UNITED STATES TAX COURT

ALVAN L. BOBROW AND ELISA S. BOBROW,	)	Docket No. 7022-11
Petitioners,	)	
v.	)	
COMMISSIONER OF INTERNAL REVENUE,	)	The Honorable Joseph W. Nega
Respondent.	)	

BRIEF AMICUS CURIAE OF

AMERICAN COLLEGE OF TAX COUNSEL

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The American College of Tax Counsel (the "College") respectfully submits this brief amicus curiae in support of Petitioners' Motion to Vacate or Revise Pursuant to Rule 162 the Court's opinion in Bobrow v. Commissioner, T.C. Memo 2014-21.[1] (Citations of the Court's opinion in this case hereafter are to "Slip Op." with page references as noted below.)

I. Interest of Amicus Curiae

The College is a nonprofit professional association of tax lawyers in private practice, in law school teaching positions and in government, who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. The purposes of the College are:

- To foster and recognize the excellence of its members and to elevate standards in the practice of the profession of tax law;
- To stimulate development of skills and knowledge through participation in continuing legal education programs and seminars;
- To provide additional mechanisms for input by tax professionals in development of tax laws and policy; and
- To facilitate scholarly discussion and examination of tax policy issues.

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[1] Petitioners styled their February 28, 2014, filing as a motion for reconsideration. The Court's March 7, 2014, order retitled the motion.

The College is composed of approximately 700 Fellows chosen in recognition of their outstanding reputations and contributions in the field of tax law, and is governed by a Board of Regents consisting of one Regent from each federal judicial circuit, two Regents at large, the Officers of the College, and the last retiring Chair of the College.

This amicus brief is submitted by the College's Board of Regents and does not necessarily reflect the views of all members of the College, including those who are government employees.

* * *

In 2008, Petitioner Alvan Bobrow ("Mr. Bobrow") maintained two individual retirement accounts ("IRAs"), which the Court described as his traditional IRA and his rollover IRA. It is undisputed that on April 14, 2008, Mr. Bobrow withdrew $65,064 from his traditional IRA, and that on June 6, 2008, he withdrew $65,064 from his rollover IRA. It is likewise undisputed that $65,064 was deposited in Mr. Bobrow's traditional IRA on June 10, 2008 (which was less than sixty days after the April 14, 2008, withdrawal from that account) and that $65,064 was deposited in his rollover IRA on August 4, 2008 (which was less than sixty days after the June 6, 2008, withdrawal from his rollover IRA). If the one-rollover-per twelve-month-period rule in Code section 408(d)(3) is applied on an account-by-account basis, then each of the two withdrawals

and deposits described above qualified as a non-taxable rollover. If, as this Court determined in its opinion, that Code section permits only one rollover per taxpayer during a twelve-month period, then Mr. Bobrow's withdrawal from his rollover IRA was taxable and could not be part of a tax-free rollover.[2]

For over three decades, however, Treasury and the Service have consistently instructed taxpayers – in proposed regulations, in private letter rulings, and in IRS publications – that the Code permits them to roll over each IRA that they own once each year. The Court's opinion does not discuss this authority, and the College respectfully submits this brief because it appears that the stipulation and briefs submitted to the Court by the parties thus far have not apprised the Court of the longstanding administrative guidance directly supporting the taxpayers' position or of the extent of that guidance.[3]

The Court's opinion is a matter of significant concern to the tens of millions of individual taxpayers who have substantial portions of their retirement savings in IRAs and to

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[2] Consistent with Petitioners' motion, this brief addresses only the 2008 distributions and deposits by Mr. Bobrow with respect to his IRAs and does not address the distribution and deposit by his wife, Elisa S. Bobrow, from her IRA.

[3] Because the parties filed a joint motion under Tax Court Rule 122 to submit the case for decision without a trial, the stipulation and briefs were the only submissions before the Court.

their advisors. The College respectfully submits that Code section 408(d)(3)(B) is at least ambiguous with respect to whether the twelve-month rule applies on a per-IRA or per-taxpayer basis, as evidenced by the consistent, longstanding, and repeatedly publicized administrative interpretation of that statute by Respondent and the Treasury that the twelve-month limitation is applied on an account-by-account basis. Sound tax administration and basic fairness require that Respondent not alter his longstanding position without notice to taxpayers.

II. Thirty Years of Consistent Administrative Guidance from Treasury and the IRS Supports Application of Code Section 408(d)(3)(B) on an IRA-by-IRA Basis

For over three decades, Treasury and the IRS have announced and applied a clear rule governing rollovers by taxpayers who own multiple IRAs – specifically that a taxpayer could make one such rollover for each such account in a twelve-month period.

A. Proposed Treasury Regulation § 1.408-4(b)(4)(ii)

As the Court observed in its opinion, Congress created the statutory framework to govern individual retirement accounts as part of the Employee Retirement Income Security Act of 1974 ("ERISA"), Public Law Number 93-406, § 2002(b), 88 Stat. 829, 958 (1974). See Slip Op. 13. The rules codified in Code section 408(d)(3) initially permitted owners of IRAs to receive tax-free distributions once every three years, as long as the distributions were rolled over into IRAs within sixty days. See

id. at 14 n.6. Four years later in 1978, Congress relaxed the three-year rule and amended Code section 408 to permit tax-free rollovers once each year. Id. Congress did not, however, provide guidance regarding how the rule governing rollovers was to apply to taxpayers who owned multiple IRAs.

Treasury likewise failed to address this issue in the final regulations it issued under Code section 408 in 1980. Those regulations contained a section entitled "Frequency limitation." The first part of the "Frequency limitation" guidance largely parroted the statutory language, and the second part was "[Reserved]" for later use. See Income Tax; Individual Retirement Arrangements, 45 Fed. Reg. 52,782, 52,787 (Aug. 8, 1980) (to be codified at 26 C.F.R. pts. 1 and 54).

The next year, in 1981, Treasury issued proposed regulations to address statutory changes to the law governing individual retirement accounts "made by the Employee Retirement Income Security Act of 1974, the Tax Reform Act of 1976, the Revenue Act of 1978 and the Technical Corrections Act of 1979." Individual Retirement Plans and Simplified Employee Pensions, 46 Fed. Reg. 36,198, 36,198 (July 14, 1981) (to be codified at 26 C.F.R. pts. 1, 25, 31, 54, and 301). The notice of proposed rulemaking explained that "[t]he regulations would provide the public with the guidance needed to comply with these Acts . . . ." Id.

The 1981 proposed regulations included Proposed Treasury Regulation section 1.408-4(b)(4)(ii) (the "Proposed Regulation"). See 46 Fed. Reg. 36,198, 36,206. The Proposed Regulation filled the gap that Treasury had "Reserved" in the final regulation it issued the previous year. Treasury clearly explained how the rule allowing once-a-year rollovers applied to taxpayers who owned multiple IRAs:

> This rule applies to each separate individual retirement account, individual retirement annuity, or retirement bond maintained by an individual. Thus, if an individual maintains two individual retirement accounts, IRA-1 and IRA-2, and rolls over the assets of IRA-1 into IRA-3, he is not precluded by this subdivision from making a tax-free rollover from IRA-2 to IRA-3 or any other IRA within one year after the rollover from IRA-1 to IRA-3.

(Emphasis added.) Treasury has never withdrawn or finalized the Proposed Regulation.[4]

B. Private Letter Rulings

In the more than thirty years since issuance of the Proposed Regulation, the IRS has consistently applied Treasury's

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[4] Chief Counsel Notice CC-2003-014 (May 8, 2003), 2003 WL 24016799, states that "[i]f there are no final or temporary regulations currently in force addressing a particular matter, Chief Counsel attorneys may not take a position that is inconsistent with proposed regulations." Id. Therefore, "Chief Counsel attorneys ordinarily should not take any position in litigation or advice that would yield a result that would be harsher to the taxpayer than what the taxpayer would be allowed under the proposed regulations." Id. It is not clear from the record whether Respondent's trial counsel was aware of the Proposed Regulation or how Respondent's position in this case can be squared with Notice CC-2003-014.

interpretation of Code section 408(d)(3)(B) as reflected in that Proposed Regulation.

In Private Letter Ruling 8731041 (May 6, 1987), the Service considered an individual who withdrew funds from two different IRAs in June 1986. Within 60 days of each withdrawal, he rolled those funds over into a third, newly created IRA. The individual requested a ruling that those withdrawals – which occurred a week apart – did not cause the withdrawn amounts to be included in income. The ruling stated that the one-year rule in Code section 408(d)(3)(B):

> applies to each separate individual retirement account, individual retirement annuity, or retirement bond maintained by an individual. Thus, if an individual maintains two individual retirement accounts, IRA-1 and IRA-2, and rolls over the assets of IRA-1 into IRA-3, he is not precluded by section 408(d)(3) of the Code from making a tax-free rollover from IRA-2 to IRA-3 or any other IRA within one year after the rollover from IRA-1 to IRA-3.

Applying this interpretation of the statute, the Service ruled that the withdrawals did not cause the withdrawn amounts to be includible in the individual's income.

Six years later, the Service applied the same interpretation of Code section 408(d)(3)(B) to different facts to reach the same conclusion. In Private Letter Ruling 9626049 (June 28, 1986), the Service addressed a surviving spouse who received three of her husband's IRAs (IRAs F, G, and H) from her husband's estate. She sought a ruling that she could make a tax-free rollover of the three IRAs into a new IRA in her name.

The ruling explained that "the rule described in section 408(d)(3)(B) is applied to each IRA, i.e. IRA F, IRA G, and IRA H in this case." Accordingly, the Service ruled that she could make a tax-free rollover "into an IRA set up and maintained in her name, IRAs F, G, and H, which will be distributed to her after the disclaimers described herein are made as long as said rollover occurs no later than the 60th date after the date she receives the distributed IRAs."[5]

C. **IRS Publications**

The Service applied the Proposed Regulation's interpretation of Code section 408(d)(3)(B) not just in rulings, but also in its annual issuance of Publication 590 explaining to taxpayers how to administer their IRAs. When Congress created the statutory framework for IRAs in 1974, there was widespread recognition that the rules governing those arrangements were complex and that guidance was needed so that taxpayers would not risk their retirement savings through inadvertent technical violations of the law's requirements.

To that end, the Conference Report on ERISA in 1974 explained that "[t]he conferees also expect the Internal Revenue Service to develop a pamphlet which sets forth the restrictions

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[5] The College recognizes that letter rulings lack precedential status under Code section 6110(k)(3). Here, however, as in Rowan Cos. v. United States, 452 U.S. 247, 261 n.17 (1981), such rulings do provide evidence of Respondent's construction of the statute at issue.

and limitations with regard to the individual retirement accounts." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 338, reprinted in 1974-3 C.B. 415, 499. The report continued "[i]t is the hope of the conferees that such pamphlet would receive wide distribution so that individuals would be fully informed on the restrictions and limitations of such an account." Id. Congress recognized that individual taxpayers with IRAs often would not have the resources to hire professionals to answer arcane IRA questions. Its instruction to publish a pamphlet underscored its intention for the government to create and publicize clear rules governing these accounts that taxpayers could rely on.

In response, the IRS stated that "[w]e have published such a 'pamphlet' – Publication 590." Individual Retirement Accounts and IRS Plan Termination Survey: Hearings Before the Subcomm. on Oversight of the H. Comm. on Ways and Means, 95th Cong. 2d Sess. 390 (1978) (IRS Response to FTC's Staff Report on IRA's, T.R. Kern, Acting Assistant Comm'r, Dep't of Treas., Apr. 24, 1978) (emphasis added). The IRS stated that "[o]n the whole, we believe that Publication 590 is both understandable and accurate; it does reflect the complexities of the law." Id. at 394.

For decades, the IRS has published annually Publication 590, which is entitled "Individual Retirement

Arrangements (IRAs)".[6] Each year, the IRS has proclaimed on the front cover of Publication 590 that the publication is "[f]or use in preparing [that year's] returns." (Emphasis added.)

Since 1984, the IRS has instructed taxpayers in every issue of Publication 590 that they could make a tax-free rollover of each IRA they own once each year. The 1984 issue of the Publication explained:

> **Waiting period between rollover distributions.** A rollover distribution from an IRA may be made to you only once a year. The one-year period begins on the date you receive the IRA distribution, not on the date you roll it over (reinvest it) into another IRA.
>
> This rule applies to each separate IRA you own. For example, if you have two IRA's, IRA-1 and IRA-2, and you roll over assets of IRA-1 to a new IRA-3, you may also make a tax-free rollover from IRA-2 to IRA-3, or to any other IRA within one year after the rollover distribution from IRA-1, because you have not received more than one tax-free distribution from either IRA within one year.

(Emphasis added.) The language was nearly identical from 1985 through 1989.[7] From 1990 through 1992, Publication 590 made a similar statement and cited Proposed Regulation section 1.408-

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[6] Copies of each issue of Publication 590 since 1994 are available on the IRS website. Copies from earlier years were included in CCH's IRS Publications, which are part of the Tax Court library's collection.

[7] In addition to the substantive changes identified in the next few paragraphs, the IRS generally made minor stylistic changes in wording and punctuation annually after 1984. For example, over the years, the IRS removed the apostrophe from "IRA's" and removed the hyphen from "tax-free." These changes demonstrate that the IRS annually scrutinized Publication 590's interpretation of the twelve-month rule and consistently decided not to change the substance of the IRS guidance.

4(b)(4)(ii). Through the year 2000, Publication 590 continued to state that "[t]his rule applies separately to each IRA you own." That statement was removed in 2001, but each issue of Publication 590 from 2001 through 2013 (including the 2007 and 2008 issues) contained an example applying the twelve-month rule separately to each IRA. Thus, the current issue (2013) of Publication 590, which contains language largely unchanged since the 2003 issue, states:

> **Waiting period between rollovers.** Generally, if you make a tax-free rollover of any part of a distribution from a traditional IRA, you cannot, within a 1-year period, make a tax-free rollover of any later distribution from that same IRA. You also cannot make a tax-free rollover of any amount distributed, within the same 1-year period, from the IRA into which you made the tax-free rollover.
>
> The 1-year period begins on the date you receive the IRA distribution, not on the date you roll it over into an IRA.
>
> ***Example.*** You have two traditional IRAs, IRA-1 and IRA-2. You make a tax-free rollover of a distribution from IRA-1 into a new traditional IRA (IRA-3). You cannot, within 1 year of the distribution from IRA-1, make a tax-free rollover of any distribution from either IRA-1 or IRA-3 into another traditional IRA.
>
> However, the rollover from IRA-1 into IRA-3 does not prevent you from making a tax-free rollover from IRA-2 into any other traditional IRA. This is because you have not, within the last year, rolled over, tax free, any distribution from IRA-2 or made a tax-free rollover into IRA-2.

(Emphasis added.)

It is clear that the IRS has considered and republished its position on this issue in Publication 590

numerous times. It first published the IRA-by-IRA position in Publication 590 in 1984.[8] In 1990, it revised the Publication to cite its own Proposed Regulation. When it dropped the regulation citation a few years later, it left in place the clear statement of the rule. And then in 2001, it changed the description of the rule and the example used to illustrate it. Throughout these language changes, one thing has remained constant: The IRS has clearly instructed taxpayers – every year since 1984 in the publication Congress told it to publish for taxpayers to rely on – that taxpayers who own multiple IRAs can make tax-free rollovers of <u>each</u> IRA once each year.[9]

The College is aware that this Court has held that taxpayers generally cannot rely on IRS publications:

> [T]he fact that an IRS publication is unclear or inaccurate does not help the taxpayer. Well-established precedent confirms that taxpayers rely on such publications at their peril. Administrative guidance contained in IRS publications is not binding on the Government, nor can it change the plain meaning of tax statutes.

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[8] An example in the 1983 issue of Publication 590 applied the twelve-month rule on a per-taxpayer basis. The 1982 issue of Publication 590 did not address this issue.

[9] A leading treatise reaches the same conclusion. <u>See</u> David J. Cartano, <u>Taxation of Individual Retirement Accounts</u> §6.03[G][2][h] (2013 ed.) ("The one-year rule applies separately to each IRA that the taxpayer owns. Thus, the taxpayer may make more than one rollover during each 12 months if the taxpayer has more than one IRA." (footnote omitted (citing the Proposed Regulation, Publication 590, and the two private letter rulings)).

Miller v. Commissioner, 114 T.C. 184, 194-95 (2000), aff'd sub nom., Lovejoy v. Commissioner, 293 F.3d 1208 (10th Cir. 2002).

Notwithstanding this general rule, courts have previously held the IRS to its statements in publications where the IRS has also stated that taxpayer reliance is appropriate. See Gehl Co. v. Commissioner, 795 F.2d 1324, 1334 (7th Cir. 1986) (declining to give retroactive effect to regulations in light of contrary assurance in DISC Handbook published by Treasury and stating: "If a taxpayer knows that the Treasury's promise that a new Code provision designed to encourage certain behavior will not be adversely altered retroactively is an illusory promise, that taxpayer will surely be less likely to alter his behavior in the manner hoped for by Congress."); LeCroy Research Sys. Corp. v. Commissioner, 751 F.2d 123, 127-28 (2d Cir. 1984) ("It is clear that there are judicially enforceable limits on the Commissioner's discretion to ignore prior assurances given to taxpayers . . . . An ongoing power to dishonor deliberately created expectations will deter private parties from seeking to take advantage of proffered tax benefits designed to encourage particular economic activity."); but see CWT Farms, Inc. v. Commissioner, 755 F.2d 590 (11th Cir. 1985) (upholding retroactive application of DISC regulations despite

contrary assurance to taxpayers in the Treasury's DISC Handbook).[10]

The College respectfully submits that this is an appropriate situation to hold the government to the statements it induced taxpayers to rely on when it assured Congress that Publication 590 was "understandable and accurate." The rules governing IRAs are complex, and they are directed at ordinary taxpayers, few of whom have the resources to hire tax professionals to scour the Code and the legislative history in search of reasons why they should not trust written assurances provided annually by the IRS in a publication intended to guide return preparation.[11] Retroactively overruling years of consistent guidance in Publication 590, proposed regulations, and letter rulings that one rollover per IRA per twelve month period was permissible by simply taking a contrary position in

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[10] In CWT Farms, Inc. v. Commissioner, 755 F.2d 590 (11th Cir. 1985), the Court noted, however, that proposed regulations put taxpayer in that case on notice that the rules were changing. There has been no notice by the IRS or Treasury that either now considers Publication 590 inaccurate. Thus the decision in this case came as a surprise to taxpayers and advisors who acted on the premise that the IRS meant what it said.

[11] This is not a situation like that in Sedlacek v. Commissioner, 44 T.C.M. (CCH) 68, 71 n.6 (1982), where the Court rejected reliance by a pro se taxpayer on Publication 590. There, the statutory language was plainly inconsistent with the taxpayer's position; as explained below, here it is not. Moreover, this is not a situation where the sole source of support is a single issue of Publication 590 – a proposed regulation, multiple PLRs, and decades of annual republication of Publication 590 support the taxpayer.

litigation — without any form of general notice that Respondent now considers Publication 590 inaccurate — is arbitrary and capricious, as well as patently unfair.

III. The Court's Decision Upsets Three Decades of Consistent Administrative Authority and Settled Expectations for Taxpayers Saving for Retirement

The rules governing IRAs affect tens of millions of Americans who have accepted Congress's invitation to save for retirement in tax-advantaged individual retirement accounts. Approximately forty percent of U.S. households owned at least one type of IRA at the end of 2012. See Investment Company Institute, 2013 Investment Company Fact Book 126 (53d ed. 2013), available at http://www.icifactbook.org/pdf/2013_factbook.pdf (hereinafter "Investment Company Fact Book"). Official IRS statistics show that, in 2010, over fifty-four million Americans held over five trillion dollars of their money in IRAs. See Victoria L. Bryant & Jon Gober, Accumulation and Distribution of Individual Retirement Arrangements, 2010, Stat. of Income Bull. (IRS), at 6 fig.F (Fall 2013), available at http://www.irs.gov/pub/irs-soi/13inirafallbul.pdf (hereinafter "Accumulation and Distribution"). Over one-quarter of all U.S. retirement assets are held in IRAs. See Investment Company Fact Book 126.

It is not uncommon for an individual to have multiple IRAs. Indeed, IRA-owning households own an average of two such accounts. Craig Copeland, The Number of Individual Account

Retirement Plans Owned by American Families, EBRI Notes, Vol. 29, at 6, 7 (June 2008), available at http://www.ebri.org/pdf/EBRI_Notes_06-2008.pdf. And the taxpayers who own these accounts roll them over into different IRAs regularly. The IRS has reported that over four million taxpayers rolled over almost $300 million into IRAs in 2010 alone. See Accumulation and Distribution at 8 tbl.1.[12] Investment Company Institute data show that "of investors with traditional IRAs at year-end 2011, nearly 36 percent had made rollovers between 2007 and 2011." Investment Company Fact Book 127. "Of U.S. households owning traditional IRAs in May 2012, an ICI household survey found that 51 percent (or 20 million U.S. households) had traditional IRAs that included rollover assets." Id.

These data sets do not separately address how many of the taxpayers who have rolled over assets from one IRA to another have done so for multiple IRAs in the same twelve-month period. However, given the longstanding administrative guidance explicitly stating that such rollovers are permissible, the large number of taxpayers who own multiple IRAs, and the frequency of rollovers, it seems likely that there are a large number of taxpayers who are potentially adversely affected by the Court's ruling.

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[12] These statistics generally include only direct rollovers, not trustee-to-trustee transfers. See Accumulation and Distribution 6 ("Trustee-to-trustee transfers are not generally considered rollovers.").

The consequences for an individual who relied on the government's instructions in rolling over multiple IRAs in a single year can be severe. Any amount not treated as rolled over can be subject to a ten percent early distribution penalty under Code section 72(t). Because taxpayers often build their IRA balances over many years, the defective rollover may constitute a sufficient portion of a taxpayer's annual income to trigger accuracy-related penalties under Code section 6662. Immediate recognition of the amount of the defective rollover can push income earmarked for retirement into a higher tax bracket. The concentration of retirement income recognition into a single year also may result in a substantial omission of income that extends the statute of limitations to six years under Code section 6501(e). The amounts recontributed to IRAs in transactions that taxpayers erroneously believed were rollovers are subject to a separate excess contribution tax under Code section 4973. A deficient attempted rollover thus can destroy years of retirement planning. These harsh penalties underscore the importance of clear rules so that taxpayers are not penalized for simply doing what the IRS has told them that they could do.

Numerous commentators have expressed concern about the effect of the Court's decision upon taxpayers who have relied on this administrative guidance. Among their observations are the following:

"No citizen should be expected to go beyond an official IRS tax publication and conduct research in the Internal Revenue Code and arrive at a conclusion different than the IRS published guidance."[13]

"If this ruling is adopted by the IRS to apply to the rollover rules in spite of what Publication 590 states, it is a significant change that can drastically affect client tax situations if the wrong move is made."[14]

"This tax disaster of the IRS' own making must be fixed."[15]

"The implications of the Bobrow decision are serious."[16]

"A recent U.S. Tax Court ruling that declared IRA owners are entitled to just one nontaxable rollover every

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[13] Todd Berghuis, Tax Court Ruling and IRS Rollover Guidance Don't Add Up, Todd's Blog (Feb. 19, 2014, 2:31 PM), http://erisanews.blogspot.com/2014/02/tax-court-ruling-and-irs-rollover.html.

[14] Lawrence C. Starr, Tax Court's Take on One-IRA-Rollover-Per-Year Rule at Odds with IRS Publication 590, ASPPA asap, 2 (Feb. 5, 2014), http://www.asppa.org/Document-Vault/PDFs/ASAPs/open/14-04.aspx.

[15] Michael J. Jones, Seeing Double, WealthManagement.com (Feb. 4, 2014), http://wealthmanagement.com/retirement-planning/seeing-double.

[16] Michael D. Shelton, IRA Rollover Rules: A "Bait & Switch"?, Smith Haughay Rice & Roegge (Feb. 5, 2014), http://www.shrr.com/uploads/IRA%20Rollovers_shelton.pdf.

12 months across all their accounts upends conventional reading of the law."[17]

"[T]his is in sharp contrast with the long-standing proposed regulations (issued in 1981), and IRS Publication 590, that both apply the once-a-year limitation to each separate IRA."[18]

"What is curious is that the IRS's position in this case and the court's holding are contrary to an IRS publication and at least one private letter ruling."[19]

"This is a noteworthy decision because it directly conflicts with the widely held understanding of the rules applicable to 60-day rollovers by professionals in the industry, based on longstanding guidance on this topic provided to taxpayers in IRS Publication 590."[20]

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[17] Dan Berman, Court ruling on IRA rollovers seen as 'game changer', BenefitsPro (Feb. 12, 2014), http://www.benefitspro.com/2014/02/12/court-ruling-on-ira-rollovers-seen-as-game-changer.

[18] Groom Law Group, Tax Court Takes Restrictive View of One-Year Limitation for Indirect IRA Rollovers, Benefits Brief (Feb. 11, 2014), http://www.groom.com/media/publication/1364_Tax_Court_Takes_Restrictive_View_One_Year_Limitation_Indirect_IRA_Rollovers.pdf.

[19] Rogers Laban, IRS publications do not bind courts – or the IRS, CP America (Feb. 10, 2014), http://news.cpamerica.org/rogers/wtu/taxupdate2.asp?a=1557.

[20] Amy Neifeld Shkedy & Rebecca Rosenberger Smolen, Tax Court Imposes New Limitation on 60-Day IRA Rollovers, The Legal Intelligencer (March 7, 2014), http://www.thelegalintelligencer.com/home/id=1202645948094#.

One commentator recognized practitioners' historic reliance on the authorities cited above but questioned whether the language of the Code supported such a position.[21]

IV. The Court Should Vacate and Revise Its Decision

A. The Code Should be Read to Permit Annual Rollover of Each IRA

The College is aware that settled principles of statutory interpretation mandate application of the text of the law as written. "If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842 (1984). The Court's opinion states that Petitioners' interpretation of the statute was inconsistent with previous cases, the plain language of the statute, and the legislative history of the statute. But that decision was apparently reached without the Court's attention being directed to the long history of contrary published interpretation by Treasury and the IRS. The College respectfully suggests that due regard for the longstanding and repeatedly-published

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[21] See Bill O'Malley, The US Tax Court changes the game on IRA rollovers, McGladrey (Feb. 26, 2014), http://mcgladrey.com/content/mcgladrey/en_US/what-we-do/services/tax/tax-alerts/the-us-tax-court-changes-the-game-on-ira-rollovers.html ("Historically, many taxpayers and tax practitioners have operated under the assumption that the rollover rule applies separately to each IRA. . . . [T]he language in the Internal Revenue Code provides no support for this approach . . . .").

position taken by Treasury and the IRS, as well as the reliance interests of taxpayers, counsel in favor of reconsideration of the clarity that the Court initially gleaned from the statutory language at issue here. See Zuni Public School Dist. No. 89 v. Department of Educ., 550 U.S. 81 (2007) (first considering history and purposes before determining whether statutory language was clear).

This is not a situation in which Congress "directly addressed the precise question at issue." Mayo Found. for Med. Educ. & Research v. United States, 131 S. Ct. 704, 711 (2011) (quoting Chevron, 467 U.S. at 842-43). Nothing in the statutory language suggests that Congress contemplated the issue of one taxpayer owning and rolling over multiple IRAs in the same year. Had Congress done so, and had it wished to prohibit the practice, Code section 408(d)(3)(B) would have been written to apply to any "individual retirement account" or any "individual retirement annuity" rather an just "an individual retirement account or an individual retirement annuity."

Moreover, there is little reason to think Congress would have wanted to prevent an ordinary taxpayer with two IRAs from rolling both of them over in the same year. The statute permits a taxpayer who has $10,000 in a single IRA to withdraw the full amount for 60 days once each year; there is no reason why a taxpayer who has two $5,000 IRAs should only be able to withdraw and redeposit half of his IRA savings annually. See

Private Letter Ruling 9626049 (June 28, 1986), discussed above at pages 7-8, which illustrates a similar situation in which a widow consolidated three IRAs inherited from her husband into a single new IRA by rollovers occurring in the same year.

The Court's opinion relies on Congress's use of "general terms" and the indefinite article "an" in discussing the twelve-month rule. See Slip. Op. 12. But the Court does not explain why Petitioners' (and Treasury's and the IRS's) interpretation of the statute in the Proposed Regulation, letter rulings and Publication 590 is not at least equally plausible. The legislative history cited by the Court is phrased in the same terms as the statute, and it does not suggest that the statutory language represents a considered choice on the question at issue here. See id. at 13-14. For example, the Court cites the statement that "an individual can transfer amounts between individual retirement accounts only once every three years." That sentence could reasonably be read to permit only one transfer every three years, or only one transfer between any two accounts every three years.

Nor do the cited cases reflect considered judgments in those cases of the question at issue here. Martin v. Commissioner, 63 T.C.M. (CCH) 3122 (1992) (referred to by the Court as "Martin I"), aff'd, 987 F.2d 770 (5th Cir. 1993) (unpublished per curiam decision); Martin v. Commissioner, 67 T.C.M. (CCH) 2960 (1994) (referred to by the Court as "Martin

III"); and Bhattacharyya v. Commissioner, 93 T.C.M. (CCH) 711 (2007), involved pro se taxpayers. Neither taxpayer appears to have made the Courts in those cases aware of the longstanding authorities cited in this brief apparently because, in each of those cases, those authorities would not have assisted either taxpayer, both of whom made later withdrawals within twelve months from the same IRA into which they had deposited rolled over funds from another IRA. In such circumstances, Publication 590 specifically cautions:

> Generally, if you make a tax-free rollover of any part of a distribution from a traditional IRA, you cannot, within a 1-year period, make a tax-free rollover of any later distribution from that same IRA. You also cannot make a tax-free rollover of any amount distributed, within the same 1-year period, from the IRA into which you made the tax-free rollover.

(Emphasis added.) Thus the decisions in Martin I and Bhattacharyya both involve an attempt to make a second rollover within twelve months from the same IRA into which the earlier rollover was deposited, unlike this case in which Mr. Bobrow's rollovers were made from different IRAs as specifically permitted by Publication 590, the Proposed Regulation, and the letter rulings.[22]

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[22] The taxpayer in Martin I argued that his first distribution from one IRA and deposit in a different IRA was not a rollover at all but instead a "trustee-to-trustee" transfer to which neither the sixty-day nor twelve-month limitations apply. See Rev. Rul. 78-406, 1978-2 C.B. 157. The Martin I Court rejected this contention because the funds were distributed to the taxpayer by a check made out to him, then deposited the same day in the other IRA rather than transferred directly between the

The College respectfully suggests that the statutory language should be interpreted to apply the twelve-month rule separately to each IRA owned by a taxpayer in accordance with the longstanding administrative guidance cited in this brief.

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trustees. The Martin I Court then stated that subsequent distributions were taxable "because the section 408(d)(3)(A) exemption was not available for these withdrawals." Martin v. Commissioner, 63 T.C.M. (CCH) 3122, 3123-24 (1992). But that was because the taxpayer made an additional withdrawal within twelve months from the same IRA into which he had deposited the first rollover distribution. There is no indication that the Court in Martin I intended to take a position contrary to the Proposed Regulation or Publication 590; that issue was simply not what it was asked to decide.

In Martin III, the same taxpayer as in Martin I attempted to re-litigate the trustee-to trustee transfer issue in the context of an assessment of excise tax for excess contributions to an IRA and was held to be collaterally estopped by the decision in Martin I, but there is likewise no analysis in that opinion to indicate that the Court in that case was adopting a position contrary to the Proposed Regulation and Publication 590.

In Bhattacharyya, as in Martin I, the taxpayer apparently asserted that distributions from an IRA into which he had made rollovers earlier in the taxable year could also be treated as rollovers but the Court found there was no evidence that the later withdrawals were ever redeposited. The fact pattern in Bhattacharyya thus involved a situation in which the later withdrawals were from the same account to which a rollover deposit had been made within twelve months and there was no proof of any redeposit of the later distributions. While the Court did state in section I.C. of its opinion that "[e]xclusion of a rollover from one IRA to another can only be made by an individual once during any 1-year period," Bhattacharyya v. Commissioner, 93 T.C.M. (CCH) 711, 715 (2007), citing the statute and Martin I, it provided no analysis of that conclusion and there is no indication that the Court there considered the authorities presented in this brief or intended to disagree with them.

The College urges that the statutory language and legislative history do not mandate a different result from that guidance.

B. The Proposed Regulation and the Private Letter Rulings Provide Substantial Authority for Applying Code Section 408(d)(3)(B) Separately to Each IRA

The College recognizes that the Court was not made aware of the authorities cited in this brief when it issued its original opinion. Respondent's assertion of penalties is inappropriate because there was substantial authority for Petitioners' position with respect to Mr. Bobrow's rollovers from separate IRAs. Treasury Regulation section 1.6662-4(d)(3)(iii) lists both proposed regulations and private letter rulings as sources of substantial authority. The Proposed Regulation and the two private letter rulings cited above squarely address the issue here and adopt the position taken by Petitioners. The College respectfully suggests that penalties are inappropriate given the existence of these authorities.

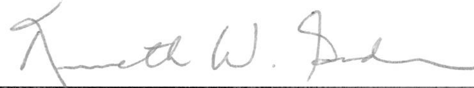
V. Conclusion

For decades, at the IRS's invitation, taxpayers have acted with respect to their IRAs trusting administrative guidance explicitly instructing them that the twelve-month rule applies separately to <u>each</u> IRA they own. In this case, Respondent now informs these taxpayers that they have made an error with potentially catastrophic financial consequences in taking him at his word. This result undermines public confidence in our tax system, and it is inconsistent with basic

principles of tax administration. For these reasons, the College respectfully requests that the Court grant Petitioners' motion to vacate and revise its opinion and apply longstanding administrative guidance in this case.

Respectfully Submitted,

Dated: March 20, 2014



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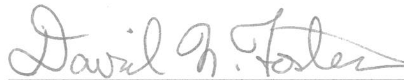

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing paper was served on Petitioners and on counsel for Respondent both by electronic mail and by sending the same on March 20, 2014, via FedEx overnight delivery addressed as follows:

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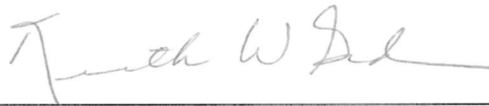

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