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FROM THE CHAIR

Hail and Farewell

By George C. Howell, III, Hunton & Williams LLP, Richmond, VA

It has been an honor and a privilege to serve as Chair of the Tax Section over the past year. My time as Chair generally has flown by, although there were a few moments when the clock hands seemed to slow down a bit (e.g., reviewing a 100-plus page government submission over a weekend). With the devotion of our volunteer members and the help of our dedicated staff, much has been accomplished. Please indulge me as I reflect on some of the highlights of the past twelve months.

Highlights of the Past Year

There are too many to list, but here is a sampler:

• Three successful meetings—Fall, Midyear, and May—with high attendance and loads of high quality CLE and other programming;

• The insightful Fall plenary session remarks from Nina Olson about the future of the IRS and our tax system;

• A thought-provoking Midyear plenary speech by Professor Ed Kleinbard regarding U.S. fiscal policy;

• The first-time speech to the Section by Mark Mazur, the Assistant Secretary of the Treasury for Tax Policy, at the May plenary session;

• The increase in our fundraising for the TAPS endowment, enabling us to surpass the $425,000 mark in total contributions and pledges;

• The formation of a TAPS Endowment Task Force to guide our future fundraising efforts;

• The continued promotion of the Section’s pro bono and public service efforts;

• The implementation of the Section’s new Diversity and Inclusion Plan;

• The participation of ABA President Paulette Brown in the LGBT Ally Toolkit panel at the Midyear Meeting;
• The success that the Diversity Committee and the Young Lawyers Forum (YLF) have had in putting on top-notch programming and attracting younger tax lawyers from more diverse backgrounds to the Section;

• The rebranding of the NewsQuarterly as the ABA Tax Times and its conversion to an all-digital format;

• The creation of the first Chair’s video message;

• Our continuing cooperation with RPTE, including a joint membership drive;

• Our fall and spring courtesy calls with IRS, Treasury, and the various congressional tax-writing staffs; and last, but certainly not least,

• The dramatic increase in the volume of law improvement comments submitted to the government.

There were also some sad and bittersweet moments. With the passing of Ken Gideon and Phil Mann, we lost two giants of the Section and the tax bar. In addition, the Section’s highest honor—its Distinguished Service Award—was presented posthumously to Ken. The acceptance speech by his widow, Carol, was the most poignant event of the year. It was one of those times that induces both tears and smiles.

In the remainder of this column, I will discuss the progress that we have made in the three focus areas that I outlined in my first column a year ago. I also will describe some of the work that remains to be done in these areas.

Pro Bono and Public Service

The Tax Section’s vibrant pro bono and public service programs have been nurtured and developed by my predecessors over a number of years. My job in this area was made easy by all the hard work that was done in the past. For example, I inherited the innovative Brunswick Fellowship program, which funds recent law school graduates for two years in representing low-income taxpayers. The Section also continues to provide many opportunities for members to participate directly in pro bono activities through the Tax Court calendar call, Volunteer Income Tax Assistance (VITA), and Adopt-A-Base programs. I am pleased with the way that all of these programs have thrived over the past year.

While cheerleading for the Section’s pro bono and public service efforts, my main focus was to ramp up our fundraising for the TAPS endowment to provide financial support for them. In order for the Section’s pro bono and public service programs to continue to flourish, it is critical that they have this sort of dedicated funding. Our goal is to raise $2.5 million over a five-year period, which is a lofty goal. Over the past year, total donations and pledges to TAPS have increased from approximately $219,000 to in excess of $425,000. We are a long way from our goal, however, so much fundraising work remains to be done.

What can you do to support the Section’s pro bono and public service efforts? First, I strongly encourage you to become involved in one or more of our pro bono programs if you have not already done so. All of us have an obligation to give back to the tax system in general and to underserved taxpayers in particular. Second, please give generously to the TAPS endowment through the ABA Fund for Justice and Education.
Diversity and Inclusion

A second area of focus for me has been diversity and inclusion. A little over a year ago, thanks to the efforts of my predecessors, Michael Hirschfeld and Armando Gomez, the Tax Section Council adopted an updated Diversity and Inclusion Plan. The adoption of this plan was critical for two reasons. First, it was the right thing to do. Second, attracting young lawyers, who are inherently more diverse than the lawyers of my generation, is vital to the continued health of the Section. The new plan has been a step forward in our ongoing effort to increase our membership rolls by bringing in a younger and more diverse group of members. I am delighted to report that the Section has made substantial headway in implementing it.

I also want to highlight the success of the Section’s Diversity Committee and YLF. The Diversity Committee has provided a plethora of informative programs with an emphasis on diversity issues. I attended a number of these programs, including the LGBT Ally Toolkit panel at the Midyear Meeting in which Paulette Brown, the first female African-American ABA President, participated. The YLF once again sponsored the Annual Law Student Tax Challenge, which is a wonderful tool for introducing law students to the Section. The YLF also organized a number of first-rate programs aimed at young lawyers, including the Tax Bridge to Practice. This latter program provides an introduction to tax practice and covers both substantive tax and career-building topics. Both the Diversity Committee and the YLF have served as magnets in attracting new members to the Section.

How can you help with diversity and inclusion? I urge each of you to make the Section and its committees a more welcoming place. Help us expand the diversity of the Section by bringing young lawyers from your firm or organization to a Section meeting. Welcome all new faces at committee meetings. Ask a lawyer from underrepresented constituencies to work on a committee project or participate in a panel. Attend Diversity Committee or YLF programs. This sort of grassroots effort will pay big dividends over time.

Law Improvement

I am pleased to report that the Section's law improvement efforts ramped substantially over the past year. During the last twelve months, our committees have completed 36 government submissions, which is a much higher number than in any recent year. I am proud of the high-quality law improvement comments that were submitted this year. In addition, some of these reports were extraordinarily complex and lengthy. For example, two recent submissions—the comments on the new partnership audit rules, and the proposed section 385 regulations—were more than 80 pages long (176 pages in the case of the section 385 report). In addition to addressing complex subject matters, these two projects required multiple committees and large numbers of volunteers to work together. The resulting high-quality reports are proof of what the Section can do when all of its resources are brought to bear.

All of this year’s government submissions were the result of the outstanding work of the volunteers from our substantive committees who undertake these projects. I feel confident that these submissions have had, and will continue to have, a significant positive impact on the thinking of the congressional tax-writing staffs, the Treasury, and the Internal Revenue Service regarding the various subject matters covered by the submissions.

I applaud and appreciate all of the strong law improvement efforts made by our committees over the past year, but we cannot relax because much work lies ahead. The government will continue to look to us for technical comments and practical guidance on legislative and administrative law changes, and we must answer the call.
What can you do to help? I urge each of you to participate in law improvement projects with your favorite committee. I have found participation in these projects to be one of the most rewarding aspects of Section membership, and I think you will, too.

**Thanks and a Baton Pass**

It has been my privilege and good fortune to have been surrounded by a talented and energetic team of officers and Council Directors, who have performed superbly over the past year and have made my job easy. I want to extend special thanks to Chuck Rettig, Vice-Chair (Administration), Julie Divola, Vice-Chair (Publications), Peter Blessing, Vice-Chair (Government Relations), Tom Callahan, Vice-Chair (Committee Operations), Joan Arnold, Vice-Chair (CLE), and Wells Hall, Vice-Chair (Pro Bono and Outreach). I also want to express my deep appreciation for all of the good counsel and guidance that I received from Armando Gomez, our Immediate Past Chair, Bill Caudill, our Chair-Elect, and Karen Hawkins, the incoming Chair-Elect.

I also want to salute once again the many contributions made by the Section’s superb staff, led by our executive director, Janet In. Although their work is largely behind the scenes, they make it possible for the Section to function smoothly. During my year as Chair, I came to more fully appreciate all that our staff does, and I am grateful for all of their efforts (and patience) on my behalf. They deserve a warm and appreciative round of applause.

I am thankful for all that has been accomplished during my year as Chair, but much unfinished business lies ahead. The challenges that the next Chair will face include (but by no means are limited to) addressing budgetary issues, continuing the fundraising for the TAPS endowment, maintaining a high level of law improvement activity, and implementing the new ABA-wide CLE diversity policy. I can assure you that I am turning the Section over to very capable hands when Bill Caudill succeeds me as Chair in early August. With your support, I know that Bill will propel the Section forward and continue its good work.

Let me close by paraphrasing that great American songwriter, Jimmy Buffett:

> Some of it’s magic, some of it’s tragic,
> But I had a good year all the way.

*Ave atque vale.*
Providing a Valuable Benefit

By William H. Caudill, Norton Rose Fulbright LLP, Houston TX

It is both exciting and humbling to be presented with the opportunity to serve as Chair of the Tax Section for 2016-2017. As we formulate our plans for the upcoming year, it is inspiring to consider what was accomplished over the past year under the indefatigable leadership of our outgoing Chair, George Howell. It was my good fortune to have worked with George on a number of significant projects, including the formulation of important initiatives with our colleagues in the government, the organization of the Tax Assistance Public Service (TAPS) endowment task force, and the development of a workable implementation plan that responds to the ABA's new CLE diversity requirement (which I discuss later in this column). I want to thank George for his unflagging energy and good work over the past year. His will be a hard act to follow.

2016 – 2017 Objectives

I have three objectives for the coming year:

• Focusing on the high quality output of our Committees in the areas of CLE programming and government submissions. The breadth of knowledge and diversity of experience and backgrounds that the Committees bring to these two important areas are vital to the Section's continued success. These are valuable benefits for our members and the tax community.

• Continuing the promotion of the Section’s pro bono and public service efforts—a longstanding priority for the Section—within the constraints of our limited resources, including raising funds for the Tax Assistance Public Service (TAPS) endowment.

• Attracting new members, particularly younger and diverse tax lawyers, to the Section, and identifying new opportunities to meet their needs.

Committee Programs and Law Improvement Projects

The Committee and Section CLE programs at our three main meetings are extraordinarily valuable to our members and the tax community in general, and they continue to be the best value around. They provide opportunities for members to network and become active, as well as a foundation for other activities and initiatives that serve our members, including other conferences, publications, and webinars. At our last May meeting, there were over 150 panel presentations of the highest quality with invaluable government participation and presenters from across the country. We must continue our focus on these first-class
Committee programs and presentations, as they truly provide an important service to the tax bar and underscore the high value of membership in our Tax Section.

The volume of law improvement projects produced by our Committees this year has been particularly impressive. This significant work must continue. We know that the government values the Section's perspective and our government submissions reflect a breadth of knowledge and experience and provide a public service for which we can be truly proud. These projects are the result of the outstanding and sometimes difficult work under significant time pressure of numerous volunteers from our substantive Committees.

Over the last year, there have been 36 comment projects submitted to the government—a dizzying feat. The current legislative environment combined with the resource constraints imposed on the Service means that the government continues to need our help in developing guidance. I am following George Howell's lead in urging each substantive committee to strive to undertake at least one law improvement project over the next year. Participation in a comment project can be one of the most rewarding and meaningful aspects of your Section membership, as well as a great way for our Committees to involve younger lawyers.

**New Diversity Requirements for Tax Section Programs**

The ABA Board of Governors recently voted in favor of a new policy requiring speaker diversity on all programs of ABA Sections, Divisions, and Forums (which includes the Tax Section). Any program with three or more presenters, including the moderator, will be required to comply. Programs with three or four presenters must have at least one diverse member; programs with five to eight presenters must have at least two diverse members; and programs with nine or more presenters will be required to have at least three diverse members. If a program fails to comply, the ABA will not seek CLE accreditation for that program. The effective date of this new policy is March 1, 2017. Rest assured that your Section officers, staff, and Board of Governors liaison worked hard to moderate this new policy, and the final version reflects this work.

The Tax Section has worked to incorporate diversity in all of its programs for many years. Speaker diversity, as apparent in the Final Program for the 2016 May Meeting, easily exceeded the new requirements on an overall meeting basis. However, we must now comply on a panel-by-panel basis. Each of our Committees must continue to work to ensure adequate diversity in panels in compliance with the new requirements, or the Section not only runs the risk of not being able to provide valuable CLE credits for our members, but also of losing credibility with our increasingly diverse membership.

In anticipation of the new policy going into effect, we are working through the ABA Section Officers Conference to clarify operational questions regarding its implementation. Fortunately, we have several months to prepare. We owe it to our members and our profession to support these efforts to increase diversity in our programs.

**Pro Bono and Public Service**

The Tax Section has vibrant pro bono and public service programs that have been cultivated over many years. The Tax Section is committed to continuing these important programs within the constraints of its limited resources. We fund recent law school graduates, known as Brunswick Fellows, for two-year fellowships designed to provide representation to low-income taxpayers. The Section also provides many opportunities for members to participate directly in pro bono activities through the Tax Court calendar call, Volunteer Income Tax Assistance (VITA), and Adopt-A-Base programs. All of us have an obligation to give back to the tax system, and participating in one or more of the Section's pro bono programs is a great way
to do that. For information, I encourage you to refer to the Section’s website, or contact the Section’s Pro Bono Counsel, Derek Wagner.

In order for the Section’s pro bono and public service efforts to continue to thrive, it is critical that they have adequate funding. The TAPS endowment has been set up for this very purpose. Its initial focus is to assure funding for the Brunswick Fellowships that the Section awards each year. In addition, it may also enable the Section to enhance support of its other pro bono and public service initiatives.

As George Howell noted in his farewell, we have set an ambitious fundraising goal of $2.5 million for the TAPS endowment, with approximately $425,000 raised to date. I believe we can achieve our target over the next four years, but it will require widespread participation. I am pleased that all of the Section’s officers have made contributions or pledges, but we need broader support (particularly from our Committee leadership and other groups within the Tax Section). If you have not already given, I encourage you to read more about the good work of our Brunswick Fellows and to contribute to the TAPS endowment.

**Member Recruitment**

We should all work to attract new members to the Section. If you are reading this, I suspect you find membership in the Tax Section to be worthwhile. If you have benefitted personally and professionally from membership in the Section, I’d like to challenge you to make an earnest effort this year to identify one or two prospective members from your firm or wider contacts and recruit them to the Section.

The effectiveness of these connections is evident at every level in the Section. One of our members was a young lawyer when the Bankruptcy Reform Act was enacted some years ago, and he was asked by the Tax Section to participate. His participation with the Tax Section formed the foundation for his long career in the bankruptcy tax bar. Another member served on the Law Student Tax Challenge and ended up hiring one of the student competitors who is now looking forward to a promising career with her firm. The Tax Section provided the opportunity to hire a young lawyer and also introduced the young lawyer to a job. Another young tax lawyer from a small town came to the Section and was warmly received for her hard work and intelligence. That member eventually was asked to serve on a Capitol Hill tax committee. Ultimately, that member was confirmed as a United States Tax Court Judge, all in significant part due to that member’s work with the Tax Section. I myself have had important client referrals and connections over the years which arose from the Tax Section. Our Members have served as Commissioner of the Internal Revenue Service, Chief Counsel, Director of the Office of Professional Responsibility, Assistant Secretary of the Treasury for Tax Policy, Assistant Attorney General for the Tax Division, and United States Tax Court Judge. This list goes on and on. The Tax Section provides a very valuable service to our members, and we should work to tell prospective new members about it. The personal outreach of our individual members is critical to our future as a Section as we strive to continue to be relevant to the changing needs of our members.

I also want to highlight the critical roles that the Section’s Diversity Committee and Young Lawyers Forum (YLF) are playing in attracting new members. The Diversity Committee presents truly inspiring programs and draws lawyers from diverse groups and backgrounds to the Section. The YLF organizes the highly competitive and successful Annual Law Student Tax Challenge, which enters its 16th year this fall. It also regularly presents the Tax Bridge to Practice program—an introduction to tax practice which covers both substantive tax and career-building topics.

Each of you can help in this effort. I urge each of you to engage in a one-to-one campaign to make the Section and its Committees a more attractive and inclusive place. Formulate in your mind what one or
two things make the Tax Section a valuable proposition for you, and tell prospective new members about it. Encourage a new lawyer from your firm or organization to attend a Section meeting. Extend a warm welcome to all new faces that show up at Committee meetings. Invite a new lawyer to work on a Committee project or participate in a CLE panel. Attend a Diversity Committee meeting or YLF program. Doing these sorts of things will make a difference.

**Looking Ahead**

We have three CLE-packed meetings to look forward to over the next year—the [Joint Fall CLE Meeting](#) with RPTE at the Westin Boston Waterfront in Boston, the Midyear Meeting at the Hilton Bonnet Creek and Waldorf Astoria in Orlando, and our traditional May Meeting in Washington. We also have some outstanding CLE programming that will occur outside of these three meetings, including the [International Tax Enforcement and Controversy Conference](#) in October and the [Philadelphia Tax Conference](#) in November, as well as a variety of webinars. I hope that you will attend one or all of the upcoming Section meetings, as well as participate in the other [CLE opportunities](#) offered by the Section. The quality and price of the Section's meetings and CLE cannot be beat.

**Leadership Transition**

The Section is fortunate to have a very talented incoming Chair-Elect and a group of Vice-Chairs who bring a wealth of experience to their roles. As most of you know, Karen L. Hawkins is the incoming Chair-Elect. I am delighted to work with Karen over the next year and look forward to having the benefit of her experience and energy. Scott D. Michel, the incoming Vice-Chair (Committee Operations) replaces Thomas J. Callahan, who kept the Section’s committees operating smoothly. Julian Y. Kim, the incoming Vice-Chair (Government Relations), takes over for Peter H. Blessing, who did a masterful job managing the Section’s relations with the government. Bahar Schippel, the incoming Vice-Chair (Pro Bono and Outreach), takes over for C. Wells Hall, who provided his passionate dedication to the many Pro Bono and Outreach programs offered by the Section, such as the Tax Court calendar call, VITA, and the Adopt-A-Base programs. The continuing Vice-Chairs include Charles P. Rettig (Administration), Joan C. Arnold (CLE), and Julie A. Divola (Publications). I am thrilled to work with such dedicated individuals. I also want to thank Tom, Peter, and Wells for all of their good work during their tenures as Vice-Chairs.


I must also acknowledge the many contributions made by the Section's staff, led by our Executive Director, Janet In. Janet and her wonderful staff are the backbone of the Section. They make it possible for the Section to function smoothly. The institutional knowledge and range and quality of the services and support that they provide is consistent and first-class. I anticipate that 2016-2017 will be another active year for the Section. I am excited and humbled with the opportunity to serve as Chair, and I welcome your ideas and participation.
POINT & COUNTERPOINT

Perspectives on Two Proposals for Tax Filing Simplification

Editor’s Note: In this Point and Counterpoint, Stanford Professor Joseph Bankman and Villanova Professor James Edward Maule debate two related tax-filing simplification proposals. Under a data-retrieval system, the government would give each taxpayer access to third-party reports it received about the taxpayer. Third-party reports include wage data from employers, interest paid by financial institutions, mortgage interest paid to financial institutions, dividends paid, and so on. Taxpayers would be able to download this data onto the correct line of an electronic return. Taxpayers would then be responsible for correcting any errors, adding any necessary return information the government does not have (such as marital status, dependents, charitable deductions, or other income), and calculating the tax due.

Under a pro forma return system, the government would use third-party data, together with information from a taxpayer’s prior year tax return to provide the taxpayer with a tentative current year tax return. Taxpayers would be responsible for verifying the accuracy of the information and making any necessary changes. The pro forma return approach would be available only for those taxpayers with relatively simple returns.

Under either the data-retrieval or pro forma return system, taxpayers could elect not to take part in the simplified filing system and continue to file their returns as they have in the past. Taxpayers who chose not to opt out could authorize their preparers to access their data/returns. Taxpayers could also download their data/returns onto proprietary software, such as Turbo Tax.

POINT: Simplified filing would be a boon for all taxpayers, not just those who file the simplest returns, and would save substantially on filing costs.

By Joseph Bankman, Ralph Parsons Professor of Law and Business, Stanford Law School, Stanford, CA
The Financial and Other Costs of the Current Tax Filing System

Filing taxes is expensive. The annual cost of individual filing for taxpayers without self-employment income has been estimated at about $40 billion a year.\(^1\) Although absolute costs of filing rise with income, filing imposes significant costs, as a percentage of income, on all taxpayers. The primary cost is the value of the taxpayer’s time.

Filing also imposes other costs not incorporated in the above estimates. Filing leaves many taxpayers with feelings of anxiety, frustration and anger. The basic problem is that filing requires expertise and skills most taxpayers don’t have, as well as detailed record-keeping. This is true even for non-itemizers, who only have to keep track of a few pieces of information (such as their W-2s) and can file a short form such as Form 1040A.

As tax lawyers, we may regard these tasks as simple. We sometimes forget, or do not realize, how difficult those tasks are for citizens who are less literate and numerate than we are. Scholars today define literacy in terms of task (rather than grade-level). Only 30% of Americans can use a bus schedule to determine how long a particular bus ride will take.\(^2\) Taxpayers with these levels of literacy and numeracy don’t find filing simple. As income falls below average, the difficulty of self-filing increases, because of the need to make additional determinations relevant for the earned income tax credit. As income rises, levels of literacy and numeracy rise, but the complexity of the return increases.

Of course, taxpayers don’t have to do their returns themselves—they can and do farm out the task. Figuring out whom to hire for that task, however, is itself anxiety-provoking. More importantly, the largest single component of filing costs is record-keeping, and that task can’t be farmed out. Faced with the difficulty of the task, many low income taxpayers who would receive refunds simply don’t file.

The remaining taxpayers who do file must bear the financial and psychological costs of doing so. Some of the complexities they face can be tackled only by simplifying the basic structure of the tax code, but that is close to impossible in the current political climate. In contrast to simplifying the tax code, simplifying filing is relatively easy. Almost all the information that the government asks for it gets from third parties. Under the data-retrieval proposal outlined above, the government would provide that data to the taxpayer as downloadable entries on an electronic tax return.

The Benefits of Simplified Filing with Data Retrieval and Pro Forma Returns

It is easy to see how this system would simplify filing for non-itemizers. Their electronic return would show wage income and (possibly) some interest income. All they would need to do to file is to add or check on dependents and hit “calculate.”

What may surprise readers is that it would simplify filing for itemizers as well. Consider, for example, someone with taxable income of $800,000. According to IRS data, the average taxpayer in this position

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has income from wages, taxable and tax-free interest income, dividends, capital gains and losses from stocks, and deductions for state taxes, mortgage interest and charitable contributions. All of these items except charitable contributions are already subject to third-party reporting.3

Some taxpayers who now use preparers or pay for e-filing programs, like TurboTax, would find it easy enough to file their own taxes with the new system. Others would still want to use a trusted third party to double-check the information the government provides or do the necessary calculations. In such cases, they could authorize the government to provide the information it already has directly to the e-filing program or tax preparer. With all third-party income already accurately reported by the government, the equilibrium price of professional programs or preparers is likely to fall.

For most non-itemizers, third-party reported data constitutes all the information on the return other than marital status and dependents. For such taxpayers, the government could provide a tentative, or pro forma, tax return using third-party data together with the prior return year’s information on marital status and dependents. Taxpayers would be expected to verify the accuracy of the information and make any necessary corrections. If and when the return is accurate, they could simply hit “accept.”

Pro forma tax returns work well only for those whose profile is characteristic of simple returns. For taxpayers who itemize (or who show expenses for which software can predict the option to itemize), a data-retrieval system will be more accurate. Taxpayers in the latter group would not be eligible for pro forma returns. Thus, even if a data-retrieval system includes the option of pro forma returns, those returns will make up a minority of total returns.

One way to think about data retrieval is to compare tax filing to paying other bills like credit card charges.4

One of the goals of either a data-retrieval system or a data-retrieval system with pro forma returns is to reduce taxpayer anxiety or frustration. Accordingly, each system would be optional. Taxpayers who do not want to access the government’s record of third-party information for their own use or their preparer’s use would not be forced to do so. (It is difficult to imagine why any taxpayer would not want to access that information, a fact that testifies more eloquently than anything else to its being in taxpayers’ interests for the government to make it available). One way to think about data retrieval is to compare tax filing to paying other bills like credit card charges. Suppose VISA sent each cardholder a blank piece of paper each month, asking the taxpayer to list their charges and calculate their payment due. In addition, suppose VISA assumed that any discrepancy between the taxpayer’s bottom line and its own calculations was due to cardholder error and levied a penalty on any amount not paid. Cardholders would rebel. Since VISA has all the charges in its computer system and is going to use its data in any event, it would seem senseless to all concerned for VISA not to list that information in the monthly statement so that the basis for the charge is clear. It makes paying infinitely easier, and makes it easier for customers to spot errors in VISA’s internal accounting.

Pro forma returns are the norm in many countries, including OECD nations such as Finland, Sweden, Norway and Denmark.4 (Other OECD countries make greater use of withholding at the source, thus eliminating the equivalent of April 15 for most citizens.) California also offers a form of data-retrieval, after a successful

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3 See Bankman, Using Technology, supra n.1, at 774-775.
4 OECD, Forum on Tax Administration, USING THIRD PARTY INFORMATION REPORTS TO ASSIST TAXPAYERS MEET THEIR RETURN FILING OBLIGATIONS (Mar. 2006), Table 1 at 13.
pilot program on pro forma returns. The IRS offers a limited form of data retrieval as well, though most current-year data is not in the system. A recent proposal for a federal program of data-retrieval and pro forma returns was supported by scores of tax scholars, including Austin Goolsbee and Emmanuel Saez.\(^5\)

**The Opposition’s Arguments Are Not Convincing.**

Not everyone agrees that this kind of filing simplification is desirable. Professor Maule, the author of the related Counterpoint, has been a determined and indefatigable opponent. Intuit, the maker of Turbo Tax, has also opposed filing simplification, going as far as to make a $1 million independent campaign expenditure in support of a politician who promised to eliminate the California pilot program mentioned above.\(^6\) Finally, the filing simplification proposals outlined above have been opposed by conservatives such as Rush Limbaugh and Grover Norquist.

In the Counterpoint, Professor Maule levies thirteen arguments against simplified filing. A number of these arguments are effectively made in the alternative. For example, Maule at one point argues that taxpayers won’t use simplified returns, but later he argues that tens of millions of taxpayers will fail to notice problems in the substantive tax law when they use pro forma returns. In order to fit this reply in the space allotted, I confine my responses below to what I believe are the most significant and plausible concerns Maule raises.

1. **Taxpayers won’t benefit from, or use, simplified returns.**

Maule argues that data retrieval offers taxpayers no real benefit, since entering information from W2s, 1099s, and other third-party reports received by taxpayers is one of the “quickest and easiest” steps in the filing process. In fact, as noted above, tax filing is enormously time-consuming and expensive, even though the process for most taxpayers consists solely of keeping information returns and putting the data from the returns onto the correct line of the tax return. One way to reconcile Maule’s intuition with the literature on compliance cost is to realize that there are 160 million taxpayers who spend over 10 hours each on record keeping and filing, so reducing time by even an hour (and imputing a value to that time) produces cost savings of billions of dollars a year. More generally, what seems “quick and easy” to us as tax lawyers is befuddling to the average citizen.

2. **Simplification will cause taxpayers to pay too much tax.**

Maule argues that the government will make systemic errors in its favor under a simplified filing regime, and taxpayers will miss deductions. This echoes the main argument made against the proposals by Grover Norquest and Intuit.

This argument is unfounded with respect to data retrieval. Data retrieval merely gives a taxpayer access in easily usable electronic form to third-party information, such as wage data, that the government already has in its file. This is the same data that the third parties have sent directly to the taxpayer. Using the government’s copy of that data should have no effect on tax liability. Moreover, unless notified that it is mistaken, the government is going to use its own third-party data to determine tax liability anyway. Data retrieval lets the taxpayer know ahead of time if there is a mismatch, so she can work to correct the government’s file (for example, by getting an information-provider to send a corrected return to the government).

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Pro forma returns include one additional piece of information not supplied by data retrieval: information on the taxpayer’s marital status and dependents, generally acquired from the taxpayer’s prior year’s return—the same place that most accountants and e-filing programs acquire it. In all cases, taxpayers would be asked to verify that information. While mistakes are always possible, there is no reason to think they would be more frequent with pro forma returns than without them, or that such errors would systematically favor the government.

There is also no reason to think that pro forma filers would lose deductions. Pro forma returns would be limited to non-itemizers. Taxpayers whose reported data indicates that it may be to their advantage to itemize would be denied a pro forma return on that ground. So, for example, a taxpayer with mortgage interest who applied for a pro forma return would be told that she was not eligible because the presence of mortgage interest suggests she might be better off itemizing. Far from causing the taxpayer to lose deductions, a pro forma return system would alert taxpayers to deductions to which they are entitled.

In addition, a pro forma return regime would no doubt be monitored closely by the tax preparation industry. One would expect the industry to offer to review the returns for accuracy and publicize any cases in which the taxpayer was disadvantaged.

One final point: Maule uses the error rate (as of 2010) in the United Kingdom’s withholding-at-the-source system to support his claim of systemic error in pro forma systems. Withholding at the source is a much different system than the data retrieval or pro forma systems recommended here. It offers many advantages, essentially eliminating tax filing altogether, but is much more prone to errors than a pro forma system.7

3. Simplification will cause taxpayers to pay too little tax.

Maule is correct to assert that pro forma returns and data retrieval might reduce tax compliance, by letting taxpayers know what information the government doesn’t have. Taxpayers with unreported cash income, for example, know they can misreport that income without (much) fear of detection. But the effect is likely to be small. Studies of compliance rates show that taxpayers with cash income already know the income is not subject to third-party reporting – that’s why they report so little of it. In a recent article (and other articles on filing simplification), I discuss this form of evasion and suggest easy-to-implement modifications of these proposals that are likely to actually increase taxpayer compliance.8

4. There are significant administrative costs to implement filing simplification.

Maule argues that filing simplification imposes significant costs on third-party reporters and the IRS. In fact, the only change required for third-party reporters is to send reports to the government contemporaneously with sending those reports to taxpayers (currently, employers and other reporters send data to the government after they send it to employees). The cost of that change is negligible.9 The IRS would bear costs to develop

7 Maule’s cited source for the UK example is an on-line op-ed, which cites to a study funded and published by The Technology Policy Institute. The Technology Policy Institute is a section 501c(3) think tank founded and funded by Intuit and other high-tech companies.
9 See Bankman, Using Technology, supra n.1, at 777-80.
software and improve the data-retrieval system it already maintains for taxpayers with preparers. California, whose income tax is based on the federal tax, developed the software needed for its program for a few million dollars, and it needs only a handful of employees to run the program.

5. Security is a major concern with simplified filing.

Security is an important concern of any new or existing tax program. California, which has adopted a version of data retrieval and pro forma returns, adheres to industry best practices (such as the so-called “NIST standards”). Any proposal for filing simplification must be based on the government’s ability to conform to those practices and standards.

Of course, even financial institutions or third-party vendors, such as Intuit, are vulnerable to break-ins. The same will be true of the most secure government agency. It is in part for this reason that participation in filing simplification (like participation in on-line banking) should be elective.

6. Filing acts as a check on Congress.

Maule argues that filing helps citizens “become aware of what Congress has done with the tax law” and that taxpayer frustration from filing is the “necessary seed of grassroots income tax reform.” Tax filing simplification, on the other hand, creates “tax zombies” who will “never feel a thing” as the government “extracts a wee bit more” from their paycheck. He suggests that having the government’s assistance in incorporating data into a return somehow means taxpayers no longer “take ownership” of their tax obligations, though taxpayers still must review their returns and pay the tax due.

I am less confident than Maule that the majority of taxpayers dislike the compromises that comprise our substantive tax law. It is not clear that there is another tax system out there that would win in a head-to-head vote. I am also skeptical of the claim that the level of government services and the tax rate required to pay for them is inconsistent with citizen preferences. It just might be that elected representatives give their constituents what they want, or at least what they think they want.

It is a moot point, though, because preparing one’s own return tells a taxpayer nothing about the substantive tax law, the magnitude or recent direction in government expenditures and budget deficits, or the distribution of the tax burden, and does not make salient individual average or marginal tax rates. It is instead an exercise in record-keeping, literacy and numeracy, requiring that taxpayers save information returns and copy numbers on those returns to the right lines of their 1040s. Taxpayers sensibly reject this exercise and farm the task out to preparers, or they purchase software that requires them to passively answer questions before spitting out a completed return. They are left with the compliance costs mentioned at the start of this essay, but without any more substantive knowledge of the tax law than they’d get with a simplified filing system.
COUNTERPOINT: Although theoretically appealing, simplified filing systems entail too many risks of security, resource, and compliance costs.

By James Edward Maule, Professor of Law, Villanova University Charles Widger School of Law, Villanova, PA

The data-retrieval system, the pro-forma-return approach, and tax transcripts put taxpayer information on the internet, theoretically for access by the taxpayer, but realistically for access by every two-bit hacker with evil intentions.

The data-retrieval system and the pro forma return approach, the latter officially proposed under the name Real-Time Tax System, are both appealing theoretical ideas that fail miserably when they meet practical reality. Though the ideas are inspired by the best of intentions, implementation of either one requires resources and protections currently unavailable and unlikely to be provided in the future.

There are at least thirteen reasons for rejecting the data-retrieval system, the pro forma return approach, or both. Some are more serious than others, but all focus on risks that will be faced by taxpayers and the nation if either proposal is pushed through Congress or the IRS.

Both the data-retrieval system and the pro forma return approach pose huge security risks. Almost every day we wake up to news of another security breach at the IRS. For example, not long ago the IRS announced that it was cutting off taxpayer access to the electronic filing PIN tool, after supposedly fixing flaws leading to earlier intrusions affecting at least 100,000 taxpayers, because of “additional questionable activity.” The IRS continues to update the number of taxpayers whose transcripts were hacked, with the most recent total number approaching at least one million. The data-retrieval system, the pro forma return approach, and tax transcripts put taxpayer information on the internet, theoretically for access by the taxpayer, but realistically for access by every two-bit hacker with evil intentions. In many respects, the data-retrieval system is nothing more than an early release of taxpayer transcripts. Until and unless the IRS fixes its security issues, which requires funding from a Congress intent on curtailing the IRS, both the data-retrieval system and the pro forma return approach almost guarantee identity theft and financial disruption for millions of taxpayers. Failure of the Congress to renew IRS streamlined critical pay authority triggered the departure of the IRS Chief Technology Officer and “harms [its] ability to recruit the best IT and cybersecurity talent out there.”

Worse, some advocates of these simplified filing approaches have reacted to criticisms pointing out the risk that taxpayers will fail to add transactions to those included by the IRS on the return

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10 IRS, IRS Statement on the Electronic Filing PIN (June 23, 2016).
11 IRS, IRS Statement on “Get Transcript” (Feb. 26, 2016).
12 Aaron Boyd, IRS’s top techie leaves citing lapsed critical pay authority, Federal Times (July 5, 2016).
by suggesting that the IRS collect additional details of taxpayers’ financial accounts, cleared checks, credit card statements, organization memberships, and all sorts of similar records. Some advocates of these proposals even suggest having the taxpayer provide a credit card number to the IRS so it can automatically collect additional taxes when it decides the return or return information needs to be changed. It’s possible that some proponents of these filing approaches advocate them with the goal of creating a base for such an expansion of collection possibilities. Considering the state of IRS digital security, the entire theory underlying both proposals is a recipe for a tsunami of identity theft and financial disruption. Surely those hackers living in the dark edges of the internet are rooting for one of these proposals to be adopted. I agree with Bankman that “[a]ny proposal for filing simplification must be based on the government’s ability to conform to [industry best] practices and standards.” The problem is that the IRS is not ready for this proposal and, in light of its future prospects, will not be ready for this proposal for a long time, if ever.

Both the data-retrieval system and the pro forma return approach will likely erode the value of self-compliance, a core principle of the federal income tax system. By taking ownership of their obligation to pay taxes through filing returns, citizens participate in government. When they focus on the details of the return, they become aware of what Congress has done with the tax law. Those “feelings of anxiety, frustration, and anger” are the necessary seeds of grass-roots-nourished income tax reform. Democracy demands transparency in taxation.

Both the data-retrieval system and the pro forma return approach hide the tax law (the former to a lesser extent) and could thus reduce the number of voices demanding tax reform. The pro forma return approach, in particular, will entice tens of millions of taxpayers into thinking that the federal income tax no longer is a problem in need of a solution. Taxpayers who do tax returns receive an education, and an educated electorate is far more valuable to democracy than is a pacified electorate.

Both the data-retrieval system and the pro forma return approach pose huge conflict of interest problems, with the latter presenting the greatest challenge. The pro forma return approach puts the IRS in the dual roles of tax return preparer and tax collector. Does one branch of the IRS audit the other? If the IRS makes an error, either in generating a pro forma return or in making available a partially filled-out return—and errors will happen—does it take the same “it’s not our fault if our advice is bad” position it offers to taxpayers calling in for assistance? Is there not a conflict between the IRS goal of maximizing tax collections and its preparer role requiring fiduciary responsibility to taxpayers?

Contrary to the claims advanced by their advocates, the pro forma return approach (and, to a lesser extent, the data-retrieval system) will decrease tax return accuracy. A system in the United Kingdom similar to the pro forma return approach generates an error rate of 15 percent in favor of the government. In the less frequent instances when an error is made in the taxpayer’s favor in that system, the taxpayer is liable for the mistake. By nurturing taxpayer dependency on partial or full government-prepared returns, both the data-retrieval system and the pro forma return approach make it less likely that taxpayers who experience

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13 See, e.g., Tom Giovanetti, Trust Us: IRS Wants to File Your Taxes For You, breitbart.com (Jan. 25, 2012); Kay Bell, Senator wants IRS to provide free online tax-filing, Bankrate.com (Apr. 14, 2016) (Tax Filing Simplification Act of 2016 would give filers ability to download information the IRS has on them, including “some investment and retirement account statements”).

14 See, e.g., Tom Giovanetti, Trust Us: IRS Wants to File Your Taxes For You, breitbart.com (Jan. 25, 2012) (“Our voluntary tax compliance system is a . . . key indicator of self-government” and “The return-free system and thus the virtual elimination of voluntary tax compliance) is the ultimate goal of the revenue establishment”).


16 Ryan Young, A backdoor tax on the poor, The Hill (Nov. 9, 2011).
extraordinary transactions will bother to make changes on account of them. Worse, when the government-prepared return or partly completed return has an error in favor of the taxpayer, the odds of the taxpayer pointing out that error are very low. Advocates claim that the error rate in California’s Ready Return system is lower than that of returns not prepared in the system, but that rate reflects the test taker grading its own exam.

Both the data-retrieval system and the pro forma return approach are inefficient. Their proponents claim that they save people time. Advocates claim that taxpayers will save enormous amounts of time by having the IRS enter onto “prefilled” returns information it receives on Forms W-2 and 1099. Yet the entering of information from those forms is one of the easiest and quickest steps in the tax return preparation process. Neither the data-retrieval system nor the pro forma return approach offer much in terms of saving time because, in reality, it takes much more time to check thoroughly what the government has inserted on a return than to do it on one’s own, with a preparer’s assistance, or by using tax preparation software. Only the taxpayer can serve as a screen against fake and erroneous Forms 1099 sent to the IRS, and both these filing approaches cut off the remedial techniques suggested by practitioners. A taxpayer is much more likely to spot a fake Form 1099 when it arrives from a third party than when it is buried in a pre-filled return. Banking on cursory reviews to make the data-retrieval system and the pro forma return approach appealing does not take the federal income tax system in the direction of efficiency.

Both the data-retrieval system and the pro forma return approach will cost businesses money and increase compliance burdens for them. Advocates of these approaches explain that Forms W-2 and 1099 would need to be filed much earlier. Alternatively, taxpayer refunds will be delayed. The Electronic Tax Administration Advisory Committee reported that accelerating the information return filing deadlines is a significant workload increase, especially for small businesses. It has been estimated that the cost of accelerating these due dates is between $500 million and $5 billion, and that does not take partnership Schedules K-1 into account.

Both the data-retrieval system and the pro forma return approach present huge challenges to IRS operational capacity. What happens when a taxpayer finds an error on the IRS-prepared return, whether preliminary or pro forma? Is it fixed in time to permit the taxpayer to continue preparing the return? Does the taxpayer file a return inconsistent with what the IRS prepared? Does doing so increase the risk of audit? What happens when the issuer of the Form W-2 or Form 1099 submits a corrected copy? Is another “prefilled” return issued to the taxpayer by the IRS? Will the process of IRS amendment of “prefilled” returns be as inefficient as the current information return matching program? What happens if the data-retrieval or the pro forma return web site goes down on April 14 because of overloads or denial of service attacks? What happens if the system is outsourced and the contractor makes errors? Who pays the cost of fixing the mistakes?

17 A nudge for tax day, Nudge (a blog post commenting on California’s Ready Return system).
18 Liz Day, ProPublica, How the maker of TurboTax fought free, simple tax filing, BDN Maine (Apr. 18, 2016) (absurd claim that only five minutes is required to review and file return).
19 See, e.g., Robert W. Wood, Disagree with an IRS Form 1099? Here’s What to Do, Forbes (Jan. 28, 2015).
21 IRS, ELECTRONIC TAX ADMINISTRATION ADVISORY COMMITTEE, ANNUAL REPORT TO CONGRESS, Publ. 3415 (June 2016).
22 See Young, supra n. 16.
happens to taxpayer protections when the outsourced pro forma return process is coupled with outsourced tax collection functions?

Neither the data-retrieval system nor the pro forma return approach will reduce the tax gap, contrary to the claims advanced by their advocates. Both the data-retrieval system and the pro forma return approach rely on Forms W-2 and 1099, but the tax gap exists because of transactions that people fail to report on those forms. To the extent the tax gap reflects deliberate cheating, neither of these approaches will shut off the opportunities. To the extent the tax gap reflects unwitting noncompliance, neither of these approaches solves the problem because very few of the mistakes made by taxpayers are within the scope of the transactions reported on information returns. To the extent the IRS makes an error in the taxpayer’s favor, unscrupulous taxpayers are likely to let it slide, thus increasing the tax gap.

Neither the data-retrieval system nor the pro forma return approach will shrink the tax return preparation business, contrary to the arguments and goals of their advocates. Instead, that business will be transformed. A comparison with the Pennsylvania local real property tax system, which is not unlike that found in other states, predicts what will happen. Similar to the dream of the data-retrieval system and the pro forma return approach lobbies, local taxing authorities prepare the real property tax return and send an invoice to the taxpayer. For many years, almost everyone blindly paid the bill. Eventually, as a few taxpayers began to question the locality’s computations (especially valuations), a new industry was born. It advertises and contacts taxpayers directly, offering to dispute a property tax bill. It is not difficult to imagine that the commercial tax return preparers so despised by the pro forma return approach advocates will go into the “dispute the IRS invoice” business. So much for the claim that the data-retrieval system and the pro forma return approach reduce tax compliance costs for taxpayers. The only thing that reduces tax compliance costs is tax simplification, and it’s a shame that the energies of the data-retrieval system and the pro forma return approach lobbies aren’t aimed in that direction. Yes, simplification is a difficult challenge, but it is essential. For it to happen, complexity supporters ought not be given another excuse for maintaining the sad state of the federal income tax system by having the opportunity to claim that return filing has become much less of a problem for taxpayers.

Neither the data-retrieval system nor the pro forma return approach, contrary to the claims made by their advocates, will save taxpayers money. Advocates argue that taxpayers will pay less in preparer fees, but taxpayers will end up paying preparers to check what the IRS has prepared, a task that will take at least as long, if not longer. Those taxpayers who decide to abandon their preparers by putting their trust in the IRS will pay in the form of higher tax liabilities generated by IRS errors not caught by the taxpayers. Only the most trusting and naive of taxpayers would do anything less than prepare their own returns, or pay an independent third party to do so, even if the IRS puts a “prefilled” return on the taxpayer’s table.

Both the data-retrieval system and the pro forma return approach pose an economic threat. Both, especially the pro forma return approach, are designed to put some tax return preparers out of work. What is the impact of that disruption on the economy? Would those job losses be made up by the IRS hiring programmers to design the data-retrieval system or the pro forma return approach? Is there any guarantee that the extensive programming work required to implement either proposal would not be outsourced overseas? Where will the IRS obtain the funds to turn itself into a tax preparation service or to generate partially completed returns? As improbable as are the chances of tax simplification happening in the next year, the chances of the IRS obtaining additional resources to support its activities are even lower. A bill passed by the House of Representatives in early July of this year would make additional cuts in the agency’s budget (reducing its funding level to less than it was eight years ago) and would also prohibit the IRS from using
any appropriations “to provide to any person a proposed final return or statement for use by such person to satisfy a filing or reporting requirement.” Given the choice between paying preparers and paying additional taxes to fund a government tax return preparation department in the IRS, taxpayers surely prefer the former, a conclusion reinforced by the next problem with the proposals.

Both the data-retrieval system and the pro forma return approach require taxpayer acceptance, and experience demonstrates that this is unlikely to happen, especially with the latter. Advocates of this system claim that California’s Ready Return program proves the approach’s worthiness. Fewer than 90,000 California taxpayers used the program in 2015. That’s a rather awful “vote with your feet” response considering that almost 14 million personal income tax returns were filed in California in 2015. But it’s not surprising. One poll discovered that 71 percent of Americans would not trust the IRS to prepare their returns. It’s difficult to imagine support for partial preparation under the data-retrieval system would be much higher. After all, only 19 percent of Americans trust the federal government to do what is right.

Neither the data-retrieval system nor the pro forma return approach is necessary. The IRS FreeFile initiative provides free tax return preparation for low-income taxpayers. One advocate for pro forma returns claims that this free service is useless because it does not use IRS software. Why is that a problem? In reality, it is a blessing that IRS software is not used for FreeFile, because IRS software is plagued with problems.

Extending its use beyond its current boundaries is senseless and unnecessary.

There is a reason both the data-retrieval system and the pro forma return approach find their strongest support in the corridors of academia, in the sound-bite promises of some politicians, and in the dreams of those who think that a tax return unseen is a tax obligation escaped. The current Administration included “pre-filled” tax forms in its 2008 campaign promises, but discovered, once taking office, that reality presented overwhelming obstacles.

The “here, let us take care of it for you, don’t worry, be happy” message of the pro forma return approach drowns out the “and you’ll never feel a thing as we extract a wee bit more, remove a deduction, eliminate an exclusion, terminate a credit” part of the script. Both the data-retrieval system and the pro forma return approach create tax zombies. Why do that? Both proposals open the door to “just let us tap

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23 Financial Services and General Government Appropriations Act of 2017, H.R. 5485 §114, 114th Cong., 2nd Sess. (as passed by the House). The Republican Policy Committee website summarizing the bill notes that the bill notes that it would allocate $10.9 billion for the IRS—a cut of $235 million below the fiscal year 2016 enacted level and $1.3 billion below the President’s budget request.” RPC, H.R. 5485 (114th Congress).
28 Stross, Why Can’t the I.R.S. Help, supra n. 20.
into your bank account and all of your other information and we’ll do everyone’s return.” The data-retrieval system is simply the first step on the way to the pro forma return approach.

When tax compliance gets so complicated that the IRS must prepare, in whole or in part, taxpayer returns—even assuming the IRS is better at doing so than are taxpayers and paid tax return preparers—the tax law surely has become not only too complicated but also inefficient and unjust. IRS preparation of tax returns in an unnecessarily complicated system opens the door to government control beyond reasonableness. Both the data-retrieval system and the pro forma return approach are first steps in the wrong direction, a band-aid on a hemorrhage, and a threat to the transparency required by democracy.
Spending Without Appropriations: Who’s to Complain?

By Jasper L. Cummings, Jr., Alston & Bird, LLP, Charlotte, NC

A. A Loss for Obamacare

United States House of Representatives v. Burwell, 2016 U.S. Dist. LEXIS 62646 (D. D.C. 2016) ruled that DHHS cannot pay insurance companies the costs they incur in reducing the “cost sharing” for some Affordable Care Act insurance policy holders. It enjoined further payments to the insurance companies for those costs, but stayed the injunction pending appeal, which surely will occur. In other words, the House of Representatives won. The ruling enforced the Appropriations Clause of the United States Constitution:

No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.1

This is a rare sort of case, but not unusual within the realm of litigation over the Appropriations Clause. It is rare because Congress seldom gets involved in litigation; and it is surprising how seldom the Appropriations Clause is litigated; and when it is litigated, the plaintiffs usually are disgruntled creditors that the United States did not pay because the agency knew Congress failed to appropriate money for the claim. But here the agency thought Congress had appropriated money and so here the creditors have been paid (so far). Moreover, no “concerned citizen” complained, in contrast with the rare case when someone thought the CIA should not spend money without revealing how.2

Amid all of this rarity, one feature of this case is common: politics is behind most Appropriations Clause litigation. Here the Republican-controlled House filed this suit to throw yet another roadblock across the path of Obamacare. It asserted that Congress had not appropriated the money that DHHS has been spending on this key feature of Obamacare. This political use of the Appropriations Clause fits into a longstanding pattern, though it has never before arisen through the House alone suing an agency.

The House found a sympathetic ear in the person of Judge Rosemary M. Collyer, who served in the Reagan administration and was appointed to the D.C. District bench by George W. Bush in 2002. Her prior ruling in the case was probably the more important of the two rulings: she ruled that the House had standing to complain and that the case was justiciable and not a “political question.”3

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1 U.S. Constitution, Article I, Section 9, Clause 7.
Her opinion on the merits is a little short on Supreme Court authority (discussed below), but at first glance seemed correct (but stay tuned). It recounts the history of the appropriations that had been made to fund various parts of Obamacare, and adopts the arguments of the House that they skirted around funding the cost-sharing spending.

But a deeper read of what is not in the opinion reveals that DHHS may ultimately win.

The case is eerie in that it presents almost precisely the same conundrum that required Supreme Court contortions to resolve in *NFIB v. Sebelius*⁴ and *King v. Burwell*.⁵ In Sebelius the Supreme Court had to decide whether Congress' obfuscation of the nature of the individual mandate as a tax meant Congress intended that it not be a tax.⁶ In King the Court had to decide whether Congress intentionally limited subsidies to policies sold on state exchanges or just accidently said that.⁷ In the current case, the trial judge had to decide in part whether Congress accidently did not appropriate for the cost-sharing payments or intentionally failed to do so.

Or at least that is how the trial judge characterized the issue, which made it easy to enforce the rule of literalism and find no appropriation. But the best DHHS argument has real potential to prevail eventually, when the Supreme Court may find these words in the Affordable Care Act to constitute an appropriation by authorizing DDHS to contract in advance of appropriations:

> The Secretary shall also notify the Secretary of the Treasury and the Exchange under paragraph (1) if an advance payment of the cost-sharing reductions under section 1402 [42 USCS § 18071] is to be made to the issuer of any qualified health plan with respect to any individual enrolled in the plan. *The Secretary of the Treasury shall make such advance payment at such time and in such amount as the Secretary specifies in the notice.*⁸

The issue should be whether the italicized sentence satisfies this sentence in 31 U.S.C. 1301(d):

> A law may be construed to make an appropriation out of the Treasury or to authorize making a contract for the payment of money in excess of an appropriation only if the law specifically states that an appropriation is made or that such a contract may be made.

The trial court opinion surprisingly avoided the relevance of this clause by cutting it out of the quotation of the statute and never using the word “contract.” That allowed Judge Collyer to avoid the issue of advance contract authorization discussed below, and thus to rule that the cost-sharing clause was starkly different from the appropriation in the following clause for tax credits:

> The Secretary of the Treasury shall make the advance payment under this section of any premium tax credit allowed under section 36B of the Internal Revenue Code of 1986 [26 USCS § 36B] to the issuer of a qualified health plan on a monthly basis (or such other periodic basis as the Secretary may provide).⁹

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⁸ 42 USCS § 18082(c)(3) (emphasis added).
⁹ 42 USCS § 18082(c)(2)(A).
One obvious difference between the credits to individual taxpayers and the payments to insurance companies is that the former are paid under tax refund statutes and the latter are paid under contracts. So necessarily the cost-sharing section would read differently than the credits section. That difference should not determine whether the insurance company clause is an advance contract authorization under 31 U.S.C. 1301(d).

Congress can appropriate without using the word “appropriate” if it gives authority for an agency to contract to spend money in advance of appropriation.10 If an appellate court focuses on this, DHHS may win.

B. How Did This Happen?

Without doing a Watergate-style investigation of the appropriations act in 2013 that produced this imbroglio, it is a fair guess that someone on the Hill was well aware that this landmine had been planted in the troubled appropriations acts that year. It was the year of the shutdown of the U.S. government from October 1 to October 16, as part of a huge standoff between the Obama administration and Republicans led by House Budget Committee Chairman Paul Ryan.11 That shutdown employed both of the ultimate political fiscal levers that can thwart government in America: appropriations and borrowing. The American system “works” like this:

• First, Congress must authorize spending, as it did in authorizing a program like Obamacare.

• Second, the agency authorized to carry out the program can contract with vendors and sometime spends without contracting, as in the case of spending for tax refunds.

• Third, to pay the contracted party for spending, Congress must appropriate money, meaning it tells the agency it can draw cash from the Treasury (or sometimes, can use other sources such as fees collected). The general authorization to carry out a program is not sufficient to constitute an appropriation, but authorization for contracting in advance of appropriations, as discussed above, can be an appropriation.

• Fourth, if Treasury runs out of cash from taxes and other revenues with which to fund appropriations, it has to borrow. As we all know, there is a cap on borrowing, which Congress refreshes from time to time (or not).

The problem raised by the House in the Burwell suit concerned step 3: it said it had not appropriated money for the spending it had authorized. The DHHS argued that the failure of authorization of this particular type of spending either was a footfault that the court should fix, or would create absurd results that the court should avoid. The judge in effect ruled that it was very unlikely to have been a footfault, which is true since it occurred right in the middle of the huge 2013 government shutdown that was all about the delayed appropriations bill at issue in Burwell. But the court did not focus on the possibility of advance contract authorization.

Even if DHHS knew the landmine was in the appropriations act, it is possible that it was lulled into hoping it would not matter by the vast discretion the government has habitually exercised over the meaning of the Appropriations Clause. One can infer this discretion by perusing the Red Book, or Principles of Federal

Appropriations Law (currently in its 4th Edition), which the trial court cited and relied on almost to the exclusion of case law (but without discussing the advance contract possibility).

The Red Book appeared first during the Reagan administration and is written in a style that would surprise “regular lawyers.” It is liberally sprinkled with quotes from deep sources—for example, it begins with an Alexander Hamilton quote. Its introduction to the “analytical framework” of appropriations analysis begins with a quote from Winnie-the-Pooh:

I’m very glad, said Pooh happily, that I thought of giving you a Useful Pot to put things in.

The Red Book proceeds to explain statutory interpretation almost entirely in terms of Comptroller Opinions and other authorities related to the Appropriations Clause, as if it existed in a world of its own apart from the huge world of law on statutory interpretation. It is likely that the great majority of decisions about whether an appropriation exists are not made in court rulings but in GAO or Comptroller decisions, which have created this world of their own.

That DHHS (or the DOJ lawyers who administer Appropriations Clause cases) believed in the specialness of the legal issue is suggested by its primary reliance on the two exceptions to literalism identified in the Red Book: avoidance of absurd results and correction of drafting errors. One can sense that the government attorneys really were accustomed to using self-help to pick a logical path through complex and sometimes incomplete appropriations, and substantive, statutes.

So the House’s lawsuit happened as a result of some very fundamental forces that are baked into the American system:

- There are entirely too many checks on the actual operation of government;
- Usually those checks can be circumvented because no one complains, leading to creations like the Red Book;
- But if anyone wants to complain, and if we now have a path for Republicans in the House to sue an agency, the wheels of government are very likely to come off absent a huge lift by the Supreme Court, as has already occurred twice for Obamacare, and may have to happen a third time.

C. The Long Political History of Appropriations Disputes

The Burwell opinion relied almost entirely on the Redbook and Comptroller’s Opinions for the law on appropriations, and ignored historic Supreme Court opinions on the subject. The opinions reveal that politics is a frequent companion in these cases, as it was in Burwell.

In 1878 the Supreme Court ruled for the first time, 5 to 4, that the United States could not be made to pay a debt it had contracted without an appropriation to pay the debt. The opinion did not cite any earlier

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12 PRINCIPLES Ch. 1, 1-4.
13 PRINCIPLES Ch. 1, 1-23.
14 See generally, CUMMINGS, THE SUPREME COURT’S FEDERAL TAX JURISPRUDENCE (ABA 2010).
15 PRINCIPLES Ch. 1 1-29.
Supreme Court ruling but did cite the Appropriations Clause in the Constitution and a British decision. A little digging into that case suggests that it had political overtones.

In those days appropriations bills evidently addressed government obligations one by one. Congress had made annual appropriations to pay for a leased building in each of the first two lease years, but shortchanged the third year’s rent, appropriating less than half the annual rent and directing the postmaster to give up the property at the end of the term. The four dissenters thought that the appropriations for the first two years “bound” the United States to pay for the third year.

The location is now opposite the back side of the FBI Building on E Street in Washington. It was leased for a post office. The lease stated that the payment of rent was contingent on congressional appropriation. The lease was entered in 1873 during the administration of President Sherman. The majority opinion was written by Justice Clifford, appointed in 1857 by the last Democratic President James Buchanan. The four dissenters were all appointed by Republican Presidents.

The property was leased for part or perhaps all of the term from Alexander Robey Shepherd, who was then a very well-known personage in Washington. He was variously called “Governor Shepherd” and “Boss Shepherd” and was both the Territorial Governor of DC and head of the important Board of Public Works in the early 1870s. He is credited with creating much of modern Washington through the building of public works. But as often accompanies such undertakings, he also was viewed as corrupt and ultimately went bankrupt and moved to Mexico, trying to mine silver.

Shepherd had borrowed money in 1873. On June 21, 1877 he secured the note with a deed of trust on the E Street property he had acquired from Bradley (the nominal plaintiff in the suit for rent), pledging also the post office lease. By this time Shepherd was in financial difficulty and had made an assignment of his property to trustees for creditors. Bradley appeared as attorney for Shepherd in several suits against him by creditors, and may have been Shepherd’s straw man to begin with in the original lease of the property to the post office.

Without trying to recreate all of the history of A.R. Shepherd, it seems highly likely that Congress chose not to fully fund the last year of the lease with him because he was viewed as a crook at that time, albeit a Republican (as was Congress).

Shepherd, through Bradley and his trustees, asserted that Congress had recognized the obligation of the United States under the lease by funding the first two lease years and so was obligated to pay the rent for the third year. The opinion by Justice Clifford disagreed because it was clear Congress chose not to fund all of the rent that otherwise was due. Clifford relied heavily on Clifford’s own opinion as Attorney General in 1847, when he told the War Dept. that it could not contract to spend more than Congress had appropriated for a port.

Despite its seminal nature, the Supreme Court has cited the Bradley opinion only twice, and has addressed the Appropriations Clause in relatively few opinions. Citing Bradley and statutes on which Bradley also had
relied (which remain in the U.S. Code today), Justice Brandeis ruled in 1921 that authorized projects could not be paid for without an appropriation.\(^{21}\)

The Supreme Court next discussed the Appropriations Clause in depth in the politically charged case involving Robert M. Lovett.\(^{22}\) Lovett was a “famous” liberal who was given a job as the Government Secretary of the Virgin Islands in 1939 by his friend Harold Ickes, Secretary of the Interior, after Lovett’s retirement from the University of Chicago. He came under the scrutiny of Congressman Martin Dies in his investigations of Communists in government. Congress ordered that he be fired and he sued for unpaid wages after he quit. As in the current case regarding representation of the House in litigation, Congress had to hire its own lawyer, as Attorney General Biddle said he could not represent Congress.\(^{23}\)

Congress enacted a law that no appropriation could be used to pay Lovett after a stated date. Lovett continued in his job for a period, unpaid. Justice Black, writing for a unanimous Court, said that the legislation was not a mere exercise of the appropriations power but also an unconstitutional Bill of Attainder designed to force the discharge of an executive branch employee.

The two most recent Supreme Court decisions in the area may have been less political.\(^{24}\)

**D. Conclusion**

The D.C. District Court ruling may not seem of immediate interest to tax lawyers. But then we did not think that the *Sebelius* ruling was either, though it dealt with the core issue of the scope of the Taxing Power. Perhaps the most important aspect of the case for us as citizens is to wonder about a system in which Congress authorizes programs that spend and then has two ways to thwart those same programs: not to appropriate for the spending and not to allow borrowing to fund the appropriations. Even if DHHS ultimately loses this case, it may not be the end of the story. The District Court opinion observes that the insurance companies may have their own right to recover the payments from the DHHS if it stops paying.\(^{25}\)

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\(^{24}\) *Office of Pers. Management v. Richmond*, 496 U.S. 414 (1990) applied the Appropriations Cause against a claimant in a non-political case, asserting there is no equitable exception, such as estoppel. The most recent Supreme Court opinion on appropriations was in 2012: *Salazar v. Ramah Navajo Chapter*, 132 S. Ct. 2181 (2012).

\(^{25}\) See note 20 of the opinion.
The government is appealing the Tax Court’s decision in *Altera*, 1 and filed its opening brief with the Ninth Circuit at the end of June. I was part of a group of 19 tax law and administrative law professors who filed an amicus brief on July 5 supporting a reversal of the Tax Court. This piece provides an overview of the tax law and administrative law issues in the *Altera* case, as presented in our brief.2 This overview differs from what might be drawn from the Tax Court opinion because, as described below and as we presented to the Ninth Circuit, that opinion misapplied significant administrative law precedent. As a result, it misconstrued the Department of Treasury’s authority under section 482 (the statute authorizing the regulation at issue in the case).

**Section 482, Arm’s Length, and Commensurate-with-Income**

Section 482 grants Treasury and the IRS authority to police transfer pricing. As is familiar in the tax community, these prices can be very important for tax purposes: multinational corporations seeking to avoid paying taxes can arrange affairs and set transfer prices so that income arises in low-tax jurisdictions like the Cayman Islands, rather than high-tax jurisdictions like the United States. Section 482 authorizes Treasury to “distribute, apportion, or allocate gross income, deductions, credits, or allowances” between two related organizations if necessary “to prevent evasion of taxes or clearly to reflect the income of any of such organizations.”3

Since the 1930s, Treasury has provided regulations establishing that the so-called “arm's-length standard” should be used to determine adjustments made under section 482.4 The basic rule under this standard is that true taxable income should be determined by reference to “comparable transactions under comparable circumstances” carried out between unrelated parties.5 The operating theory of this approach is that if related parties use approximately the same prices as unrelated parties, there is no tax advantage to be had in related-party transactions.

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5 Treas. Reg. § 1.482-1(d)(1).
Some transactions between related parties, however, do not have unrelated-party analogues to use as a point of reference. This problem is particularly acute with intangible property. Congress identified this limitation to the arm’s-length standard in 1986 and added additional authority under section 482. This second sentence of section 482 provides that in transactions involving the transfer or license of intangible property, “the income with respect to such transfer or license shall be commensurate with the income attributable to the intangible.” In other words, the “commensurate-with-income” authority looks to the income generated by the intangible property and does not rely on comparable transactions which, as Congress acknowledged in the legislative history (discussed below), may not exist for certain intangible property.

In the most straightforward scenario, a parent corporation transfers intangible property (for example, the code for computer software) to its subsidiary in exchange for a royalty to be paid as that software generates income for the subsidiary. Commensurate-with-income authority allows the IRS to make adjustments to income based on the income generated by the software in the hands of the subsidiary.

The Cost-Sharing Regulation

Cost-sharing agreements are another mechanism for transferring intangible property between related entities. These agreements provide that, in exchange for sharing the costs of developing intangible property, parties can share the proceeds derived from that property. In 2003, Treasury finalized section 1.482-7A(d)(2) of the regulations, which lays out rules for how cost-sharing agreements must account for costs and allocate benefits to satisfy section 482. The rules act as a safe harbor: if a taxpayer conforms to the cost-sharing regulation, that taxpayer will not face adjustments under section 482.

The dispute in the Altera case concerns what costs must be included in the “cost pool,” i.e., the total costs to be shared. The regulation calls for the cost pool to include the cost of stock-based compensation (for example, stock options given to employees developing the intangible property). Altera did not include this cost.

To understand the tax effect of Altera excluding stock-based compensation from the cost pool, consider the following stylized example. Altera plans to undertake research and development (“R&D”) activities that will cost $100 million. Absent any cost-sharing agreement, Altera U.S. (the U.S. parent) would bear the entire $100 million of those costs and would have rights to the worldwide exploitation of any new intangible property it develops. If Altera U.S. and its wholly-owned subsidiary, Altera Cayman, enter into a cost-sharing agreement, Altera U.S. can maintain the right to exploit any newly developed intangible property in North America (assume this is 30% of the worldwide market) and Altera Cayman can obtain the right to exploit it in the rest of the world (70%). The agreement would—if it conforms to the cost-sharing regulation—provide for a cost pool of the entire $100 million. Altera Cayman would then make payments to Altera U.S. in proportion to Altera Cayman’s share of the anticipated benefits from the new circuit—here, 70% of $100 million ($70 million). Thus, under the agreement, Altera U.S.’s net costs would be $30 million. As a result, Altera U.S. would have only $30 million (instead of $100 million) of deductible net expenses for purposes of U.S. federal income tax.

6 IRC § 482 (second sentence).
7 Treas. Reg. § 1.482-4(f)(2).
8 This regulation was in effect during the years at issue in the Altera litigation. An updated regulation, Treas. Reg. § 1.482-7(d)(3), has been in effect since January 2009.
If, however, $25 million of the $100 million R&D expense consists of stock-based compensation costs for employees working on developing the intangible property, Altera U.S. and Altera Cayman benefit by excluding that cost from the cost pool. If the stock-based compensation cost is left out of the cost pool, the total cost pool would be $75 million and Cayman Sub would make a cost-sharing payment of only $52.5 million (70% of $75 million) rather than $70 million. That would decrease Altera U.S.’s income by $17.5 million (because it receives a $52.5 million cost-sharing payment, rather than $70 million), thus decreasing its income tax liability by approximately $6.125 million (assuming the 35% corporate tax rate). Furthermore, Altera U.S. would still get to place all its profits from outside North America in the Cayman Islands, which has no income tax.

Indeed, Altera’s tax returns and cost-sharing agreements for the relevant years revealed that the cost-sharing agreement between Altera U.S. and its Cayman Islands subsidiary did not include the costs of stock-based compensation. These costs were disproportionately incurred by Altera U.S.; consequently, the Cayman subsidiary paid far less than its proportionate share of the actual costs of R&D activities. Following an examination, the IRS increased Altera’s U.S. income by between $15 million and $24.5 million per year, thus increasing Altera’s U.S. income tax liability.

Defending the Cost-Sharing Regulation

The Tax Court held that the cost-sharing regulation was not a reasonable application of the arm’s-length standard. Because it determined that the regulation failed to conform to the arm’s-length standard, the Tax Court indicated that it did not matter whether the commensurate-with-income authority provided an independent basis for the regulation. That position, however, is incorrect under leading administrative law precedent.9

The Ninth Circuit has held that if an agency’s determination can be supported on “any rational basis,” it must be upheld.10 The commensurate-with-income standard provides a reasonable basis for the cost-sharing regulation. Crucially, the legislative history makes clear that Congress considered how the commensurate-with-income authority should apply to cost-sharing agreements, and described the challenge of dealing with transfer pricing of intangible property.11

When Congress enacted the “commensurate-with-income” authority, the legislative history included an explanation that, for a cost-sharing agreement to satisfy the commensurate-with-income requirement, “the income allocated among the parties” should “reasonably reflect the actual economic activity undertaken by each,” meaning that “the cost-sharer would be expected to bear its portion of all research and development costs.”12 That is, the Conference Report provides that “all research and development costs” is a sufficient

9 See Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing S.E.C. v. Chenery, 332 U.S. 194, 196 (1947)) (even though a court “may not supply a reasoned basis for the agency’s action that the agency itself has not given,” the court should “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned.”).
10 See McFarland v. Kempthorne, 545 F.3d 1106, 1113 (9th Cir. 2008) (emphasis added).
proxy for “actual economic activity.” 13 Under these conditions, the Conference Report explains that cost-sharing agreements are “an appropriate method of allocating income attributable to intangibles.” 14

When the regulation was proposed, commenters offered two primary critiques, each of which the Tax Court adopted in its opinion while faulting Treasury for not responding sufficiently when it finalized the cost-sharing regulation in 2003. First, some commenters claimed that cost-sharing agreements between unrelated parties do not account for stock-based compensation. Treasury responded to this evidence in the preamble to the final rule:

The uncontrolled transactions cited by commentators do not share enough characteristics of [cost-sharing agreements under the regulation] involving the development of high-profit intangibles to establish that parties at arm’s length would not take stock options into account in the context of an arrangement similar to a [cost-sharing agreement under the regulation]. 15

Further, as Treasury noted in the preamble, “the legislative history of the Tax Reform Act of 1986,” explains that “there is little, if any, public data regarding [unrelated-party] transactions involving high-profit intangibles.” 16 In short, the lack of comparable unrelated-party transactions is precisely the issue that Congress sought to address when it enacted the commensurate-with-income authority, which validates the need for a cost-sharing regulation that does not rely on unrelated-party transactions.

Second, commenters claimed that stock-based compensation is not a real cost to employers. But, as the preamble and the cost-sharing regulation explain, this claim is belied by the general rules that the Code provides to measure stock-based compensation for purposes of allowing a deduction for such costs. 17 These rules are the basis for calculating taxable income for employers and employees outside of the related-party context to which section 482 applies. The cost-sharing regulation reflects these general rules by providing that “the operating expense attributable to stock-based compensation is equal to the amount allowable … as a deduction for Federal income tax purposes … (for example, under section 83(h)).” 18

The reality that stock-based compensation is a real cost is confirmed by Altera’s own filings with the Securities and Exchange Commission. According to Altera’s most recent annual report, its stock-based compensation cost was 4.98% of its total revenue ($96.4 million of $1.932 billion). 19 Altera’s 2005 proxy statement stated that the “use of stock options has long been a vital component of Altera's overall compensation philosophy,” and that, “without stock options or another form of equity compensation, Altera would be forced to consider cash alternatives to provide market-competitive total compensation package.” 20 Of course, Treasury could not cite these filings when it finalized the cost-sharing rule (and accounting standards did not require that stock-based compensation be accounted for in income statements in 2003), but these disclosures underscore the fundamental reasonableness of Treasury’s view in 2003 that stock-based compensation is a real cost.

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13 Id.
14 Id.
17 See IRC §§ 83, 421, 422; Treas. Reg. § 1.482-7A(d)(2)(i), (iii) (citing 26 USC § 83).
The professors’ *Altera* brief advocates for the Ninth Circuit to reverse the Tax Court and hold that the cost-sharing regulation is a reasonable exercise of Treasury’s commensurate-with-income authority. This is justified based on Treasury’s explanation of the cost-sharing regulation in the preamble, and the legislative history supporting Treasury’s approach. Additionally, the brief suggests that even if the Ninth Circuit agrees with the Tax Court that Treasury’s explanation of the cost-sharing regulation (in the preamble issued with the final rule) is inadequate, it should provide Treasury with an opportunity to clarify its explanation.

The policy issues in the *Altera* litigation are significant: billions of dollars of revenue are at stake under the cost-sharing regulation and its inclusion of stock-based compensation. Further, and perhaps more significantly, spillover effects could destabilize tax administration, as other Treasury regulations might be subject to similar procedural challenges. Therefore, the Ninth Circuit’s analysis and disposition of this case is important beyond the immediate outcome for the cost-sharing regulation.

The taxpayer is scheduled to file its answering brief on August 26.
PRACTICE POINT

Recent Developments Affecting Qualified and Nonqualified Deferred Compensation, Part I: New Proposed Regulations

By David Pratt, Professor of Law, Albany Law School, Albany, NY

There have been a number of significant regulatory developments in the area of deferred compensation. This Part I considers various regulatory proposals and other amendments under consideration. Part II, which will appear in the fall issue of ABA Tax Times, discusses the Department of Labor’s new fiduciary rule and the five lawsuits challenging the rule.

I. New Proposed Regulations Under Code Section 409A

Before 2004, nonqualified deferred compensation was often the wild west of tax planning. The contours of permissible practice were determined by general tax concepts (constructive receipt, economic benefit, equivalence of cash) that were often difficult to apply and that were often ignored by those marketing deferred compensation plans. When Congress enacted Code section 409A in 2004, the change brought order to the area along with great complexity.

On June 22, 2016, Treasury and the Service published proposed regulations1 to clarify or modify specific provisions of the final regulations under section 409A. The document also (i) withdraws a specific provision of a December 8, 2008 proposed regulation2 regarding the calculation of amounts includible in income under section 409A(a)(1) and (ii) replaces that provision with revised proposed regulations. Comments and requests for a public hearing must be received by September 20, 2016. Taxpayers may rely upon the proposed regulations immediately.

The preamble explains the government’s purpose in revising the regulations:

The Treasury Department and the IRS have concluded that certain clarifications and modifications to the final regulations and the proposed income inclusion regulations will help taxpayers comply with the requirements of section 409A. These proposed regulations address certain specific provisions of the final regulations and the proposed income inclusion regulations and are not intended to propose a general revision of, or broad changes to, the final regulations or the proposed income inclusion regulations. The narrow and specific purpose of these proposed regulations should be taken into account when submitting comments on these proposed regulations.

Comments and requests for a public hearing [on the new proposed regulations under Code section 409A] must be received by September 20, 2016. Taxpayers may rely upon the proposed regulations immediately.

A. Preamble’s Summary of the Proposals

The Preamble states that the proposals:

1. Clarify that the rules under section 409A apply to nonqualified deferred compensation plans separately and in addition to the rules under section 457A.\(^3\)

2. Modify the short-term deferral rule to permit a delay in payments to avoid violating Federal securities laws or other applicable law.\(^4\)

3. Clarify that a stock right that does not otherwise provide for a deferral of compensation will not be treated as providing for a deferral of compensation solely because the amount payable under the stock right upon an involuntary separation from service for cause, or the occurrence of a condition within the service provider’s control, is based on a measure that is less than fair market value.\(^5\)

4. Modify the definition of the term “eligible issuer of service recipient stock” to provide that it includes a corporation (or other entity) for which a person is reasonably expected to begin, and actually begins, providing services within 12 months after the grant date of a stock right.\(^6\)

5. Clarify that certain separation pay plans that do not provide for a deferral of compensation may apply to a service provider who had no compensation from the service recipient during the year preceding the year in which a separation from service occurs.\(^7\)

6. Provide that a plan under which a service provider has a right to payment or reimbursement of reasonable attorneys’ fees and other expenses incurred to pursue a bona fide legal claim against the service recipient with respect to the service relationship does not provide for a deferral of compensation.\(^8\)

7. Modify the rules regarding recurring part-year compensation.\(^9\)

8. Clarify that a stock purchase treated as a deemed asset sale under section 338 is not a sale or other disposition of assets for purposes of determining whether a service provider has a separation from service.\(^10\)

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(9) Clarify that a service provider who ceases providing services as an employee and begins providing services as an independent contractor is treated as having a separation from service if, at the time of the change in employment status, the level of services reasonably anticipated to be provided after the change would result in a separation from service under the rules applicable to employees.11

(10) Provide a rule that is generally applicable to determine when a “payment” has been made for purposes of section 409A: “a payment is made, or the payment of an amount occurs, when any taxable benefit is actually or constructively received”, including the inclusion of an amount in income under section 457(f)(1)(A). 12

Under the proposed rules, for example, a deferred amount subject to Code Section 457(f) (relating to tax-exempt and governmental employers) will be a “payment” on the vesting date (the date on which it is generally taxable under section 457(f)) and not the actual payment date for purposes of determining (i) whether the arrangement is exempt from section 409A as a “short-term deferral” and (ii) if it is not exempt) whether it satisfies section 409A’s timing of payment rules. A transfer of unvested property (e.g., restricted stock) is not a “payment” unless the service provider makes a section 83(b) election to include the value in current income. Treasury and the Service request comments on whether rules similar to those applicable to amounts included in income under section 457(f) should be adopted for amounts included in income under section 457A.

(11) Modify the rules applicable to amounts payable following death.13

(12) Clarify that the rules for transaction-based compensation apply to stock rights that do not provide for a deferral of compensation and statutory stock options. 14

(13) Provide that the addition of the death, disability, or unforeseeable emergency of a beneficiary who has become entitled to a payment due to a service provider’s death as a potentially earlier or intervening payment event will not violate the prohibition on the acceleration of payments.15

(14) Modify the conflict of interest exception to the prohibition on the acceleration of payments to permit the payment of all types of deferred compensation (not only certain types of foreign earned income) to comply with bona fide foreign ethics or conflicts of interest laws.16

(15) Clarify the provision permitting payments upon the termination and liquidation of a plan in connection with bankruptcy.17

15 Prop. Reg. § 1.409A-3(j)(1), (2).
(16) Clarify other rules permitting payments in connection with the termination and liquidation of a plan.\(^\text{18}\)

(17) Provide that a plan may accelerate the time of payment to comply with Federal debt collection laws.\(^\text{19}\)

(18) Clarify and modify section 1.409A-4(a)(1)(ii)(B) of the proposed regulations regarding the treatment of deferred amounts subject to a substantial risk of forfeiture for purposes of calculating the amount includible in income under section 409A(a)(1). The 2008 proposed regulations permit the correction of certain plan provisions that fail to comply with section 409A. The new proposed regulations clarify and modify the anti-abuse rule of the proposed regulations to preclude certain changes.

(19) Clarify various provisions of the final regulations to recognize that a service provider can be an entity as well as an individual.\(^\text{20}\)

B. Effective Dates

The provisions of the proposed regulations amending the final regulations are proposed to be applicable on or after the date on which they are published as final regulations. For periods before this date, the existing final regulations and other applicable guidance apply (without regard to the proposed regulations). Taxpayers may, however, rely on the proposed regulations before they are published as final regulations and, until final regulations are published, the IRS will not assert positions that are contrary to the positions set forth in the proposed regulations.

Certain provisions of the proposed amendments to the final regulations are not intended as substantive changes to the current requirements, as clarified in the Preamble:

[T]he Treasury Department and the IRS have concluded that the following positions may not properly be taken under the existing final regulations: (1) That the transfer of restricted stock for which no section 83(b) election is made or the transfer of a stock option that does not have a readily ascertainable fair market value would result in a payment under a plan; (2) that a contribution to a section 402(b) trust includible in income under section 402(b) to fund an obligation under a plan would not result in a payment under a plan; (3) that a stock purchase treated as a deemed asset sale under section 338 is a sale or other disposition of assets for purposes of determining when a service provider separates from service as a result of an asset purchase transaction; or (4) that the exception to the prohibition on acceleration of a payment upon a termination and liquidation of a plan pursuant to section 1.409A-3(j)(4)(ix)(C) applies if the service recipient terminates and liquidates only the plans of the same category in which a particular service provider participates, rather than all plans of the same category that the service recipient sponsors.

The proposed income inclusion regulations are proposed to be applicable on or after the date on which they are published as final regulations. Until the Treasury Department and the IRS issue further guidance,

taxpayers may rely on the proposed income inclusion regulations, as modified by the new proposed regulations, for purposes of (i) calculating the amount includible in income under section 409A(a)(1) (including the identification and treatment of deferred amounts subject to a substantial risk of forfeiture) and (ii) the calculation of the additional taxes under section 409A(a)(1). The IRS will not assert positions, with respect to periods before the date final regulations are published, that are contrary to the positions set forth in the amended proposed income inclusion regulations.

Taxpayers may rely on either the rules in the new proposed regulations or the rules in Notice 2008-62 relating to recurring part-year compensation for the taxable year in which the proposed regulations are published as final regulations and all prior taxable years.

C. Comment

The proposed regulations are generally helpful in clarifying areas that were previously uncertain. This is particularly important in view of the severe penalties for failing to comply with section 409A. Nevertheless, we now have more than 10 years of experience with the section, and it is time for Congress to review the scope and requirements of the statute with a view to simplification. Congress in its review, or the Treasury and IRS in finalization of these proposals, should develop safe harbors that allow for correction of inadvertent violations without severe penalties.

II. New Proposed Regulations for 457 Plans

A. Background

Code section 457, originally enacted in 1978, contains additional requirements for most deferred compensation arrangements of governmental employers and private tax-exempt employers. If a plan of an eligible employer is subject to section 457, and satisfies the requirements of section 457(b) (including an annual limit on the amount deferred), then it is an “eligible plan” and benefits are generally taxed on actual or (for a non-governmental plan) constructive receipt. If a plan of an eligible employer is subject to section 457, and does not satisfy the requirements of section 457(b), then it is an “ineligible plan” and the compensation deferred under the plan is includible in the gross income of the participant or beneficiary under section 457(f)(1)(A) on the date (the “applicable date”) that is the later of (i) the date the participant or beneficiary obtains a legally binding right to the compensation or (ii) if the compensation is subject to a substantial risk of forfeiture at that time, the date the substantial risk of forfeiture lapses. An ineligible section 457 plan is also required to comply with section 409A.

Section 457(e) includes definitions and special rules for purposes of section 457 and describes plans that are not subject to section 457 or are treated as not providing for a deferral of compensation under section 457. Section 457(e)(11) provides that certain plans are treated as not providing for a deferral of compensation: (i) any bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, or death benefit plan, (ii) any plan paying solely length of service awards to certain bona fide volunteers

21 An eligible employer described in section 457(e)(1)(A) means a State, a political subdivision of a State, or any agency or instrumentality of a State or political subdivision of a State (a governmental entity). It does not include the federal government or any agency or instrumentality of the federal government.


23 Plans described in certain statutes that are not incorporated into the Code are not subject to § 457. See §§ 1107(c)(3)(B), 1107(c)(4), and 1107(c)(5) of the Tax Reform Act of 1986, as amended, and §§ 1101(e)(6), 6064(d)(2), and 6064(d)(3) of the Technical and Miscellaneous Revenue Act of 1988.
(or their beneficiaries), and (iii) certain voluntary early retirement incentive plans. Section 457(e)(12) provides that section 457 does not apply to certain non-elective deferred compensation of nonemployees.

There are significant additional differences between governmental and non-governmental 457 plans. For example, tax-free rollovers may be made between eligible governmental 457 plans and IRAs or qualified plans. Further, eligible governmental 457 plans must, and non-governmental plans may not, be funded.

On July 11, 2003, the Treasury Department and the IRS issued final regulations under section 457 (2003 final regulations). The 2003 final regulations reflect the changes made to section 457 through 2002. In Notice 2007-62, and at regular intervals since then, Treasury and IRS have promised substantive further guidance on areas of uncertainty under section 457. On June 22, 2016, Treasury and IRS published proposed amendments to the regulations under section 457.

These new regulations would resolve many of the previous uncertainties. The proposed regulations make changes to the 2003 final regulations to reflect statutory changes to section 457 since 2003. In addition, the proposed regulations (i) provide guidance on certain issues under sections 457(e)(11) and 457(e)(12) that are not addressed in the 2003 final regulations, and (ii) provide additional guidance under section 457(f). The rules under section 457 apply to plan participants and beneficiaries without regard to whether the related services are provided by an employee or independent contractor.

Comments on the proposed regulations, and an outline of topics to be discussed at a public hearing scheduled for October 18, 2016, must be received by September 20, 2016.

B. Regulatory Amendments to Reflect Statutory Changes to Section 457

1. Qualified Roth Contribution Program

The proposed regulation section 1.457-4 revises subsections (a) and (b) to reflect the change that allows an eligible governmental plan to include a qualified Roth contribution program. The proposed regulations also amend section 1.457-7(b)(1), which provides guidance regarding the circumstances under which amounts are included in income under an eligible governmental plan, to specify that qualified distributions from a designated Roth account are excluded from gross income.

2. Distributions for Qualified Accident and Health Insurance Premiums

The proposed regulation section 1.457-7(b) amends the rules for the taxation of eligible governmental plan distributions to reflect the change with respect to certain amounts distributed to an eligible public safety officer.

3. Rules Related to Qualified Military Service

Proposed regulation section 1.457-2(f) implements the requirements of section 457(g)(4), which provides that an eligible governmental plan must meet the requirements of section 401(a)(37). In addition the

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24 Announcement 2000-1, 2000-1 CB 294 (January 1, 2000) provides transitional guidance on the reporting requirements for certain broad-based, nonelective deferred compensation plans maintained by State or local governments.


27 § 457(e)(2) provides that the performance of services for purposes of § 457 includes the performance of services as an independent contractor and that the person (or governmental entity) for whom these services are performed is treated as an employer.
proposed regulations amend section 1.457-6(b)(1) to provide a cross reference to the rules under section 414(u)(12)(B), providing that leave for certain military service is treated as a severance from employment for purposes of the plan distribution restrictions that apply to eligible plans.

C. Certain Plans That Are Not Subject to Section 457 or Are Not Treated as Providing for a Deferral of Compensation Under Section 457

1. **In General**

Section 1.457-2(k) of the 2003 final regulations defines the term “plan” for purposes of section 457 and identifies (i) certain plans that are not subject to section 457 and (ii) certain plans that are treated as not providing for a deferral of compensation for purposes of section 457. The new proposed regulations remove these provisions from that section and move the provisions regarding most of these plans to section 1.457-11. That regulation also provides additional guidance on:

- bona fide vacation leave, sick leave, compensatory time, severance pay, disability pay, and death benefit plans, as described in section 457(e)(11)(A)(i), which are treated as not providing for a deferral of compensation for purposes of section 457; and

- plans paying solely length of service awards to bona fide volunteers (or their beneficiaries), as described in section 457(e)(11)(A)(ii), that also are treated as not providing for a deferral of compensation for purposes of section 457.28

The proposed regulations also provide guidance in a new section 1.457-12 on plans described in section 457(f)(2), to which section 457(f)(1) does not apply.

2. **Bona Fide Severance Pay Plans**

The proposed regulations provide that a plan must meet certain requirements to be a bona fide severance pay plan that is treated as not providing for the deferral of compensation (and therefore not subject to section 457).29 The benefits provided under the plan must be payable only (i) upon a participant’s involuntary severance from employment or (ii) pursuant to a window program or voluntary early retirement incentive plan. There are also limitations on the amount paid and the time of payment. An employee’s voluntary severance from employment may be treated as an involuntary severance from employment if the severance from employment is for good reason.

3. **Ineligible Plans Under Section 457(f)**

Generally, the amount that is includible in gross income on the applicable date is the present value, as of that date, of the amount of compensation deferred, including any earnings as of that date on amounts deferred under the plan. Any earnings credited thereafter are includible in gross income when paid or made available to the participant or beneficiary and are taxable under section 72. For purposes of section 72, the participant (or beneficiary) is treated as having an investment in the contract equal to the amount actually included in gross income on the applicable date.

28 See § 457(e)(11)(B) for special rules relating to length of service award plans.
In general, a plan provides for a deferral of compensation if a participant has a legally binding right during a taxable year to compensation that, pursuant to the terms of the plan, is or may be payable in a later taxable year.

The proposed regulations provide general rules for determining the present value of compensation deferred under an ineligible plan. The regulations also include specific rules for determining the present value of compensation deferred under account balance plans. The rules for determining present value in the proposed regulations are similar to the rules for determining present value in the proposed section 409A regulations.

The proposed regulations also set forth rules for calculating the present value of compensation deferred under an ineligible plan that is not an account balance plan. The present value of an amount deferred under such a plan as of an applicable date is the value, as of that date, of the right to receive payment of the compensation in the future, taking into account the time value of money and the probability that the payment will be made. Any actuarial assumptions used to calculate the present value must be reasonable as of the applicable date, determined based on all of the relevant facts and circumstances.

4. Definition of Deferral of Compensation

In general, a plan provides for a deferral of compensation if a participant has a legally binding right during a taxable year to compensation that, pursuant to the terms of the plan, is or may be payable in a later taxable year. However, the proposed regulations generally provide that a participant does not have a legally binding right to compensation to the extent that it may be unilaterally reduced or eliminated by the employer after the services creating the right have been performed.

a. Short-Term Deferrals

The proposed regulations provide that a deferral of compensation does not occur with respect to any amount that would be a short-term deferral under section 1.409A-1(b)(4), substituting the definition of a substantial risk of forfeiture provided under the proposed regulations for the definition under section 1.409A-1(d).

b. Recurring Part-Year Compensation

To simplify the rule set forth in Notice 2008-62, and recognizing that educational employers frequently structure their pay plans to include recurring part-year compensation, the proposed regulations modify the recurring part-year compensation rule for purposes of section 457(f). The proposed regulations provide that a plan or arrangement under which an employee receives recurring part-year compensation that is earned over a period of service does not provide for the deferral of compensation if (i) the plan or arrangement does

30 See Prop. Reg. §1.457-12(c), including the 9 Examples in §1.457-12(c)(1)(iv)(D).
31 One difference between these regulations and the proposed § 409A regulations is that income inclusion under § 457(f) and § 1.457-12(a)(2), and the present value calculation under the proposed regulations, is determined as of the applicable date, whereas income inclusion under § 409A, and the present value calculation under the proposed § 1.409A-4, is determined as of the end of the service provider’s taxable year.
not defer payment of any of the recurring part-year compensation to a date beyond the last day of the 13th month following the first day of the service period for which the recurring part-year compensation is paid, and (ii) the amount of the recurring part-year compensation (not merely the amount deferred) does not exceed the annual compensation limit under section 401(a)(17) ($265,000 for 2016) for the calendar year in which the service period commences. A conforming change is included in the new proposed regulations under section 409A.

5. Interaction of Section 457 With Section 409A

The proposed regulations provide that the rules under section 457(f) apply to plans separately and in addition to the requirements under section 409A. Thus, a deferred compensation plan of an eligible employer that is subject to section 457(f) may also be a nonqualified deferred compensation plan that is subject to section 409A.

6. Substantial Risk of Forfeiture

The proposed regulations provide that an amount is generally subject to a substantial risk of forfeiture for purposes of section 457(f) only if entitlement to that amount is conditioned on (i) the future performance of substantial services, or (ii) the occurrence of a condition that is related to a purpose of the compensation if the possibility of forfeiture is substantial. Also, an amount is not subject to a substantial risk of forfeiture if the facts and circumstances indicate that the forfeiture condition is unlikely to be enforced. A special rule applies to determine whether initial deferrals of current compensation may be treated as subject to a substantial risk of forfeiture and whether a substantial risk of forfeiture can be extended.

Whether an amount is conditioned on the future performance of substantial services is based on all of the relevant facts and circumstances, such as whether the hours required to be performed during the relevant period are substantial in relation to the amount of compensation.

If a plan provides that entitlement to an amount is conditioned on an involuntary severance from employment without cause, the right is subject to a substantial risk of forfeiture if the possibility of forfeiture is substantial. For this purpose, a voluntary severance from employment that would be treated as an involuntary severance from employment under a bona fide severance pay plan (that is, a severance from employment for good reason) is also treated as an involuntary severance from employment without cause. Compensation is not considered to be subject to a substantial risk of forfeiture merely because it would be forfeited if the employee accepts a position with a competing employer unless certain conditions are satisfied.

The proposed regulations provide that an amount is generally subject to a substantial risk of forfeiture for purposes of section 457(f) only if entitlement to that amount is conditioned on (i) the future performance of substantial services, or (ii) the occurrence of a condition that is related to a purpose of the compensation if the possibility of forfeiture is substantial.

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36 See also §1.409A-1(a)(4).
37 Prop. Reg. §1.457-12(d)(5)(iii) provides an example of the interaction of §§409A and 457(f).
38 See Prop. Reg. §1.457-12(e), including the 4 Examples.
39 See §III.B.2 of the preamble for a discussion of circumstances under which a severance from employment for good reason may be treated as an involuntary severance from employment for purposes of §457(e)(11)(A)(i).
Additional conditions apply with respect to the ability to treat initial deferrals of current compensation as being subject to a substantial risk of forfeiture. Similarly, an attempt to extend the period covered by a risk of forfeiture, often referred to as a rolling risk of forfeiture, is generally disregarded under the proposed regulations unless certain conditions are met.

The Treasury Department and the IRS request comments on whether special provisions for newly eligible employees are needed, and if so whether the rules under sections 1.409A-1(c)(2) and 1.409A-2(a)(7) of the regulations would be a useful basis for similar rules under section 457(f) and how an aggregated single plan (versus multiple plans) should be defined for this purpose to ensure that the rules are not subject to manipulation.

D. Proposed Applicability Dates

Generally, the regulations are proposed to apply to compensation deferred under a plan for calendar years beginning after the date of publication of the rules as final regulations, including deferred amounts to which the legally binding right arose during prior calendar years that were not previously included in income during one or more prior calendar years. No implication is intended regarding application of the law before the proposed regulations become applicable. Taxpayers may rely on the proposed regulations until the applicability date.40

There are special applicability dates for collectively bargained plans and governmental plans, to the extent that legislation is required to amend a governmental plan. For all plans, with respect to the rules regarding recurring part-year compensation, for periods before the applicability date of the regulations, taxpayers may rely on either the rules set forth in the proposed regulations or the rules set forth in Notice 2008-62.

E. Comment

The proposed regulations are helpful in resolving uncertainty in certain important areas (e.g., the definition of a bona fide severance pay plan and the definition of substantial risk of forfeiture). In some respects, the proposed regulations are less restrictive than many experts had feared, e.g., in accepting that a covenant not to compete may result in a substantial risk of forfeiture in certain cases and the limited allowance of rolling risks of forfeiture.

The long-awaited issuance of regulations may indicate that the IRS will increase audit activity with respect to section 457 plans. Sponsors must ensure that plan documentation is adequate, that the terms of the plan documents are being followed in operation, and that the plan complies with the requirements of the law and regulations. Given the prevalence of section 457 plans, it would be very helpful if the IRS extended the Employee Plans Compliance Resolution System to include them. ■
Editor’s Note: With the next ABA Tax Section meeting set for September 29 – October 1, 2016, in Boston, Massachusetts, we thought it would be appropriate to talk with someone who has provided pro bono services in the Northeast region. Andy Roberson interviewed Professor Keith Fogg in mid-July. Keith directs the Harvard Federal Tax Clinic and is a visiting professor from Villanova Law School. He joined the Villanova faculty in 2007 after working for over 30 years with the IRS Office of Chief Counsel. Keith is a tireless advocate for low-income taxpayers, and is a past recipient of the ABA Tax Section Janet R. Spragens Pro Bono Award. He is co-author of the popular procedurallytaxing.com blog, which focuses on current issues regarding tax procedures, and serves as the editor of the ABA Tax Section publication “Effectively Representing Your Client Before the IRS.” He also authored the collection chapters in “IRS Practice & Procedure” created by Michael Saltzman. Keith previously served as Chair of the ABA Tax Section Pro Bono and Tax Clinics Committee. In this interview, Keith discusses his tax career, with a focus on helping low-income taxpayers and what others can do to become more involved in pro bono efforts.

Q: You were with the Office of Chief Counsel for over 30 years before joining Villanova. What was the transition like for you?

A: I found the transition remarkably easy. My goal as a Chief Counsel attorney was to find the right answer. I never felt any pressure to resolve a case or give advice that did not involve the right answer. As a clinic director, I also seek the right answer. Ethical issues concerning client representation dictate some differences in what I do with the right answer, but generally the path of a case follows a similar course in the clinic and in the government.

In the Chief Counsel’s office, I served as a manager for many years. In some respects the manager of a
small Chief Counsel field office manages a group of attorneys similar in size to the group of clinic students I usually manage. Many similarities exist between the two functions with respect to organization and management of the office and motivation of employees. In the clinic my staff turns over every four months or so instead of every 30 years or so. That has advantages and disadvantages since problems go away much quicker but experience is lacking.

My law school did not have clinics when I attended. My first experience with clinical education happened when I taught the class the first semester. My clinic colleagues provided constant assistance to help me prepare and teach the clinic class. Their assistance made the transition much easier. My first semester in the clinic Les Book, the tax clinic director I replaced, co-taught the clinic with me. That also provided me a great opportunity to learn how to run a clinic.

The easiest part of the transition occurred with respect to the freedom allowed to academics. I could voice any opinion I wanted to whomever I wanted. That freedom is liberating after 30 years of carefully controlled communication as a government employee. I do not mention this to criticize Chief Counsel’s office or the government in general; however, academic freedom serves as a refreshing change. It comes with responsibility and a much smaller safety net but still makes the job wonderful.

**Q:** What are some of the accomplishments during your career, whether it was with the Office of Chief Counsel or after leaving the government, of which you are most proud?

**A:** The part of the job I enjoy the most is finding solutions for my clients. A field attorney in Chief Counsel’s office litigates Tax Court cases (and for many years also handled bankruptcy cases); however, much of the work involves providing guidance to local IRS employees. My goal was to provide appropriate guidance in a reasonable time frame and to develop a trusting relationship with my clients from all functions of the IRS. I was generally successful in making this happen and it was an important accomplishment.

As a litigator I had some success on small fact-based cases. As an advisor and instructor on collection cases I had enough success in my field office to become recognized on a broader level.

During the period leading up to passage of the IRS Restructuring and Reform Act of 1998 (RRA 98), I represented the first IRS employees who went before the Senate staff investigating IRS abuses. I believe I convinced the staff on the case in which I was involved that the IRS employees acted properly and even generously toward the taxpayer who complained about their actions. The investigation of that case stopped at the staff level. During that same period, I received a call one day from the Chief Counsel asking me to draft collection provisions that would benefit taxpayers and the IRS. Recently retired Deputy Chief Counsel Chris Sterner (working in Richmond with me at the time) and I spent a weekend drafting about 25 provisions. Six of them made it into the legislation. After the passage of RRA 98, I temporarily headed the National Office Division of Chief Counsel’s office in charge of the collection provisions of the code. In that position I got to supervise the writing of the Collection Due Process regulations and other collection regulations and guidance needed in the immediate aftermath of that legislation.
As a clinic director there have been several cases where the representation by the clinic has made a significant difference in the lives of our clients. Those cases are important accomplishments even if they are system accomplishments. One of the cases my clinic handled in my first semester has perhaps had the largest impression on me. We represented a young adult who came to us because of a levy on his wages. The clinic was able to show the IRS that he did not owe the money, get the taxes abated, and obtain a return of all of the money taken from him through the levy. His life was transformed. I could recount several stories where the clinic has made a significant difference for our clients and where the experience of making that difference has made a real difference to the students who handled the case.

Working with the ABA Tax Section I have had the opportunity to make a difference on a broader scale. Partnering with other attorneys at the ABA to achieve some of the broader victories for low-income taxpayers has made me proud. Receiving the Janet Spragens Pro Bono Award from the ABA was very meaningful to me.

Q: You led the charge a few years ago to ensure that the Tax Court had 100% coverage at its calendar calls. What led you to undertake this challenge and what benefits do you see with the calendar call program?

A: I was the chair of the Low Income Taxpayers Committee (now called the Pro Bono and Tax Clinics Committee) at the time. Obtaining full coverage seemed like an attainable goal and one that could meaningfully impact taxpayers at a time of significant stress in their lives. Clinicians were becoming more interested in and less frightened of Tax Court representation. Chief Judge Colvin and his successor Chief Judge Thornton were extremely supportive. It was the right time.

I think the calendar call program has benefits for every party. For the taxpayer it gives the individual a chance to feel the system treated them fairly. Even if a clinician or pro bono attorney tells them that they should concede their case, they hear it from someone with no stake in the case but to assist them. They feel better, not bitter, about the Tax Court experience. While it does not happen at every calendar, many individuals have won because of this representation. It also serves as a place to connect the individuals with representation for the collection phase of the case when some liability exists. For Chief Counsel’s office it allows resolution of cases without requiring them to devote time and resources to a trial for a matter that should be resolved by agreement or concession. For the Court it eliminates needless trials and keeps the judges from having to try to find the right answer without the proper adversarial representation on both sides. The ABA Tax Section should be very proud of the work it has done to contribute to the Tax Court process.

Q: As someone who has been involved with the low-income taxpayer community and a vocal advocate of pro bono services, what are some of the ways that you encourage private practitioners to become more involved and what benefits are there for these volunteers?

A: The aspect of tax clinics that surprised me the most was how hard it is for most clinicians. Academic clinicians generally have a good support network at the school both in resources and tax knowledge. The tax clinicians at independent clinics and legal services clinics often have no support network at their clinic and few research resources. As a District Counsel, my office faced the Community Tax Law Project led by Nina Olson. I was accustomed to a clinic with a very knowledgeable practitioner who worked hard to obtain resources. I knew Nina was extraordinary but I did not appreciate how extraordinary until I began to learn about all of the clinics. Before she started CTLP, Nina had been a tax practitioner for more than 15 years and obtained her LL.M. in tax at Georgetown.
In many low-income tax clinics the director previously worked as a consumer lawyer, housing lawyer, domestic lawyer, etc. and then the organization in which the tax clinic is housed obtained a grant under section 7526 and the lawyer with little or no tax experience becomes the tax director. Not only is the new tax clinic director someone with little or no tax clinic experience but they have no one in their organization to mentor them. With no other tax lawyers in the organizations, the new tax clinic directors have to learn tax procedure and tax law on their own.

Tax lawyers can provide valuable mentoring to clinicians in addition to taking cases. Finding a clinic to partner with can provide a great benefit to the clinic and a great mentoring opportunity for the experienced tax lawyer or tax firm. Tax attorneys in the United States are very generous with their time compared to attorneys around the world. I think they are so generous because they feel good when they are able to assist someone and because they know that their work can have a life-changing impact on the individual assisted as well as on the tax system. Many low-income taxpayers make difficult clients. Volunteering does not always create a feel-good experience. Volunteering requires some persistence. It can be a great way to learn about tax procedure and tax law the attorney might otherwise not experience. It also provides significant insight into the lives of those living in economically marginal circumstances. It is too easy for many of us to live privileged lives and never obtain significant insight into those in different economic circumstances.

Q: I’ve noticed that you have become more active in recent years in providing your services, either through direct representation or through amicus briefs, in Tax Court cases involving novel issues. How have you become involved in these cases and what suggestions would you give to others that want to become more involved in providing these types of pro bono services?

A: I am trying at the Harvard clinic to identify broad issues on which we could make an impact through litigation in addition to working routine cases in which we are assisting clients in our community in Boston. Identifying and litigating the cases involving novel issues requires significant assistance from experienced practitioners. Students can add value when they work on such cases but generally lack the ability to identify the appropriate cases or grasp some of the necessary nuances within the time period offered by litigation. Going after the cases with novel issues where litigation might make a difference requires that we partner with the best practitioners. So far, Harvard has been very fortunate to partner with two Janet Spragens Award recipients, Carl Smith and you. The knowledge and experience that each of you brought to the cases has allowed the students to learn and to make the appropriate arguments.

These types of cases may be easier for academic clinics to pursue than for non-academic groups, because of the possibility of partnering with others to add deep experience. As clinics become more sophisticated and experienced, I expect that they will bring more impact litigation in the future. I am glad that Harvard is able to do this. I hope that we can bring issues to the attention of courts that will have a positive impact on low income taxpayers.

Q: With all the work that you do—teaching, running a tax clinic, litigating cases, co-authoring a blog and acting as editor for other publications, and being involved in the ABA Tax Section—what sort of activities do you do outside the tax world?

A: I relax by riding my bicycle. In nice weather I try to ride for a couple of hours each day on the weekend or when I am on vacation. I enjoy travel. My sons find interesting places to live and for me to visit. My daughter lives in our hometown, Richmond, Virginia. I enjoy visiting her family and seeing my grandchildren.
PATHS IN TAX

Emily and Shane Kiggen’s Path to Finding Their Passion for Tax

By Matthew Sontag, Tax Manager, RSM US, LLP, McLean, VA

One of the rewards of practicing tax law is the opportunity to cross paths with colleagues who share our passion for our chosen profession, and thereby to build deeper connections. For some, those professional connections can grow into strong personal bonds, even into lifelong partnerships. So it was with Emily and Shane Kiggen, whose stories form the core of this issue’s Paths in Tax.

Though their paths ultimately joined in EY’s Washington National Tax practice, Emily and Shane’s origin points were quite different, sharing only their dedication to gaining a deeper understanding of their chosen profession. Their stories amply illustrate the success achieved when we recognize our own natural affinities and work hard to realize their promise.

Emily, following her love of linear analysis, jumped at the opportunity to study advanced mathematics at Southern Methodist University. While there, her interests and her major expanded to include computer science. She enjoyed writing code, but ultimately the foot-fault punctiliousness of computers began to wear. “It’s really frustrating to spend a ton of time on a program, repeatedly getting a ‘blue screen of death’ just because you missed a comma somewhere,” Emily observes, noting that not all challenges are created equal. In the end, she opted to explore alternative venues that would still use her passion for methodical thinking.

That led her to law school at George Washington, where the coverage of tax law on the Virginia bar exam pushed her through the doors into individual income tax and, in her last year in law school, she discovered a field of law that delighted her mathematical thinking. Recognizing that she needed to delve deeper into this complex field in order to succeed, she enrolled in the Tax LL.M. program at the University of San Diego. While there, she joined an EY practice group part time. That led indirectly to a full time position with the firm’s San Francisco office after graduation.

By contrast, Shane’s preferred approach is one of abstraction grounded in fact. That led him to study history and philosophy at Vanderbilt. Law proved a natural continuation of those interests, so Shane enrolled in Boston University’s JD program immediately upon graduation.

At BU, he discovered that corporate taxation and related tax policy issues excited his passion in the same way that history and philosophy had done. He saw in each pairing a “big picture” approach that applies theory to the practical world. The close affinity between the JD and Tax LL.M. programs at BU made continuing directly into the LL.M. program a natural extension of Shane’s study. Upon graduation, Shane joined EY’s Boston office.
It’s at this point that a common thread emerges in Emily’s and Shane’s stories. That thread is their self-motivated drive to pursue in-depth knowledge relentlessly. It allowed them to supercharge their respective careers. As Shane described it:

**Especially for technical practices, if you’re exploring an issue for the first time, you don’t need to know the answer right off; but if you don’t know your bearings of where you are in the Code, it can be very hard to keep up.**

He immediately follows with the observation that knowledge isn’t something certain people just happen to have while all others don’t. Instead, it is the product of hard work invested in learning, exploring, and studying. The key differentiator becomes initiative—the drive to work to develop skills and increase capabilities.

In both Shane’s and Emily’s cases, this drive came readily because they chose areas of practice that aligned with their personalities and their natural inclinations. Emily summed up the key lesson succinctly:

**Be cognizant of your strengths and your interests, because if you’re wrong, you will end up doing something you’re not good at, and you won’t be happy doing it. . . . Don’t measure your decisions based on the views of others—sure, a given field can sound really exciting, but if it’s not your passion and doesn’t play to your strengths, it’ll be a bad experience.**

Due to their personal passion for their field, Emily and Shane worked to develop expertise beyond that required in the normal exercise of professional competence. They sought out specific topics and conducted self-guided deep dives, pushing themselves to truly understand not only the specific questions being presented but the broader context of those questions. Leveraging a key strength of large tax practices within major accounting firms—the ability to specialize—they pushed towards deep mastery of their topics.

They both credit this self-directed study with two related but distinct results: (1) laying the fundamental groundwork for professional excellence, and (2) “credentialing” that excellence in an objective way.

For the first, the deep dives allowed them to achieve a high level of competence for someone with their “paper” experience. They accumulated knowledge and understanding beyond the norm through extra hard work squeezed in around the edges. Using each project as an opportunity for further self-directed exploration, they both essentially “front-loaded” their professional development. While they acknowledge that study is no substitute for experience, they definitely credit that background of knowledge developed from hard study as key to their careers.

Second, because of the expertise they each acquired through intensive study, they were able to work on a significant group of projects. As a result, each had a set of objective experiences that they could use to demonstrate to others their capabilities and their passions. Credibility in technical discourse has to be earned, and preferably supported by tangible evidence. The self-study gave Shane and Emily the breadth of understanding, and confidence, necessary to demonstrate their professional capabilities in dialog and work product.

**Knowledge isn’t something certain people just happen to have while all others don’t. Instead, it is the product of hard work invested in learning, exploring, and studying. The key differentiator becomes initiative—the drive to work to develop skills and increase capabilities.**
Thanks in no small part to this extra effort, they were both offered rotations in the Washington National Tax Practice (WNT). There, they met a new set of technical challenges—and each other.

At WNT, Emily and Shane found areas of the law in which to continue their deep dives, continuing the skill-building process they had developed. Through that process, Shane found his true calling at EY. Emily found deep personal satisfaction in the work, but came to realize that she also enjoyed being an integrated part of a large team. Ultimately she decided to pursue an alternate path, to trade in her laser-focus on a specific topic (or in her case, a specific code section) across all clients for a broader topical exposure focused on the needs of a single client. She joined the in-house tax team at a Fortune 200 company.

What didn't change for either of them was the realization that they had more in common than just overlapping areas of professional interest. They ultimately concluded that their own, personal partnership was a permanent one, marrying in May 2014. They welcomed their first daughter, Georgie, in May 2015.

Reflecting on the key factors of success so far, Emily summed it up as “find out what you love; be realistic—what is your skillset and what do you enjoy?” They both come back to a simple mantra: find what you enjoy and dive deeply.

Both also give strong credit to their respective LL.M. programs, while acknowledging that further academic study isn’t the right fit for everyone. Shane points out the benefits of the advanced degree.

> If you’re in law school, which can provide a very good foundation, then it depends on where you want to end up. If you’re headed to a transactional law firm, coverage of the basics—corporate, partnership, international, maybe some M&A—can be enough. If you have different aspirations, such as pushing deeper into a technical field, then the LL.M. can be a great chance to get the career you actually want.

They also note the real power of the Tax LL.M. as a way for attorneys to make a mid-career change. Both Shane and Emily knew solo and small-firm practitioners in their LL.M. programs who were using the tax LL.M. to move into a tax specialty practice or to otherwise reinvigorate their careers. Representing perhaps the clearest tangible expression of self-motivated technical study, the Tax LL.M. can simultaneously establish and document a high level of professional investment in a chosen field. It proves a great springboard for attorneys to shift their focus within a field or to pursue an entirely different course.

Ultimately, although Shane and Emily started from very different places for completely different reasons, they ended up coming together professionally and personally. Their key takeaway remains a profoundly simple observation: “You can’t be great at something without it being the right fit—so find your passion!”

■
IN THE STACKS

Call for Book Reviews

The move to a digital-only format has allowed ATT to expand the types of materials we publish. One new feature is reviews of books and articles on topics of interest to our members. Reviews inform readers of recent publications pertaining to tax policy and emerging issues, as well as broader concerns about the interrelationship between tax policies and economic growth, income inequality and poverty. Reviews may be of single books or articles or they may be review essays that discuss and compare two or more books and articles addressing the same topic, similar to such review essays in the *New York Review of Books*. Reviews will be considered for publication in each issue of ATT.

Reviews should be no more than 2,000 words in length, though on rare occasions longer submissions will be accepted on consultation with the editor. Reviews should provide a concise introduction to the item’s primary themes and a critical analysis of its significance that considers strengths, weaknesses, and relevance to the field.

Here is an eclectic sampling of titles in our stacks for which ATT will consider a review.

- **Beginner’s Guide to Tax-Exempt Bonds for Affordable Housing**, Alysse Hollis & Richard M. Froehlich (ABA 2016)
- **Carbon Pricing**, ed. Larry Kreiser et al. (Edward Elgar 2016)
- **Economic Behaviour and Taxation**, James Alm & J. Sebastian Leguizamon (Edward Elgar 2016)
- **Environmental Pricing**, ed. Larry Kreiser et al. (Edward Elgar 2016)
- **Social Security Law, Policy, and Practice**, Frank Bloch & Jon Dubin (West Academic Publishing 2016)
- **Taxation of Entertainers, Athletes, and Artists**, Lionel S. Sobel (ABA 2015)

If you are interested in submitting a review of any of these titles or in discussing other content ideas for ATT, contact Supervising Editor, Linda M. Beale at lbeale@wayne.edu.
YOUNG LAWYERS CORNER

Save the Date: 16th Annual Law Student Tax Challenge (2016-2017)

An alternative to traditional moot court competitions, the Law Student Tax Challenge asks two-person teams of students to solve a cutting-edge and complex business problem that might arise in everyday tax practice. Teams are initially evaluated on two criteria: a memorandum to a senior partner and a letter to a client explaining the result. Based on the written work product, six teams from the J.D. Division and four teams from the LL.M. Division receive a free trip (including airfare and accommodations for two nights) to the Section of Taxation 2017 Midyear Meeting, January 19-21, in Orlando, FL, where each team will defend its submission before a panel of judges representing the country's top tax practitioners and government officials, including Tax Court judges.

The competition, sponsored by the Young Lawyers Forum, is a great way for law students to showcase their knowledge in a real-world setting and gain valuable exposure to the tax law community. On average, more than 60 teams compete in the J.D. Division and more than 40 teams compete in the LL.M. Division.

IMPORTANT DATES

Problem Release Date: September 6, 2016, released by 5pm EST

Submission Deadline: November 4, 2016, by or before 5pm EST

Notification of Semifinalists and Finalists: December 16, 2016

Semifinal and Final Oral Defense Rounds: January 20, 2017, in Orlando, FL
TAX Bits

OVDP

By Robert S. Steinberg, Law Offices of Robert S. Steinberg, Palmetto Bay, FL

(To tune of “Tonight,” by Leonard Bernstein and Stephen Sondheim, from West Side Story.)

OV-DP
A voluntary plea
I wanted to come in from the cold.

OV-DP
You promised certainty
Seems your word is more tinsel than gold.

I thought
Mistakes would be forgiven
Into a herd we’re driven
Of culpability.

The room is crammed
Both innocent and damned
In OV-DP.

OV-DP
My head was in the stars
What did I know of FBARS the while?

OV-DP
My head was in the clouds
Never read, my return, when I’d file.

The deal
You sold me seemed terrific
Until you brought up PFIC
To up the tab on me.

Now fear, now doubt
And whether to opt-out
Of OV-D-P. ■
LET’S CONFER

U.S. – Latin America Tax Planning Strategies Conference

By Derek B. Wagner, Pro Bono Counsel, ABA Section of Taxation, Washington, DC

On June 8-10, 2016, approximately 200 tax practitioners from more than twenty countries throughout Latin America and across the world convened in Miami for the 9th Annual U.S.-Latin America Tax Planning Strategies Conference. Organized by the ABA Section of Taxation in conjunction with the International Fiscal Association–USA Branch, the International Bar Association–Taxes Committee, the Tax Executives Institute, and the ABA Section of International Law, this conference offered three days of workshops and panel discussions focusing on issues relevant to tax practice in the United States and Latin America. This article highlights just a few of the programs available during this three-day event.

Wealth and Asset Planning Workshop

The first day of the conference featured the Wealth and Asset Planning Workshop, which consisted of two panels addressing common tax planning issues encountered by practitioners whose clients live or hold assets in a foreign country. The first of these panels, “Cross-Border Estates: Do You Really Know How They Work?,” provided a crash-course introduction to multi-jurisdictional estate planning. Speakers from Brazil, Mexico, Peru, Portugal, and the United States presented a case study to explore the myriad issues that frequently arise when formulating an international estate plan. The hypothetical client in this case study was a Spanish citizen who lived in Portugal with his wife, a dual citizen of the United States and Spain, and who held assets and business interests in a number of additional countries. The panelists laid out the issues associated with preparing an effective and tax-efficient transfer of the client’s assets upon his death; they broke down the income, estate, gift, and inheritance tax regimes in each of the countries represented on the panel and evaluated the benefits and potential snares associated with the hypothetical client’s various options. The United States, for instance, is considered a high-tax regime with a maximum gift and estate tax rate of 40%. Absent a treaty provision stating otherwise, the regime’s more generous exclusions (such as the unlimited deduction for spousal transfers and the unified lifetime exclusion) are only available to U.S. citizens or U.S. residents. Non-U.S. residents owning substantial U.S. real estate or other U.S.-situs assets, such as the panelists’ hypothetical client, may consider means to take advantage of these benefits, but must be cognizant of both the United States’ and their home country’s anti-avoidance rules before making any decisions.

The second part of the Wealth and Asset Planning Workshops, entitled “The Worst of Two Worlds – U.S. Tax Residents or Citizens with Assets in Latin America; Locals with Heirs or Assets in the United States,” focused on tax-planning strategies for U.S. residents with assets in Latin American countries and for residents of Latin American countries with ties to the United States. The panelists used a series of hypotheticals to explore income and transfer tax laws, residency rules, and common investment structures for international clients. The panelists looked at current trends and recent events impacting investment and tax planning strategies. Of particular concern to many taxpayers is the increasing use by tax administrations of information-exchange agreements, which impose new reporting requirements and filing obligations on
individuals and financial institutions in an effort to combat tax avoidance. Recent developments, including
the G20/OECD Base Erosion and Profit Shifting (BEPS) action plan and U.S. regulations under the Foreign
Account Tax Compliance Act\(^1\) (FATCA) have made the need for careful attention to international tax-planning
all the greater.

The [G20/OECD BEPS] action plan seeks to combat tax revenue losses stemming from
base erosion and profit-shifting activities of MNEs by implementing a coordinated series
of items designed to more accurately align the location of taxable profits with the location
of economic activity or value creation. These measures include model provisions to
prevent treaty abuse and treaty shopping, standardized Country-by-Country reporting,
improved dispute resolution mechanisms, tightening of Controlled Foreign Company rules,
restrictions on interest deductibility, and efforts to improve the information available to tax
authorities to apply their laws consistently and effectively.

**Tax Executives’ Perspective: The Changing Tax World and Its Impact on Latin America**

The past few years have seen significant political and economic change in Latin America. The “Tax Executives’
Perspective: The Changing Tax World and Its Impact on Latin America” discussed how such developments
affect multi-national entities (MNEs) with operations in Latin American countries. The panelists began
by offering their views on the impact on MNEs of current events. The panelists agreed that the ongoing
political upheaval in Brazil has made significant tax reform unlikely for the foreseeable future, though talk of
resuscitating a financial transactions tax has already surfaced. Similarly, economic turbulence in Venezuela
will likely translate into major losses for operations in that country in 2016. The panelists also discussed
the effects of the G20/OECD BEPS action plan. Although only four Latin American nations are members
of either organization,\(^2\) the panelists emphasized that these initiatives will have significant effects for both
member and non-member countries. The action plan seeks to combat tax revenue losses stemming from
base erosion and profit-shifting activities of MNEs by implementing a coordinated series of items designed to
more accurately align the location of taxable profits with the location of economic activity or value creation.\(^3\)
These measures include model provisions to prevent treaty abuse and treaty shopping, standardized Country-
by-Country reporting, improved dispute resolution mechanisms, tightening of Controlled Foreign Company
rules, restrictions on interest deductibility, and efforts to improve the information available to tax authorities
to apply their laws consistently and effectively.\(^4\) Panelists considered the compliance burden for these
initiatives to be high and likely to create legal problems for taxpayers if tax authorities adopt inconsistent
interpretations of the BEPS plan or if non-OECD member countries adopt different approaches or standards
from those expressed in the plan.

MNE tax transparency was another issue addressed by the panel. Panelists noted that the tax-planning
strategies of MNEs are more public now than at any time in the past, creating a need for enhanced

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2. Chile and Mexico are the only OECD countries; Argentina, Brazil, and Mexico are G20 countries.
4. Id. at ¶¶ 11-21.
public relations skills and assessment of disclosure impact as part of any tax-planning strategy. Other topics covered during this ninety-minute panel included the anticipated effects of the proposed section 385 regulations and other anticipated changes in tax law or tax administration.

Tax Judges Roundtable: The Investigative Powers of the Tax Authorities

The Tax Judges Roundtable brought together members of the judiciaries of several countries to discuss recent court decisions impacting the scope of and limitations on the investigative powers of tax authorities. Many countries grant their tax authorities wide investigative powers. The Honorable Rodolfo Facio, of Argentina’s Court of Appeals on Administrative Matters, and U.S. Tax Court Special Trial Judge Lewis Carluzzo discussed the basis of these powers in their respective jurisdictions. In the United States, section 7602 grants broad authority for the IRS to summon books, records, and other documents in determining liability under U.S. tax laws. This authority, however, is subject to certain important limitations. Section 7602(c) requires that the IRS provide notice to a taxpayer if a summons is issued to a third party in relation to the taxpayer’s liability. Further, the IRS lacks independent authority to penalize noncompliance with a summons. Rather, the IRS must seek enforcement of the summons in a U.S. district court.5

The Honorable Eugene P. Rossiter, Chief Justice of the Tax Court of Canada, presented a series of recent cases detailing when and to what extent Canadian revenue agents owe a duty of care to taxpayers under examination, and the consequences that ensue if that duty is breached. In McCreight v. Canada6 and Leroux v. Canada Revenue Authority,7 the Canadian courts established a positive duty of care to taxpayers, at first only when criminal behavior is implicated but then more generally. The duty of care creates civil liability when Canadian tax authorities fail to conduct their work in a reasonable fashion and with reasonable care. In Revenue Quebec v. Group Enico, Inc.8 for instance, the Court awarded damages to a taxpayer who was forced to close his business following what the Court described as an unreasonable abuse of power by the revenue authorities. Under the doctrine of sovereign immunity, the panelists noted, judicial authority to fashion such rules is not unlimited, and varies from country to country. In the United States, for example, the federal government is insulated from such suits absent explicit statutory waiver.

For a full list of the panels offered during the 2016 U.S./Latin America Tax Planning Strategies Conference, please check out the program here. The 2017 conference will be held in Miami on June 14-16, 2017. ■

5 IRC § 7604.
6 2013 ONCA 483.
7 2014 BCSC 720.
8 2016 QCCA 76.
SECTION NEWS

Government Submissions Boxscore

Since January 1, 2016, the Section has coordinated the following government submissions, which can be viewed and downloaded free of charge from the Section’s website at http://www.americanbar.org/groups/taxation/policy.html.

SUBMISSIONS AND COMMENTS ON GOVERNMENT REGULATIONS, ADMINISTRATIVE RULINGS, BLANKET AUTHORITY and ABA POLICY

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The technical comments and blanket authority submissions listed in this index represent the views of the ABA Section of Taxation. They have not been approved by the ABA Board of Governors or the ABA House of Delegates and should not be construed as representing the policy of the ABA.
ANNOUNCEMENTS

The Tax Lawyer – Spring 2016 Issue Is Now Available

The Spring 2016 Issue of The Tax Lawyer, the nation’s premier, peer-reviewed tax law journal, is now available. The Tax Lawyer is published quarterly as a service to members of the Tax Section. Click here to read or download the complete issue.

2016 Erwin N. Griswold Lecture Before the American College of Tax Counsel

Emily A. Parker, Stroke of the Scrivener’s Pen: Role of a Tax Planner and Litigator

Selected Articles from the Inaugural International Taxpayer Rights Conference

Nina E. Olson, Introduction

Alice G. Abreu and Richard K. Greenstein, Tax as Everylaw: Interpretation, Enforcement, and the Legitimacy of the IRS

Keith Fogg and Sime Jozipovic, How Can Tax Collection be Structured to Observe and Preserve Taxpayer Rights: A Discussion of Practices and Possibilities

Leslie Book, Bureaucratic Oppression and the Tax System

Amanda Bartmann, Making Taxpayer Rights Real: Overcoming Challenges to Integrate Taxpayer Rights into a Tax Agency's Operations

Other Articles

Karen C. Burke and Grayson M.P. McCouch, Sham Partnerships and Equivocal Transactions

Daniel S. Goldberg, The Target Method for Partnership Special Allocations and Why It Should Be Safe-Harbored

Stanley Veliotis, AMT with No or Trivial Transactional Preferences: The Regular Tax Rate Schedule as an Implied AMT Preference

Comment

Michael W. Jin, Section 501(r): A Better Charitable Tax Exemption for Nonprofit Hospitals?

Save the Date: 16th Annual Law Student Tax Challenge (2016-2017)

The Law Student Tax Challenge, sponsored by the Young Lawyers Forum, is a great way for law students to showcase their knowledge in a real-world setting and gain valuable exposure to the tax law community. More information regarding the competition may be found here: http://www.americanbar.org/groups/taxation/awards/law_student_tax_challenge.html
The Practical Tax Lawyer – Summer 2016 Issue Is Now Available

Produced in cooperation with the Tax Section and published by ALI-CLE, The Practical Tax Lawyer offers concise, practice-oriented articles to assist lawyers with all aspects of tax law. The articles are written by practitioners and are reviewed by an expert board of editorial advisors who are members of the ABA Tax Section and are appointed by the Section. Published four times yearly, each issue of The Practical Tax Lawyer brings you pragmatic, nuts-and-bolts advice on how to solve your clients' tax problems. The Summer 2016 issue features the following articles:

Robert F. Reilly, Discount for Lack of Marketability for the Closely Held Company
Barbara T. Kaplan, Procedures and Strategies for Resolving Cases at Exam (Part 1)
Jerald David August and Stephen R. Looney, Tax Planning for S Corporations: Mergers and Acquisitions Involving S Corporations (Part 3)
Ted David, Learn To Love the IRS, by Ted David, including: It’s a Horse Race; Levy v. Lien; Coffee and Taxes; Helllooo-IRS Calling!

Index to Volumes 26, 27, 28, 29, and 30

Tax Section members are entitled to a subscription discount. For more information, visit PTL's webpage: https://www.ali-cle.org/index.cfm?fuseaction=publications.periodical&pub=PTL.

Support the Section’s Public Service Efforts with a Contribution to the TAPS Endowment

Through the Tax Assistance Public Service (TAPS) endowment fund, the Section of Taxation seeks to provide stable, long-term funding for its tax-related public service programs. The TAPS endowment fund will primarily support the Christine A. Brunswick Public Service Fellowship program. The Public Service Fellowship program provides two-year fellowships for recent law school graduates working for non-profit organizations offering tax-related legal assistance to underserved communities. Consider giving to the TAPS endowment fund today. Your generous support will help ensure that the Section can continue its mission to provide legal assistance to those in need.

Get Involved in ATT

ABA Tax Times (ATT) is looking for volunteers to join its ranks as associate editors to assist in writing and acquiring articles for publication. This opportunity is open to Section members with significant writing or publication experience, a genuine interest in helping ATT attract great content, and a willingness to commit to at least one article a year. You can find more information about our submission guidelines here. If you are interested in a regular writing and editing opportunity with ATT, contact Linda M. Beale, Supervising Editor, at lbeale@wayne.edu.
SECTION EVENTS & PROMOTIONS

ABA Section of Taxation Meeting Calendar

www.americanbar.org/groups/taxation/events_cle.html

ABA Tax Section meetings are a great way to get connected, get educated, and get the most from your membership! Join us for CLE programming and the latest news and updates from Capitol Hill, the IRS, Treasury and other federal agencies.

September 29-October 1, 2016
JOINT FALL CLE MEETING
Westin Boston Waterfront – Boston, MA

January 19-21, 2017
MIDYEAR MEETING
Hilton Bonnet Creek & Waldorf Astoria – Orlando, FL

May 11-13, 2017
MAY MEETING
Grand Hyatt – Washington, DC

September 14-16, 2017
JOINT FALL CLE MEETING
Hilton Austin – Austin, TX

If You Missed the Last Section Meeting

Materials / TaxIQ

View and search hundreds of materials submitted for the Section’s Fall, Midyear, and May Meetings on TaxIQ and Westlaw. This member service is made possible by Thomson Reuters—a publishing sponsor of the Section of Taxation. For more information, go to the TaxIQ page on the website.

Recordings

Audio recordings of CLE programs from recent Tax Section Meetings are available from Digital Conference Providers (DCP), the Section’s audio service provider. Orders can be placed through the DCP website at https://www.dcporder.com/abatx/ or by calling 630/963-8311.

Online CLE from West LegalEd

The ABA is a content partner with Thomson Reuters, and many programs presented at the Tax Section’s Fall, Midyear, and May Meetings are subsequently made available through the Thomson Reuters West LegalEd Center. For more information, go to http://westlegaledcenter.com.
# SECTION EVENTS & PROMOTIONS

## ABA Section of Taxation CLE Calendar

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ABA Section of Taxation CLE Products

Listen at your convenience to high-quality tax law CLE on a variety of topics, including: Affordable Care Act implementation, new Circular 230 rules, partnerships and S corporations, recent legislation, ethics, international tax planning, and more. ABA CLE downloads are generally accepted in the following MCLE jurisdictions: AK, AR, CA, CO, GA, HI, IL, MO, MT, NV, NM, NY, ND, OR, TX, UT, VT, WV. Recordings and course materials from the following recent Tax Section webinars and more are available through the ABA Web Store.

Turning the Tables: The United States as a Tax Haven Destination
Civil and Criminal Employment Tax Enforcement Efforts – Employers Beware
The Nuts and Bolts of REITs
Ethical Issues in Setting Engagement Terms
Current Developments in Individual, Corporate, Partnership and Estate & Gift Taxation
The Administrative Tax Controversy Case from Examination to Appeals
The Nuts and Bolts of the Taxation of Mergers and Acquisitions
Responding to the Repeal of TEFRA
A New Era in Taxation of Derivatives
Basics of IRS Collection Alternatives
State Income, Double Taxation, and Tax Discrimination in the Post-Wynne World
Current Issues for Private Investment Funds and Their Managers
Designing a Pro Bono Project for Your Firm
Reading and Understanding a Partnership Agreement
Top Ten Revenue Rulings for Estate Planners
Affordable Care Act Implementation Issues Impacting Individuals and Families
Oil and Gas Tax Partnerships
Choosing Wisely: When to Use (or Not Use) Mediation to Obtain Cost Effective Closure in Exam & Collection Cases
Holding Company Jurisdictions for Investments in Latin America - What You Need To Know Now
What’s a Young Tax Attorney to Do When…?
Bitcoins: What You Need To Know About Virtual Currency
Update on State Taxation of Tribal Leased Lands: The New Leasing Regulations
Going Out on Your Own and Changing Firms – Practical and Ethical Considerations
Kicking it Upstairs – How to Elevate Issues Within the IRS
Back to Basics on the Ethics of Federal Tax Practice: Best Practices 101
The Tax Consequences of the Legalization of Marijuana Inversions: New Rules, Continued Challenges
Tax Issues Arising from Tax Sharing Agreements (Part I)
Tax Issues Arising from Tax Sharing Agreements (Part II)
BEPS Won’t Wait; It’s Here and Now and You Need to Know About It!
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<td>JOINT FALL CLE MEETING</td>
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RESOLVING IDENTITY THEFT IN TAX ADMINISTRATION

Throughout the past decade, tax-related identity theft cases increased dramatically. Victims of tax-related identity theft could face serious financial, emotional, and long-drawn-out consequences that cannot be overstated. The financial consequences of tax-related identity theft may include theft of tax benefits, frozen or delayed refunds, assessment of additional taxes, levies, liens, and problems with other government benefits due to attribution of additional income.

In an effort to help taxpayers who have been victims of identity theft, this chapter has been updated to include:

• Recent changes to the IRS procedures, including detailed instructions how enable victims of identity theft may request redacted copies of their tax returns.
• Changes made to the Service’s organizational structure that are intended to improve identity theft outcomes.
• Updated Service practices and protocols related to identity theft from the Internal Revenue Manual.
• Updated statistics and reports by the Treasury Inspector General for Tax Administration.

This chapter will illuminate an otherwise unclear process and facilitate the resolution of tax-related identity theft cases before the Service.

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UNDERSTANDING THE AFFORDABLE CARE ACT AND ITS IMPACTS ON LOW-INCOME TAXPAYERS

With the passage of the Affordable Care Act (ACA), the Internal Revenue Code took on a much more central role in the health care system. The ACA added dozens of tax provisions to help drive consumer behavior, shape employer provided health care benefits, and to help fund the expanded system. This updated chapter reflects numerous developments from the IRS, including:

• Revised regulations and new guidance on exemptions from the individual shared responsibility payment and how certain exemptions may be claimed
• Procedures for ACA-related return processing, IRS taxpayer contacts, and math error authority for ACA issues.
• Details on ACA-related information returns including Forms 1095-A, 1095-B, and 1095-C.
• Regulations and guidance related to the employer shared responsibility payment, including minimum value of employer-sponsored insurance.
• Regulations and guidance on the excise tax for non-compliant group health plans.
• HHS guidance designating additional health coverage as MEC.
• The Expatriate Health Coverage Clarification Act of 2014.

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Visit [www.ambar.org/taxiq](http://www.ambar.org/taxiq) and click the TaxIQ logo to be directed to the TaxIQ Meeting Index.

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