January 17, 2018

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Subject: Request for Comments on Revenue Procedure 99-21; OMB Number: 1545- 1649

Dear Kathy

I am writing these comments as a follow up to our discussion in November during the ABA visit to the IRS Commissioner and Chief Counsel as well as in response to the call for comments on Rev. Proc. 99-21. The ABA will be submitting formal comments regarding Rev. Proc. 99-21. In this comment I will not revisit the matters discussed in the ABA's comments; however, I wish to point you to a few other sources that might be of interest in rethinking this revenue procedure or in creating regulatory guidance to replace it. Because it is already four weeks past the date on which comments were requested, I am submitting them both before the ABA sends its comments (which I expect it will submit shortly) and before I have obtained all of the medical resources I hoped to provide you. I will supplement this as I gain more information.

The ABA comments you will receive will go into detail on the historical aspects of the issue and the legal issues presented. Those comments will also mention the vulnerability of the population targeted by the statute. While I do not want to be duplicative with the ABA comments, I would like to start by saying that individuals seeking IRC 6511(h) relief are usually quite vulnerable. They come to the situation of needing this relief because of some type of impairment. They frequently have not obtained timely medical attention and their resources are often limited. Maybe I approach this from the perspective of someone running a low income taxpayer clinic and have not seen a broad cross section of these cases but my perspective from the cases I have encountered is that the individuals seeking 6511(h) relief face many challenges. I know that the IRS also faces challenges in trying to identify appropriate individuals for relief under this statute. The current procedures place a heavy burden on individuals seeking this relief. Finding a path that does not unduly burden either the taxpayer or the IRS should be our goal. With that in mind, my comments try to point you to other resources that consider that problem of cognitive impairment and how to evaluate it.

The Social Security Administration has issued some guidance recently that might benefit the person assigned to review this procedure. On January 18, 2017 it published revisions to 20 CFR Parts 404 and 416 entitled "Revisions to Rules Regarding the Evaluation of Medical Evidence." In this document it revises rules regarding acceptable medical sources, how it considers medical opinions and other rules relating to medical information it needs in order to evaluate individuals seeking relief. The material is not relevant in its entirety but it does provide a detailed look at who qualifies, why, what evidence qualifies and other criteria that may assist in expanding the discussion in any new procedure or regulation. It has also published corrections.

Another resource worth considering is chapter 12 of Social Security's Disability Professional's Bluebook. This chapter deals with adult mental disorders. As with the revised regulations discussed above, the

material in this chapter is not entirely relevant; however, some of it provides useful guidance. In particular, Section C. entitled "What evidence do we need to evaluate your mental disorder?" provides a useful guide. Note in subsection 2. that Social Security will consider all relevant medical evidence about the applicant's disorder from "your physician, psychologist, and other medical sources, which include health care providers such as physician assistants, psychiatric nurse practitioners, licensed clinical social workers and clinical mental health counselors." Following the list of qualified individuals it lists the type of medical sources. In subsection 3. entitled "Evidence from you and people who know you" a helpful description of the non-medical sources of information is provided. Of course, these would carry different weight but should not be entirely discounted. Subsection 5. entitled "Need for longitudinal evidence" provides another potentially useful source of information because the 6511(h) determination is one that goes back in time and can cover periods for which a taxpayer has little medical evidence.

Starting with Section E. of this chapter are several sections that detail how the evaluator at Social Security will look at the evidence presented. These sections might provide a useful basis for IRM provisions if not for regulatory guidance. In the cases in which Service employees overrule the opinions of the medical provider who has followed Rev. Proc. 99-21, it can be frustrating as a representative because the Service employee has little or no guidance upon which to use their judgment in overruling the medical opinion. I do not suggest that the Service employees should not use their judgment or that medical opinions should be blindly followed but that more guidance to the employees, and to practitioners, concerning how the evidence will be evaluated would assist the process.

While I did not find it as helpful, Social Security also publishes a vocational guideline that might be of marginal benefit to someone studying this area to determine the best way to establish financial disability.

I obtained this material after extended conversations with an individual who works with me at the Legal Services Center who handles the social securities and benefits work. She regularly handles cases in which she must prove the client's disability. She is usually proving it for the present but there are situations under the social security laws in which you must prove that a disability existed at some point in the past in order to obtain the benefits. One example of that exists when a young adult needs to provide a condition existed prior to adulthood in order to obtain certain disability benefits. My colleague is willing to speak with someone at your office if gaining insight to social security from the perspective of a claimant's counsel would provide benefit.

In addition to talking to her, I spoke with *Ashish Jha*, M.D., MPH. Dr. Jha is the K.T. Li Professor of Global Health at Harvard University, Senior Associate Dean for Research Translation and Global Strategy at Harvard T.H. Chan School of Public Health and the Director of the Harvard Global Health Institute. He is a practicing General Internist and also Professor of Medicine at the Harvard Medical School. I described to him the type of information the statute requires and asked who could best provide this information in a manner that would satisfy others. He said that many patients have undiagnosed cognitive impairment and can function fairly well within their home environment. He provided the following insights regarding to aspects of the current procedure for determining financial disability:

1) The set of mental health providers who can comment on a patient should be expanded. In expanding the set of providers you could provide different weight to the opinion of different providers depending on their education and experience. He said that the current procedures make it difficult for physicians who were not treating the individual during the period of financial disability. Physicians do not like to speculate on someone's condition whom they did not treat or did not treat during all or part of the period of impairment needed to satisfy the test of financial disability.

2) It should be possible to set up a list of predictive factors that could be used by the IRS and by medical professionals commenting on the individual's circumstances. One highly relevant circumstance is the individuals' past history of filing. If someone has timely filed for a significant period of time and then stops filing even though the obligation continues or filing is needed to obtain a refund, this is a very relevant factor in identifying the type of impairment needed for financial disability. He felt the right group of professionals should be able to craft a list of predictive factors that would be of assistance to the IRS and to a medical professional trying to provide an opinion regarding financial disability. (Some of the material from the Social Security Administration that I referenced above does this.)

Dr. Jha offered to speak to colleagues and seek to find the right person(s) within the medical community to advise on this. Once I hear back from him I will forward any information I receive.

Please contact me if you have any questions or if I can provide you with any assistance in the reconsideration of Rev. Proc. 99-21.

Sincerely,

T. Keith Fogg