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May 19, 2017

Via E-mail to SpecialCounsel.Filings@cpa.texas.gov

Gina Calviño

Legal Assistant, Office of Special Counsel for Tax Hearings
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RE: Comments on Proposed New 34 Tex. Admin. Code § 1.41,
"Ex Parte Communications"

Dear Ms. Calviño:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Texas Comptroller of Public Accounts for comments pertaining to Proposed New 34 Tex. Admin. Code § 1.41. The proposal appeared in the April 21, 2017, edition of the Texas Register.

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT

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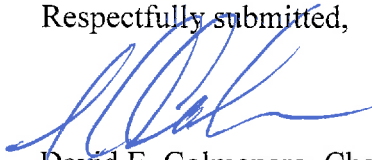
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SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

We commend the Texas Comptroller of Public Accounts for the time and thought that has been put into preparing Proposed New 34 Tex. Admin. Code § 1.41, and we appreciate being extended the opportunity to participate in this process.

Respectfully submitted,



David E. Colmenero, Chair
State Bar of Texas, Tax Section

COMMENTS ON PROPOSED NEW 34 TEX. ADMIN. CODE § 1.41

These comments on Proposed New 34 Tex. Admin. Code § 1.41 (“Comments”) are submitted on behalf of the Tax Section of the State Bar of Texas. The principal drafter of these Comments was Sam Megally, Chair of the State and Local Tax (“SALT”) Committee of the Tax Section of the State Bar of Texas. The Committee on Government Submissions (“COGS”) of the Tax Section of the State Bar of Texas has approved these Comments. Ira Lipstet, Co-Chair of COGS, also reviewed the comments and made substantive suggestions on behalf of COGS.

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: May 19, 2017

I. INTRODUCTION

These Comments are in response to the publication of Proposed New 34 Tex. Admin. Code § 1.41 (the “Proposed Rule”), by the Texas Comptroller of Public Accounts (the “Comptroller”) in the April 21, 2017, edition of the Texas Register.

We recognize and appreciate the time and thoughtful work invested by the Comptroller’s office in preparing the Proposed Rule. We also appreciate the efforts of the Comptroller to survey existing authority and update existing Rules, particularly as needed to reflect statutory changes. These efforts are extremely useful to taxpayers and practitioners. It is our intent to present items for consideration that may help and support Comptroller personnel in this endeavor.

II. COMMENTS REGARDING PROPOSED RULE

The Proposed Rule sets forth the limitations on communications between parties to a contested case and persons assigned to render decisions or make findings of fact and conclusions of law. Subsection (a)(4) sets forth a list of persons who “participate in rendering decisions,” and with whom ex parte communications are prohibited, including the Comptroller, and staff of the Office of Special Counsel for Tax Hearings. We respectfully suggest that this provision is inconsistent with and overbroad as compared to Government Code § 2001.061(a), which prohibits ex parte communications only with persons who are “assigned to render a decision or to make findings of fact and conclusions of law,” and not all persons who participate in rendering decisions or making findings and conclusions.

We understand from prior communications that “the [Comptroller’s office] employee assigned to render a decision in tax hearings is the Deputy Comptroller, and staff in the Office of Special Counsel for Tax Hearings provides legal advice to the Deputy Comptroller with respect to the proposals for decision.” It is our view that the Comptroller, who is an elected official, must remain at all times available to taxpayers, including as required by the U.S. and Texas Constitutions; The agency’s explanation of the Comptroller personnel responsible for rendering decisions demonstrates that ensuring taxpayer access to the Comptroller, even during the pendency of a contested case, is workable and should remain at all times permissible.

Indeed, we suggest that the Comptroller’s office should err at all times in favor of granting taxpayers unfettered access to Comptroller personnel and protecting taxpayers’ ability to discuss with Comptroller personnel a wide range of tax matters. To the extent the Comptroller elects to delegate tasks to his Deputy Comptroller, we observe that it is likely that taxpayers would seek reasonable access to the Deputy Comptroller in connection with meetings to discuss tax matters of importance to taxpayers. In addition, while taxpayers may be able to determine who the Comptroller’s Special Counsel for Tax Hearings is, they are unlikely to be able to determine which Comptroller personnel are on the Special Counsel’s staff. We respectfully note that broadening the ex parte prohibition to include not just the Special Counsel but also his or her staff goes far beyond the language and intent of Government Code § 2001.061(a).

Therefore, we propose that the Comptroller revise subsection (a)(4) so that the only person with whom ex parte communications are expressly prohibited is the administrative law judge assigned to the contested case. Alternatively, even if you decline to remove from the list the Deputy Comptroller and the Special Counsel, we propose that you remove from the list at least the Comptroller and the staff of the Office of Special Counsel.

III. CONCLUSION

We greatly appreciate the opportunity to work with your office on these significant tax issues and hope these Comments provide relevant analysis for your review. We also reiterate our earlier request for a roundtable meeting to address these issues, and would welcome the opportunity to participate in such a discussion. Thank you for your consideration.