**Internal Revenue Service**

# memorandum

CC:F&M:GLS-1095-97
CASE No.: GLS-110326-97
EGG:ETewel

Date:

To: Director of Practice C:AP:D

From: Assistant Chief Counsel (General Legal Services) CC:F&M:GLS

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Subject: Privatization of Special Enrollment Examination

This is in response to your request for our views concerning a proposal whereby designated professional associations would develop and administer the Special Enrollment Examination (SEE). As discussed below, while the proposal is consistent with the authority of the Director of Practice to determine the qualifications and competency of practitioners, it would be prudent prior to implementation to seek revision of the Treasury practice regulations which currently provide for IRS administration of the examination and payment of application fees to the Service. In addition, implementation as proposed is contingent on Treasury and OMB approval of the Service's chartering of an advisory committee under the Federal Advisory Committee Act (FACA).

You have indicated that you are considering a proposal whereby the National Association of Enrolled Agents (NAEA), the National Society of Accountants, the National Association of Tax Practitioners, and the National Society of Tax Professionals would enter into an agreement for the joint development and administration of the SEE. The proposal is modeled on the agreement entered into by the Joint Board for the Enrollment of Actuaries (JBEA) with the American Society of Pension Actuaries and the Society of Actuaries (SOA), whereby the SOA administers Basic and Pension Examinations developed by Examination Committees based on Advisory Committee guidance and subject to Advisory Committee review. The agreement you are contemplating would similarly provide for an Examination Committee whose members are appointed by the four participating professional associations. The Examination Committee would develop examination questions for the SEE and related educational materials based on guidelines provided by an Advisory Committee and subject to the review and approval of the Advisory Committee and the associations. The Advisory Committee in turn would make recommendations to the associations and the Director of Practice concerning examination content and a passing score.[1] Advisory Committee functions will also include consideration of future changes in the examination program. Advisory Committee members would be appointed by the Director of Practice from among nominees selected by the associations and others. NAEA has offered to provide necessary administrative services, including printing of application and examination forms, proctoring, computer grading, and notifying candidates of their scores, while

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[1] While the examination will be jointly administered, each party may adopt a separate passing score.

the National Society of Public Accountants (NASPA), the organization that administers the AICPA examinations, also has a possible interest in providing administrative services. In contrast to the arrangements made by the JBEA, the Director of Practice may not be a party to the aforementioned agreement among the professional associations for the development and administration of the SEE.

*Authority to Provide for Enrollment Based on Jointly-Administered Examination*

The authority of the Director of Practice to conduct an examination program for enrolled agents is based on the Treasury practice statute, whereby the Secretary may require that before admitting a representative to practice before the Department, the representative demonstrate necessary qualifications and competency.[2] *See* 31 U.S.C. § 330(a)(2)(C), (D). Under the practice regulations, the Director of Practice has been delegated the authority to act upon applications for enrollment. Treasury Circular 230 (31 C.F.R.), § 10.1(b). As provided at 31 C.F.R. § 10.4(a), the Director of Practice may grant enrollment to an applicant who demonstrates special competence in tax matters by written examination administered by the Service. *See also* 31 C.F.R. § 10.5(b) (authorizing enrollment on condition of completion of a written or oral examination, as prescribed by the Director of Practice). Applications for enrollment are to be filed with the Director of Practice, accompanied by check or money order made payable to the Service in the amount prescribed on the application form. 31 C.F.R. § 10.5(a). The regulations further provide that the application fee shall be retained by the Government whether or not the applicant is granted enrollment. *Id.*

We have considered whether the proposal for joint administration of the enrolled agent examination with selected professional associations would be an improper delegation of the governmental authority and responsibility of the Director of Practice to the associations, and have concluded that the proposal is acceptable in this regard. Under the agreement that is contemplated, the Director retains the responsibility for setting policy and standards for enrollment, and final decisionmaking authority with regard to passing scores for purposes of enrollment. In *Tabor v. Joint Board for Enrollment of Actuaries*, 566 F.2d 705, 708, fn. 5 (D.C.Cir. 1977), the court upheld Joint Board procedures in the face of a challenge based on the theory that the Board's reliance on association-developed standards was an improper delegation of authority by the Board. The court concluded that Board regulations treating association membership (based on passing an association-developed and administered examination) as sufficient evidence of qualifications to practice as an actuary does not, as a factual matter, result in a substantial delegation of the Board's statutory responsibility in light of the continued availability of passing the Joint Board's examination as an alternative means of establishing one's qualifications. In addition, the court stated that such delegation by the Board to private parties is permitted pursuant to the Board's statutory authority to establish reasonable standards and qualifications. We recognize that the proposal that is contemplated (and the Board's

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[2] Such authority is subject to the agency practice statute, 5 U.S.C. § 500, which authorizes attorneys to practice before the agencies and CPAs to practice before the Service.

arrangements with the professional associations) for a jointly administered examination is distinguishable from *Tabor,* in that candidates for enrolled agent status will not have the opportunity to establish their qualifications through a Government-developed examination. However, in contrast to the purely association-developed and administered examination that was acceptable to the court in *Tabor*, the Director of Practice retains the authority to review proposed examinations recommended by an advisory committee to determine their acceptability and to set passing scores. Accordingly, in light of Treasury's broad statutory authority to establish standards for practice and the authority retained by the Director of Practice under the proposed agreement, in our opinion, there is no indication that the proposed arrangements are precluded by a general limitation on delegation of Governmental authority.

In addition, we do not view the proposal as violating the principle set forth in OMB Circular A-76 that inherently Governmental functions must be performed by Government employees rather than contracted out to commercial sources, absent statutory authority. As stated at para. 6.e of the Circular, Governmental functions include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government, and normally fall into two categories: (i) the act of governing, i.e., the discretionary exercise of Governmental authority, and (ii) monetary transactions or entitlements. Certainly, the administration and grading of the SEE are not inherently Governmental, in that these functions involve a minimal exercise of discretion and value judgments. *Compare* 70 Comp. Gen. 682 (1991) (due to the extensive detail and guidance provided by the NRC, which eliminates virtually all discretion and value judgments in the development and administration of testing of nuclear reactor operators, contract examiners are not performing an inherently Governmental function) with Comp. Gen. Dec. B-237356 (December 29, 1989) (DOE may not use contract hearing officers to determine eligibility for security clearances, since in considering and ruling on disputed evidence and making preliminary findings, the contractors exercise broad discretionary authority and make value judgments for the Government). While the development of the SEE apparently involves significant discretion under the procedures set forth in the contemplated agreement with the associations and therefore could be characterized as inherently Governmental, since the Director of Practice will retain the discretion to review and approve the recommended examination and will determine the passing score for enrollment, we do not view the proposal as involving a delegation of inherently Governmental functions to nonGovernment entities.

Accordingly, in our opinion, the proposal is well within the broad authority of the Secretary to require evidence of necessary qualifications and competency before admitting a representative to practice, and would not violate general legal principles precluding the performance of inherently Governmental functions by private entities in the absence of statutory authority.[3] [redacted] DP

[3] The Joint Board does not have a similar regulatory framework. Instead, the Joint Board's enabling statute and implementing regulations provide for qualification, based on

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Under the proposal, the Director of Practice does not participate directly in the activities of the Examination Committee, but rather is advised by the Advisory Committee that forwards the recommended SEE to the Director and the associations for review. By serving as a party to the agreement, the Director will gain a direct and enforceable interest in the matters that are described, including the determination of passing scores among the parties, and administration of the examination (e.g., the setting of examination fees, selection of examination centers, and the resolution of alleged irregularities in the administration of the examination)[redacted] DP

*Application of the Federal Advisory Committee Act (FACA)*

It is our understanding that the contemplated advisory committee will be composed of representatives of the four participating associations and several additional members selected by the Director of Practice following notice in the Federal Register. As described in the agreement, Advisory Committee functions will include providing guidance to the Examination Committee and recommending examination content and passing scores to the Director of Practice and the associations.

In order to avoid improper influence by private interests, FACA generally requires a group that is "established or utilized" by an agency to provide advice or recommendations to be publicly chartered. *See* FACA, 5 U.S.C. Appendix, §§ 2, 9. The formation of an advisory group under FACA is conditioned on a formal agency determination, in consultation with GSA and OMB, that the formation of the group is in the public interest. *See* FACA, § 9(a)2), and OMB Circular A-135 (October 5, 1994), 59 Fed. Reg. 53856 (October 26, 1994). In addition, all IRS advisory committee charters must be approved by the Department of the Treasury, Assistant Secretary for Administration. *See* T.D. 21-03, § 5(b) (although the Directive was cancelled, we have been advised the Department's procedures remain in effect). If a group is subject to FACA, advance public notice of meetings, meetings that are open to the public, and public availability of committee minutes, reports and other documents are generally required.[5] *See*

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successful completion of an examination given by the Board *or other actuarial examinations* deemed adequate by the Board. *See* 29 U.S.C. § 1242(a)(1)(B) and (C), and 20 C.F.R. §§ 901.13(c) and (d).

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[5] Advisory committee meetings, but not working group meetings, are open to the public,

FACA, §§ 9 and 10. Further, under FACA, § 10(e) and (f), no advisory committee meeting may be conducted without the advance federal approval of the meeting agenda, and attendance of a federal employee designated by the agency. The Service, like other agencies, is restricted in creating new advisory committees.[6]

We considered whether the contemplated Advisory Committee could properly be characterized as "operational" rather than advisory and accordingly outside the scope of FACA. In accordance with the legislative history of the Act, GSA's implementing regulations contain an exclusion for committees established to perform primarily operational as opposed to advisory functions. *See* 41 C.F.R. § 101-6.1004(g). Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. *Id.* Under the proposal, the Committee will not set or implement Government policy with regard to qualifications for enrollment or other aspects of the enrollment process, but rather will make recommendations to the Director of Practice regarding his authority to test applicants.[7] In addition, the Committee's provision of advice to the associations is not inconsistent with its advisory role to the Government.[8] Accordingly, an IRS Advisory Committee that has a role modeled on the Advisory Committee described in the JBEA agreement is an advisory committee under the Act, since it will be established and utilized by the Service in the interest of obtaining advice concerning the enrollment examination.

*Enrollment Application Fees*

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subject to the exceptions provided under the Government in the Sunshine Act, 5 U.S.C. § 552b. *See* FACA, § 10(a), and 41 C.F.R. § 101-6.1004(k). Advisory committee minutes and other records are available to the public, subject to the exceptions provided under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. *See* FACA, § 10(b). If you would like legal advice in order to protect the examination questions from disclosure, you should contact the office of the Assistant Chief Counsel (Disclosure Litigation).

[6] The agencies have been directed to reduce their use of advisory committees and limit committee costs. *See* Executive Order 12838, Termination and Limitation of Federal Advisory Committees, 58 Fed. Reg. 8207 (February 10, 1993), and OMB Circular A-135, *supra.*

[7] This is consistent with our conclusion that the proposal does not involve an impermissible delegation of inherently Governmental functions to private parties.

[8] In a recent case, it was recognized that an advisory panel formed by a Government agency for the purpose of establishing guidelines *for practitioners and outside groups* is not an advisory group under FACA, despite the Government's subsequent decision to use the recommended guidelines for purposes of Medicare reimbursement. *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929 (D.C.Cir. 1995). However, in contrast to an agency's merely incidental or optional use of a nonGovernment panel's recommendations as in *Sofamor*, the IRS proposal contemplates the formation of an outside group expressly to advise the Director of Practice in regard to qualifications for enrollment (as well as to handle the administration of the examination).

Under the proposal, one or more of the participating professional associations will be responsible for the actual administration of the SEE and will be compensated by collecting application fees from those who wish to take the examination. As indicated above, this aspect of the proposal is inconsistent with the fee provisions of the practice regulations, which specifically require the payment of application fees to the Service. *See* 31 C.F.R. § 10.5(a). Assuming that the regulations are amended (or other notice appropriately provided regarding the new enrollment procedures), we believe, as discussed below, that this aspect of the proposal is acceptable.

The Comptroller General has approved similar arrangements involving the collection of fees by contractors, finding that the fees received by the Government contractor for services directly provided to third parties are not received "for the use of the Government" and therefore need not be deposited as miscellaneous receipts pursuant to 31 U.S.C. § 3302(b). Such arrangements are not viewed as resulting in an unauthorized augmentation of the agency's appropriations, although they enable the agency to obtain certain services without incurring related costs. *See* Comp. Gen. Dec. B-2383065 (May 9, 1990) (travel agents may retain payments from the airlines as compensation for arranging travel services for Government employees) and 61 Comp. Gen. 285 (1982) (contractor may retain payments by third parties for copying services). *See also* 63 Comp. Gen. 459 (1984) (FCC may accept offer of free exhibit space at industry trade show without resulting in an augmentation of the Commission's appropriations; and such offers are not gifts, but rather mutually beneficial arrangements in which FCC participation increases attendance and resulting income to the promoter from the event, while the FCC gains the opportunity to inform the public of certain programs). Our office similarly has advised that the Service may enter into agreements or make informal arrangements whereby contractors or conference "co-sponsors" collect vendor fees or registration fees from attendees, thus covering the costs of conference facilities and administration and facilitating the Service's presentation of its educational message to attendees. Similarly, in our view, the proposal to have a professional association collect application fees does not result in an unauthorized augmentation of agency appropriations and is otherwise consistent with fiscal and appropriations law.

*General Comments and Conclusion*

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In conclusion, in our opinion, the proposal to privatize the development and administration of the SEE is consistent with the statutory authority that has been delegated to the Director of Practice to establish the qualifications of enrolled agents, and does not violate principles prohibiting the delegation of inherently governmental functions to nonGovernment parties. In the absence of Government-provided detailed guidelines concerning examination content, we believe it necessary that the Director retain review and decision authority concerning the examination and a passing score, and accordingly the examination development by the professional associations remains advisory and requires compliance with the FACA. [redacted]

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[redacted] you have any questions concerning this memorandum, please contact Stuart Endick or Eva Tewel at 401-4944.

MARK S. KAIZEN

By: _____
STUART W. ENDICK
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