ASSESSMENT OF PUBLIC COMMENT

DEPARTMENT OF TAXATION AND FINANCE

Written comments were received regarding proposal TAF-38-13-00002-P from the New York State Society of Certified Public Accountants ("NYSSCPA"), the New York State Society of Enrolled Agents ("NYSSEA") Government Relations Committee, and New York State Assembly Members Kenneth P. Zebrowski, Assembly Chair of the Administrative Regulations Review Commission, Helene Weinstein, Chair of the Judiciary Committee, and Herman D. Farrell, Jr., Chair of the Ways and Means Committee. The department also received comments from an individual who is both an enrolled agent ("EA") and a certified public accountant ("CPA") and from a tax return preparer who prepares returns for a small number of clients, including senior citizens. As described below, no changes to the rule were made in response to the comments from NYSSCPA, NYSSEA, the EA/CPA, or the tax return preparer. Changes were made, however, in response to the comments by the Assembly Members.

Section 4 of Part VV of Chapter 59 of the Laws of 2009 required the Commissioner of Taxation and Finance to convene a Task Force on Regulation of Tax Return Preparers (the "Task Force") to prepare a report (the "Report") regarding the regulation of tax return preparers, and authorized the Commissioner to promulgate regulations to implement any of the recommendations of the Task Force. This rule was proposed pursuant to this authority to implement certain of the recommendations of the Task Force set forth in its report dated September 28, 2011. The Report makes recommendations regarding the scope of the regulatory scheme and appropriate professional qualifications for tax return preparers, including, but not limited to, educational qualifications and continuing professional education requirements ("CPE").

Both NYSSCPA and NYSSEA expressed support for the regulation of tax return preparers generally but articulated concerns with certain provisions of the proposed rule. NYSSEA is of the opinion that the number of credits of continuing professional education ("CPE") required for commercial tax return preparers should be

increased from the proposed initial 16 credits annually for beginning tax return preparers and 4 credits a year thereafter, and 4 credits annually for experienced commercial tax return preparers. NYSSEA also recommended strict requirements for determining whether a preparer would be considered "experienced". The Task Force reviewed the CPE requirements imposed on tax preparers by other states and the IRS and concluded, as does the department, that the proposed requirements achieved the appropriate balance between ensuring competency and honesty in the field of tax preparation and creating undue barriers to working in the field. (Task Force Report, page 13)

NYSSEA recommended that, in the interest of the tax paying public, the competency examination requirement should be phased in over 1 year, rather than the proposed 3-year phase-in period. The tax return preparer, on the other hand, advocated for a "grandfather" clause waiving the exam for tax return preparers with an extended record of preparing New York State tax returns without errors or client complaints. The Task Force examined the CPE requirements for tax return preparers in other states and at the federal level, and determined that a 3-year phase in period would appropriately balance these competing concerns—the taxpayers' interest in competent tax preparation and the need to avoid unduly burdening tax return preparers. (Task Force Report, page 14) The department concurs.

The EA/CPA took the view that the department should dispense with its exam entirely and require all commercial tax return preparers to pass the IRS enrolled agent exam. New York State recognizes the professional requirements applicable to EAs by exempting them from the registration and exam requirements. However, it was the opinion of the Task Force, which is shared by the department, that it is critical that a New York State commercial tax return preparer demonstrate state tax competence *in addition* to federal tax competence. For this reason, the rule requires commercial tax return preparers to pass a state tax competency test in addition to the IRS exam for registered tax return preparers, should such an exam be required for federal purposes. The EA exam does not test issues related specifically to New York State tax preparation. Further,

while the EA exam is comprehensive in the covered areas, it tests areas, such as IRS representation and procedures, not directly related to New York return preparation. Accordingly, the rule contemplates the development of a system of testing tailored to New York tax preparation that will help to ensure that New York State commercial tax return preparers possess the requisite competence in both federal and state tax return preparation.

NYSSEA , while noting that the language of subparagraphs (f) (1) and (2) of proposed section 2600-4.3 of the regulations is consistent with section 10.28 of Treasury Department Circular 230, asserted that subparagraph (f)(2) nonetheless should be modified. Specifically, NYSSEA expressed concern over the exclusion of documents prepared by the preparer from the definition of client records required to be returned to the client upon request, if the documents are being withheld pending the client's performance of its contractual obligation to pay fees with respect to such documents. NYSSEA believes that this provision "requires a customer to pay a fee before they can evaluate the quality of the work of their commercial income tax preparer." This criticism ignores the fact that tax return preparers are not required to withhold such documents pending payment; they are merely permitted to do so. Likewise, the client is not obliged to pay a fee prior to reviewing and approving the work of the preparer. The rule merely requires the preparer to return the client's own records to him or her upon request, while distinguishing the preparer's work product from the client records.

NYSSCPA approved of stricter regulation of tax return preparers but, noting that the New York State Education Department is responsible for disciplining CPAs in New York State, questioned what disciplinary referrals the department would make under section 2600-1.1(b) respecting CPAs who prepare tax returns. The rule provides that the department may coordinate with federal, state, and local taxing authorities and professional licensing or other regulatory bodies to exchange information and make disciplinary referrals regarding the conduct of any individual who prepares a substantial portion of a tax return for compensation, irrespective of whether that individual is required to be registered under section 32 of the Tax Law. The

conduct requirements set forth in the rule are minimum standards of conduct to which all practitioners should adhere. Under the rule, the department may refer CPAs violating the rule's standards of conduct to the Education Department, the IRS, or any other entity responsible for regulating the conduct of CPAs.

NYSSCPA also opined that the terms "fraud," "deceit," "dishonest," and "unscrupulous" contained in section 2600-2.1(e) and (f) "are too broad in terms of identifying activity and require further clarification if they are to be made the basis to deny someone registration." The department disagrees. This terminology is consistent with the recommendations of the Task Force and IRS Circular 230 and in plain language describes extreme conduct. Moreover, the rule provides that tax return preparers subjected to denial of registration or other disciplinary action under the rule may request a hearing as a matter of right pursuant to Article 40 of the Tax Law.

NYSSCPA characterized section 2600-4.3(2) as overbroad with respect to providing guidance on acceptable fees, opining that the "sheer number of facts and circumstances that are involved in the setting of fees warrants clear standards" and noting that the New York Division of Consumer Protection is "set up to handle such issues." Again, the department disagrees; the rule prohibits *unconscionable* fees, and provides that a fee is unconscionable if the amount of the fee is either excessive or unreasonable based on all of the relevant facts and circumstances, including the complexity of the underlying issue or issues to be addressed with respect to the matter and the time required to resolve the matter before the department. The reasonableness of a fee may be evaluated by reference to industry standards. Moreover, the prohibition is not against excessive fees, but unconscionable (i.e., shockingly excessive) fees. Further, tax return preparers are entitled to a hearing regarding any disciplinary action imposed for violation of the acceptable fee provisions of the rule.

The Assembly Members noted that the rule provides for denial of registration or other disciplinary action where a court issues an order under section 458-b of the Family Court Act, which provides for suspension of the license, permit, registration or authority to practice of an individual whose child support

obligations are equal to or exceed the amount of support due for a period of 4 months. The Members believed it would be appropriate to include a reference to section 244-c of the Domestic Relations Law in sections 2600-2.1 and 2600-5.1 of the proposed rules, as section 244-c similarly provides for the issuance of a court order to suspend the license, permit, registration, or authority to practice of an individual who has accumulated support arrears equal to or exceeding the amount of support due for a period of 4 months. The department concurs, and has made this technical amendment to reflect current New York State law.

The Assembly Members also thought it appropriate to include a reference to section 3-503 of the General Obligations Law in section 2600-2.1 of the rules, relating to grounds for denial of registration. Section 3-503 requires that every applicant for a certificate, license, permit or grant of permission required by New York State law must certify in the application in a written statement under oath that, as of the date the application is filed, he or she has satisfied certain requirements with respect to child support obligations. If the applicant is unable to so certify, the department may issue or renew the registration, but it will expire in six months unless before that time the applicant submits a written certification in accordance with section 3-503. Once again, the department agrees with the Assembly Members, and has made the necessary technical amendment to the rule to reflect current New York State law.

The registration applications reflecting the adoption of this rule will conform with the technical amendments made to these sections of the rule.