June 21, 2006

Honorable Mark W. Everson
Commissioner
Internal Revenue Service
1111 Constitution Avenue, NW
Room 3000
Washington, DC 20224

Re: Comments Regarding Proposed Memo to Circular 230

Dear Commissioner Everson:

Enclosed are comments addressing the proposed amendment to Section 10.27 of Circular 230, relating to Contingent fees. These comments represent the views of the Internal Revenue Service Liaison Committee of the American Association of Attorney-Certified Public Accountants (AAA-CPA).

An executive summary of comments is as follows:

1. We believe that Section 10.27 of Circular 230 should not be changed. The current standards are fair and reasonable and make sense.

2. The changes, which now would prohibit contingent fees except for specific carved out exceptions, are frought with pitfalls and are likely to have unintended results.

3. The proposed amendment to Section 10.27 are overboard and prohibit contingent fees in cases in which the taxpayer cannot exploit the audit process.

4. If the Treasury insists on changing the approach of Section 10.27 to prohibit contingent fees and carved out exceptions, then we would propose that additional exceptions be added to cover the following list of services:

    - Abatement and/or refund of penalties and/or interest.

    - Negotiation of offers in compromise, installment agreements, and any other matters in connection with taxes previously assessed.

    - Representation in connection with Section 6015 with respect to innocent spouses.

    - Representation of taxpayers with respect to substitute for return notices.

    - In connection with the filing of an amended return involving a change in tax of less than $50,000, but only if a practitioner reasonably anticipates that the amended tax return or refund claim will likely receive substantial review by the

Internal Revenue Service.

- The filing of amended returns that are provided directly to a Revenue Agent, a Revenue Officer or an Appeals Officer or anyone in the chain of management above such positions.

- Representation of a taxpayer with respect to the proposed assessment of a trust fund recovery penalty pursuant to Section 6672 of the Internal Revenue Code.

- Representation of taxpayers with respect to pre-filing services such as letter rulings and advanced pricing agreements.

We agree with the statement of the American Bar Association that, absent a connection with the exploitation of the audit process, the regulation of contingent fees by the Office of Professional Responsibility is not appropriate.

Thanking you very much for your attention to these matters.

Very truly yours,

E. Martin Davidoff, CPA, Esq.

EMD:dlm

cc: Mark E. Matthews - Deputy Commissioner, Internal Revenue Service
Donald L. Korb - Chief Counsel, Internal Revenue Service
Steven Whitlock - Acting Director, Office of Professional Responsibility, Internal Revenue Service
Anita Soucy - Attorney Advisor in the Office of Tax Policy, Internal Revenue Service
Matthew S. Cooper - Attorney, Branch 2, Administrative Provision & Judicial Practice Division, IRS
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Good morning. My name is E. Martin Davidoff. I am here representing the American Association of Attorney-Certified Public Accountants ("AAA-CPA") to provide testimony on the proposed revisions to section 10.27 of Circular 230 with respect to Contingent Fees. In addition to representing the AAA-CPA, I practice as a CPA and a tax attorney in Dayton, New Jersey. Although the use of contingent fees in my practice is limited, it is a critical tool in my practice, enabling those with limited resources to secure top-notch representation before the IRS.

Contingent fees serve an important purpose to the public in balancing the scales between a formidable IRS and the average taxpayer. Contingent fee arrangements encourage higher quality work and discourages frivolous claims. And, after all, in light of "best practices" don't we want higher quality work?

In all cases where I offer a contingent fee arrangement for my clients, I also offer to work on an hourly basis. I let the client make the choice and the decision on what they are most comfortable with. In my initial interview, I may say something along the following lines:

> *"How would you feel if our fees ran $3,500 and we did not succeed in securing your refund/abatement?"*

I then would follow that up with the next question:

> *"How would you feel if I got your $30,000 refund/abatement and earned my $10,000 fee with a single phone call or letter?"*

Invariably, the clients with the smallest cases elect the contingent arrangement. They want no risk of additional out-of-pocket expenditures. With respect to larger cases, I get a mix of responses. Some want to minimize the overall fee and figure my willingness to take the case on a contingency basis means that there is great merit to their case. Others want no further risk of incurring additional out-of-pocket expenditures. Professional fees can build up quickly if the negotiations with the IRS become extended.

Earlier, I mentioned that contingent fee arrangements encourage higher quality work. If a tax professional is being paid to complete an amended tax return for which no contingent fee is at stake, he may be tempted to send in an adequate return, a return that may not be as robust with documentation as it could be. Often this may be as a result of concerns of the client about fees. When there is a contingent arrangement, a practitioner is more likely to take the additional time to secure additional documentation from the client up front, anticipating all of the likely questions of an examiner of the return. The practitioner knows that the time invested up front will save time down the road and increase the chances of a successful result.

Often, a practitioner's unwillingness to take a case on a contingency indicates to the client that there may be difficulties to the case. If the IRS prohibits contingent arrangements in many cases, then that "barometer" disappears.

We believe that Section 10.27 of Circular 230 should not be changed. The current standards are fair and reasonable and make sense. Also, the prohibition of contingent fees is specific. The assumption being that contingent fees will be permissible if not specifically prohibited. The proposed changes to Section 10.27 turn this approach on its head by generally prohibiting ALL contingent fee arrangements and then carving out specific exceptions. This approach is fraught with pitfalls and likely to have unintended results.

In arriving at this change in approach, did Treasury conduct any significant research to determine when contingent fee arrangements are used in tax practice? I suspect that the Treasury is concerned about the larger arrangements as evidenced in its discussion of the SEC and the Public Company Oversight Board. I represent no public companies in tax matters. In fact, I represent no companies that are under the jurisdiction of the LMSB Division of the IRS.

The underlying presumption of the change is that there are a large number of disreputable Circular 230 practitioners...that, somehow, are running amuck in preparing faulty amended returns on a contingent basis that are bypassing IRS scrutiny. We know of no such evidence in this regard.

Prohibiting contingent fees as proposed would eliminate the following contingent arrangements:

- Claims for refunds and/or amended returns with respect to the abatement and refund of penalties;

- Seeking abatements of penalties and interest through IRS Revenue Officers and Appeals;

- The filing of amended returns to correct a taxpayer's tax liability. Frequently, taxpayers omit allowable deductions, carryovers, exemptions or have included in their returns non-taxable income as taxable.

Most taxpayers do not understand the inner workings of the IRS. And, as such, will look to a professional to help them along. Often, we as practitioners may believe that a position is very strong and we offer to take such positions on a contingent basis. Taxpayers, fearful of additional fees and

fearing that the IRS will never give them back money, will not file amended returns as they believe that they will have little or no success in spite of contrary advice. Contingent fees enable the more knowledgeable practitioner to take the risk.

Recently, I used contingent fee arrangements to:

- Secure a $6,000 refund of penalties for a divorcee who filed her tax returns late (but paid by October 15th) because of information she had to secure from her ex-husband.

- Secure a $38,000 refund relating to an NOL which the predecessor accountant had forgotten to note on the tax return.

- Secure an abatement of $100,000 of penalties against a taxpayer with horrific depression problems. In so doing, I used the Collection Appeals Process to keep liens off the taxpayer while the appeal on the penalties was being considered.

- I am currently representing someone who was unable to secure representation before the IRS. The IRS was seizing assets from her and not leaving her with sufficient assets or income to meet her basic living needs. They were not even allowing her to pay her current estimated income taxes! We created a contingent fee arrangement to enable me to provide representation without the necessity of receiving a retainer. Her fees to me are contingent upon the income allowable to her by the IRS in connection with an installment agreement. It is limited to 125% of my actual time and charges. Over the past two years, I have collected about $12,000 in fees on over $100,000 in chargeable time.

  Without my willingness to enter into this arrangement, this taxpayer would have been unrepresented. This was a situation of an overzealous IRS that had targeted this woman inappropriately. Ultimately, Appeals, the Taxpayer Advocate's Office, and the Department of Justice had a different view from the IRS and provided relief for the taxpayer.

None of the engagements above impinge upon our voluntary system of taxation. In fact, they help it work better by protecting taxpayers from, at times, an overzealous IRS.

And, although I have not personally entered into the types of contingent arrangements described below, there would appear little reason to prohibit arrangements which:

- Legally avoiding levies or seizures of assets;
- Successfully negotiating an offer in compromise;
- Successfully negotiating a favorable installment agreement;
- Innocent Spouse proceedings;
- Pre-filing services such as letter rulings and advanced pricing agreements;
- Avoiding or reversing the assessment of the Trust Fund Recovery Penalty; or
- Eliminating garnishments of salaries/wages.

In its proposed changes to Circular 230, the Treasury allows for contingent fees in an examination

environment. Frankly, I would have no idea how to write an engagement letter with respect to such fee. I have never entered, and suspect will never enter, into a contingent arrangement on an examination. Think about it. The Taxpayer gets a notice that his/her/its return is being audited. How is one to compute the contingent fee? The practitioner doesn't know the real exposure involved. In my case, I always charge an hourly rate for such examinations. Occasionally, I negotiate a bonus provision based upon an overall perception of the results and my efficiency in getting those results. This is also referred to as "value" billing and is very common in the accounting profession.

So, in effect, Treasury is proposing to virtually eliminate all contingent fees for all administrative proceedings. The exception for examinations is meaningless for the most part. And, the only other exception is for judicial proceedings. The impact of the proposed changes to section 10.27 of Circular 230 would be to, in effect, deprive many taxpayers their right to representation.

If Treasury insists on changing the approach of section 10.27 to prohibit contingent fees and carve out exceptions, then we would propose that additional exceptions be added to proposed section 10.27(b) as follows:

"(4) A practitioner may charge a contingent fee for any services rendered in connection with the abatement and/or refund of penalties and/or interest arising out of the Internal Revenue Code. Such services shall include, but not be limited to, the filing of amended returns and/or claims for refunds claiming such refunds and/or abatements."

"(5) A practitioner may charge a contingent fee for any services rendered in connection with the collection of taxes previously assessed (including representation in offers in compromise)."

"(6) A practitioner may charge a contingent fee for any services rendered in connection with any claims made pursuant to section 6015 of the Internal Revenue Code with respect to innocent spouses."

"(7) A practitioner may charge a contingent fee for any services rendered in connection with the representation of a taxpayer in responding to all IRS notices and inquiries which propose the assessment of additional taxes. This shall include responses to SFR notices."

"(8) A practitioner may charge a contingent fee for any services rendered in connection with the filing of amended returns involving a change in tax of less than $50,000, but only if the practitioner reasonably anticipates, at the time the fee arrangement is entered into, that the amended tax return or refund claim will likely receive substantive review by the Internal Revenue Service."

"(9) A practitioner may charge a contingent fee for any services rendered in connection with the filing of amended returns that are provided directly to a Revenue Agent, a Revenue Officer, or an Appeals Officer or anyone in chain of management above such positions."

"(10) A practitioner may charge a contingent fee for any services rendered in connection with representation of a taxpayer with respect to the proposed assessment of the Trust Fund Recovery Penalty pursuant to section 6672 of the Internal Revenue Code."

"(11) A practitioner may charge a contingent fee for any services rendered in connection with the representation of a taxpayer with respect to any pre-filing services, including, but not limited to, securing from the Internal Revenue Service letter rulings, pre-filing agreements, advanced pricing agreements, and approvals to changes in accounting methods."

None of the services above exploit the audit selection process. With the exception of the amended returns involving a tax of less than $50,000, all of the actions above would involve significant IRS scrutiny. And, even for the less than $50,000 situations, a contingent arrangement would be allowed only if the practitioner believes that such filing is likely to receive a substantive review by the Internal Revenue Service.

We would be willing to your responses to our comments. We welcome any inquiries. We look forward to working with you in finalizing the proposed changes to Circular 230.

Please note that the positions set forth in this presentation have been adopted by the Internal Revenue Service Liaison Committee of the AAA-CPA.

Respectfully Submitted

E. Martin Davidoff, CPA, Esq.
Chairperson AAA-CPA Internal Revenue Service Liaison Committee &
Vice President, AAA-CPA, 2006-2007

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