

# **DRAFT**

**Statement of  
Herbert N. Beller**

**on behalf of the**

**American Bar Association  
Section of Taxation**

**IRS Oversight Board Hearing  
Washington, DC**

**January 29, 2002**

**Panel 3: Improving Operations**

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Mr. Chairman and Members of the Board:

Good afternoon. My name is Herbert N. Beller. I practice tax law in Washington, D.C. and am the Chair-elect of the American Bar Association's Section of Taxation. My testimony is presented on behalf of the Section, but has not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, it should not be construed or reported as representing the policy of the ABA.

**Introduction**

The Section of Taxation is comprised of approximately 20,000 tax lawyers. As the country's largest and broadest-based professional organization of tax lawyers, one of our primary goals is to make the tax system fairer, simpler and easier to administer. Our members include attorneys who work in law firms, corporations and other business entities, government, non-profit organizations, academia, accounting firms and other multidisciplinary organizations. We advise on virtually every substantive and procedural area of the tax laws, and interface regularly with the Internal Revenue Service and other

government agencies and offices responsible for administering and enforcing such laws. Many of our members have served in staff and executive-level positions at the IRS, the Treasury Department, the Tax Division of the Department of Justice, and the congressional taxwriting committees.

We very much appreciate the opportunity to provide input to the Board regarding ways in which the IRS might more efficiently and effectively administer the internal revenue laws. There are, of course, numerous aspects to this enormous task. My testimony today focuses on what we believe to be an especially important administrative objective: the opportunity to reduce audit disputes and otherwise achieve administrative efficiencies through the issuance of published guidance.

### **Types of Administrative Guidance**

Our self-assessment federal income tax system depends in the first instance upon the filing of returns that properly reflect taxable income and the amount of tax due. This in turn requires an understanding of how relevant Internal Revenue Code provisions apply to taxpayer-specific situations. Some Code provisions are cast as brief, broadly stated principles, while others present lengthy and highly technical rules. In either setting, the express statutory language may present ambiguities and uncertainties that need to be addressed through administrative guidance.

**Published guidance.** A basic explanation of statutory requirements often can be found in the detailed instructions that accompany all IRS returns and forms, or in the fairly wide array of IRS Publications that provide comprehensive discussions and specific

examples relating to discrete areas of the tax law. These publications, however, lack the force of law and are not binding on the IRS.

Beyond this threshold level of published guidance, Treasury regulations represent the principal vehicle through which IRS interpretations of Code provisions are expressed. Regulations generally have the force of law, although in relatively rare instances courts have found particular regulations to be “arbitrary and capricious” and, therefore, invalid. For some Code provisions, regulations may not exist or may have been issued only in proposed or temporary form. Moreover, regulations may not address all requirements or aspects of the underlying statutory provision; and they may be ambiguous or unclear as to certain issues of statutory interpretation.

For taxpayers contemplating transactions or otherwise faced with tax questions that are not adequately covered by regulations (or not covered at all), other relevant published IRS guidance may be available. For example, if the taxpayer’s facts are identical or substantially similar to those addressed in a published revenue ruling, or meet the requirements of a published revenue procedure, the taxpayer may safely rely on the revenue ruling or revenue procedure in reporting the tax consequences of its situation.<sup>1</sup> Published guidance may also take the form of a “Notice” or “Announcement,” which alerts the public to contemplated actions by IRS (*e.g.*, the issuance of proposed regulations that will take a particular position on a controversial issue), or declares that certain types of transactions will be subjected to disclosure requirements or other special scrutiny (*e.g.*, “listed” tax shelters).

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<sup>1</sup> While courts are not bound by revenue rulings, they sometimes embrace the reasoning and result of published rulings in deciding cases involving similar fact patterns.

**Private guidance.** In contrast to published revenue rulings, which generally bind the IRS with respect to all similarly-situated taxpayers, so-called “private letter rulings” (“PLRs”) technically bind the Service only as to the particular taxpayer who sought and received the ruling. Because PLRs are disclosed to the public (without identifying the taxpayer), they may provide other taxpayers with helpful insight into the current position of the IRS on a particular issue or transactional format. However, the IRS may decide to change its ruling position on matters with respect to which PLRs have previously been issued; and it is under no obligation to publicly announce any such change in ruling policy. Taxpayers contemplating similar transactions therefore cannot assume that their tax consequences will necessarily be the same as those accorded another taxpayer in a PLR.<sup>2</sup>

Seeking a PLR in connection with a proposed transaction or other tax-sensitive event is not always feasible. The processing time for PLRs normally runs at least 90-120 days, and can extend up to several months more if supplemental factual or legal submissions become necessary, or if the request is subjected to multiple levels of review within the IRS National Office. These time frames may not accommodate inflexible transaction closing dates or other factors requiring near-term action. Another potential drawback, especially for individual or other nonbusiness taxpayers, is the cost of retaining an outside tax professional to prepare the ruling request and shepherd it through the National Office. Unless the desired ruling will protect the taxpayer from tax exposures which are substantially higher than such cost, the PLR approach is difficult to

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<sup>2</sup> Likewise, courts are not bound by PLRs and, in contrast to published rulings, rarely cite or discuss PLRs in opinions. PLRs may, however, be taken into account in determining whether a taxpayer can avoid a 20 percent “substantial understatement” penalty by reason of demonstrating “substantial authority” for the tax treatment reported on the return.

justify from an economic standpoint. And finally, there can be no assurance that the IRS will rule favorably; and it may decline to rule altogether for reasons that are not always clear.

Despite these negatives, the National Office is literally flooded with PLR requests on a continuing basis. The National Office also receives numerous requests from revenue agents or Appeals Offices for “technical advice” or “field service advice” on issues that have arisen in the course of audit examinations. The written responses to such requests take the form of a “technical advice memorandum” (“TAM”) or a “field service advice memorandum” (“FSA”). Like PLRs, TAMs and FSAs are disclosed to the public, but cannot be relied on by other taxpayers as binding legal precedent. Nonetheless, TAMs and FSAs are often especially illuminating to similarly-situated taxpayers, because they typically provide a more detailed legal analysis than do PLRs.

### **Need to Increase and Prioritize Published Guidance**

All of the described forms of taxpayer guidance – both published and private – are important features of our tax system. However, the development and implementation of such guidance entails an enormous expenditure of time on the part of IRS and Treasury lawyers and support staff. From an administrative perspective, the critical challenge is to allocate available personnel and other resources to the generic types of guidance programs in a way that produces as much high quality guidance as possible within the shortest feasible timeframes.

In this regard, we are concerned that too much time and energy is being devoted, to processing PLRs.<sup>3</sup> At the same time, the numbers of published rulings and revenue procedures have dropped off dramatically compared to earlier years.<sup>4</sup> We believe that greater emphasis and priority should be given to generating new published guidance relating to issues of interest to large segments of the individual and business taxpayer populations – as opposed to PLRs, which typically involve narrow and often unusual fact patterns. When taxpayers have knowledge of relevant and legally binding IRS positions that are expressed in published guidance, they likely will structure their transactions and file their returns accordingly. As a result, audit disputes that might have arisen in the absence of such guidance can be avoided. Further, to the extent that the guidance covers issues that might have been the subject of a PLR request, the necessity for such a request will often be eliminated. These results can be achieved, however, only if the published guidance sets forth the relevant legal interpretations and/or procedural requirements as clearly as possible, so that they can be readily implemented by taxpayers and examining revenue agents.

In short, an increased emphasis on the use of published guidance will not only increase taxpayer understanding and compliance, but also should lead to significant administrative efficiencies in other aspects of IRS operations in both the National Office and the field. During the past year, the Service issued several important published rulings, procedures and other pronouncements on subjects of far-reaching significance to

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<sup>3</sup> More than 2,000 PLRs were issued in 2001. In addition, 67 TAMs and 254 FSAs were issued.

<sup>4</sup> For example, 355 published rulings were released in 1980, but only 58 in 2000. In 1992 there were 104 revenue procedures, but only 50 in 2000.

large numbers of taxpayers.<sup>5</sup> Moreover, in 2001 the numbers of published revenue rulings (66) and revenue procedures (61) did increase over the 2000 figures (58 revenue rulings and 50 revenue procedures). We applaud these efforts, and urge the IRS and Treasury to continue to expand published guidance initiatives to the greatest extent possible. Toward that end, we offer the following additional thoughts and suggestions.

**Quicker release of revenue rulings and procedures.** At the present time, the issuance of revenue rulings and revenue procedures can take as long as the issuance of regulations. That ought not be the case. Some of this delay may result from duplicative review of all published guidance at IRS and Treasury. Although IRS Chief Counsel attorneys generally have primary responsibility for drafting regulations, published rulings and other published guidance, Treasury staff attorneys and officials in the Office of Tax Legislative Counsel and the Assistant Secretary for Tax Policy usually have substantial involvement as well. This additional review and coordination is expected to, and normally does, improve the technical quality of the guidance work product. It also can serve as an important check on whether the proposed guidance takes proper account of real world business practices and other practicalities of taxpayer behavior. The pursuit of these important objectives generally justifies the additional time required to complete the guidance project.

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<sup>5</sup> In recent months, for example, important guidance has been issued with respect to (i) expanded availability of the cash method of accounting [Notice 2001-76]; (ii) mergers between corporations and disregarded entities [Prop. Treas. Reg. §1.368-2]; (iii) tax issues arising out of the events of September 11 [Notices 2001-61 and -63]; (iv) penalty waivers based on certain disclosures relating to tax shelter transactions and other items [Announcement 2002-2]; (v) expanded and consolidated automatic consent procedures for changes in accounting methods [Rev. Proc. 2002-9]; and (vi) capitalization v. expense issues arising out of expenditures to acquire, create or enhance intangible assets [Advance Notice of Proposed Rulemaking dated Jan. 17, 2002].

In some instances, however, it may be possible to reduce the amount of time attributable to the duplicative review of published guidance projects without serious risk to the overall quality or effectiveness of the guidance. For projects involving proposed revenue rulings and revenue procedures, the object should be not only to quicken the release time, but also to increase the quantity, of such guidance. If the Service or Treasury later has second thoughts about the result or analysis of a published ruling, or the criteria or other requirements set forth in a revenue procedure, there is ample flexibility to expeditiously re-evaluate the guidance and either modify or revoke it (generally on a prospective basis). In all events, any efforts to speed up the process of reaching consensus as to the thrust and content of proposed published guidance will need to take account of the traditional roles and responsibilities of Treasury (with respect to tax policy issues) and the IRS (with respect to administrative issues).

We urge Treasury and the IRS to actively seek opportunities for coordinating and completing their work on all types of published guidance projects in a more expeditious manner. Such efforts will be especially welcomed, for example, in connection with industry-specific issues that spawn frequent audit disputes requiring enormous expenditures of time and resources on the part of both taxpayers and the government.

**PLRs as source of published guidance topics.** Published revenue rulings sometimes address issues and fact patterns similar to those involved in a PLR. The National Office should systematically consider the suitability for this purpose of each PLR issued. Where at least several such PLRs have been issued (*e.g.*, with respect to a commonly recurring transactional format), “upgrading” that private guidance to a

published revenue ruling would achieve administrative efficiencies by eliminating or reducing the need for subsequently seeking PLRs in similar circumstances.

**Early stakeholder input.** Treasury and IRS annually release a “Business Plan” which lists various published guidance projects on which work is expected to occur during the coming year. Topics for new published guidance are developed internally and also from suggestions made by outside tax professional groups such as the ABA Tax Section, AICPA, Tax Executives Institute and the New York State Bar Tax Section. In the case of proposed regulation projects, these organizations typically submit detailed comments and sometimes testify at IRS hearings on the proposals. However, their significant input at the front-end or other developmental stages of such projects is normally sporadic. Moreover, there is a perception among many of our members that such input generally is not encouraged by Treasury or the Service – apparently because of concerns about the possibility of selective input reflecting client interests and, further, because of a desire to retain complete control over the scope and drafting of the contemplated guidance.

While we certainly appreciate such concerns, we believe that they ought not be obstacles to earlier participation by outside stakeholder groups in the published guidance process. In that regard, the ABA Tax Section has conflict of interest policies which are designed to preclude or strictly limit participation by our members in government submissions or meetings if they have specific client interests relating to the same subject matter. We have over forty committees that are able and willing to provide technical expertise in most areas of the tax law, and to do so from the perspective of seasoned practitioners who have direct experience with a wide range of transactions and other

taxpayer situations. By working together throughout the process with the responsible IRS or Treasury lawyers, we believe that we can contribute significantly to the overall quality of the resulting guidance product. We also think that such participation may facilitate an earlier issuance of the guidance, thus freeing up government personnel for work on other guidance projects. We urge Treasury and IRS to explore with the Section and similar professional organizations ways in which we can become more involved in the development of published guidance on a systematic basis.

**Adjustment of business plan items.** In allocating resources to published guidance projects, it is important that IRS and Treasury be flexible in deviating from business plan priorities and completion targets in order to address (i) unanticipated issues of major significance; (ii) important areas that should have been on the business plan in the first instance but were for some reason overlooked; or (iii) plan items that deserve higher priority based on new information. The immediate and innovative IRS response to the many tax questions and implications resulting from the horrific events of September 11 is an excellent example in this regard. We urge the Service and Treasury to exercise similar spontaneity where appropriate.

**Assignment of IRS lawyers.** Under its current operational structure, IRS Chief Counsel attorneys often work simultaneously on PLR requests and published guidance projects. This system differs from the approach followed in earlier years, when dedicated divisions or groups of IRS attorneys worked exclusively on regulations, published rulings, Tax Court matters and other discrete areas. Many think that the multi-task approach results in better training of IRS lawyers and, ultimately, higher quality guidance products. However, an adverse consequence of this approach is that IRS docket attorneys

may have to set aside work on a pending PLR request in order to meet published guidance deadlines. In such instances, the waiting time for the PLR may increase significantly, thus causing considerable unhappiness on the part of the taxpayer and its representative.

We appreciate the perceived benefits of the multi-task approach and do not urge that it be disbanded. We recommend, however, that IRS consider modifying that approach to permit a limited number of its lawyers to work exclusively on one type of guidance (*e.g.*, published revenue rulings) for a fixed period of time (*e.g.*, 6-12 months). Such concentration, we believe, should result in the issuance of more published guidance and, at least to some extent, reduce the incidence of PLR request assignments that are derailed in favor of docket attorney obligations in respect of published guidance projects.

### **Conclusion**

We hope that the foregoing observations and suggestions are helpful to the Oversight Board in discharging its important responsibilities. I or other representatives of the ABA Tax Section would be happy to meet or otherwise communicate with Board members in order to further discuss these views or any other matter on which our input might be considered helpful.