



American Institute of CPAs  
1455 Pennsylvania Avenue, NW  
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November 29, 2012

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Acting Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

The Honorable William J. Wilkins  
Chief Counsel  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, DC 20224

Mr. Mark Mazur  
Assistant Secretary of Tax Policy  
Department of the Treasury  
1500 Pennsylvania Avenue, NW  
Washington, DC 20220

RE: Comments regarding proposed regulations on Circular 230, [REG-138367-06](#)

Dear Messrs. Miller, Wilkins and Mazur:

The American Institute of Certified Public Accountants (“AICPA”) is pleased to provide comments on the proposed amendments to Circular 230, the regulations that govern practice before the Internal Revenue Service (“IRS” or “Service”). The comments were developed by the AICPA’s Tax Practice Responsibilities Committee, and approved by the AICPA’s Tax Executive Committee.

The AICPA is the world’s largest member association representing the accounting profession, with nearly 386,000 members in 128 countries and a 125-year heritage of serving the public interest. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America’s largest businesses.

### **General Comments**

The AICPA recognizes that the proposed regulations are part of a series of regulations and other guidance that reflect a comprehensive effort by the Department of the Treasury (“Treasury”) and the IRS to enhance the standards of tax practice for all tax practitioners, including tax return preparers. We support the Service’s objective of increasing tax compliance and elevating ethical conduct through the elimination of the complex rules governing covered opinions in current §10.35 and the modification of requirements for written advice under §10.37.

As detailed below, we support the addition of a competency requirement in proposed §10.35, and offer two suggestions for clarification. With respect to written tax advice, we suggest adding a requirement that the practitioner consider and apply the relevant authorities. We also note that new provisions in §10.37(b) could be read to impose a new duty of inquiry on practitioners, and we recommend

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modifications to eliminate uncertainty. Finally, as a general matter, we ask that when the regulations are finalized, Treasury and the Service make the effective date clear – e.g., the rules will be effective on the date finalized, and any written advice issued on or after the effective date should conform to the final regulations.

We have also included in this letter a section that contains comments on several existing provisions of Circular 230 which the current proposals do not address. We suggest a revision to §10.3, Who May Practice, in light of the IRS's statement in 2011 that the preparation of a federal tax return is practice before the IRS. We also suggest revisions to §10.22, Due Diligence, to more explicitly state that determining the reasonableness of the reliance on another practitioner will be determined by the facts and circumstances. Finally, we suggest modifications to §10.30, Solicitation, to incorporate portions of Notice 2011-45 as a permanent part of Circular 230.

### **Proposed §10.35 – Competence**

The proposed regulations would add a new §10.35 to impose an obligation of competence on practitioners. The AICPA strongly supports the addition of an obligation of competence.

The proposed rule states that “competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.” We commend Treasury and the IRS for recognizing that Circular 230 should obligate the practitioner to be competent to address the matters for which the practitioner is engaged. However, we think that practitioners should be able to fulfill the obligation of competence by research and study during the course of the representation or by consulting with other practitioners having particular relevant expertise. We recommend that the section include a statement to the effect that a practitioner may become, or be deemed to be, competent with respect to an issue or matter through research and study or through consulting with other practitioners competent in the issue or area.

We note that the proposed regulations are silent as to how a practitioner will be determined to have been competent with respect to any engagement. We believe that such determination should be made based on all relevant factors relating to the practitioner's role and responsibility in the representation, including reasonable reliance on the work of another practitioner, taking proper account of the parties' respective roles in the representation. A nonexclusive list of factors in the preamble to the final regulations that would be considered in evaluating competence would be helpful to practitioners.

### **Proposed §10.37 - Requirements for Written Advice**

The AICPA applauds Treasury and the IRS for heeding the advice of numerous stakeholders and commentators by removing the covered opinion rules in §10.35 and replacing these rules with principle-based standards to which all practitioners must adhere when rendering written tax advice. We agree with the view expressed in the preamble that the technical and detailed requirements of current §10.35 impose a burden on practitioners while providing minimal benefit to taxpayers, and therefore commend the elimination of such rules.

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While we agree that the requirements set forth in proposed §10.37 are appropriate standards for practitioners when providing written advice, the AICPA believes that the following modifications to the proposed standards should be considered.

Proposed §10.37(a)(2) should be amended to include a requirement that the practitioner consider appropriate authorities. The proposed standards for written advice address the factual basis and assumptions on which the professional bases his or her analysis. However, a requirement to consider applicable authorities is not included in proposed §10.37, even though this requirement is present in existing §10.35. Including such a requirement in Circular 230's written advice standards would be consistent with the standards for written advice contained in the AICPA's Interpretations No. 1-1 and 1-2 of Statement on Standards for Tax Services No. 1, Tax Return Positions. A requirement to evaluate pertinent authorities is also contained in Reg. § 1.6694-2(b)(1), and, we believe, is generally understood and accepted by all tax professionals. Accordingly, we respectfully recommend an additional standard for written tax advice in §10.37(a)(2) to the effect that practitioners are required to consider and apply the relevant authorities, including relevant judicial doctrines, to the relevant facts.

Proposed §10.37(b) addresses when a practitioner may rely on the advice of another practitioner, and expressly states that reliance would not be reasonable if the other practitioner lacks competence or has a conflict of interest. The subsections §10.37(b)(2) and (b)(3) could be read as imposing a broader statement of practitioner responsibility than currently exists. The current analogous provision, §10.35(d), permits a practitioner to rely on the advice of another practitioner "unless the practitioner knows or should know that the opinion of the other practitioner should not be relied on." Thus, the current standard does not suggest a duty to make inquiries beyond the relying practitioner's actual knowledge and an assessment of the opinion on which the practitioner relies. In contrast, the proposed standard could be read to require a practitioner considering whether to rely on the opinion of another practitioner to inquire into the skills and experience of the practitioner who authored the opinion and whether the author had a conflict personally or with another client when writing the opinion. We expect that the proposed standard was not intended to impose such duties, and therefore respectfully recommend that §§10.37(b)(2) and (b)(3) be eliminated, and that the current standard in § 10.35(d) be incorporated into the final regulations.

#### **Additional Comments Directed to Existing Provisions of Circular 230**

This section contains comments on existing provisions of Circular 230 that we think should be modified, but not all of these provisions are addressed in the proposed changes. We provide these comments with the hope that, if not now, these recommendations will be considered in future proposed revisions to Circular 230.

#### *Section 10.3 - Who May Practice*

Circular 230 §10.3 enumerates the categories of persons who may practice before the IRS, and paragraphs (a) and (b) address the authority of duly licensed attorneys and CPAs, respectively to practice. Both §10.3(a) and §10.3(b) contain two sentences: the first generally stating that an attorney or CPA not under suspension or disbarment may practice by filing a written declaration with the IRS, and

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the second generally stating that a written declaration is not required to be filed before rendering written tax advice.

In 2011, the IRS stated that “preparing a tax return or claim for refund (even if the tax return or claim for refund is filed by another person) is practice before the IRS.” *T.D 9527, 75 Fed. Reg. 51713 (June 3, 2011)*. We understand that CPAs and attorneys need not file declarations to prepare a tax return or a claim for refund. To clarify when a declaration is required, we recommend that an explicit statement be added that a declaration is not needed by CPAs and attorneys to prepare tax returns.

Alternatively, we think that any reference to declarations could be eliminated. We note that §10.3(c) and §10.3(f), which address enrolled agents and registered tax return preparers (“RTRPs”), contain no reference to the filing of a written declaration to represent a taxpayer even though these individuals, like attorneys and CPAs, are also required to make a declaration on Form 2848, Power of Attorney and Declaration of Representative.

#### *Section 10.22 - Diligence as to Accuracy*

Circular 230 §10.22 obligates practitioners to exercise due diligence in practice before the IRS, and paragraph (b) permits a practitioner to rely on the work product of another person if the “practitioner use[s] reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.” We believe that there are other situations where it is reasonable for one practitioner to rely on another. For example, a junior practitioner who is supervised by a more experienced professional should be able to reasonably rely on that experienced professional; a practitioner who shares responsibility in an engagement, such as multiple managers or associates working under the direction of a partner, should be able to reasonably rely on those other professionals in meeting the obligation of due diligence; and a practitioner who consults with another person having specific expertise in meeting his or her obligation of competence under proposed §10.35 should be able to reasonably rely on that person.

We recommend that clarifying language be added to §10.22 to the effect that a determination of whether a practitioner is deemed to have exercised due diligence will be made based on all relevant factors relating to the practitioner’s role and responsibility in the representation. Those factors would include reasonable reliance on the work of another person, taking proper account of the parties’ respective roles in the representation. We believe such an addition would provide to practitioners a better understanding of how the IRS intends these principles to be interpreted. Alternatively, or in addition, we believe that it would also be helpful to enumerate a nonexclusive list of factors that would be considered in evaluating due diligence in the preamble to the final regulations. For examples of factors that could be deemed relevant, see the reasonable cause provisions in Reg. §1.6694-2(e)(5).

#### *Section 10.30 - Solicitation*

While we recognize that the proposed regulations do not address the rules regarding solicitation found in Circular 230 §10.30, we would support a future amendment to §10.30 to conform it with the guidance in Notice 2011-45, Restrictions on Use of the Term Registered Tax Return Preparer. We note that portions

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of [Notice 2011-45](#) have been incorporated in other sections of Circular 230. We suggest that §10.30 be amended so that it clearly applies to RTRPs, as is stated in Notice 2011-45. Additionally, Notice 2011-45 provides that §10.30 will be amended to “require a registered tax return preparer using any paid advertising involving print, television or radio, in which the individual represents himself or herself to be a registered tax return preparer to display” the statement: “The IRS does not endorse any particular individual tax return preparer. For more information on tax return preparers go to [www.irs.gov](http://www.irs.gov).” We would like to see this addition made to section §10.30 in the near future, especially as the IRS plans to make a database of tax practitioners available to the public.

Finally, as we have noted in previous comment letters regarding proposed modifications to Circular 230, we recommend that the term “listed” be substituted for the term “designated” in the last sentence of §10.30(a)(1). The word “designated” infers that the IRS is conferring a credential upon unenrolled preparers who register for Preparer Tax Identification Numbers (PTINs). That final sentence would then read “An example of an acceptable description for registered tax return preparers is ‘listed as a registered tax return preparer with the Internal Revenue Service.’”

## Conclusion

As already noted, the AICPA strongly supports Treasury’s and the Service’s efforts to increase tax compliance and elevate ethical conduct through the proposed amendments to Circular 230. We believe that if the Service modifies certain aspects, as suggested in the above comments, the regulations will be more effective, less costly and less burdensome to tax practitioners.

We appreciate your consideration of our recommendations, and look forward to working with you in the future on this matter. We are available to meet with you to discuss our comments further. If you have any questions, please contact me at (304) 522-2553, or [jporter@portercpa.com](mailto:jporter@portercpa.com); or you may contact James Sansone, Chair of the AICPA’s Tax Practice Responsibilities Committee, at (847) 413-6912, or [james.sansone@mcgladrey.com](mailto:james.sansone@mcgladrey.com); or Melanie Lauridsen, AICPA Technical Manager, at (202) 434-9235, or [mlauridsen@aicpa.org](mailto:mlauridsen@aicpa.org).

Sincerely,



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Chair, AICPA Tax Executive Committee

cc: Matthew D. Lucey, Senior Technical Reviewer, Internal Revenue Service  
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Karen Hawkins, Director, Office of Professional Responsibility, Internal Revenue Service