

# **HAVE YOU EVER READ A REGULATION THAT COULD BE IMPROVED?**

*Bob Probasco*

Of course! We all have. One of the primary objectives of the State Bar of Texas Tax Section is to help address this – improving the substance and administration of state and federal tax laws, one regulation or rule at a time.

## **WHAT WE DO**

To make their regulations more effective, departments and agencies – including the IRS and the Texas Comptroller’s Office – typically issue the regulations in proposed form first. They then solicit and consider comments from the public before finalizing the regulations. This “notice and comment” process is an important component of the rule-making process. The Tax Section often provides comments to the departments or agencies as part of that process, and representatives may also testify on the Section’s behalf at public hearings on the proposed regulations. Under appropriate circumstances and with appropriate approval, the Section can even offer suggestions on final regulations for which the agency has not proposed changes or requested comments.

All such comments, to be filed on behalf of the Section, must be approved by our Committee on Government Submissions (“COGS”). But COGS is primarily a facilitator committee, coordinating and assisting with the process. The primary work of identifying regulations for comment and drafting those comments is done by individual members of the Section, usually organized by the appropriate substantive committee with responsibility for that particular area of tax law. Many individual members offer their time and experience to produce quality feedback on the proposals.

Our experience has been that the agencies sincerely appreciate responses to their proposals, even if they ultimately do not agree. Our suggestions reflect practical experience that the agencies may not have and contribute to better final regulations. Under the guidance of prior COGS Chairs Dan Baucum and Stephanie Schroeffer, the Tax Section established a strong reputation within the agencies as one of the best source of comments to proposed regulations. We take a collaborative, rather than confrontational, approach and make practical suggestions. We comment on a wide range of proposals, more than most other state bars. Most importantly, we target our suggestions. Rather than trying to prepare a lengthy, comprehensive response that addresses all aspects of the proposed regulations, we generally choose just a few issues that deserve particular attention or for which we think our perspective may be particularly helpful. The substance of our comments sometimes is as brief as one or two pages. Agencies appreciate such focused responses that don’t waste time and effort analyzing minor aspects of the regulations with limited effect.

The agencies, taxpayers, and tax practitioners benefit from better and more considered regulations. The Tax Section benefits from a higher profile and prestige for the contributions. And the Tax Section members who work on the projects benefit from the exposure, within the

Tax Section and from publication of comments in the national tax media. It's a win-win situation, for all involved.

## **RECENT PROJECTS**

Our comments letters are included in each issue of *Texas Tax Lawyer*, as applicable, and are also posted to the Tax Section's [website](#). Our recent projects include the following:

- The Texas Comptroller's Office has issued several proposed rules in the Texas Administrative Code this fiscal year. **Charolette Noel** and other members of the State & Local Tax Committee (including **David Colmenero, David Cowling, Karen Currie, Sandi Farquharson, Justin Hepworth, Ira Lipstet, Kirk Lyda, Sam Megally, Cindy Ohlenforst, and Alyson Outenreath**) further strengthened the Tax Section's relationship with the Comptroller's Office by submitting thoughtful responses to virtually all significant proposals. These rules have addressed a wide range of issues, including aircraft, sales for resale, timely filing and payment, and tax responsibilities/nexus. The committee's accomplishments are especially impressive due to the very short time frame typically available for preparing and submitting comments.
- Last fall, the IRS issued proposed regulations under Section 7602, which would allow third-party private contractors to participate in a summons interview. **Richard Hunn** and **Rob Morris** of the Tax Controversy Committee submitted comments – the only ones received by the IRS on these proposed regulations – that pointed out practical problems with, and the questionable legality of, allowing outside parties to actually question the witness under oath in a summons interview. This issue has been receiving a lot of attention recently, as a result of the IRS engagement of the law firm Quinn Emanuel Urquhart & Sullivan LLP for a transfer pricing audit of Microsoft. Media accounts of the controversy continue to mention our submission, months after it was filed.
- The Employee Benefits Committee has completed two important projects this fiscal year. The Texas Department of Insurance issued an informal working draft of rules concerning professional employer organizations sponsoring partially or fully self-funded/self-insured employee health benefit plans. **Henry Talavera** and **Jim Griffin** submitted comments and also attended a stakeholder meeting in Austin to discuss the draft rules. Their experience and expertise helped them point out potential conflicts with the Patient Protection and Affordable Care Act (“ACA”) and ERISA, as well as the probable economic effects of the draft rules on PEO's and other co-employment relationships. As a result of their practical experience with co-employment arrangements and in-depth familiarity with relevant law like ACA and ERISA, TDI singled out Henry and Jim as part of a small group to work further with TDI on finalizing the rules. More recently, Henry and **Karen Suhre** worked with the Real Estate, Probate and Trust Law Section of the State Bar to draft a bill to amend the Texas Property Code regarding the treatment of inherited IRAs.

## **JOIN US!**

You don't need to be one of the top Texas experts in tax law to participate. If you've ever read a regulation and thought about how you might have written it differently, you have what it takes to write comments on proposed regulations. If you read a particular proposed regulation that you would like to see changed, contact the Chair of the appropriate substantive committee (see our [website](#) for contact information) and volunteer to help. Even if you haven't run across a particular problem, you can express your interest in any upcoming projects to committee Chairs – they often can use some additional participants to share the effort. And if you have any questions about the process or would like to discuss further, feel free to contact any of the members of the COGS committee:

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We hope you'll consider participating!