September 1, 2010

The Honorable Timothy F. Geithner
Secretary of the Treasury
Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Dear Secretary Geithner:

The undersigned state and national medical organizations, representing a vast majority of physicians in our country, are writing in response to recent reports that the Treasury Department is considering a change in federal tax policy to allow a special tax deduction for trial attorneys who enter into gross fee contingency contracts with their clients. We believe strongly that such a policy change would be ill-advised and urge you to reject this proposal.

Numerous news articles have recently reported that the Treasury Department may reverse its long-standing tax policy maintaining that court and other litigation expenses advanced by trial attorneys are not deductible as business expenses. Such a change is estimated to cost taxpayers over $1.5 billion and could act as a financial incentive for trial attorneys to file less meritorious lawsuits against physicians and other health care providers. Even though a substantial majority of claims are dropped or decided in favor of physicians, the cost of defending against meritless claims averages over $22,000. This leads to increased costs for physicians and patients—money that could otherwise be spent expanding coverage to the uninsured. Given that President Obama and Members of Congress from both parties have publically recognized that our medical liability system is in need of reform to reduce meritless lawsuits, and that the Congressional Budget Office estimates that effective medical liability reforms would decrease defensive medicine and save the government $54 billion over 10 years, we find it perplexing that the Treasury Department would consider a change in policy that could add to the cost of health care, especially at a time when our nation is engaged in implementing comprehensive health care reform and expanding coverage to the uninsured. We would object in the strongest possible terms to any change in federal tax policy that could increase meritless claims and add unnecessary costs to our health care system.

We understand that the Treasury Department is basing its consideration on a 1995 Ninth Circuit Court of Appeals case, *Boccardo v. Commissioner of Internal Revenue*, where the court overturned the U.S. Tax Court and long-standing tax policy and held that attorneys are not extending loans to clients under gross fee contracts (as distinct from net fee contracts), and therefore may treat litigation costs as deductible expenses in the year they occur. This ruling, however, has not been validated by other Circuit Courts. Also, the Internal Revenue Service (IRS) issued guidance in 1997 maintaining the position that litigation expenses advanced by trial lawyers are not deductible regardless of whether a trial attorney uses a gross fee or net fee contract with clients. Further, legislation introduced in the U.S. Senate and House of Representatives that would provide trial attorneys with a statutory tax deduction for litigation costs in contingency fees cases has failed to attract enough support to hold hearings on the issue, let alone be considered by either chamber. Considering these dynamics, we believe that any change in tax policy would be unjustified without a full and public examination of the ramifications.

We are also concerned that a change in tax policy by the Treasury Department would conflict with long-standing state ethics rules against trial attorneys providing financial assistance to clients

without the expectation of being paid back upon the successful conclusion of the case. These rules are meant to prevent a conflict of interest whereby a trial attorney's financial stake in a case is put ahead of the client's desire for justice. Rule 1.8(e) of the American Bar Association's Model Rules of Professional Conduct provides that "a lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that…a lawyer may advance court costs and expenses of litigation, *the repayment of which may be contingent on the outcome of the matter*...." (emphasis added) In other words, the ABA Model Rules consider expenses advanced by trial attorneys to be loans, which the IRS does not consider a deductible expense unless the loan is not paid back. Given that most states have adopted the ABA Model Rules, including some states in the Ninth Circuit, we believe that the Treasury Department is obligated to, at a minimum, consult with the ABA and every state that has adopted the ABA Model Rules to determine whether a change in tax policy, effectively allowing the expensing of costs associated with a client's claim, would undermine the intent and spirit of the Model Rules or otherwise subvert States' efforts to protect citizens against unethical practices by trial attorneys.

In conclusion, we believe there is no compelling justification for the Treasury Department to further consider a change in its tax policy relating to the deductibility of litigation costs for trial attorneys, and strongly urge the Department to reconsider any plans to issue an official guidance or rule that would change current policy.

Sincerely,

American Academy of Dermatology Association
American Academy of Facial Plastic and Reconstructive Surgery
American Academy of Family Physicians
American Academy of Ophthalmology
American Academy of Otolaryngology—Head and Neck Surgery
American Academy of Sleep Medicine
American Association of Neurological Surgeons
American Association of Orthopaedic Surgeons
American College of Cardiology
American College of Chest Physicians
American College of Emergency Physicians
American College of Gastroenterology
American College of Osteopathic Surgeons
American College of Phlebology
American College of Physicians
American College of Radiation Oncology
American College of Radiology
American College of Rheumatology
American College of Surgeons
American Congress of Obstetricians and Gynecologists
American Gastroenterological Association
American Geriatrics Society
American Medical Association

American Medical Group Association
American Osteopathic Academy of Orthopedics
American Osteopathic Association
American Rhinologic Society
American Society for Gastrointestinal Endoscopy
American Society of Anesthesiologists
American Society of Cataract and Refractive Surgery
American Society of Plastic Surgeons
American Urological Association
College of American Pathologists
Congress of Neurological Surgeons
Heart Rhythm Society
Infectious Diseases Society of America
Medical Group Management Association
North American Spine Society
Renal Physicians Association
Society for Cardiovascular Angiography and Interventions
Society of Gynecologic Oncologists
Society of Hospital Medicine
The Society of Thoracic Surgeons

Alaska State Medical Association
Arizona Medical Association
Arkansas Medical Society
California Medical Association
Colorado Medical Society
Connecticut State Medical Society
Medical Society of Delaware
Medical Society of the District of Columbia
Florida Medical Association Inc
Medical Association of Georgia
Hawaii Medical Association
Idaho Medical Association
Illinois State Medical Society
Indiana State Medical Association
Iowa Medical Society
Kentucky Medical Association
Louisiana State Medical Society
Maine Medical Association
MedChi, The Maryland State Medical Society
Massachusetts Medical Society
Michigan State Medical Society
Minnesota Medical Association
Mississippi State Medical Association
Missouri State Medical Association
Montana Medical Association

Nebraska Medical Association
Nevada State Medical Association
New Hampshire Medical Society
Medical Society of New Jersey
New Mexico Medical Society
Medical Society of the State of New York
North Carolina Medical Society
Ohio State Medical Association
Oklahoma State Medical Association
Oregon Medical Association
Pennsylvania Medical Society
Rhode Island Medical Society
South Carolina Medical Association
South Dakota State Medical Association
Tennessee Medical Association
Texas Medical Association
Utah Medical Association
Vermont Medical Society
Medical Society of Virginia
Washington State Medical Association
West Virginia State Medical Association
Wisconsin Medical Society
Wyoming Medical Society