Tax Practice Before the IRS:
Circular 230 Update

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(Excerpted from:

Structuring Ownership of Privately-Owned Businesses:

Tax and Estate Planning Implications)

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I. Introduction

This document is excerpted from "Structuring Ownership of Privately-Owned Businesses: Tax and Estate Planning Implications, a several thousand page. Dully searchable PDF that discusses how federal income, employment and transfer taxes and estate planning and trust administration considerations affect how one might structure a business and then transition the business through ownership changes, focusing on structural issues so that readers can plan the choice of entity or engage in estate planning with an eye towards eventual transfer of ownership in the business.

With rapid changes in our global economy, flexibility in structuring a business entity is more important than ever. This document focuses on income tax flexibility in buying into a business and also exiting from or dividing a business, also discussing particular aspects of the taxation of operations, as well as individual and fiduciary income taxation (including the 3.8% tax on net investment income) on the income relating to a business entity that is taxable to them. It also discusses estate planning issues, including transfer tax issues and drafting and administering trusts to hold business interests. In addition

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All references to the "Code" are to the Internal Revenue Code of 1986, as amended. All references to a "Reg." section are to U.S. Treasury Regulations promulgated under the Code.

to the issues covered in this document, consider whether a family-controlled entity requires a legitimate and significant nontax reason.[1]

The author sends a link to the most recent version in his free electronic newsletter (roughly quarterly), called "Gorin's Business Succession Solutions." If you would like to receive this newsletter, please complete https://www.thompsoncoburn.com/forms/gorin-newsletter or email the author at sgorin@thompsoncoburn.com with "Gorin's Business Succession Solutions" in the subject line; the newsletter email list is opt-in only. Please include your complete contact information; to comply with the anti-spam laws, we must have a physical mailing address, even though delivery is electronic. Please also add ThompsonCoburnNews@tcinstitute.com to your "trusted" list so that your spam blocker will not block it. Send any inquiries to the author at sgorin@thompsoncoburn.com and not to ThompsonCoburnNews@tcinstitute.com, which is not the author's email address but rather is an address used to transmit newsletters.

For free oral presentations of various issues in this document, go to my CPA Academy instructor page. These webinars are free and available on demand without continuing education credit or at scheduled times with CPE credit. The last Tuesday of the month after a calendar quarter ends, I record a free TCLE webinar with CLE credit in California, Illinois, Missouri, New York, ands Texas covering the articles in the quarterly newsletter. Additional Thompson Coburn LLP resources are at https://www.thompsoncoburn.com/subscribe.

II.G.19.j. Regulations Governing Practice before the IRS (Circular 230)

Proposed regulations [REG-116610-20] RIN 1545-BQ12 (12/26/2024) are proposed to apply 30 days after date of publication of final regulations in the Federal Register. As to who is affected:

> The proposed regulations would affect EAs, ERPAs, attorneys, CPAs, and AFSP participants[1843] who practice before the IRS. The proposed regulations would also affect appraisers who submit appraisals in an administrative proceeding before the Treasury Department or the IRS. Circular 230 affects both individual practitioners and firms. For example, the flush language of 31 U.S.C. 330(c) authorizes the Secretary, or her delegate, to impose a monetary penalty on a firm if the firm knew or should have known that a representative acting on its behalf intended to defraud a client. Further, proposed § 10.36(a) would require practitioners who oversee a firm's practice to take reasonable steps to ensure that the firm has adequate procedures to comply with Circular 230.

Proposed § 10.2(a)(4), (5) and (6) provide:

> (4) *Practice before the Internal Revenue Service* comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing documents;

[1] Such a reason may be necessary to ensure estate tax recognition of the entity and to avoid double inclusion of the post-formation appreciation in the value of any business interest the decedent owned within three years of death. See fns. 91-92 in part II.A.2.d.i Benefits of Estate Planning Strategies Available Only for S Corporation Shareholders.

[1843] [my footnote:] AFSP refers to Annual Filing Season Program, which is explained in part II.G.19.j.vi Enrolled Agents and Various Other IRS-Credentialled Representatives.

filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings. Any action that supports a presentation to the Internal Revenue Service, including the preparation and submission of tax returns in connection with representing a client in a matter before the Internal Revenue Service, may constitute practice before the Internal Revenue Service.

(5) *Practitioner* means any individual described in § 10.3(a), (b), (c), (d), or (e).

(6) A *tax return* includes an amended tax return and a claim for refund or credit within the meaning of section 6696(e)(2) of the Internal Revenue Code, such as a claim for refund or credit made on IRS Form 843, *Claim for Refund and Request for Abatement*.

This part II.G.19.j Regulations Governing Practice before the IRS (Circular 230) includes the following parts:

- II.G.19.j.i Tax Return Preparation. Proposed § 10.21 would require practitioners to explain actions a client should take to correct the noncompliance, error, or omission. It would also instruct practitioners to consider whether they can continue to meet their obligation to exercise diligence as to the accuracy of tax returns and other documents if the client refuses to take corrective action.

- II.G.19.j.ii Written Tax Advice. Proposed changes to § 10.37 would clean up various definitions, including that covered tax advice includes advice on the ability to take a specific return position (whether prospective or completed).

- II.G.19.j.iii Tax Practice Management Generally. Proposed § 10.33 focuses on the need for technological security and practice succession, including identifying when a practitioner may not be able to perform well anymore.

- II.G.19.j.iv Appraiser Standards. Proposed rules would provide more definitive regulations on possible appraiser misconduct.

- II.G.19.j.v Contingent Fees; Collecting Fees. Proposed regulations would define disreputable conduct to include both charging contingent fees in connection with the preparation of an original or amended tax return or claim for refund or credit, and charging fees that, under the facts and circumstances, are unconscionable fees.

- II.G.19.j.vi Enrolled Agents and Various Other IRS-Credentialled Representatives.

- II.G.19.j.vii AICPA Statements on Standards for Tax Services. Given that these statements are proprietary, this part II.G.19.j.vii includes only those standards that the government references in part II.G.19.j.i Tax Return Preparation.

II.G.19.j.i. Tax Return Preparation

The preamble to proposed regulations [REG-116610-20] RIN 1545-BQ12 (12/26/2024) provides background:

> Prior to 2011, individual tax return preparers were generally not subject to Circular 230 unless the tax return preparer was an attorney, certified public accountant (CPA), enrolled agent (EA), or other type of practitioner identified in Circular 230. On June 3, 2011, the Treasury Department and the IRS published final regulations (TD 9527) in the Federal Register (76 FR 32286) to establish qualifications for tax return preparers, which required them to become registered tax return preparers subject to the requirements under Circular 230 and describing the allowable scope of a registered tax return preparer's practice before the IRS (2011 amendments).
>
> The 2011 amendments were challenged in *Loving v. IRS*, 917 F.Supp.2d 67 (D.D.C. 2013), in which case the plaintiffs argued that the Treasury Department and the IRS did not have authority under 31 U.S.C. 330 to regulate tax return preparation because return preparation was not practice before the IRS. The United States District Court for the District of Columbia (District Court for the District of Columbia or district court) concluded that under 31 U.S.C. 330(a), practice before the IRS is limited to representing taxpayers before the IRS by assisting them in presenting their cases. Because the district court considered preparing and filing tax returns as falling short of "presenting a case," it held that the Treasury Department and the IRS lacked statutory authority to regulate tax return preparation as practice before the IRS under 31 U.S.C. 330(a) and enjoined the Treasury Department and the IRS from enforcing the 2011 amendments to Circular 230 related to registered tax return preparers. The United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit or court of appeals) affirmed the district court's opinion and order for injunction. The court of appeals upheld the district court's statutory construction, explaining that, while tax return preparers assist taxpayers, they do not represent taxpayers before the IRS or formally act as their agent. *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014).

The preamble to proposed regulations [REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230:

> **1. Elimination of Regulation of Registered Tax Return Preparers as Practitioners**
>
> As a result of the decision and injunction order in *Loving*, the 2011 amendments that relate to registered tax return preparers are no longer enforceable. Therefore, the proposed regulations would eliminate rules regarding registered tax return preparers under current §§ 10.3 through 10.6. The proposed regulations would also remove references to registered tax return preparers under current §§ 10.0, 10.2, 10.30, 10.38, and 10.90 and redesignate current § 10.90 as § 10.110.
>
> **2. Revision of Standards Relating to Tax Return Preparation**
>
> Circular 230 contains provisions that are unrelated to the registered tax return preparer program but impose specific standards on tax return preparation. Consistent with the holding in *Loving*, the proposed regulations would eliminate or revise these provisions to impose standards related to tax returns prepared, approved, or submitted in connection with representing a client

in a matter before the IRS. This distinction would be also incorporated under the amended definition of "practice before the IRS" under proposed § 10.2(a)(4), which would clarify that practice before the IRS includes the preparation and submission of tax returns in connection with representing a client in a matter before the IRS.

Current § 10.8 provides rules related to tax return preparation, describes actions that individuals who did not prepare all, or substantially all, of a tax return can take before the IRS, and prohibits non-practitioners from preparing all, or substantially all, of a tax return. The proposed regulations would eliminate the current language under § 10.8 in its entirety. However, guidance regarding what actions non-practitioners may take in response to IRS inquiries is still necessary and authorized under 31 U.S.C. 330. Therefore, the proposed regulations would retitle current § 10.8 as "Participation in IRS proceedings by non-practitioners" and would provide that, except for appraisers who have been disqualified pursuant to proposed § 10.61(a), any individual may appear as a witness before the IRS or furnish information at the request of the IRS.

Current § 10.22 imposes standards related to diligence as to accuracy, including standards related to the preparation or approval of tax returns, documents, affidavits, and other papers. The proposed regulations would revise current § 10.22 to specify that the diligence as to the accuracy requirement for tax returns is limited to tax returns prepared, approved, or submitted in connection with representing a client in a matter before the IRS. The proposed regulations would not revise existing diligence standards related to documents, affidavits, and other papers that are not tax returns. The diligence requirements in the proposed regulations would also apply to a practitioner's preparation of a tax return prior to representing a client in a matter before the IRS when the subsequent representation involves the tax return. When the representation involves a tax return prepared by a practitioner, the practitioner's diligence with respect to preparing the tax return would be treated under the proposed regulations as related to the practitioner's practice before the IRS under 31 U.S.C. 330(a).

Current § 10.34 imposes standards with respect to a practitioner's preparation of tax returns and other documents. The current regulations incorporate standards under the Code relating to tax return positions, describe standards for advising clients with respect to potential penalties, and address the ability of a practitioner to rely on information furnished by a client. The proposed regulations would maintain these standards but clarify that the standards only apply to a tax return either when the tax return is prepared while representing a client before the IRS or when the tax return prepared prior to representation is submitted while representing a client before the IRS, regardless of whether the tax return was filed with the IRS before the representation begins. With respect to tax returns prepared prior to representation, the current standards relate to a practitioner's duty to not further an unreasonable return position taken on a previously prepared return while representing a client in a matter before the IRS. The proposed regulations would not impose the standards on the preparation of a tax return in the absence of a practitioner's representation of a client.

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230:

F. Knowledge of Error or Omission

Current § 10.21 requires practitioners to advise a client of any noncompliance with internal revenue laws or any error or omission on a tax return or other document submitted to the IRS and the consequences under the Code and regulations of the noncompliance, error, or omission. Proposed § 10.21 would clarify that the noncompliance, error, or omission may have been made by either the client or the practitioner or a prior practitioner, such as if the practitioner or prior practitioner made an inadvertent mistake on a tax return prepared and filed for the client that the practitioner later discovers.

Proposed § 10.21 would expand the current guidance by requiring practitioners to explain actions the client should take to correct the noncompliance, error, or omission. Knowingly failing to inform a client of the noncompliance, error, or omission is disreputable conduct under 31 U.S.C. 330(c) because it causes practitioners to perpetuate false or misleading information to the IRS and potentially exposes the client to penalties and other adverse consequences. Proposed § 10.21 would also instruct practitioners to consider whether they can continue to meet their obligation to exercise diligence under proposed § 10.22(a) as to the accuracy of tax returns and other documents if the client refuses to take corrective action during the course of the practitioner's representation. A practitioner's obligation under proposed § 10.22(a) applies only to tax returns that are prepared, approved, or submitted in connection with representing a client in a matter before the IRS. Under those circumstances, the failure to correct inaccurate or unsupportable return positions would result in their perpetuation in submissions to the IRS during the course of the practitioner's representation. These changes would align Circular 230 with similar professional standards relating to knowledge of a client's error. *See* AICPA Statement on Standards for Tax Services No. 6 (Knowledge of Error: Return Preparation and Administrative Proceedings) (Rev. April 30, 2018); *see also Schmitz v. Crotty*, 528 N.W. 112 (Iowa 1995) (holding that in a civil malpractice action, an attorney was negligent for, in part, failing to correct an error on tax returns that he was aware of).

AICPA Statement on Standards for Tax Services ("SSTS") No. 6, "Knowledge of Error: Return Preparation and Administrative Proceedings" (Rev. April 30, 2018), has been restated as SSTS No. 1.2, "Knowledge of Errors."[1844]

Proposed § 10.21, "Knowledge of error or omission, provides:

(a) *In general*. A practitioner who, while representing a client in a matter before the Internal Revenue Service, knows that either the client, the practitioner, or a prior practitioner has not complied with the revenue laws of the United States and regulations, or has made an error in or omission from any return, document, affidavit, or other paper that the client submitted or executed under the revenue laws of the United States and regulations, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences of the noncompliance, error, or omission, as provided under the internal revenue laws of the United States and regulations, and recommend the corrective actions, such as disclosure, to be taken.

[1844] See text accompanying and following fn. 1851 in part II.G.19.j.vii AICPA Statements on Standards for Tax Services.

(b) *Disclosure and continued representation*. If a practitioner is representing a client in a matter before the Internal Revenue Service, the practitioner should request the client's agreement to disclose the noncompliance, error, or omission to the Internal Revenue Service. The practitioner must also take reasonable steps to ensure that the noncompliance, error, or omission is not repeated in subsequent submissions to the Internal Revenue Service. If the client does not agree to disclose the noncompliance, error, or omission, the practitioner should consider whether the practitioner can continue to represent the client before the Internal Revenue Service and meet the obligation to ensure diligence as to accuracy under § 10.22.

AICPA recommended[1845] changing "If a practitioner is representing a client in a matter before the Internal Revenue Service, the practitioner should request the client's agreement to disclose the noncompliance, error, or omission to the Internal Revenue Service" to "If a practitioner is representing a client in a matter before the Internal Revenue Service, the practitioner must advise the taxpayer to disclose the error to the Internal Revenue Service and of the potential consequences of not disclosing the error." It also recommended changing the following to conform with this change: ""The practitioner must also take reasonable steps to ensure that the noncompliance, error, or omission is not repeated in subsequent submissions to the Internal Revenue Service as relating to the practitioner's representation of the client in a matter before the Internal Revenue Service."

Prop. Reg. § 10.22, "Diligence as to accuracy," subsection (a), "In general," provides, "A practitioner must exercise due diligence":

(1) In preparing or assisting in the preparation of, approving, or submitting documents, affidavits, and other papers, including tax returns prepared, approved or submitted in connection with representing a client in a matter before the Internal Revenue Service;

(2) In determining the correctness of oral or written representations made by the practitioner when representing a client in a matter before the Internal Revenue Service; and

(3) In determining the correctness of oral or written representations made by the practitioner to clients when representing clients in a matter before the Internal Revenue Service.

Existing (pre-12/26/2024) Reg. § 10.34, "Standards with respect to tax returns and documents, affidavits and other papers," provides:

(a) *Tax returns*.

(1) A practitioner may not willfully, recklessly, or through gross incompetence -

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that -

(A) Lacks a reasonable basis;

[1845] See part II.G.19.j.viii AICPA Comments on Proposed Changes.

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempted by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion off a tax return or claim for refund containing a position, that-

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence.

(b) *Documents, affidavits and other papers*.

(1) A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

(2) A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service -

(i) The purpose of which is to delay or impede the administration of the Federal tax laws;

(ii) That is frivolous; or

(iii) That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

(c) *Advising clients on potential penalties*.

(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to -

(i) A position taken on a tax return if -

(A) The practitioner advised the client with respect to the position; or

(B) The practitioner prepared or signed the tax return; and

(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.

(2) The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

(3) This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.

(d) *Relying on information furnished by clients*. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

Proposed § 10.34 has a new title, "Standards with respect to tax returns, documents, affidavits, and other papers prepared or submitted while representing a client before the Internal Revenue Service." Proposed § 10.34(a)(1)(i) is restated:

Prepare, while representing a client in a matter before the Internal Revenue Service or, for tax returns prepared by the practitioner prior to the representation, including returns already filed with the Internal Revenue Service, submit a tax return or claim for refund or a claim for a credit that the practitioner knows or reasonably should know contains a position that-

Proposed § 10.34(c)(1)(i) is restated:

(i) A position taken on a tax return that is relevant to the representation of a client in a matter before the Internal Revenue Service if -

(A) The practitioner provided written advice, as defined under § 10.37, to the client with respect to the position; or

(B) The practitioner prepared and submitted the tax return while representing the client in a matter before the IRS.

(ii) Any document, affidavit or other paper submitted in a matter before the Internal Revenue Service.

Proposed § 10.4(d), "Relying on information furnished by clients," is restated:

A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted in a matter before the Internal Revenue Service, generally may rely in good

faith without verification upon information furnished by the client. However, the practitioner may not ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

Reg. § 10.34 refers in a couple of places to Code § 6694(a)(2). Reg. § 1.6694-2, below, applies not only to income tax preparation but also to preparing estate tax returns,[1846] gift tax returns,[1847] and generation-skipping transfer tax returns.[1848]

Reg. § 1.6694-2(d), "Exception for adequate disclosure of positions with a reasonable basis," provides:

(1) *In general*. The section 6694(a) penalty will not be imposed on a tax return preparer if the position taken (other than a position with respect to a tax shelter or a reportable transaction to which section 6662A applies) has a reasonable basis and is adequately disclosed within the meaning of paragraph (c)(3) of this section. For an exception to the section 6694(a) penalty for reasonable cause and good faith, see paragraph (e) of this section.

(2) *Reasonable basis*. For purposes of this section, "reasonable basis" has the same meaning as in § 1.6662-3(b)(3) or any successor provision of the accuracy-related penalty regulations. For purposes of determining whether the tax return preparer has a reasonable basis for a position, a tax return preparer may rely in good faith without verification upon information furnished by the taxpayer and information and advice furnished by another advisor, another tax return preparer, or other party (including another advisor or tax return preparer at the tax return preparer's firm), as provided in §§ 1.6694-1(e) and 1.6694-2(e)(5).

(3) Adequate disclosure -

(i) *Signing tax return preparers*. In the case of a signing tax return preparer within the meaning of § 301.7701-15(b)(1) of this chapter, disclosure of a position (other than a position with respect to a tax shelter or a reportable transaction to which section 6662A applies) for which there is a reasonable basis but for which there is not substantial authority is adequate if the tax return preparer meets any of the following standards:

(A) The position is disclosed in accordance with § 1.6662-4(f) (which permits disclosure on a properly completed and filed Form 8275, "Disclosure Statement," or Form 8275-R, "Regulation Disclosure Statement," as appropriate, or on the tax return in accordance with the annual revenue procedure described in §1.6662-4(f)(2));

(B) The tax return preparer provides the taxpayer with the prepared tax return that includes the disclosure in accordance with § 1.6662-4(f); or

(C) For returns or claims for refund that are subject to penalties pursuant to section 6662 other than the accuracy-related penalty attributable to a substantial understatement of income tax under section 6662(b)(2) and (d), the tax return

[1846] Reg § 20.6694-2(a).
[1847] Reg § 25.6694-2(a).
[1848] Reg § 26.6694-2(a).

preparer advises the taxpayer of the penalty standards applicable to the taxpayer under section 6662. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files.

(ii) Nonsigning tax return preparers. In the case of a nonsigning tax return preparer within the meaning of § 301.7701-15(b)(2) of this chapter, disclosure of a position (other than a position with respect to a tax shelter or a reportable transaction to which section 6662A applies) that satisfies the reasonable basis standard but does not satisfy the substantial authority standard is adequate if the position is disclosed in accordance with § 1.6662-4(f) (which permits disclosure on a properly completed and filed Form 8275 or Form 8275-R, as applicable, or on the return in accordance with an annual revenue procedure described in § 1.6662-4(f)(2)). In addition, disclosure of a position is adequate in the case of a nonsigning tax return preparer if, with respect to that position, the tax return preparer complies with the provisions of paragraph (d)(3)(ii)(A) or (B) of this section, whichever is applicable.

(A) *Advice to taxpayers*. If a nonsigning tax return preparer provides advice to the taxpayer with respect to a position (other than a position with respect to a tax shelter or a reportable transaction to which section 6662A applies) for which there is a reasonable basis but for which there is not substantial authority, disclosure of that position is adequate if the tax return preparer advises the taxpayer of any opportunity to avoid penalties under section 6662 that could apply to the position, if relevant, and of the standards for disclosure to the extent applicable. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files. The contemporaneous documentation should reflect that the affected taxpayer has been advised by a tax return preparer in the firm of the potential penalties and the opportunity to avoid penalty through disclosure.

(B) *Advice to another tax return preparer*. If a nonsigning tax return preparer provides advice to another tax return preparer with respect to a position (other than a position with respect to a tax shelter or a reportable transaction to which section 6662A applies) for which there is a reasonable basis but for which there is not substantial authority, disclosure of that position is adequate if the tax return preparer advises the other tax return preparer that disclosure under section 6694(a) may be required. The tax return preparer must also contemporaneously document the advice in the tax return preparer's files. The contemporaneous documentation should reflect that the tax return preparer outside the firm has been advised that disclosure under section 6694(a) may be required. If the advice is to another nonsigning tax return preparer within the same firm, contemporaneous documentation is satisfied if there is a single instance of contemporaneous documentation within the firm.

(iii) *Requirements for advice*. For purposes of satisfying the disclosure standards of paragraphs (d)(3)(i)(C) and (ii) of this section, each return position for which there is a reasonable basis but for which there is not substantial authority must be addressed by the tax return preparer. The advice to the taxpayer with respect to each position, therefore, must be particular to the taxpayer and tailored to the taxpayer's facts and circumstances. The tax return preparer is required to contemporaneously document the

fact that the advice was provided. There is no general pro forma language or special format required for a tax return preparer to comply with these rules. A general disclaimer will not satisfy the requirement that the tax return preparer provide and contemporaneously document advice regarding the likelihood that a position will be sustained on the merits and the potential application of penalties as a result of that position. Tax return preparers, however, may rely on established forms or templates in advising clients regarding the operation of the penalty provisions of the Internal Revenue Code. A tax return preparer may choose to comply with the documentation standard in one document addressing each position or in multiple documents addressing all of the positions.

(iv) *Pass-through entities*. Disclosure in the case of items attributable to a pass-through entity is adequate if made at the entity level in accordance with the rules in § 1.6662-4(f)(5) or at the entity level in accordance with the rules in paragraphs (d)(3)(i) or (ii) of this section.

(v) *Examples*. The provisions of paragraph (d)(3) of this section are illustrated by the following examples:

Example (1). An individual taxpayer hires Accountant R to prepare its income tax return. A particular position taken on the tax return does not have substantial authority although there is a reasonable basis for the position. The position is not with respect to a tax shelter or a reportable transaction to which section 6662A applies. R prepares and signs the tax return and provides the taxpayer with the prepared tax return that includes the Form 8275, "Disclosure Statement," disclosing the position taken on the tax return. The individual taxpayer signs and files the tax return without disclosing the position. The IRS later challenges the position taken on the tax return, resulting in an understatement of liability. R is not subject to a penalty under section 6694.

Example (2). Attorney S advises a large corporate taxpayer concerning the proper treatment of complex entries on the corporate taxpayer's tax return. S has reason to know that the tax attributable to the entries is a substantial portion of the tax required to be shown on the tax return within the meaning of § 301.7701-15(b)(3). When providing the advice, S concludes that one position does not have substantial authority, although the position meets the reasonable basis standard. The position is not with respect to a tax shelter or a reportable transaction to which section 6662A applies. S advises the corporate taxpayer that the position lacks substantial authority and the taxpayer may be subject to an accuracy-related penalty under section 6662 unless the position is disclosed in a disclosure statement included in the return. S also documents the fact that this advice was contemporaneously provided to the corporate taxpayer at the time the advice was provided. Neither S nor any other attorney within S's firm signs the corporate taxpayer's return as a tax return preparer, but the advice by S constitutes preparation of a substantial portion of the tax return, and S is the individual with overall supervisory responsibility for the position giving rise to the understatement. Thus, S is a tax return preparer for purposes of section 6694. S, however, will not be subject to a penalty under section 6694.

Reg. § 1.6694-2(c), referred to above, was reserved, with T.D. 9436 (12/22/2008) explaining:

> Section 1.6694-2 of these final regulations does not provide substantive guidance reflecting amendments to the Code made by the 2008 Act. Rather, the Treasury Department and the IRS are reserving § 1.6694-2(c) in these final regulations and are simultaneously issuing a notice in the Internal Revenue Bulletin providing interim guidance on the amendments to the Code made by the 2008 Act.

IRS annually publishes a Revenue Procedure for adequate disclosure. For example, Rev. Proc. 2023-40, § 1, "Purpose," provides (highlighting added):

> This revenue procedure updates Rev. Proc. 2022-41, 2022-50 I.R.B. 527, and identifies circumstances under which the disclosure on a taxpayer's income tax return with respect to an item or position is adequate for the purpose of reducing the understatement of income tax under section 6662(d) of the Internal Revenue Code (relating to the substantial understatement aspect of the accuracy-related penalty), and for the purpose of avoiding the tax return preparer penalty under section 6694(a) (relating to understatements due to unreasonable positions) with respect to income tax returns. This revenue procedure does not apply with respect to any other penalty provisions (including but not limited to the disregard provisions of the section 6662(b)(1) accuracy-related penalty, the section 6662(i) increased accuracy-related penalty in the case of nondisclosed noneconomic substance transactions, and the section 6662(b)(7) and (j) increased accuracy-related penalty in the case of undisclosed foreign financial asset understatements). If this revenue procedure does not include an item or position, disclosure is adequate with respect to that item or position only if made on a properly completed Form 8275 or 8275-R, as appropriate, attached to the return for the year or to a qualified amended return. See Treas. Reg. § 1.6664-2(c) for information about qualified amended returns.
>
> This revenue procedure applies to any income tax return filed on 2023 tax forms for a taxable year beginning in 2023, and to any income tax return filed in 2024 on 2023 tax forms for short taxable years beginning in 2024.

II.G.19.j.ii. Written Tax Advice

Proposed regulations [REG-116610-20] RIN 1545-BQ12 (12/26/2024) provide background:

> Circular 230 was most recently amended in TD 9668, which was published in the Federal Register (79 FR 33685) on June 12, 2014, to, among other changes, revise rules relating to written tax advice and eliminate the covered opinion rules (in former § 10.35) that previously governed written tax advice.

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230:

> Current § 10.37 provides basic principles to which all practitioners must adhere when giving written tax advice. Circular 230 was amended in 2014 to eliminate the covered opinion rules (in former § 10.35) and replace them with broad standards for written tax advice under a current § 10.37. *See* TD 9668. Proposed § 10.37 would maintain these principles-based standards and make minor wording changes. Current § 10.37(d) defines a "Federal tax matter," for purposes of that section, as the application or interpretation of a revenue provision defined under section 6110(i)(1)(B) of the Code, any provision of law impacting a person's obligations under the

internal revenue laws and regulations, and any other law or regulation administered by the IRS. Proposed § 10.37 would amend this definition of a Federal tax matter under proposed § 10.37(d) to clarify that it encompasses any transaction, plan, arrangement, or other matter (whether prospective or completed), which is of the type that the IRS determines has the potential for tax avoidance or evasion.

This proposed change aligns standards for written tax advice under proposed § 10.37 more closely with the statutory language of 31 U.S.C. 330(e), which acknowledges that the Treasury Department may "impose standards applicable to the rendering of written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion."

Current § 10.37(c)(1) imposes a reasonable practitioner standard, considering all of the facts and circumstances, to determine whether a practitioner has complied with the written advice standards under this section. Current § 10.37(c)(2) imposes the same reasonable practitioner standard in the case of an opinion the practitioner knows or has reason to know will be used by another person to promote, market, or recommend to one or more taxpayers a partnership or other entity, investment plan, or arrangement a significant purpose of which is the avoidance or evasion of any tax (Significant Purpose Transactions). Current § 10.37(c)(2) adds that, under the facts-and-circumstances analysis for Significant Purpose Transactions, emphasis will be "given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances." Considering a practitioner's knowledge of the taxpayer's circumstances is generally relevant to whether a practitioner has satisfied written tax advice standards. Therefore, the proposed regulations would remove paragraph (c)(2) in current § 10.37 and proposed § 10.37(c) would include consideration of the practitioner's knowledge of the client's particular circumstances under the reasonable practitioner standard.

Reg. § 10.37, "Requirements for written advice," provides:

(a) *Requirements*.

(1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations marketing or promoting transactions.

(2) The practitioner must -

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable;

(v) Relate applicable law and authorities to facts; and

(vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(3) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.

(b) *Reliance on advice of others*. A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when -

(1) The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;

(2) The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or

(3) The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part.

(c) *Standard of review*.

(1) In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.

(2) In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances, when determining whether a practitioner has failed to comply with this section.

(d) *Federal tax matter*. A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of -

(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.

Proposed § 10.37(b)(2) is restated:

> The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice, or is unaware of all relevant facts and circumstances; or

Proposed § 10.37(c) and the introduction to § 10.37(d) are restated:

(c) *Standard of review*. In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement, the practitioner's knowledge of the client's particular circumstances, and the type and specificity of the advice sought by the client.

(d) *Federal tax matter*. A Federal tax matter, as used in this section, is any transaction, plan, arrangement, or other matter (whether prospective or completed), which is of a type that the Internal Revenue Service determines as having a potential for tax avoidance or evasion, concerning the application or interpretation of -

Proposed § 10.37(d)(2) is restated:

> Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax, ability to take a specific return position (whether prospective or completed), or obligation to file returns; or…

The AICPA commented on proposed § 10.37:[1849]

> This provision should be further expanded to include in the definition "prospective and pre-transaction advice regardless of the format of written advice and method of delivery of the written advice to the taxpayer."

The AICPA explained:

> Currently proposed section 10.37(d)(2) expands the definition of Federal tax matter to include advice on a taxpayer's ability to take a specific return position (whether prospective transaction

[1849] See part II.G.19.j.viii AICPA Comments on Proposed Changes.

or completed). Clarification is warranted based upon the fact that representatives who provide overly aggressive, pre-transaction advice are subject to the rules of Circular 230 with respect to that advice. Therefore, as an example, applying this section to pre-transaction advice regardless of the format and delivery method is intended to include all pre-transaction advice, whether formal, informal, a white paper memo, email or otherwise.

II.G.19.j.iii. Tax Practice Management Generally

II.G.19.j.iii.(a). Overview of Tax Practice Management Issues

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230:

H. Best Practices for Tax Practitioners

Current § 10.33 provides best practices for practitioners related to client representation. Proposed § 10.33 would replace references to "tax advisors" with "tax practitioners" to better align § 10.33 with descriptions used elsewhere in Circular 230.

Proposed § 10.33(a)(4) would provide that it is a best practice for practitioners to create a data security policy to maintain safeguards with respect to client information and establish a plan and procedures for responding to data breaches. Practitioners who also prepare returns have a legal obligation to comply with the Federal Trade Commission's Safeguards Rule under the Gramm-Leach Bliley Act, which requires businesses to implement safeguards, including a written information security plan, to protect the security, confidentiality and integrity of customer information. 16 CFR part 314 (2002). This proposed change acknowledges this duty and complements the newly proposed duty to maintain technological competence under proposed § 10.35 and better aligns Circular 230 with other professional standards. *See* American Bar Association Formal Ethics Opinion 18-483; IRS Publication 4557, *Safeguarding Taxpayer Data*; IRS Publication 5708, *Creating a Written Information Security Plan for Your Tax & Accounting Practice*.

Proposed § 10.33(a)(5) would provide that it is a best practice for practitioners to identify, evaluate, and address a mental impairment arising out of, or related to, age, substance abuse, a physical or mental health condition, or some other circumstance that could adversely impact a practitioner's ability to effectively represent a client before the IRS. An impairment, left untreated, can have adverse consequences on a client's representation and to the health and well-being of a practitioner. The purpose of proposed § 10.33(a)(5) is to encourage practitioners who are suffering from a mental impairment to seek and obtain assistance or treatment. *See, e.g.*, DC Legal Ethics Opinion 377.

Proposed § 10.33(a)(6) would provide that it is a best practice for practitioners to establish a business continuity and succession plan that includes procedures and safeguards related to both the cessation of a practitioner's practice or the occurrence of an outside event, such as a natural disaster or cyberattack. Business continuity and succession planning are essential because they proactively protect clients in the event of a practitioner's death or disability or from the occurrence of an unforeseen event.

Finally, proposed § 10.33 would eliminate current § 10.33(b), which provides steps to ensure that a firm's procedures are consistent with best practices. Current § 10.33(b) would be

duplicative of procedures under proposed § 10.36 to ensure compliance with subparts A, B, and C of part 10, which instructs practitioners to take reasonable steps to ensure that the firm's procedures are consistent with the best practices under proposed § 10.33(a).

I. Duty To Maintain Technological Competence

Current § 10.35 provides that a practitioner must be competent when engaged in practice before the IRS. Specifically, practitioners are required to have the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter in which the practitioner is engaged. Increasingly, competence also includes maintaining familiarity with technological tools used to represent a client. A similar standard for technological competency is included in the American Bar Association (ABA) Model Rules of Professional Conduct. Proposed § 10.35 is based on Comment 8 to ABA Model Rule 1.1 and would define competency to include understanding the benefits and risks associated with relevant technology used by the practitioner to provide services to clients or to store or transmit confidential information, including tax return information.

Proposed § 10.33, "Best practices for tax practitioners," provides:

(a) *Best practices*. Tax practitioners should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:

(1) Communicating clearly with the client regarding the terms of the engagement, including those relating to fees, expenses, and payment. For example, the practitioner should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

(2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.

(3) Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.

(4) Maintaining a policy related to data security safeguards with respect to a client's tax return or other confidential information. Practitioners should also consider developing an incident response plan with specific procedures for responding to a data breach and for disclosure of data breaches to clients.

(5) Identifying, evaluating, and addressing a mental impairment, whether chronic or temporary, arising out of or related to age, substance abuse, a physical or mental health condition, or other circumstance that may have an adverse impact on a tax

practitioner's ability to provide the highest quality representation of a client before the Internal Revenue Service.

(6) Establishing a business continuity and succession plan that addresses procedures and safeguards in the event of the sale or cessation of the practitioner's practice, the practitioner's death or disability, or the occurrence of extraordinary events such as a natural disaster, cyberattack, or pandemic.

I inserted paragraphs (2) and (3) from current (pre-12/26/2024) regulations.

Proposed § 10.35, "Competence," would add to the end of § 10.35(a):

> Competency includes understanding the benefits and risks associated with relevant technology that is used by the practitioner to provide services to clients or to store and transmit tax return and other confidential information.

The AICPA recommended that § 10.35 provide that a covered practitioner "should exercise appropriate professional judgment and professional care when relying on a tool,"[1850] commenting:

> We agree that competence includes using professional judgment in choosing and relying on a technological tool. However, our recommendation is to use similar language to SSTS section 1.4 because instead of requiring the practitioner to fully understand the benefits and risks of the relevant technology, the practitioner should use professional judgement in choosing those tools. It may not be reasonable for the practitioner to fully understand the technology, but instead to reasonably rely on tools to provide quality representation.

Proposed § 10.36, "Procedures to ensure compliance," would restate § 10.36(a):

> Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including, while representing a client, the provision of advice concerning Federal tax matters or the preparation or submission of documents in a matter before the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees (whether or not those individuals are otherwise subject to this part) for purposes of complying with subparts A through C of this part, as applicable (including the best practices described in § 10.33(a)). In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in this paragraph (a), the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230:

> **K. Incompetence or Disreputable Conduct**
>
> Current § 10.51 defines disreputable conduct for which a practitioner may be sanctioned. Incompetence or disreputable conduct under current § 10.51 is a basis for imposing sanctions against practitioners that is separate from a failure to meet the duties and abide by the

[1850] See part II.G.19.j.viii AICPA Comments on Proposed Changes.

restrictions relating to practice before the IRS under subpart B. Subpart C, retitled to relate to incompetence and disreputable conduct, would redesignate current § 10.51 as proposed § 10.50 and, as described in part B of this Explanation of Provisions, proposed § 10.51 would define certain fee arrangements that constitute disreputable conduct.

Proposed § 10.50(a) would explain that a practitioner can be sanctioned for conduct that relates to the practitioner's overall fitness to practice and is not limited to actions taken while representing clients in a matter before the IRS. Proposed § 10.50(a)(12) would clarify that contemptuous conduct subject to sanction includes conduct in connection with practice before the IRS, any proceeding pursuant to redesignated proposed § 10.80 or any investigation by the Treasury Inspector General for Tax Administration. New proposed § 10.50(a)(19) would provide that the willful failure to follow any Federal tax law is disreputable conduct because knowingly violating a Federal tax law reflects a lack of due regard for the tax laws.

New proposed § 10.50(b) would provide that any assessment against a practitioner of penalties relating to a willful attempt to understate tax liabilities under section 6694(b); aiding or abetting in the understatement of tax liabilities under section 6701; careless, reckless, or intentional disregard for the rules or regulations (within the meaning of 26 CFR 1.6662-3(b)(2) and 1.6694-3(c)) under section 6662(b)(1); or promotion of abusive tax shelters under section 6700 will be considered a violation of proposed § 10.50(a)(7). The assessment of any of these penalties, however, would not be required to show a violation of proposed § 10.50(a)(7).

II.G.19.j.iii.(b). Written Information Security Plan

IRS Tax Tip 2024-93, Dec. 6, 2024, titled Tax professional tips for creating a data security plan, explains:

Tax professionals are required by law to create a Written Information Security Plan – or WISP – to protect their clients' data. The IRS and the Security Summit partners have created an easy-to-follow Written Information Security Plan that outlines the basics and walks tax professionals through how to get started on a plan and understand security compliance requirements and professional responsibilities.

Creating a WISP

A WISP protects client information most effectively when tailored to the size, scope, complexity and sensitivity of the customer data it handles. A WISP should focus on:

- Employee training and management.
- Information systems.
- System failure detection and management.

WISP requirements

Tax professionals are required by law to have a WISP in place to protect customer data. As a part of their security plan, each tax professional needs to:

- Designate one or more employees to coordinate its information security program.

- Identify and assess risks to customer information in each relevant area of the company's operation.
- Evaluate the effectiveness of the current safeguards for controlling those risks.
- Design and implement a safeguards program and regularly monitor and test it.
- Contract a service provider that maintains safeguards and handling of customer information.

Tax professionals should always be evaluating and adjusting their WISP based on relevant circumstances, changes in the firm's business or operations or the results of security testing and monitoring. For more on security awareness and WISPs, check out National Tax Security Awareness Week 2024.

More information:

- Publication 5708, Creating a Written Information Security Plan for your Tax & Accounting Practice PDF
- Publication 5709, How to Create a Written Information Security Plan for Data Safety PDF
- Publication 5293, Data Security Resource Guide for Tax Professionals

Additional IRS resources include:

- Security Summit
- Protect your clients; protect yourself — Summer 2025

II.G.19.j.iv. Appraiser Standards

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230:

> The proposed regulations would incorporate new subpart D, which provides definitions related to appraisers and standards for the disqualification of appraisers. Current § 10.50(b) references the authority of the Secretary, or her delegate, and the IRS to disqualify appraisers from presenting evidence or testimony in any administrative proceeding before the Treasury Department or the IRS. Current Circular 230, however, does not provide a separate definition of appraisers or what constitutes an administrative proceeding for purposes of disqualification. The proposed regulations would provide separate definitions for both appraisers and administrative proceedings and explain how they would relate to the new appraiser standards. Current § 10.60(b) provides that proceedings to disqualify appraisers can be instituted whenever a penalty has been assessed against an appraiser under the Code and the IRS determines that the appraiser acted willfully, recklessly, or through gross incompetence with respect to the conduct at issue.
>
> This penalty prerequisite limits the IRS's ability to respond to misconduct under Circular 230 when the misconduct is not covered by a specific penalty, an applicable penalty is not imposed,

or a proposed penalty assessment has not yet been made. There is no penalty prerequisite for appraiser disqualification under 31 U.S.C. 330, and the only procedural requirement for the disqualification of appraisers under 31 U.S.C. 330(d) is notice and an opportunity for a hearing. An appraiser's conduct may be disreputable or fail to conform to appraisal standards even when the IRS has not assessed a penalty or when no penalty under the Code is applicable. Therefore, the proposed regulations would eliminate the penalty prerequisite under current § 10.60(b) because it provides an unnecessary barrier to address misconduct.

Proposed § 10.61, under new subpart D, would require appraisals submitted in an administrative proceeding before the IRS to conform to the substance and principles of the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation or the International Valuation Standards (IVS) promulgated by the International Valuation Standards Council. Proposed § 10.61 would thus ensure that appraisals submitted in an administrative proceeding generally conform to broadly applicable standards without requiring strict compliance with such standards. Appraisers who willfully fail to meet these standards may be subject to disqualification under Circular 230. A failure to conform to the substance and principles of either USPAP or IVS standards that is not the result of willful, reckless, or grossly incompetent conduct is not sanctionable. In contrast, appraisers who recklessly or through gross incompetence engage in a pattern of submitting appraisals that do not conform to the substance and principles of USPAP or IVS standards may be subject to disqualification under the proposed regulations. The IRS's Office of Professional Responsibility (OPR) would determine whether an appraisal conforms to the substance and principles of these general appraisal guidelines during the Circular 230 investigatory and disciplinary process, prior to instituting any formal disciplinary proceeding under subpart F of 31 CFR part 10. An opinion by a court, such as the United States Tax Court (Tax Court), finding that an appraiser failed to comply with the substance and principles of USPAP (or otherwise violated the standards for appraisers) may be considered when making that determination. *See, e.g.*, *Oconee Landing Property, LLC v. Commissioner*, T.C. Memo. 2024-25 (finding that the appraisers had reached an advance agreement with the donors to appraise the subject property "in the neighborhood of" a pre-determined overvalued price).

Using the substance and principles of the USPAP or IVS appraisal standards as a basis for disqualification would enable the IRS to proactively address inadequate appraisals submitted in administrative proceedings. Both USPAP and IVS provide broad standards for general appraisal methodology. USPAP and IVS appraisal standards also provide a generally accepted standard of care that is widely followed in U.S. and international valuation matters for real property, personal property, and businesses. As such, they form a "floor" for appraiser competency, similar to how the ABA's Model Rules of Professional Conduct provide general standards for attorneys. Like state bars, other professional appraiser organizations and state licensing boards elaborate on and are free to impose stricter standards on appraisers. Further, USPAP is required for state-licensed and state-certified real property appraisers and has been widely adopted by professional appraisal societies. Internal Revenue Service Advisory Council Annual Report at 118-28 (November 2017). Under Notice 2006-96, 2006-46 I.R.B. 902 (November 13, 2006), the IRS already recognizes USPAP as generally accepted appraisal standards relating to charitable contribution deductions under section 170(f)(11)(E)(i) of the Code. The Tax Court has also looked to adherence to USPAP as a measure of the credibility of an appraisal. *See, e.g.*, *Estate of Cecil v. Commissioner*, T.C. Memo. 2023-24 (giving no weight to a valuation that was inconsistent with USPAP). Therefore, the proposed regulations would provide additional clarity

to appraisers with respect to the standard for appraisals submitted in an IRS administrative proceeding.

Proposed § 10.61(b)(2) would also provide that appraisers who know or reasonably should know that an appraisal will be used in an administrative proceeding by taxpayers to support a substantial valuation misstatement under section 6662(e), a substantial estate or gift tax valuation understatement within the meaning of section 6662(g), or a gross valuation misstatement pursuant to section 6662(h), would be subject to disqualification if they act willfully, recklessly, or through gross incompetence. This standard would allow the IRS to address common appraiser misconduct related to tax return positions.

Consistent with current § 10.60(b), new proposed § 10.61(c) would provide that an appraiser who has been assessed a penalty under section 6694, 6695A, 6700, or 6701 of the Code, for which it is determined that the appraiser acted willfully, recklessly, or through gross incompetence with respect to the proscribed conduct may be disqualified for engaging in disreputable conduct, although this assessment is not a prerequisite to disqualification. Appraisers who have been assessed penalties as a result of their willful, reckless, or grossly incompetent conduct have engaged in disreputable conduct that should disqualify them from presenting evidence or testimony in an administrative proceeding before the Treasury Department or the IRS and should result in the appraiser's appraisals having no probative effect in an administrative proceeding. If the penalty is later abated, an appraiser can petition for reinstatement under redesignated proposed § 10.101.

The proposed regulations also provide that an appraiser may show adherence to USPAP standards when issuing the relevant appraisal, which will be taken into account as a defense in determining whether an appraiser acted willfully, recklessly, or through gross incompetence with respect to potential disqualification under proposed § 10.61(b)(2) or (c).

Because appraisers are not practitioners under Circular 230, it is appropriate to include standards relating to their disqualification under a separate subpart from standards relating to practitioners. However, because appraisers are subject to the same notice and opportunity for a hearing as practitioners under Circular 230, disqualification procedures for appraisers would remain the same as those for practitioners under new subpart F (Rules Applicable to Disciplinary Proceedings).

Proposed § 10.60, "Definitions," is added:

(a) *Appraiser*. The term appraiser means any individual who determines the market value of any asset to support a position taken on a tax return or in an administrative proceeding. Appraisers include, but are not limited to, individuals who meet the definition of a "qualified appraiser" under section 170(f)(11)(E) of the Internal Revenue Code.

(b) *Administrative proceeding*. An administrative proceeding for purposes of this subpart, includes any matter or other action before the Department of the Treasury or the Internal Revenue Service that involves the presentation of documents, testimony, or other evidence. Administrative proceedings include, but are not limited to, investigations, examinations, appeals, and collection actions.

Proposed § 10.61, "Disqualification of appraisers," is added:

(a) *Authority to disqualify appraisers*. The Commissioner, or delegate, after due notice and an opportunity for a hearing, may disqualify an appraiser for violations of any of the standards under paragraph (b) of this section or for the disreputable conduct described under paragraph (c) of this section. Disqualification may include a finding that appraisals by such appraiser will have no probative effect in an administrative proceeding or barring an appraiser from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service.

(1) The disqualification of an appraiser will remain in effect until the appraiser is authorized to present evidence or testimony pursuant to § 10.101. The prohibition applies to appraisals, evidence, and testimony submitted or presented by the appraiser and is not limited to a specific appraisal or client. The prohibition also applies to appraisals made before the effective date of disqualification.

(2) Any appraisal made by a disqualified appraiser after the effective date of disqualification will not have probative effect in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service. An appraisal otherwise barred from admission into evidence pursuant to this section may be admitted into evidence solely for the purpose of determining the client's reliance in good faith on such appraisal.

(b) *Appraisal standards and prohibited conduct*.

(1) All appraisals submitted in an administrative proceeding should conform to the substance and principles of generally accepted appraisal standards as evidenced by the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board of the Appraisal Foundation or the International Valuation Standards (IVS) promulgated by the International Valuation Standards Council (IVSC).

(2) An appraiser may not prepare an appraisal, where the appraiser knew or reasonably should have known that it would be submitted during an administrative proceeding and used to support a substantial valuation misstatement as defined in section 6662(e) of the Internal Revenue Code (Code), a substantial estate or gift tax valuation understatement as defined in section 6662(g), or a gross valuation misstatement as defined in section 6662(h).

(c) *Disreputable conduct*. An appraiser who has been assessed a penalty under section 6694, 6695A, 6700, or 6701 of the Code, for which it is determined that the appraiser acted willfully, recklessly, or through gross incompetence with respect to the proscribed conduct may be disqualified for engaging in disreputable conduct.

(d) *Misconduct triggering disqualification*. An appraiser may be disqualified under § 10.61(a) if the appraiser:

(1) Willfully violates any of the standards described in paragraphs (b)(1) and (2) of this section.

(2) Recklessly or through gross incompetence engages in a pattern of submitting appraisals that violate the standards described in paragraph (b)(1) of this section.

(3) Recklessly or through gross incompetence violates the standard described in paragraph (b)(2) of this section.

(4) Engages in the disreputable conduct described in paragraph (c) of this section.

(e) *Defenses to disqualification*. If an appraiser shows compliance with the substance and principles of USPAP standards or IVS with all relevant appraisals, the showing will be taken into account as a defense in determining whether the appraiser acted willfully, recklessly, or though gross incompetence with respect to a violation of paragraph (b)(2) or (c) of this section.

Proposed § 10.62, "Receipt of information concerning appraisers," is here.

II.G.19.j.v. Contingent Fees; Collecting Fees

Proposed regulations [REG-116610-20] RIN 1545-BQ12 (12/26/2024) provide background:

> Final regulations (TD 9359) published in the Federal Register (72 FR 54540) on September 26, 2007, amended the rules under Circular 230 regarding charging contingent fees in current § 10.27 (2007 amendments). The 2007 amendments amended the exceptions to the general prohibition on contingent fees, which prohibited practitioners from charging contingent fees for original returns, to permit practitioners to charge a contingent fee for services rendered in connection with the IRS's examination of, or challenge to, (i) an original tax return or (ii) an amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination or a written challenge to the original tax return. The Treasury Department and the IRS subsequently clarified the 2007 amendments in Notice 2008-43, 2008-1 C.B. 748 (March 26, 2008) to provide that a practitioner may charge a contingent fee for services rendered in connection with the IRS's examination of, or challenge to, an amended return or claim for refund or credit filed (1) before the taxpayer received a written notice of examination of, or a written challenge to, the original tax return or (2) no later than 120 days after the receipt of such written notice or written challenge. Notice 2008-43 also provided an exception that allows practitioners to charge a contingent fee with respect to whistleblower claims under section 7623 of the Internal Revenue Code (Code). Current § 10.27 also permits practitioners to charge contingent fees in connection with the determination of statutory interest and penalties and for services rendered in connection with judicial proceedings arising under the Code. Current § 10.27 prohibits contingent fee arrangements for services rendered in connection with any other matter before the IRS, including the preparation of original returns, amended returns, and claims for refund or credit.
>
> On July 28, 2009, the Treasury Department and the IRS published in the Federal Register (74 FR 37183) a notice of proposed rulemaking (REG-113289-08) proposing modifications to the rules relating to contingent fees under Circular 230 (2009 proposed regulations). The 2009 proposed regulations have not been finalized.

In 2014, the District Court for the District of Columbia held that preparing and filing ordinary refund claims, like preparing original tax returns, did not involve representing taxpayers or practice before the IRS. *Ridgely v. Lew*, 55 F. Supp.3d 89 (D.D.C. 2014). As a result, according to the district court, the IRS lacked authority to treat the preparation of ordinary refund claims as practice before the IRS as described under 31 U.S.C. 330(a). *Id*. Thus, the district court concluded that the IRS cannot prohibit charging contingent fees for ordinary refund claims based on its authority to regulate practice before the IRS under 31 U.S.C. 330(a).

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230 regarding contingent fees:

Current § 10.27 prohibits practitioners from entering into contingent fee arrangements for services rendered in connection with a "matter before the IRS," which § 10.27(c)(2) defines to include assisting with filing tax returns or claims for refund or credit and "all matters connected with a presentation to the [IRS] ... relating to a taxpayer's rights, privileges, or liabilities under the laws and regulations administered by the [IRS]." Current § 10.27 was intended to restrict contingent fee arrangements based on their potential to encourage practitioners and their clients to take aggressive positions with the hope that they will not be audited.

As described in the Background, the District Court for the District of Columbia held in *Ridgely* that practitioners do not act in a representative capacity when they assist clients with "ordinary refund claims," which are defined as refund claims, including amended returns, filed prior to the examination of a tax return for that taxable year or period. The district court also concluded that preparing an ordinary refund claim is not an activity that constitutes practice before the IRS under 31 U.S.C. 330(a). Thus, the court concluded that the IRS cannot prohibit charging contingent fees for ordinary refund claims based on its authority to regulate practice before the IRS under 31 U.S.C. 330(a). The court did not otherwise address the propriety of contingent fees.

The proposed regulations would remove current § 10.27 and, under subpart C, define disreputable conduct under proposed § 10.51 to include both charging contingent fees in connection with the preparation of an original or amended tax return or claim for refund or credit, and charging fees that, under the facts and circumstances, are unconscionable fees.

Charging a contingent fee for the preparation of an original return, amended return, or claim for refund or credit prepared prior to the examination of a tax return is disreputable conduct because these circumstances encourage evasion or abuse of Federal tax laws by incentivizing practitioners to take unduly aggressive tax positions for their clients, which would increase their clients' reported tax benefits, thus resulting in personal gain for the practitioner. A practitioner with a direct, financial interest in the tax benefits of a client may be incentivized to increase such tax benefits. Therefore, these contingent fee arrangements reflect conduct that is incompatible with ethical practice before the Treasury Department or the IRS under Circular 230.

Under 31 U.S.C. 330(c), the Treasury Department and the IRS have the authority to censure or suspend or disbar from practice before the Treasury Department or the IRS practitioners who engage in disreputable conduct whether or not the conduct constitutes representation of a client. Unlike the contingent fee standards under current § 10.27, proposed § 10.51 is not dependent upon the preparation of a tax return or claim for refund or credit constituting

practice before the IRS. Charging contingent fees for preparing tax returns, amended returns, and claims for refund or credit is prohibited under the rules of professional conduct applicable to many accountants. The American Institute for Certified Public Accountants (AICPA) Code of Professional Conduct, for example, acknowledges the disreputable nature of contingent fees and prohibits CPAs from charging contingent fees for the preparation of original returns, amended returns, and ordinary refund claims because of the risk that these contingent fee arrangements would allow a CPA to benefit improperly from an interest in, or relationship with, a client. *See* AICPA Code of Professional Conduct 1.000.010.14(c); 1.510.001.01(b). Many state accountancy board rules also prohibit contingent fee arrangements for preparing an original or amended return or claim for refund or credit. *See, e.g.*, N.J. Admin. Code section 13:29-3.8(e) (2019); Tenn. Code Ann. section 62-1-123(b)(1)(B) (2016) (prohibiting contingent fees for preparation of an original return); Cal. Code Regs. Tit. 16 section 62(a)(2) & (3) (2021); *cf.* New York Society of Certified Public Accountants Code of Professional Conduct Rule 302 (March 2013).

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230, "Negotiation of payments to clients," regarding collecting fees:

> Current § 10.31 provides that a practitioner may not endorse or otherwise negotiate any check issued to a client by the Government in respect of a Federal tax liability, including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with which the practitioner is associated. When it was last amended in 2014, this regulation was revised to clarify that the prohibition on practitioner negotiation of taxpayer tax refunds applied to the electronic environment in which both the IRS and practitioners operated. Proposed § 10.31 would maintain this prohibition and broaden it to apply to all electronic payments to clients with respect to a Federal tax liability, including prepaid debit cards, phone or mobile payments, or other forms of electronic payments, even if that payment method is not currently used by the Treasury Department. These changes acknowledge the evolving electronic environment in which tax refunds and other payments to taxpayers are processed through a variety of means.

Proposed § 10.31, "Negotiation of payments to clients," is found here.

II.G.19.j.vi. Enrolled Agents and Various Other IRS-Credentialled Representatives

[REG-116610-20] RIN 1545-BQ12 (12/26/2024) explains proposed amendments to Circular 230:

> **C. Enrolled Retirement Plan Agent and Enrolled Agent Procedures**
>
> Current § 10.3(e)(1) provides that enrolled retirement plan agents (ERPAs) may practice before the IRS. Current § 10.4(b) authorizes the IRS to grant status as ERPAs to individuals who demonstrate special competence in qualified retirement plan matters by passing a written examination and who have not engaged in any conduct that would justify suspension or disbarment under Circular 230. The IRS stopped offering the Enrolled Retirement Plan Agent Special Enrollment Examination (ERPA-SEE) on February 12, 2016, and no longer accepts applications for new enrollment as an ERPA. Because of a steady decline in ERPA-SEE test-takers, the cost to administer the ERPA-SEE no longer warranted offering the test. *See* 83 FR 58202, published in the Federal Register on November 19, 2018. Individuals who had passed the ERPA-SEE before February 12, 2016, and are currently enrolled as ERPAs can maintain their status.

Therefore, the proposed regulations would clarify that ERPAs who passed the ERPA-SEE prior to February 12, 2016, remain authorized to practice before the IRS if they continue to pay the annual user fee described under 26 CFR 300.10(b) and complete the continuing education described in § 10.6(e). The proposed regulations would also remove current § 10.4(b), which describes the process to become an ERPA by special examination.

Current § 10.4(d) provides that a former IRS employee, based on past service and technical experience in the IRS, may be granted enrollment as an EA or ERPA without testing if certain criteria are met. There is no statutory requirement that the IRS provide this exemption to former employees and administering requests for this waiver has consumed substantial IRS resources. Accordingly, the proposed regulations would eliminate the opportunity for former IRS employees to apply for a waiver of enrollment requirements as of 30 days after the date these regulations are published in the Federal Register as final regulations. Applications from former IRS employees submitted on or before that date would be processed according to the procedures under current § 10.4(d).

Current § 10.5 includes ERPAs in the description of application procedures to become a practitioner under Circular 230. Because the IRS no longer offers the special enrollment examination to become an ERPA and no longer accepts applications for new enrollment as an ERPA, these procedures are no longer relevant and references to ERPAs would be removed under proposed § 10.5. The renewal period and procedures for existing ERPAs remains unchanged under current § 10.6.

Current § 10.6(b) states that the IRS will provide confirmation of enrollment to EAs and ERPAs by issuing a registration card or certificate. Instead of specifying the form of confirmation, proposed § 10.6(b) would provide that the IRS will issue a document, which may be an enrollment card or other document. This revision would give the IRS flexibility as to the form of enrollment confirmation provided to practitioners in the future without requiring an amendment to the regulations.

Current § 10.6(d)(2) provides an explanation of the renewal period for EAs. Proposed § 10.6(d)(2) would make minor revisions to this description but makes no substantive changes to the renewal period or renewal process for EAs.

D. Limited Practice and Annual Filing Season Program (AFSP) Participants

Proposed § 10.7(c)(1)(viii) would provide that individuals who possess a current Annual Filing Season Program (AFSP) Record of Completion may engage in limited practice, by representing taxpayers before the IRS with respect to tax returns or claims for refund or credit the individuals prepared and signed during a calendar year for which a Record of Completion was issued. The individual must have a valid Record of Completion for the calendar year in which the tax return or claim for refund or credit was prepared and signed and a valid Record of Completion for the year or years in which the representation occurs. AFSP participants generally are otherwise unenrolled preparers who, pursuant to Rev. Proc. 2014-42, 2014-29 I.R.B. 192 (July 14, 2014), voluntarily consent to be subject to Circular 230 duties and restrictions to participate in the AFSP, including prohibitions on incompetence or disreputable conduct, and must comply with the duties and restrictions to the extent they represent taxpayers before the IRS under the

AFSP. The authority for the Treasury Department and the IRS to implement the AFSP was upheld by the D.C. Circuit, in *AICPA v. IRS*, 746 Fed. Appx. 1 (D.C. Cir. 2018).

Proposed § 10.6, "Term and renewal of status as an enrolled agent or enrolled retirement plan agent," is found here.

Proposed § 10.7(c)(1)(viii) is found here.

See also the IRS web pages, Annual Filing Season Program and Enrolled Retirement Plan Agent program.

II.G.19.j.vii. AICPA Statements on Standards for Tax Services

This part II.G.19.j.vii briefly mentions the AICPA Statements on Standards for Tax Services (effective January 1, 2024). Statements on Standards for Tax Services No. 1–4 (1/1/2024) explains:

> The AICPA's Tax Executive Committee (TEC) reviewed the updates to the AICPA Statements on Standards for Tax Services (SSTSs) as proposed by the SSTS Revision Task Force. On May 18, 2023, the TEC unanimously adopted them, effective January 1, 2024. Changes to the existing standards included the following:
>
> - Reorganization of the SSTSs by type of tax work performed
> - Promulgation of three new standards surrounding data protection, reliance on tools and the representation of tax clients before taxing authorities
>
> View the revised AICPA Statements on Standards for Tax Services (SSTS) adopted by the Tax Executive Committee effective January 1, 2024, and a practice aid that traces the previous standards to the revised standards.
>
> *The AICPA's Statements on Standards for Tax Services (SSTSs) are enforceable tax practice standards for members of the AICPA. Additional guidance is also found in the corresponding interpretations and frequently asked questions (FAQs). Access to the complete set of SSTSs and guidance are available in the AICPA Statements on Standards for Tax Services library*.

The AICPA had limited access to the SSTS, but it made them public in connection with part II.G.19.j.viii AICPA Comments on Proposed Changes.

SSTS § 1.2, "Knowledge of Errors,"[1851] provides:

> **Introduction**
>
> 1.2.1. This section sets forth the applicable standards for a member who becomes aware of
>
> a. an error in a taxpayer's previously filed tax return;
>
> b. an error in a return that is the subject of an administrative proceeding, such as an examination by a taxing authority or an appeals conference;

[1851] See text accompanying and preceding fn. 1844 in part II.G.19.j.i Tax Return Preparation.

c. a taxpayer's failure to file a required tax return; or

d. an error in a tax representation engagement.

1.2.2. As used herein, the term error includes any position, omission, or method of accounting that, at the time a position is recommended or a return is filed, fails to meet the standards set out in sections 1.1, "Advising on Tax Positions," or 2.1, "Tax Return Positions." The term error also includes a position taken on a prior-year's return that no longer meets these standards due to legislation, judicial decisions, or administrative pronouncements having retroactive effect. However, an error does not include an item that has an insignificant effect on the taxpayer's tax liability (see paragraph 1.2.16). The term administrative proceeding does not include a criminal proceeding.

1.2.3. This section applies regardless of whether the member prepared or signed a return that contains the error.

1.2.4. In addition to the AICPA, applicable taxing authorities may impose specific standards regarding errors discovered during the provision of tax services by a member. These standards can vary between taxing authorities and by type of tax.

1.2.5. Special considerations may apply when legal counsel engages a member to provide assistance in a matter relating to a taxpayer.

Standard

1.2.6. A member should promptly inform a taxpayer upon becoming aware of the taxpayer's failure to file a required return, an error in a previously filed return, an error in a return that is the subject of an administrative proceeding, an error in an administrative filing (such as a ruling request, accounting method change, and so on), an error in a tax representation engagement, or an error in advice provided if discovered by the member while providing services for the taxpayer. A member also should advise the taxpayer of the potential consequences of the error and advise on corrective measures to be taken. Such advice may be given orally. See also paragraph 3.1.3 regarding the documentation of advice.

1.2.7. If a member prepares a tax return for the current year or a prior tax year, and the taxpayer has not taken appropriate action to correct an error related to a tax return position in a tax return for a prior year, the member should consider whether to withdraw from preparing the current return and whether to continue a professional or employment relationship with the taxpayer. If the member does prepare the current-year return, the member should take reasonable steps to ensure that the error is not repeated.

1.2.8. A member is not allowed to inform a taxing authority of an error without the taxpayer's permission, except when required by law. Members also should consider whether they can continue a professional relationship with a taxpayer who refuses to properly mitigate a discovered error.

1.2.9. If a member believes that a taxpayer may face possible exposure to allegations of fraud or other criminal misconduct, the member should promptly advise the taxpayer to consult with an attorney before the taxpayer takes any action. The member should also consider consulting with the member's legal counsel before deciding whether to provide advice to the taxpayer and whether to continue a professional or employment relationship with the taxpayer.

Explanations

1.2.10. If a member becomes aware of an error while performing tax services, the member's responsibility is to advise the taxpayer of the existence of the error. The member should advise the taxpayer of the error and the potential consequences and advise on corrective measures to be taken, if any. If the member does not prepare the taxpayer's tax return or was not the provider of the advice, the member may instead advise that the error be discussed with the taxpayer's tax return preparer or adviser. Similarly, when representing the taxpayer before a taxing authority in an administrative proceeding about a return containing an error of which the member is aware, the member should advise the taxpayer to disclose the error to the taxing authority and of the potential consequences of not disclosing the error. Refer to paragraph 3.1.3 for considerations regarding the decision to provide such advice in oral or written form.

1.2.11. It is the taxpayer's responsibility to decide whether to correct an error. If the taxpayer does not correct an error, a member should consider whether to withdraw from the engagement and whether to continue a professional or employment relationship with the taxpayer.

1.2.12. Once the member has obtained the taxpayer's consent to disclose an error in an administrative proceeding, the disclosure should not be delayed to such a degree that the taxpayer or member might be considered to have failed to act in good faith or to have, in effect, provided misleading information. In any event, disclosure should be made before the conclusion of the administrative proceeding.

1.2.13. Members have a responsibility to both the taxpayer and the tax system. Discovery of an error in an administrative proceeding or filing, such as a ruling request, might negate the effect of the ruling if not disclosed to the authority. Failure to comply with statutory or regulatory compliance requirements affects not only the taxpayer but also the tax system.

1.2.14. A conflict between the member's interests and those of the taxpayer may be created by, for example, the potential for violating the "Confidential Client Information Rule" (ET sec. 1.700.001) of the AICPA Code of Professional Conduct (relating to the member's confidential client relationship); the tax law and regulations; or laws on privileged communications, as well as by the potential adverse impact on a taxpayer of a member's withdrawal. Therefore, a member should consider consulting with the member's legal counsel before deciding whether to provide advice to the taxpayer and whether to continue a professional or employment relationship with the taxpayer.

1.2.15. If a member decides to continue a professional or employment relationship with the taxpayer and is requested to prepare a tax return for a year subsequent to that in which

an error occurred, the member should take reasonable steps to ensure that the error is not repeated. If the subsequent year's tax return cannot be prepared without perpetuating the error, the member should consider withdrawal from the return preparation. If a member learns that the taxpayer is using an erroneous method of accounting and it is past the due date to request permission to change to a method meeting the standards of paragraph 2.1.1, the member may sign a tax return for the current year, provided that the tax return includes appropriate disclosure of the use of the erroneous method.

1.2.16. Whether an error has no more than an insignificant effect on the taxpayer's tax liability is left to the member's professional judgment, based on all the facts and circumstances known to the member. In judging whether an erroneous method of accounting has more than an insignificant effect, a member should consider the method's cumulative effect, as well as its effect on the tax advice provided, current-year's tax return, or the tax return that is the subject of the administrative proceeding.

SSTS § 2.1, "Tax Return Positions," provides:

Introduction

2.1.1. This section sets forth the applicable standards for members preparing or signing tax returns (including amended returns, claims for refund, and information returns) filed with any taxing authority.

2.1.2. Additional standards apply to tax positions that a member advises on. Refer to section 1.1, "Advising on Tax Positions," of Statement on Standards for Tax Services (SSTS) No. 1, General Standards for Members Providing Tax Services. When signing or preparing a tax return that includes a tax position advised on by a third party, the member should also refer to section 2.3, "Reliance on Information From Others."

2.1.3. For purposes of this section, preparation of a tax return includes giving advice on events that have occurred at the time the advice is given if the advice is directly relevant to determining the existence, character, or amount of a schedule, entry, or other portion of a tax return.

2.1.4. This section also addresses a member's obligation to advise a taxpayer of relevant tax return disclosure responsibilities and potential penalties.

Standard

2.1.5. A tax return position is a tax position (as defined in paragraph 1.1.4 of SSTS No. 1) that is reflected on a tax return prepared by a member or for which a member signs as preparer.

2.1.6. A member should determine and comply with the standards, if any, that are imposed by the applicable taxing authority with respect to preparing or signing a tax return.

a. If the applicable taxing authority has no written standards with respect to preparing or signing a tax return, a member should not prepare or sign the tax return unless

the member has a good-faith belief that the tax return position has at least a realistic possibility of being sustained administratively or judicially on its merits if challenged.

b. If the applicable taxing authority has written standards that exceed the realistic possibility standard described in paragraph 2.1.6a, the member should comply with those taxing authority standards.

c. Notwithstanding paragraph 2.1.6a and b, a member may, as permitted by a taxing authority, prepare or sign a tax return, which includes a tax return position in which

   i. the member concludes there is a reasonable basis for the tax return position, and

   ii. the position is appropriately disclosed to the taxing authorities.

2.1.7. When preparing or signing a tax return on which a tax return position is taken, a member should, when relevant, advise the taxpayer regarding potential penalty consequences of such tax return position and the opportunity, if any, to avoid such penalties through disclosure.

2.1.8. A member should not advise a taxpayer to take a tax return position or prepare or sign a tax return reflecting a tax return position that the member knows

a. exploits the audit selection process of a taxing authority, or

b. serves only as an arguing position advanced solely to obtain leverage in a negotiation with a taxing authority.

2.1.9. A member may rely, in good faith, on others' proposed tax positions regarding the issues being considered, provided the member is satisfied that the standards in section 2.3 are satisfied.

Explanations

2.1.10. The AICPA and various taxing authorities impose specific reporting and disclosure standards regarding tax return positions and preparing or signing tax returns. In a given situation, the standards, if any, imposed by the applicable taxing authority may be higher or lower than the standards set forth in paragraph 2.1.6. A member should comply with the standards, if any, of the applicable taxing authority. If the applicable taxing authority has no standards or if its standards are lower than the standards set forth in paragraph 2.1.6, the standards set forth in paragraph 2.1.6 will apply.

2.1.11. Our self-assessment tax system can function effectively only if taxpayers file tax returns that are true, correct, and complete. A tax return is prepared based on a taxpayer's representation of facts, and the taxpayer has the final responsibility for positions taken on the return.

2.1.12. When attempting to reach a conclusion about whether a given standard in paragraph 2.1.6 has been satisfied, a member may consider a well-reasoned construction of the applicable statute and related regulations, if any. In addition, well-reasoned articles, treatises, or pronouncements issued by the applicable taxing authority (regardless of whether such sources would be treated as authority under IRC Section 6662, Imposition of accuracy-related penalty on underpayments) and the regulations thereunder may also be considered. A position would not fail to meet these standards merely because it is later abandoned for practical or procedural considerations during an administrative hearing or in the litigation process.

2.1.13. If a member has a good-faith belief that more than one tax return position meets the standards set forth in paragraph 2.1.6, a member's advice concerning alternative acceptable positions may include a discussion of the likelihood that each such position might or might not cause the taxpayer's tax return to be examined and whether the position would be challenged in an examination. In these circumstances, such advice is not a violation of paragraph 2.1.6.

2.1.14. A member's advising on whether information is appropriately disclosed by the taxpayer should be based on the facts and circumstances of the particular case and the disclosure requirements of the applicable taxing authority. If a member advising on a tax position, but not engaged to prepare or sign the related tax return, advises the taxpayer concerning appropriate disclosure of the position, then the member shall be deemed to meet the disclosure requirements of these standards.

2.1.15. If particular facts and circumstances lead a member to believe that a taxpayer penalty might be asserted, the member should advise the taxpayer and discuss with the taxpayer the opportunity, if any, to avoid such penalty by disclosing the position on the tax return. A member should also advise the taxpayer that it is the taxpayer's responsibility to decide whether and how to disclose. If the member believes disclosure of a position is required and the taxpayer chooses not to disclose the position, the member should consider whether to continue a professional or employment relationship with the taxpayer.

II.G.19.j.viii. AICPA Comments on Proposed Changes

The AICPA's comment letter is at https://www.regulations.gov/comment/IRS-2024-0063-0091.

Comments on proposed § 10.21(b) are in the text accompanying fn. 1845 in part II.G.19.j.i Tax Return Preparation.

Comments on proposed § 10.35 are in the text accompanying fn. 1850 in part II.G.19.j.iii.(a) Overview of Tax Practice Management Issues.

Comments on proposed § 10.37 are in the text accompanying fn. 1849 in part II.G.19.j.ii Written Tax Advice.

II.G.19.j.ix. Types of Disciplinary Sanctions

Announcement 2025-1 provides as follows; I did not bother indenting because all of the rest of this part II.G.19.j.ix is a quote:

The Office of Professional Responsibility (OPR) announces recent disciplinary sanctions involving attorneys, certified public accountants, enrolled agents, enrolled actuaries, enrolled retirement plan agents, appraisers, and unenrolled/unlicensed return preparers (individuals who are not enrolled to practice and are not licensed as attorneys or certified public accountants). Licensed or enrolled practitioners are subject to the regulations governing practice before the Internal Revenue Service (IRS), which are set out in Title 31, Code of Federal Regulations, Subtitle A, Part 10, and which are released as Treasury Department Circular No. 230. The regulations prescribe the duties and restrictions relating to such practice and prescribe the disciplinary sanctions for violating the regulations.
Unenrolled/unlicensed return preparers are subject to Revenue Procedure 81-38 and superseding guidance in Revenue Procedure 2014-42, which govern a preparer's eligibility to represent taxpayers before the IRS in examinations of tax returns the preparer both prepared for the taxpayer and signed as the preparer. Additionally, unenrolled/unlicensed return preparers who voluntarily participate in the Annual Filing Season Program under Revenue Procedure 2014-42 agree to be subject to the duties and restrictions in Circular 230, including the restrictions on incompetent or disreputable conduct.

The disciplinary sanctions to be imposed for violation of the applicable standards are:

Disbarred from practice before the IRS—An individual who is disbarred is not eligible to practice before the IRS as defined at 31 C.F.R. § 10.2(a)(4) for a minimum period of five (5) years.

Suspended from practice before the IRS—An individual who is suspended is not eligible to practice before the IRS as defined at 31 C.F.R. § 10.2(a)(4) during the term of the suspension.

Censured in practice before the IRS—Censure is a public reprimand. Unlike disbarment or suspension, censure does not affect an individual's eligibility to practice before the IRS, but OPR may subject the individual's future practice rights to conditions designed to promote high standards of conduct.

Monetary penalty—A monetary penalty may be imposed on an individual who engages in conduct subject to sanction, or on an employer, firm, or entity if the individual was acting on its behalf and it knew, or reasonably should have known, of the individual's conduct.

Disqualification of appraiser—An appraiser who is disqualified is barred from presenting evidence or testimony in any administrative proceeding before the Department of the Treasury or the IRS.

Ineligible for limited practice—An unenrolled/unlicensed return preparer who fails to comply with the requirements in Revenue Procedure 81-38 or to comply with Circular 230 as required by Revenue Procedure 2014-42 may be determined ineligible to engage in limited practice as a representative of any taxpayer.

Under the regulations, individuals subject to Circular 230 may not assist, or accept assistance from, individuals who are suspended or disbarred with respect to matters constituting practice (i.e., representation) before the IRS, and they may not aid or abet suspended or disbarred individuals to practice before the IRS.

Disciplinary sanctions are described in these terms:

Disbarred by decision, Suspended by decision, Censured by decision, Monetary penalty imposed by decision, and Disqualified after hearing—An administrative law judge (ALJ) issued a decision imposing one of these sanctions after the ALJ either (1) granted the government's summary judgment motion or (2) conducted an evidentiary hearing upon OPR's complaint alleging violation of the regulations. After 30 days from the issuance of the decision, in the absence of an appeal, the ALJ's decision becomes the final agency decision.

Disbarred by default decision, Suspended by default decision, Censured by default decision, Monetary penalty imposed by default decision, and Disqualified by default decision—An ALJ, after finding that no answer to OPR's complaint was filed, granted OPR's motion for a default judgment and issued a decision imposing one of these sanctions.

Disbarment by decision on appeal, Suspended by decision on appeal, Censured by decision on appeal, Monetary penalty imposed by decision on appeal, and Disqualified by decision on appeal—The decision of the ALJ was appealed to the agency appeal authority, acting as the delegate of the Secretary of the Treasury, and the appeal authority issued a decision imposing one of these sanctions.

Disbarred by consent, Suspended by consent, Censured by consent, Monetary penalty imposed by consent, and Disqualified by consent—In lieu of a disciplinary proceeding being instituted or continued, an individual offered a consent to one of these sanctions and OPR accepted the offer. Typically, an offer of consent will provide for: suspension for an indefinite term; conditions that the individual must observe during the suspension; and the individual's opportunity, after a stated number of months, to file with OPR a petition for reinstatement affirming compliance with the terms of the consent and affirming current fitness and eligibility to practice (i.e., an active professional license or active enrollment status, with no intervening violations of the regulations).

Suspended indefinitely by decision in expedited proceeding, Suspended indefinitely by default decision in expedited proceeding, Suspended by consent in expedited proceeding—OPR instituted an expedited proceeding for suspension (based on certain limited grounds, including loss of a professional license for cause, and criminal convictions).

Determined ineligible for limited practice—There has been a final determination that an unenrolled/unlicensed return preparer is not eligible for limited representation of any taxpayer because the preparer violated standards of conduct or failed to comply with any of the requirements to act as a representative.

A practitioner who has been disbarred or suspended under 31 C.F.R. § 10.60, or suspended under § 10.82, or a disqualified appraiser may petition for reinstatement before the IRS after the expiration of 5 years following such disbarment, suspension, or disqualification (or immediately following the expiration of the suspension or disqualification period if shorter than 5 years). Reinstatement will not be granted unless the IRS is satisfied that the petitioner is not likely to engage thereafter in conduct contrary to Circular 230, and that granting such reinstatement would not be contrary to the public interest.

Reinstatement decisions are published at the individual's request, and described in these terms:

Reinstated to practice before the IRS—The individual's petition for reinstatement has been granted. The agent, and eligible to practice before the IRS, or in the case of an appraiser, the individual is no longer disqualified.

Reinstated to engage in limited practice before the IRS—The individual's petition for reinstatement has been granted. The individual is an unenrolled/unlicensed return preparer and eligible to engage in limited practice before the IRS, subject to requirements the IRS has prescribed for limited practice by tax return preparers.

OPR has authority to disclose the grounds for disciplinary sanctions in these situations: (1) an ALJ or the Secretary's delegate on appeal has issued a final decision; (2) the individual has settled a disciplinary case by signing OPR's "consent to sanction" agreement admitting to one or more violations of the regulations and consenting to the disclosure of the admitted violations (for example, failure to file Federal income tax returns, lack of due diligence, conflict of interest, etc.); (3) OPR has issued a decision in an expedited proceeding for indefinite suspension; or (4) OPR has made a final determination (including any decision on appeal) that an unenrolled/unlicensed return preparer is ineligible to represent any taxpayer before the IRS.

Announcements of disciplinary sanctions appear in the Internal Revenue Bulletin at the earliest practicable date. The sanctions announced below are alphabetized first by state and second by the last names of the sanctioned individuals.

[a list follows]