



## PRESIDENT'S CORNER

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# Commissioner Shulman's Conversation with the Boardroom

When his schedule prevented his participation in TEI's Annual Conference in San Antonio, IRS Commissioner Douglas Shulman suggested that we meet separately to reinforce our mutual commitment to sound tax administration and to maintain the lines of communication between the Institute and the IRS's senior leadership. To this end, on November 20, Paul O'Connor (TEI's Senior Vice President) and I travelled to Washington where, along with Timothy McCormally and Eli Dicker of the Institute's staff, we made our way to the IRS building at 1111 Constitution Avenue.

Our time at the IRS was well spent, because it was much more than the typical "meet and greet." First, we were able to talk not only with Commissioner Shulman but also with Steve Miller, Deputy Commissioner (Services and Enforcement); Bill Wilkins, Chief Counsel; and Heather Maloy, the new Commissioner of the Large and Mid-Size Business Division. With the exception of Commissioner Shulman, the group was all relatively new to their positions, but from our vantage point, they were very much in synch. Second, all four of these government leaders were well-informed and engaged. Everyone was courteous, but no one took the meeting as a "courtesy call." Third, we did not merely exchange pleasantries (or talk about the weather), but rather discussed several very meaty topics, including the IRS's six-month settlement initiative in respect of unreported foreign accounts, the revision of LMSB's joint audit planning process, the expansion of the compliance assurance process (CAP) program, and proposals to codify the economic substance doctrine.

The topic that commanded the most time, however, was the Commissioner's mid-October speech to the National Association of Corporate Directors, where he urged members of boards of directors to reassess "their roles and responsibilities in conducting appropriate assessment and oversight of tax risk." This was the case because the Commissioner's "conversation with the Boardroom" is evidence of the growing global trend toward more active engagement by tax administrators to understand the tax risk management policies of their largest taxpayers. Moreover, the IRS's initiative has been interpreted by some commentators (and some TEI members) as suggesting that corporate tax directors — the employees charged with day-to-day management of a company's tax affairs and, hence, its tax risk — need more oversight. Indeed, at our San Antonio conference, some members gave voice to the concern that the "conversation" perhaps lent too little weight to their professionalism and to how much time and effort corporate management was already devoting to assessing and managing tax risk.

At our November meeting, the Commissioner took pains to acknowledge that numerous companies are striving to "get it right."

He reiterated that it was not the IRS's intention to second-guess legitimate and thoughtful business decision-making by corporate leaders, and further that the IRS appreciated that taxpayers would not always agree with the agency on identifying and quantifying the risk of various tax positions. He added, however, that given the importance of taxes as a cost of doing business, boards of directors have a responsibility to have a mechanism in place to oversee tax risk as part of their governance process. In his NACD speech, the Commissioner offered the following examples of what he meant:

- Setting a threshold confidence level for taking a tax position.
- Discouraging or eliminating opinion shopping by tax departments by having an independent tax firm, which has some direct dialogue with the board of directors, review major tax positions.
- Specifically addressing transfer pricing and the relative profit allocated to low-tax jurisdictions, and making sure they reflect real economic contributions made in those jurisdictions.

During our meeting, we drew particular attention to the transfer pricing point, noting that section 482 issues were likely already included on the agenda of audit committee meetings (depending on their magnitude) but questioning how detailed a review could take place given the overwhelming complexity of the governing law and the lack of tax expertise among board members. The Commissioner responded that his suggestions were just that — suggestions. His point was not that boards (or audit committees) had to "get into the trenches" (on transfer pricing or other issues), but rather that companies should have a mechanism in place to oversee their tax risks and tax strategies. In other words, corporate boards should not hide behind the "black box" of tax.

If you have not read the full text of the Commissioner's remarks, I encourage you to do so (they can be found on the IRS's website), because I believe they will become a driving force in U.S. tax administration in 2010. And I urge you to seek out commentary on his remarks — such as the recent piece by Shaun Kelly and Loughlin Hickey of KMFG in *Directorship Boardroom Intelligence* — that seeks to place the Commissioner's efforts into an overall global perspective. (Shaun was a speaker at our 2008 Annual Conference.) Messrs. Kelly and Hickey made a compelling case that Commissioner Shulman's speech is part of an evolutionary process, the next step of which is to encourage companies to self-assess their tax risks. They write:

If the reactions of companies in other countries such as the U.K. and Australia are typical, his speech will raise a variety

of emotions — suspicion, complacency, resentment, and resistance among them. There will also be those who see this as an invitation to engage. These people will treat the process as a business rather than an emotional issue.

If, as we have said, there is a long-term business imperative for tax authorities to take the evolutionary path, then the same business logic should apply to companies. . . .

We believe it is appropriate for corporate governance principles to be at the heart of the debate on tax. There need to be checks and balances on the behavior of both tax authorities and corporate taxpayers, built into their operating guidelines. Clearly, the law must be the ultimate arbiter of what is correct, but we have seen that good behaviors can go beyond the minimum requirements of the law and can help assuage the needs and concerns of both sides.

The U.S. needs to find its own way on this road, but it can take valuable lessons from the experiments going on elsewhere in the world. The first and most fundamental of these is that at the heart of a changed model are better relationships, and these new relationships can only develop with better dialogue. Talking is always the first step, and Shulman is encouraging more people to take that step.

Based on our November 20 meeting, I am convinced that the Commissioner is interested in a genuine, two-way conversation with taxpayers, and in the coming weeks and months, the Institute will take him up on his offer. We anticipate, for example, that the subject will be discussed in our March liaison meeting with the IRS, and that the Commissioner will address the matter himself during the Midyear Conference in April.

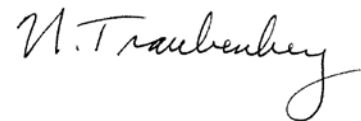
## Canadian Liaison Meetings

This issue contains the agendas for the Institute's December 8-9 liaison meetings with the Canadian Department of Finance and Canada Revenue Agency. (There were four meetings — two on income tax issues and two on excise tax issues.) The meetings were spearheaded by Sherrie Ann Pollock of the Toronto Chapter, who is the Institute's Vice President for Canadian Affairs.

I was pleased to attend the meetings which — like the November 20 session with Commissioner Shulman — underscored the value of maintaining cordial relations with our government counterparts and of speaking candidly of our concerns. It was especially gratifying to learn during the December 9 meeting with the Department of Finance that TEI's comments on the harmonization of provincial retail sales tax with the federal Goods and Services Tax had been commented on favorably during a parliamentary hearing the previous evening. It was also gratifying to watch members of TEI's four Canadian chapters engage in high-powered and highly effective discussions with representatives of Finance and CRA. Special thanks are due not only to Sherrie Ann, but also to Diana Spagnuolo, chair of the Canadian Commodity Tax Committee, and Rod Bergen, chair of the Canadian Income Tax Committee.

## Season's Greetings

On behalf of the Institute's Board of Directors and its staff, I extend the season's greetings to all members of the Institute and other readers of *The Tax Executive*. May 2010 bring you health, happiness, and professional fulfillment.



## Acknowledgments

TEI gratefully acknowledges the support of the following firms that, as of December 15, had become sponsors of the Institute's **60th Midyear Conference:**

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