

Follow-up Questions of Senator Tom Coburn, M.D.

“Nomination of Mary Smith to be Assistant Attorney General, Tax Division, Department of Justice”

United States Senate Committee on the Judiciary

May 19, 2009

1. Ms. Smith, I see from your resume that you have some litigation experience. How many cases have you tried to judgment as either first chair or the sole litigating attorney?

I have tried three cases to judgment as the sole and principal attorney.

- a. Of those cases, how many involved complex tax issues, tax policy or related to the internal revenue code?

None of these cases involved tax issues.

- b. Of the cases where you were lead attorney, in how many did you appear as a prosecuting attorney?

I have not served as a prosecuting attorney.

- c. Of the cases where you were lead attorney, in how many did you appear before a jury?

I have not appeared before a jury.

- d. Of all cases in which you have appeared in court in any capacity, how many cases were before a jury on issues related to tax law or tax policy?

I have not appeared before a jury on issues related to tax law or tax policy.

2. Throughout your career you have worked in both political and non-political positions. In which of those positions did you gain specific training, experience and knowledge in tax law or tax policy that would qualify you for this position?

While in the White House, I worked closely with the National Economic Council on legislation that would put tribal governments on par with state and local governments under the Federal Unemployment Tax Act (FUTA). I spent many months working with the Treasury Department, Congressional leaders, and the National Economic Council on addressing this disparity in tax policy between tribal governments and state governments. The end result was that the FUTA language was included in the final FY 2001 omnibus appropriations bill.

While serving as in-house counsel at Tyco, I dealt with a number of tax issues. I interacted with the Tyco tax department on a variety of issues, including the tax treatment of several items, such as those involving theft loss and charitable contributions. See, e.g., 26 U.S.C. §§ 165 and 170. I also worked with the tax

department on issues which dealt with the tax treatment of certain items arising from corporate acquisitions, as well as the proper classification of acquisition expenses. *See, e.g.,* 26 U.S.C. § 269. I also advised the tax department on responding to IRS subpoenas. In addition, two of the Company's Senior Vice Presidents of Tax were either witnesses or potential witnesses in the multi-district securities litigation for which I was responsible. One of the former heads of Tyco's tax department, R. Scott Stevenson, ultimately pled guilty to failing to report more than \$170 million in U.S. income on Tyco's tax returns and was sentenced to three years in prison. Additionally, I interacted with the tax department on issues involving state tax payments for various former senior executives. Finally, I interacted with the tax department regarding the approximately \$3 billion settlement of the Tyco securities litigation and issues involving its tax treatment. *See, e.g.,* 26 U.S.C. § 162.

3. What will be your strategy regarding the Department's approach to offshore tax evasion? How will the Department structure its negotiations with countries that are havens for tax evasion in order to gain important information to initiate criminal prosecutions?

It is of paramount importance to our system of voluntary compliance with federal tax laws that the citizens of this country have confidence that the system is fair. There is general agreement in the tax administration community that there is no "silver bullet" that will solve the problems of offshore tax avoidance. If there were such a magic solution, it would already have been implemented. Rather, an integrated approach is needed. Within this integrated approach, the Tax Division will work closely with the Internal Revenue Service and utilize the enforcement tools available to it in combating offshore tax evasion, including both criminal and civil actions and the issuance of summons to gather vital information for the IRS. However, the role of the Tax Division is to enforce the tax laws not to make laws or negotiate with countries. Rather, negotiations with countries are the purview of the Treasury and State Departments.

4. The Tax Division employs over 350 attorneys in 14 civil, criminal and appellate sections. What management experience in your background has prepared you to lead the Tax Division? Please provide specific examples.

I have management experience from both my time at Tyco and at Skadden. At Tyco, I was responsible for the one of the largest litigation matters pending in the country – the multi-district class action securities litigation arising out of the acts of former Tyco management. At any given time, there were over 40 outside counsel and over 60 contract attorneys working on this matter. I supervised all of the outside counsel and gave specific assignments to each of Tyco's outside law firms, and, in many instances, to particular attorneys at those law firms. As for the contract attorneys, prior to my arrival at Tyco, no one had a handle on all the projects at the contract review center and how many attorneys were working on each project. I instituted a process whereby on a regular basis we reviewed all the projects and the number of attorneys working on certain projects. Based on these reviews, during certain periods, I made the decision to substantially reduce the number of contract attorneys. At Tyco, I also managed an over \$50 million budget and I have extensive budgeting experience.

At Skadden, I often supervised large teams of lawyers and legal assistants during government investigations and civil litigation. I regularly taught the younger attorneys how to perform certain tasks and reviewed their work. I worked to motivate the younger attorneys by spending time with them and explaining to them how their work fit into the overall plan and strategy for the case or investigation. We often worked long hours and under tight deadlines, but I worked to ensure that all the persons on the team felt that their work was important and appreciated.

- a. The Tax Division has both civil and criminal sections. How much of your litigation experience involved criminal cases?

About 10 percent of my litigation experience has involved criminal cases. I have worked on criminal matters throughout my career. While in law school, I served as an intern in United States Attorney's Office for the Northern District of Illinois. During my clerkship in the Eleventh Circuit, I worked on criminal cases. I worked on a habeas case arising out of a criminal matter while at a law firm in Chicago. During my time at Skadden, Arps, Slate, Meagher & Flom LLP, I worked on a murder case on a pro bono basis. When I was at Tyco, I interacted and cooperated with the Manhattan District Attorney's Office on a regular basis regarding the convictions of Tyco's former CEO, L. Dennis Kozlowski, and former CFO, Mark Swartz, as well as supervising the filing of pleadings in the criminal proceedings to protect Tyco's interests.

- b. Of those criminal cases, how many did you try to judgment as first chair or sole litigating attorney?

I did not try any criminal cases to judgment as first chair or sole litigating attorney.

- c. Of those criminal cases, how many cases involved criminal tax issues?

None of these criminal cases involved criminal tax issues.

5. The Tax Division has an office under its civil section focused on the Court of Federal Claims, which "defends all tax suits filed in the United States Court of Federal Claims."

- a. How many times have you appeared before the Court of Federal Claims?

I have appeared before the Court of Federal Claims on numerous occasions. From 1994-1996, while I was a trial attorney at the Department of Justice, I practiced exclusively before the Court of Federal Claims.

- b. How many briefs or other documents have you filed with the Court of Federal Claims?

I have filed an extremely large number of briefs and other documents with the

Court of Federal Claims.