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CC:PA:LPD:PR (REG-125693-19)
Regina Johnson
Internal Revenue Service
Room 5203
PO Box 7604, Ben Franklin Station
Washington, DC 20044
pra.comments@irs.gov

RE: Response to Request for Public Comments on Proposed Regulations 301.7803-2(c)(19)-(20).

Dear Ms. Johnson:

I appreciate the Internal Revenue Services' request for public comments published in the Federal Register on September 13, 2022, concerning proposed regulations on the resolution of federal tax controversies by the Independent Office of Appeals (OMB Number 1545-0159). While I realize the comment period for these proposed regulations has closed, the regulations have not been finalized and I feel there is an issue worth considering. I have recently been reminded of the importance of the proposed regulations given the many Employee Retention Credit cases being opened. Specifically, I am seeing IRS examiners apply Notice 2021-20 as if it were binding law and know that practitioners are challenging that practice by protesting the determinations and seeking review before Appeals. See Unzeitig & Vasquez, Employee Retention Credit Notice Likely Lacks the Force of Law, 181 Tax Notes 1003 (Nov. 6, 2023) (concluding that Notice 2021-20 likely lacks the force and effect of law due to lack of compliance with the Administrative Procedure Act). If the proposed regulations were in effect, they would prevent my clients and millions of other taxpayers from raising legitimate legal defenses provided by the Administrative Procedure Act. I believe that is unacceptable, a poor use of taxpayer and government resources, and inconsistent with the principles for having an independent administrative forum to resolve cases efficiently.

The IRS Independent Office of Appeals is a crucial component of our country's tax administration. It holds as one of its most important goals the mission to resolve tax controversies in an independent and impartial manner without the need for expensive litigation. Because of the skills of its employees and the quality of their work, most federal tax disputes are settled in Appeals. And the forum is particularly important for cases in which the Tax Court lacks jurisdiction and taxpayers would otherwise be without a pre-payment jurisdiction for meaningfully settling their disputes.

But perhaps what *most* separates Appeals from other compliance functions is that Appeals gives weight to "hazards of litigation" in resolving cases. Indeed, it is the only administrative function within the IRS with the authority to consider settlements of tax controversies on the basis of uncertainty of legal issues. I have concerns, however, that certain provisions in the proposed regulations improperly and unwisely strip Appeals of its authority to consider all litigation hazards.

In addressing the proposed regulation (specifically subparagraphs (c)(19) and (c)(20)), I adopt the format presented by Judge Holmes in Oakbrook in how best to comment on proposed rules. Namely, I use the "what and why test": (1) *what* is the problem with the proposed rule; and (2) *why* is it a problem?" Oakbrook Land Holdings, LLC v. Commissioner, 154 T.C. No. 10 (2020), slip op. at 102.

What is the Problem?

The problem with the proposed regulation is that it suggests stripping Appeals of its power to consider certain litigation hazards. In particular, subparagraphs (c)(19) and (c)(20) generally remove from Appeals' consideration any legal arguments and defenses founded in violations of the Administrative Procedure Act.

Why is it a Problem?

The Administrative Procedure Act (APA) is law. Pub. L. 27-404. It is binding on Treasury and the IRS. The Supreme Court made that clear in Mayo Foundation when it said that it was "not inclined to carve out an approach to administrative review that is good for tax law only. To the contrary, [the Supreme Court has] expressly '[r]ecogniz[ed] the importance of maintaining a uniform approach to judicial review of administrative action.'" Mayo Found. For Med. Educ. & Rsch. v. United States, 562 U.S. 44 (2011). Thus, Treasury and the IRS are subject to the APA just as every other administrative agency is. This is not a question reasonably subject to interpretation.

Thus, if the goal of the Independent Office of Appeals is to resolve cases in an impartial manner that gives no preference to either side while also weighing the hazards of litigation, Appeals should have the ability to weigh *all* litigation hazards, not just *some* litigation hazards. Hazards to litigation include APA challenges.

Treasury raises three arguments in the preamble suggesting otherwise. I address those arguments in turn.

First, the preamble states that APA challenges should be ignored because the "process of reviewing and approving Treasury regulations before they are published is extensive and involves senior officials in numerous offices within the Treasury Department, the IRS, and sometimes other Federal agencies." While that may very well be true, extensive internal review *does not* mean that the regulation was properly promulgated under the APA. A rule that has been extensively reviewed by many government officials is laudable, but it provides no guarantee that it has the force and effect of law. Indeed that is precisely why the APA allows

courts to set aside rules when they are unilaterally promulgated. Administrative agencies can create rules that bind citizens only if they engage in a dialogue with citizens when creating those rules that affect them. In other words, extensive dialogue *internally* is largely irrelevant to an APA challenge. It is the dialogue with *external* citizens during promulgation that is critical.

While the preamble later states that Treasury regulations are "generally" submitted for notice and comment under the APA thus suggesting that regulations are "generally" APA-compliant, scholars and Courts have determined that Treasury has a notable record of noncompliance. See Kristin E. Hickman, Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Procedure Act Rulemaking Requirements, 82 Notre Dame L. Rev. 1727 (2007). Thus, until Treasury and the IRS can establish that their rules are *always* APA-compliant, it must be assumed that APA challenges are legitimate defenses that raise honest-to-goodness litigation hazards.

Second, the preamble says that "unlike most Appeals analysis, which weigh litigation hazards in applying the law to specific facts, considering the validity of a regulation does not involve taxpayer specific facts." I respectfully disagree. In any controversy, the IRS is enforcing a particular rule on the basis of a taxpayer's particular facts. Prior to the individual tax controversy, the taxpayer is barred from challenging the rule under the Anti-Injunction Act and can raise the APA challenge only when the IRS attempts to enforce a particular agency rule because it determines the *taxpayer's facts* make the particular agency rule applicable. Thus, facts are unique to each case in many APA challenges.

Moreover, the taxpayer's facts tend to inform whether or not an ignored comment was material. Consider Oakbrook v. Commissioner, 154 T.C. No. 10 (2020) and Hewitt v. Commissioner, 21 F.4th 1336 (11th Cir. 2021). In those cases, the facts were similar to the concerns expressed in several comment letters submitted to Treasury decades earlier that Treasury ignored when finalizing the regulation. That the taxpayers' facts were closely aligned to the issue Treasury ultimately ignored certainly weighed on some judges' conclusions that the regulation was procedurally invalid for lack of Treasury's engagement in the reasoned decision making process.

Thus, if a citizen raised concern that a proposed regulation was problematic and that citizen provided specific reasons on the basis of generalized or particular facts, but Treasury ignored those comments and finalized the rule anyway, subsequent taxpayers who have those same facts and are the subject of IRS enforcement actions (potentially many years later) would have exceptionally strong cases that the particular regulation was procedurally defective under the APA. Those taxpayers should also have the right to raise that issue before an Appeals Officer and should be afforded the opportunity to settle on the hazards raised by the claim without the need to engage in costly litigation. To otherwise enforce an agency-made rule without offering the taxpayer the opportunity to explain why the rule was lacking in enforceability strikes us a fundamentally unfair and inconsistent with the law.

Third, I address the "exception". That is, the proposed regulation provides that Appeals may consider an APA challenge in very limited instances--those in which a Court has already found the regulation at issue invalid and the decision is "unreviewable". I express concern and

confusion on how such an exception would be implemented. Consider the recent case of Green Valley Investors LLC v. Commissioner, 159 T.C. No. 5 (2022). In that case, the Tax Court held that a particular listing notice was procedurally invalid under the APA. The Court referenced in footnote 22 that while the decision was applicable only to the taxpayer before the Court, it intended to apply the decision to all similarly situated taxpayers. Assuming the government appealed that decision and prevailed (which is expected to take many years from now as the underlying substantive easement case has yet to go to trial), the listing notice might be valid and enforceable on taxpayers residing in the Fourth Circuit. But the Tax Court would continue to apply its own precedent in Green Valley holding the notice invalid in all other circuits. Golsen v. Commissioner, 54 T.C. 742, 756-57 (1970), aff'd, 445 F.2d 985 (10th Cir. 1971). Thus, there would be clear law that a taxpayer could prevail in the Tax Court in most of the country but Appeals may be precluded from agreeing with the Tax Court decision. This strikes me as unworkable. And it in fact proves the point that "hazards of litigation" can be different for different taxpayers located in different parts of the country given their unique facts and circumstances.

The proposed regulation's "exception" is also strange because APA challenges are some of the exclusive legal issues subject to the proposed restriction. That is, taxpayers with *other* legal defenses need not wait for an "unreviewable decision" before Appeals may consider the legal argument as a potential hazard. It is only taxpayers with APA and Constitutional challenges that are singled out for the restriction. Taxpayers with those defenses thus become a suspect class of citizens who have lesser rights to resolve their cases before an impartial forum due to the legal arguments supporting their claim.

Finally, I understand that this is an area of law in which Appeals Officers may not be familiar. That, however, is an unacceptable reason to exclude it from consideration as a litigation hazard. The APA has been around since the 1930s and there is a well-developed body of case law allowing Appeals, taxpayers, and the IRS to adequately evaluate the hazards associated with APA challenges. Appeals deals with appellate style issues all the time. Hewitt and Oakbrook are perfect examples of this. Appeals, as an organization, is smart and experienced enough to analyze changing precedent and apply evolving law to its existing inventory. Treasury thus has no convincing reason to carve out an exception for particular types of cases to the detriment of particular classes of taxpayers.

Hundreds, if not thousands, of taxpayers have cases where they have made (or are entitled to make) APA challenges. The government has hazards in litigating those cases. Those hazards, just as all other legal hazards, should be recognized and considered as part of a settlement analysis. If not, Appeals fails in its important mission to resolve taxpayer disputes in an impartial and low-cost forum.

The approach in the proposed regulations also disproportionately and detrimentally affects taxpayers who are represented by CPAs, enrolled agents, or anyone not licensed to practice before a Court. This is because, with extremely limited exceptions, only attorneys litigate cases and thus all other taxpayer representatives can typically only represent taxpayers as far as Appeals. If taxpayers are precluded from making an APA argument at Appeals that would otherwise be viable and available in litigation, they suffer. Taxpayers unable to afford the time,

effort, and expense of hiring a lawyer to take a case to trial are thus disproportionately affected and lose important rights.

Proposed Solution

My proposed solutions is simple: allow Appeals to consider *all* litigation hazards, not just *some* litigation hazards.

Existing Treas. Reg. 601.106(f)(2) already assumes this when it says "Appeals will ordinarily give serious consideration to an offer to settle a tax controversy on a basis which fairly reflects the relative merits of the opposing views in light of the hazards which would exist if the case were litigated." There are likely thousands of regulations, notices, and Revenue Procedures that were promulgated by Treasury and the IRS without adequate public input and consideration. The IRS will seek to enforce those rules. While some of those issues have been litigated, and more will soon, many don't need to be. The existing case law is clear that in many instances, there are hazards to the government if it tries to enforce certain agency rules. There is thus no need to force taxpayers to litigate those matters when the hazards of litigation can be considered and result in settlement.

I Support the Comments Submitted by the American Institute of Certified Public Accountants and Daniel N. Price

I would also like to note that I fully support the separate set of comments submitted by the American Institute of Certified Public Accountants and Daniel N. Price addressing this issue.

Closing

I appreciate the opportunity to provide the above comments. I would be pleased to discuss them further if you or your staff members believe it would be helpful. Feel free to contact me at (210) 278-5814.

CHAMBERLAIN, HRDLICKA, WHITE, WILLIAMS & AUGHTRY, P.C.

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