for their efforts. We hope that the IRS can use these comments as a framework for the development of rules governing practitioners' involvement with tax shelter transactions.

OTHER MATTERS

I would be remiss if I did not acknowledge several other important events and projects within the Section. Our committees continue to produce excellent comments on proposed regulations, including particularly the comments concerning split-dollar life insurance from members of the Employee Benefits committee, comments on the regulations under section 355(e) and mergers with disregarded entities that were submitted by members of the Corporate Committee, a proposal concerning constructive sales from members of the Financial Transaction committee, and comments on Form 990 from members of the Exempt Organizations committee. Sam Braunstein and Carol Burger, Chair and Vice Chair of the Professional Services Committee, have been doing a terrific job in putting together CLE programs and teleconferences; you should take advantage of these programs if you can. George Howell, Vice Chair, Communications, has been working with the staff of the Federal Trade Commission to promulgate new regulations under which lawyers would not be required to provide privacy notices to their clients under Gramm-Leach Bliley. Most recently, Greg Jenner, Chair of the Task Force on Corporate Tax Shelters, and Caroline Root, a member of that Task Force, drafted a letter from the Section to the Senate Finance Committee on proposed corporate tax shelter legislation. Finally, we all owe a debt of gratitude to Jim Holden, who in August attended his last meeting as one the Section's delegates to the ABA House of Delegates; Jim has served the Section well for many years, and his contributions have not gone unnoticed.

As you can see, the Section has been very busy. All of the comments and submissions mentioned are available on the Section's website at www.abanet.org/tax. I plan to report on the details of another major project, the pro bono initiative, in the next issue of the Newsletter. And I hope to see all of you in New Orleans in January. ■