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October 21, 2009

Commissioner Christopher Wagner, Small Business/Self-Employed Division  
Commissioner Steven T. Miller, Large and Mid-Size Business Division  
Commissioner Sarah Hall Ingram, Tax Exempt and Government Entities Division  
Diane Ryan, Chief, Appeals  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Dear Commissioners and Ms. Ryan:

The undersigned professional appraisal organizations, representing 35,000 credentialed appraisers in the U.S, are writing to request a meeting to discuss serious concerns about provisions in SBSE Memorandum 04-0809-015 (“Penalty for Valuation Misstatements Attributable to Incorrect Appraisals”). The Memo, which was issued on August 18, 2009 but only recently came to light, provides “interim guidance to ensure that all of IRS examiners, Revenue Agents, E&G attorneys and Tax Compliance Officers are aware of the procedures for assertion of the IRC section 6695A Penalty.” The processes prescribed and discussed in the Memo apparently are in effect.<sup>1</sup>

Although our organizations supported enactment of the appraisal provisions of the Pension Protection Act of 2006 (PPA) to improve the integrity and reliability of tax-related valuations<sup>2</sup> and while we sincerely appreciate the attention to detail that went into drafting the interim guidelines, we nevertheless object to the procedures established for assessing monetary penalties against appraisers because they appear to lack adequate due

<sup>1</sup>The Memo states that the interim guidance expires on August 18, 2010. There is no explanation as to why an expiration date has been established. One possible reason is that the Service may be contemplating the proposal of regulations, between now and then, to implement the valuation misstatement and civil money penalty provisions of section 6695A of the PPA.

<sup>2</sup> The PPA requires meaningful valuation-specific qualifications for those performing tax-related appraisals; adherence to generally-accepted and uniform appraisal standards, the Uniform Standards of Professional Appraisal Practice; and, the imposition of civil money penalties on individuals whose valuations are found to be substantial or gross valuation misstatements.

process safeguards and because they fail to define terms without which a valuation misstatement finding cannot, in our view, even be made. Our concern is that absent significant changes, the interim guidance is likely to lead to inappropriate civil money penalty enforcement proceedings against providers of valuation services to taxpayers.

A central problem is that under the processes outlined in the Memorandum, it appears that a penalty assessment letter (Letter 4477) will be sent to an appraiser without first advising him or her that issuance of a penalty letter is under consideration; and giving the appraiser a direct opportunity to explain the basis of the appraised value before the Letter goes forward. The 4477 letter states that the Service is “proposing a penalty under IRC section 6695A...based on our review of the appraisal(s) relating to a federal tax matter that you prepared on behalf of the taxpayer(s) named above.” While the IRS guidance states that a penalty assessment letter “generally...will not be proposed until the related tax examination is completed at the group level”; and, while receipt of the letter does not constitute a final judgment that a punishable valuation misstatement has, in fact, occurred, it does represent an official, written IRS pronouncement that a misstatement exists and it triggers a penalty assessment process – all before the appraiser has an opportunity to contest the allegation.

It’s possible, of course, that the valuer will have had some discussion about the appraisal with a revenue agent during examination of the relevant tax return. But, such discussion is not inevitable and does not appear to be required prior to the issuance of a 4477 Letter. More importantly, perhaps, is that even if such a discussion had occurred, it would not be equivalent to or an appropriate substitute for an appraiser’s right to defend the valuation prior to facing a penalty assessment proceeding.

A subordinate but equally serious problem involves whether and under what circumstances the existence of a 4477 penalty assessment Letter would have to be disclosed by the valuation practitioner. Would disclosure be required, for example, if, after receipt of the letter, the appraiser is testifying as an expert witness in unrelated litigation and is asked whether there are any proceedings pending against him or her relating to valuation competency? Would a state licensed or certified real estate appraiser be obligated to affirmatively disclose his or her receipt of a 4477 penalty assessment letter to their state appraiser licensing agency? Would the ethics requirements of nationally recognized professional appraisal organizations obligate a designated member to disclose the Letter’s existence? In addition to the fact that the interim guidelines appear to permit the sending of 4477 penalty assessment letters without notice to and a response from the valuation practitioner, there is no clarity on these important disclosure questions.

A third area of great concern is that the Memorandum fails to include a definition of and protocols related to a “safe harbor” provision in the PPA – a provision which allows the appraiser to avoid a valuation misstatement penalty. Section 6695A of the PPA states that –

“no [valuation misstatement] penalty shall be imposed...if the person establishes to the satisfaction of the Secretary that the value established in the appraisal was more likely than not the proper value.”

But, the meaning of the phrase “more likely than not the proper value” and guidance on how an appraiser would assert that defense do not currently exist. Absent such a definition and protocols, we question whether a valuation misstatement can be found and how a 6695A penalty assessment proceeding can take place absent the appraiser’s opportunity to establish that the appraisal was more likely than not the proper value.

We seek clarification of these issues at the earliest possible opportunity and, in the interim, respectfully request that no 6695A enforcement actions be initiated.

Representatives of our organizations will be contacting your offices within the next few days to seek a meeting.

Sincerely,

American Society of Appraisers  
American Society of Farm Managers and Rural Appraisers  
National Association of Independent Fee Appraisers  
Appraisal Institute