

Testimony of Thomas B. Cooke before the IRS Oversight Board

January 26, 2004
Washington, DC

Panel 4: Tax Practitioners and Professional Responsibility

Thank you for the opportunity to offer testimony today on a very important topic: Tax Practitioners and Professional Responsibility

For the over twenty five years I have had the privilege to serve as an instructor in the field of business law and federal taxation at Georgetown University.

Today, I hold the position as a distinguished teaching professor in the Robert C. McDonough School of Business. In addition to my work at Georgetown, I am the Executive Director of NSTP – The National Society of Tax Professionals, Editor of a monthly publication called The Federal Tax Alert and I write a Tax Client Newsletter.

My educational background includes three law degrees from the Georgetown University Law Center – the most recent degree being a Master of Laws in Taxation.

During the fall of each year, I have the opportunity to travel around the United States and lecture to tax professionals in what NSTP calls the Society's Annual Fall Tax Update Seminars. From October to December 2003, I visited 25 cities and reviewed a variety of issues with tax professionals. The audience that I address is a mix of EAs, CPAs, Attorneys and other tax professionals. The educational program offered by NSTP is approved by the National Association of the State Boards of Accountancy and the IRS.

Thanks to the IRS Oversight Board

I want to extend special thanks to the Oversight Board for taking the time to hold this annual public meeting and for your individual and collective efforts at the IRS Nationwide Tax Forums.

Ethics: The Time is Now

During 2002 and 2003, the IRS offered me an opportunity to address the attendees at the six Nationwide Tax Forums. One of my presentations in 2002 and 2003 was The Education Menu. In 2003 I expanded my instruction to include two separate sessions on the subject of **Ethics**. As far as I could tell, this marked the first time that **Ethics** was offered at the Forums and I cannot say that the IRS representatives jumped at the idea at first. The attendance at each of the 2003 **Ethics** presentations was “standing room only” with an estimated 2,500 tax professionals attending the sessions in Las Vegas on the last day and at the earliest hour.

The 2003 Forum attendees rated Ethics: Part II as the number one session, Ethics: Part I as number two and The Education Menu as number three out of 49 separate offerings. I am pleased to have introduced **Ethics** as a Forum topic. I have offered my services to the IRS for the 2004 Forums.

Increasingly, public and private attention is focused on ethics and professional conduct. Some states now require ethics training as part of their mandatory CPE. Circular 230 was amended some time ago to include a provision that in the future all Enrolled Agents must have two hours of **Ethics** education per year. The importance of **Ethics** as an area of study is obvious. The IRS has taken a giant step in helping to move this mission forward.

The National Taxpayer Advocate 2003 Annual Report to Congress

In preparation for today's hearings, I have taken time to review the National Taxpayers Advocate's Annual Report to Congress (2003). While I have not worked my way through all 494 pages of the report, I did pay very close attention to the sections of the report devoted to the **tax professional community**.

In her 2003 Annual Report, Nina E. Olson has restated a series of recommendations on the subject of Oversight and Compliance with Federal Tax Return Preparers. In addition to making legislative recommendations to increase existing Code penalties, the Advocate has once again stated her strong support for a number of legislative and administrative changes. While I am providing the Oversight Board with a copy of my Position Paper on several of the recommendations, I would like to briefly highlight what I believe are some of the most important proposals and those worthy of high priority status.

1. A rule requiring the registration of all federal tax return preparers is an important start.
2. While completing an annual registration form, ALL federal tax return preparers could be required to indicate the amount of Continuing Professional Education (CPE) that they have completed.
 - a. One of the problems inherent in the tax system is that any one, with any credential or the lack thereof can prepare tax returns for a living. Not everyone is subject to mandatory CPE.
 - b. In her report to Congress, the Advocate notes (page 270) that "approximately 300,000 to 600,000 preparers are not regulated by any licensing entity or subject to

minimum competency requirements.” The fact is that we really don’t know who is out there preparing taxes.

I can tell you from my 12+ years of experience with a national tax association that there are unenrolled preparers out there who are just as competent and as dedicated to the profession and ethical values as anyone. Letters after a name do not make someone any more or less competent or ethical than anyone else.

It is not fair to refer to the unenrolled preparer community as the problem child. Problems cross all levels of competency in the tax professional community.

3. While I agree with the Advocate’s premise that there are problems within the tax profession, I do not believe that the best solution is to require another level of federal bureaucracy.

The idea of establishing a system of testing and certifying federal tax preparers is far too radical an idea and there may be easier and less costly ways to raise the level of competency.

5. Why not make all federal tax return preparers subject to a minimum level of annual continuing professional education including the subject of **Ethics**? Why not call upon the nation’s tax associations to encourage and monitor this practice?

Finally, I want to offer support for the Advocate’s recommendation that Congress direct the Treasury “to establish a joint task force, on which the National Taxpayer Advocate, representatives from the

Department of the Treasury, the IRS, the Federal Trade Commission, State tax and consumer protection agencies, nonprofit consumer protection agencies, and **tax professional associations** shall serve to obtain data about the composition of the return preparer community and make recommendations about the most effective means to ensure accurate and professional return preparation and oversight.”

Thank you for letting me to share a few of my thoughts on the subject of tax practitioners and professional responsibility.

The IRS Free File Initiative

In my comments to the Oversight Board last year, I expressed concerns with the IRS supported Free File Initiative. For the reasons that follow, I want to again express concerns the project and encourage you to monitor its practice and results.

In my opinion, the IRS-tax software industry coalition (Free File Initiative) is a big mistake and the project has the potential to create more harm than good.

We are all concerned with the issue of tax fraud. The last thing that anyone of us wants to do is to create a mechanism that encourages or rewards fraudulent behavior.

Free tax software coupled with free electronic filing sponsored by the IRS, supported by the IRS is an accident waiting to happen.

The best tax return is one that has been reviewed and filed by a tax professional. The system should be encouraging the use of tax professionals and not establishing a system that discourages their involvement. Is the IRS-tax software coalition a form of competition with tax professionals?

Tax professionals were under the impression that we had entered into an informal partnership with the IRS – we would both encourage the use of electronic filing.

The IRS is under pressure from Congress to reach the 80% goal. The solution to reach the goal is and was obvious. Working with and not around the tax professional community is the answer.

The IRS Oversight Board would go a long way by encouraging Congress and the President to support the creation of a deduction above-the-line or a refundable credit for electronic filing.

Free tax software and free electronic filing poses a threat to the tax professional community. I can report to you today that many tax professionals believe that the IRS is now entering into dangerous territory – competing in the tax preparation business.

Free tax software sends the wrong message to taxpayers – the system is simple, just fill in some numbers, anybody can do it, why pay to have your return done when a government sponsored Internet site offers the service for free.

Taxpayers who are directed to the website will likely miss out of available tax benefits. How fair is that? I can see it now – returns rejected, returns identified as having errors, amended returns being filed.

Exactly who does the “coalition” see as their likely candidate? Who will guard the taxpayer’s privacy? Is the “coalition” is compliance with the federal privacy laws? Who will have access to and potentially profit from the taxpayer’s data? Will members of the tax software industry have an opportunity to “profit” from the IRS sponsored project? Will eligible taxpayers be informed of the opportunity to obtain a Refund Anticipation Loan (RAL)? If the

answer is yes, who gets to profit by the RAL? If the answer is no, how fair is that to eligible taxpayers?

Time does not allow me to share with you all of the concerns that have been expressed to me regarding the IRS Free File Initiative.

In my opinion, the plan was ill conceived, poorly timed and poorly vented with the tax professional community. If this issue had been raised at any of the 2002 or 2003 Nationwide Tax Forums the obvious concerns could have been addressed and perhaps resolved. Why wasn't the issue placed on the 2002 or 2003 agendas? The journey to encouraging electronic filing has taken a turn down the wrong path. It's time to stop and consider where we should be heading and how we can successfully get there together.

Thank you.

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24 January 2004

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The National Taxpayer Advocate 2003 Annual Report to Congress: Registration, Testing and Certifying Tax Return Preparers

Support and Criticism

**Position Paper
Thomas Barry Cooke¹**

January 24, 2004

In her Annual Report to Congress (December 31, 2003), National Taxpayer Advocate Nina E. Olson (herein Advocate) has restated² a series of recommendations on the subject of Oversight and Compliance with Federal Tax Return Preparers. In addition to making legislative recommendations to increase existing Code penalties, the Advocate once again states her support for a number of legislative and administrative changes. In this position paper, the author will comment on the merits of six recommendations made by the Advocate in her most recent report to Congress.

- 1. Establishing a registration, examination, certification and enforcement program for federal tax return preparers.³**

Comment: Oppose

In a previous position paper (October 1, 2003), the author expressed support for the idea of registering all federal tax return preparers. For the reasons previously stated, the author respectfully suggests that now is not the time for examination and

¹ BA, JD, LL.M., M.L.T. Distinguished Teaching Professor, McDonough School of Business, Georgetown University; Executive Director, The National Society of Tax Professionals; Editor, *The Federal Tax Alert* and *The Tax Client Newsletter*.

² FY 2002 Annual Report to Congress (December 31, 2002).

³ Page 272.

certification of tax return preparers and that the idea while worthy of full consideration should await a report detailing the extent of the problems created by “some” federal tax return preparers.

One idea that the author has discussed with other tax professionals is a requirement that all federal tax return preparers be subject to a minimum standard of Continuing Professional Education (CPE). The exact amount of required annual CPE could model that set out in Circular 230. All federal tax return preparers would be required to report their annual CPE to the IRS or in the alternative the nation’s tax associations could report the data.

Requiring CPE of all federal tax return preparers would go a long way in raising the level of competency and the professionalism of return preparers.⁴

As a starting point, the author would recommend that ALL federal tax return preparers state their total number of annual CPE at the time they file their annual registration.

- 2. Establishing “a joint task force, on which the National Taxpayer Advocate, representatives from the Department of Treasury, the IRS, the Federal Trade Commission, State tax and consumer protection agencies, nonprofit consumer protection agencies, and tax professional associations shall serve to obtain data about the composition of the return preparer community and make recommendations about the most effective means to ensure accurate and professional return preparation and oversight.”⁵**

Comment: Support

⁴ In her 2003 report to Congress, the Advocate notes (Page 289) that “indeed, partnering with the Federal Trade Commission, **tax professional associations**, and/or the State, we will raise both the level of competency and the professionalism of return preparers.”

⁵ Page 272. The Task Force would be authorized by Congress and directed by the Secretary of Treasury. The Task Force “should submit its report and recommendations to the House Committee on Ways and Means and the Senate Finance Committee within one year of enactment.”

This is an idea whose time is long overdue. Everyone seems to agree that there is a problem or perceived to be a problem. We need to determine the scope and degree of the problem/s by looking at facts, facts and more facts. It has become too easy to assume that all of the problems lie with the unenrolled preparer community.

Speculation and guessing accomplishes little. It is the opinion of the author that such a Task Force should exist regardless of the present subject of concern and focus.

3. Increase existing penalties.⁶

Comment: Support

It is difficult to argue against enhancement of existing civil penalties. Now, the issue of enforcement ... that's another question.⁷

Civil penalties that exist on the books and are not being enforced do not serve the tax system, tax payers or the tax professional community.

4. Amend Code sections.⁸

Comment: Support

No specific comments on these recommendations.

5. Include a checkbox on all returns and other submissions that require a preparer signature, “for the preparer to enter his or her

⁶ Code sections: 6694(a), 6694(b), 6695(a) through (e), and 6695(f).

⁷ The General Accounting Office reported that in calendar years 2001 and 2002, the IRS asserted \$2.4 million in preparer penalties and collected \$291,000, or 12% of penalties asserted.

⁸ Code sections: 6695(g), 6695, 6713.

category of return preparer (e.g. attorney, CPA, enrolled agent, or unenrolled preparer.”⁹

Comment: Support

If this step is necessary to gather the required data – do it!

If this is an effort to isolate the “unenrolled preparer” from other tax professionals - it isn’t fair and isn’t necessary.

This proposal needs to be explained to the tax professional community. Tax preparers are under the impression that the system already has this information on file.

- 6. Develop a simple, easy to read pamphlet that explains to taxpayers their protections under Code sections 6713 and 7216, their right to refuse to consent to disclosure or use of information by return preparers, and what constitutes a valid consent under the regulations.**

Comment: Support

Communication between the tax system and taxpayers is essential. Taxpayers need to have confidence that the system is working on their behalf. Any steps in furtherance of this effort should be encouraged. The use of the Internet as a starting point should be considered.

End of Paper

F/Advocate’s Report to Congress December 31, 2003

⁹ The Advocate argues that “this information will help the IRS better focus its preparer education, outreach, and competitive efforts.” (see Pages 273-274)