Association Recommends Changes to Circular 230

Posted on Aug. 15, 2000

========== SUMMARY ==========

James E. Merritt of the American College of Tax Counsel has suggested changes to Circular 230. (For a summary of REG-111835-99, see Tax Notes, May 15, 2000, p. 915; for the full text, see Doc 2000- 12723 (9 original pages), 2000 TNT 90-6, or H&D, May 9, 2000, p. 1251.) Specifically, Merritt recommends (1) applying the factual due diligence standards to tax shelter opinions; (2) requiring an opinion to take into account both the substance and purpose of the plan that gives rise to the tax shelter item; and (3) allowing practitioners to agree to conditions of confidentiality with their client. Fair and effective enforcement of Circular 230, he says, will benefit the tax system by raising the level of professionalism of tax practitioners.

========== FULL TEXT ==========

July 27, 2000

Neal Wolin, Esquire, General Counsel
Department of the Treasury
CC:DOM:CORP:R(REG-111835-99), Room 5226
Internal Revenue Service
P.O.B. 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments in Response to Department of Treasury Advance
Notice of Proposed Rule Making to Amend the Regulations
Governing Practice Before the Internal Revenue Service
(Treasury Department Circular No. 230) REG.-111835-99
(May 8, 2000)

Dear Mr. Wolin:

[1] The following comments are submitted by the American College of Tax Counsel in response to the Advance Notice of Proposed Rulemaking dated May 8, 2000 (the "Advance Notice"), which invited individuals and organizations to submit comments on revising Treasury Department Circular No. 230, "Regulations Governing the Practice of Attorneys, Certified Public Accounts, Enrolled Agents, Enrolled Actuaries and Appraisers before the Internal Revenue Service" ("Circular 230").

[2] The American College of Tax Counsel is a non-profit association consisting of outstanding United States tax lawyers in private practice, law school teaching and government service, who are recognized for their excellence in the field of taxation and for their substantial contributions and commitments to the profession. The College promotes the study of tax policy and seeks methods for improving the operation and administration of our tax system, especially those aspects that relate to voluntary compliance, professionalism, and ethics in the practice of tax law. Membership in the College is by invitation only upon nomination and election.

OVERVIEW

[3] TAX SHELTERS. The College supports efforts by the Treasury Department and the Internal Revenue Service to raise the level of professionalism among tax practitioners who advise clients -- whether corporations, other entities or individuals -- concerning transactions that may be considered "tax shelters." The recommendation by James P. Holden that Circular 230 be amended to deal explicitly with this issue was first set forth by Mr. Holden before the College when he delivered the 1999 Griswold Lecture in January, 1999. Our comments in response to the specific issues set forth in the Advance Notice are directed principally at assuring that the applicable rules are clear and fair.

[4] TECHNICAL AND CLARIFYING AMENDMENTS. The College endorses the recommendations for proposed technical and clarifying amendments to Circular 230 contained in the January 25, 1999 letter to the Commissioners from the American Bar Association's Section of Taxation. These recommendations cover many of the issues addressed in the Advance Notice.

[5] MORE EFFECTIVE ENFORCEMENT OF CIRCULAR 230. Fair and effective enforcement of Circular 230 could benefit the tax system by raising the level of professionalism of tax practitioners. The College applauds recent steps announced by the Treasury and the Internal Revenue Service to increase the staffing of the Office of the Director of Practice. We have included several specific recommendations which, if implemented, should enable the Service to make effective use of this increased staffing. It is critical, however, that the Office of the Director of Practice conduct its activities in a manner that is completely fair and impartial, and that is so perceived by tax practitioners subject to the provisions of Circular 230. The recently announced organizational shift of the Director of Practice from the National Appeals Office to an independent position under the oversight of newly appointed Senior Counselor Michael E. Shaheen, Jr., who will report directly to the Commissioner, should enable the Service to focus much-needed attention to the enforcement of Circular 230. However, care must be taken not to create a "witch hunt" atmosphere that causes practitioners to believe that they will not be fairly treated.

[6] Our detailed comments, which are set forth below, are numbered to correspond with the request for comments as set forth in Part III of the Advance Notice.

A. OPINION STANDARDS OF CIRCULAR NO. 230

1. SECTION 10.33 -- TAX SHELTER OPINIONS. Section 10.33 of Circular 230, which establishes standards relating to tax opinions provided for the marketing of tax shelters, has been in effect for more than 15 years. It establishes comprehensive rules applicable to tax advice directed at potential purchasers of tax-oriented investments other than clients of the persons providing the advice. Section 10.33 satisfactorily deals with the type of tax shelter opinion to which it is directed. We do not have any recommendations for changes to Section 10.33 at this time.

2. STANDARDS FOR OPINIONS INTENDING TO COMPLY WITH REGULATION SECTION 1.6664-4(e)(2) B)(2), RELATING TO THE REASONABLE CAUSE EXCEPTION TO THE APPLICATION OF CERTAIN PENALTIES. The Board of Regents of the American College of Tax Counsel strongly believes that effective steps should be taken to curtail the proliferation of abusive tax reduction schemes. The establishment of standards under Circular 230 for the issuance of opinions intended to protect corporate taxpayers

from the imposition of penalties with respect to tax shelters should further this objective. In fact, the initial detailed recommendation for such an amendment to Circular 230 was made January 15, 1999 by James P. Holden in delivering the 1999 Griswold Lecture before the American College of Tax Counsel. (Mr. Holden's lecture, entitled "Dealing with the Aggressive Corporate Tax Shelter Problem," is reported at 52 Tax Lawyer 239 (1999) (Winter 1999)) We strongly endorse the approach recommended by Mr. Holden in the 1999 Griswold Lecture and by the American Bar Association's Section of Taxation in its October 29, 1999 report, both of which include drafts of a proposed new Section 10.35 of Circular 230.

3. IDENTIFICATION OF PURPOSE OF OPINION UNDER REGULATION SECTION 1.6664-4(e)(2)(B)(2). Fairness requires that a practitioner should not be subject to potential sanction for violating proposed new standards for opinions intended to satisfy the requirements of Regulation Section 1.6664-4(e)(2)(B)(2), unless it is clear that the opinion was rendered to the practitioner's client (the taxpayer) with the expectation that it might be relied upon by the taxpayer under Regulation Section 1.6664-4(e)(2)(B)(2). An opinion which explicitly states that it is provided for this purpose should clearly be subject to such new standards. However, there may be other facts and circumstances which make it clear that an opinion was provided for such purpose, and in such case the failure to make explicit reference to the applicable section of the regulations should not insulate the practitioner from discipline for violating applicable standards.

On the other hand, a taxpayer should not be precluded from relying, under Regulation Section 16664-4(e)(2)(B)(2), on an opinion rendered by a practitioner for other purposes, if the opinion otherwise satisfies the requirements of the regulations. In such a case, the practitioner should not be subject to sanctions under Circular 230 if the opinion, rendered for other purposes, fails to satisfy Circular 230's standards for penalty-protection opinions.

4. (a) FACTUAL DUE DILIGENCE STANDARDS FOR TAX SHELTER OPINIONS. We recommend that factual due diligence standards comparable to those set forth in Section 10.33(a)(1) of Circular 230 should be applicable to tax shelter opinions subject to the proposed new provisions of Circular 230 applicable to penalty-protection opinions.

(b) PRACTITIONER RELIANCE ON FACTUAL ASSERTIONS OF OTHER PERSONS. Section 10.33(a)(1) limits the circumstances under which a practitioner providing a tax shelter opinion covered by such section is permitted to rely on factual assertions of other persons. We believe these are limitations are adequate and need not be modified in their application to tax shelter opinions to be governed by the proposed new provision of Circular 230 applicable to penalty- protection opinions.

(c) TAX SHELTER OPINIONS BASED UPON HYPOTHETICAL FACTS OR FACTUAL ASSUMPTIONS AND CONCLUSIONS. The factual due diligence standards of Section 10.33(a)(1) require a practitioner to be satisfied as to the accuracy and completeness of all material facts and as to the reasonableness and completeness of all material representations as to future activities. These standards should be adequate to prevent a practitioner from unreasonably basing an opinion intended to satisfy the standards of Regulation Section 1.6664-4(e)(2)(B)(2) on hypothetical facts or factual assumptions and conclusions.

(d) TAX SHELTER OPINION RECITATION AS TO ANALYSIS UNDER ALL APPLICABLE JUDICIAL DOCTRINES. In light of the definition of "tax shelter" in Regulation Section 1.6662-4(g)(2), an opinion intended to satisfy the requirements of Regulation Section 1.6664-4(e)(2)(B)(2) presumably would fail to satisfy basic standards of competence if the opinion failed to analyze the transaction in question under all applicable judicial doctrines. Nevertheless, we do not believe it should be necessary for Circular 230 to require an explicit recitation in the opinion that all applicable judicial doctrines were taken into account in rendering the opinion. On the other hand, we believe it would be appropriate to include in the proposed new provision of Circular 230 a requirement substantially identical to Section 10.35(b)(4) of the ABA Tax Section's October 29, 1999 draft, which states: "(4) CONSIDER SUBSTANCE AND PURPOSE. The opinion must take into account, to the extent relevant and appropriate under applicable law, both the substance and the purpose of the entity, plan or arrangement that gives rise to the tax shelter item in question." In addition, we believe it would be appropriate to amend Regulation Section 1.6664-4(c)(1) if such an explicit recitation is to be required, as well as including such a requirement in Circular 230.

(e) TAX SHELTER OPINION REQUIRED RECITATIONS AS TO MATERIAL TAX ISSUES AND MATERIAL TAX BENEFITS IN THE AGGREGATE. We believe the requirements of Section 10.33(a)(3), (4), and (5) of Circular 230 are adequate for purposes of opinions intended to come within Regulation Section 1.6664-4(e)(2)(B)(2). These standards require (i) that the practitioner ascertain that all material federal tax issues have been considered, (ii) that those issues which involve reasonable possibility of a challenge by the IRS have been fully and fairly addressed, (iii) that the practitioner (where possible) provide an opinion, as to each material tax issue whether it is more likely than not that the taxpayer would prevail on the merits if the IRS challenged the taxpayer's position on such issue, and (iv) that the practitioner must provide an overall evaluation as to whether the material tax benefits in the aggregate will more likely than not be realized. Regulation Section 1.6664-4(e)(2)(B)(2) requires an opinion under that Section to conclude unambiguously that there is a greater than 50% likelihood that the tax treatment of the tax shelter item in question will be upheld if challenged by the IRS. However, the regulation in question does not require that there be a greater than 50% likelihood that the taxpayer will prevail with respect to each material tax issue potentially raised by the shelter item. Accordingly, we believe that such a requirement should not be included in Circular 230.

B. CONTINGENT FEES.

1. CONTINGENT FEES AND INDEMNITIES WITH RESPECT TO POSITIONS ON ORIGINAL RETURNS. CONTINGENT FEES. We are concerned about the potential for compromising standards of professionalism when tax practitioners charge contingent fees for services relating to positions taken on tax returns, particularly where the taxpayers involved are substantial business enterprises or wealthy individuals. Section 10.28 of Circular 230 currently prohibits a practitioner from charging a contingent fee for preparing an original return. We recommend leaving this provision unchanged.

Because it is often difficult to distinguish between a practitioner charging a contingent fee and a practitioner providing an indemnity to a taxpayer with respect to a position taken in an original return, we recommend that an explicit prohibition on indemnities should be included in Section 10.28 of Circular 230.

2. CONTINGENT FEES CURRENTLY PERMITTED BY SECTION 10.28 OF CIRCULAR 230. As previously stated, we are concerned about the potential lessening of professionalism standards where practitioners charge contingent fees for tax advice. These concerns must, however, be balanced against the rights of taxpayers who might not otherwise be able or willing to incur the professional costs involved in pursuing a claim for a refund to which the taxpayer might properly be entitled. Any amendment to Section 10.28 that would curtail the charging of such contingent fees must carefully balance the rights of taxpayers who might be significantly and adversely affected by the change.

C. CONDITIONS OF CONFIDENTIALITY.

1. POSSIBLE PROHIBITION ON PRACTITIONER AGREEMENT TO CONFIDENTIALITY CONDITIONS. We believe a practitioner's response to a client's request that the practitioner agree to conditions of confidentiality in connection with representation of the client in tax matters should be resolved by the practitioner on the basis of the practitioner's relationship with the taxpayer/client, including the practitioner's fiduciary obligations to the client and the standards of professional responsibility applicable to the practitioner. Therefore, we believe that Circular 230 should not prohibit a practitioner from agreeing to conditions of confidentiality.

2. PRACTITIONER'S REQUEST THAT A CLIENT AGREE TO CONDITIONS OF CONFIDENTIALITY. A practitioner's request that a client agree to conditions of confidentiality in connection with the practitioner's practice before the Internal Revenue Service could under some circumstances raise a potentially serious issue concerning a conflict between the client's interests and the practitioner's interests. We have not been made aware of circumstances where it would be appropriate for a tax practitioner to ask a client to agree to such conditions in connection with a representation subject to Circular 230. We recommend that Section 10.29 of Circular 230, entitled "Conflicting Interests," be amended to include a provision, applicable to all practitioners, comparable to Rule 1.7(b) of the American Bar Association's Model Rules of Professional Conduct, which would provide: "A practitioner shall not represent a client if the representation of that client may be materially limited by the practitioner's own interests, unless (i) the practitioner reasonably believes the representation will not be adversely affected, and (ii) the client consents after full disclosure and consultation. A practitioner's request that a client agree to conditions of confidentiality may be subject to this provision."

D. SANCTIONS.

1. RELATIONSHIPS WITH SUSPENDED PERSONS. Sections 10.24(a) and (b) of Circular 230 prohibit certain relationships between a practitioner and persons under disbarment or suspension from practice before the Internal Revenue Service. The Section of Taxation of the American Bar Association, by letter dated January 25, 1999, submitted to Commissioner Rossotti a paper entitled "Comments Concerning Proposed Amendments to Circular 230," prepared by a Task Force of the Section of Taxation ("ABA Tax Section Task Force Comments"), a copy of which is attached. The Task Force recommended that Section 10.24 and Section 10.51(h) be amended "to clarify that a practitioner may continue to associate himself and to share fees with a person who is under suspension or disbarment so long as, during such period of suspension or disbarment, the

practitioner does not directly or indirectly accept assistance from such person in any matter relating to the Internal Revenue Service. Thus, practitioners who are partners of the law or accountancy partnership, for example, would not be required to expel another partner who was subjected to discipline simply because the disciplined partner might otherwise share in fees derived from services rendered by others before the Internal Revenue Service." The clarification would be accomplished by removing the prohibition contained in Section 10.24(b) on sharing fees with a suspended or disbarred person and by deleting from Section 10.51(h) the inclusion as an example of "disreputable conduct" the maintenance by a practitioner of a partnership for the practice of law, accountancy or related professional services with a person who has been disbarred from practice before the Service.

We endorse these recommendations of the ABA Section of Taxation Task Force. We believe suspension or disbarment from practice before the Internal Revenue Service is a serious sanction. The conduct resulting in the suspension or disbarment may, under state rules governing conduct of the practitioner's profession, lead to further sanctions upon the suspended or disbarred practitioner, including suspension or revocation of his or her license to practice in the profession. However, Circular 230's purposes should be satisfied if the practitioner is prohibited from practicing before the Internal Revenue Service, either directly or indirectly.

2. ATTRIBUTION OF A PRACTITIONER'S FAILURE TO COMPLY WITH CIRCULAR 230 TO THE PRACTITIONER'S FIRM. We agree with the ABA Tax Section Task Force Comments that in general the misconduct of a practitioner should not be attributed or imputed to the practitioner's firm or to other practitioners in the firm, for purposes of discipline under Circular 230. There may be facts and circumstances indicating that the firm and/or other practitioners in the firm may also be subject to discipline under Circular 230. For example, if other practitioners in the firm were knowing participants in or knowingly acquiesced in the practitioner's noncompliant conduct, then the other practitioners and possibly the firm itself may be subject to discipline under Circular 230. However, we believe there should not be a general rule of attributed or imputed misconduct whenever a practitioner fails to comply with Circular 230.

3. ADDITIONAL SANCTIONS FOR VIOLATIONS OF CIRCULAR 230. Circular 230 presently provides suspension and disbarment as the only sanctions that may be imposed by the Director of Practice upon a practitioner who violates the rules of Circular 230. This is consistent with the statute, 31 U.S.C. section 330(b). In some cases where he has concluded that suspension or disbarment is not warranted but that a practitioner's conduct was inappropriate, the Director of Practice has in the past delivered a private reprimand to the practitioner; this option should be continued. We believe it would be useful to expand the sanctions available to the Director of Practice for violations of Circular 230. We recommend adding as additional sanctions both public censure and the imposition of fines in amounts bearing a reasonable relationship to the practitioner misconduct. To eliminate any question as to whether such sanctions are authorized by the applicable statutory provision, we recommend that 30 U.S.C. Section 330(b) be amended to authorize these additional sanctions explicitly.

4. PUBLICIZING THE IDENTITIES OF PRACTITIONERS DISCIPLINED UNDER CIRCULAR 230. We believe that greater publicity of the identities of practitioners sanctioned under Circular 230 would have a beneficial effect upon the level of professionalism of practitioners governed by its provisions. Publicizing the names of practitioners who are sanctioned under Circular 230 and the nature of the conduct for which they were sanctioned would likely have a duel beneficial impact -- it would educate other practitioners as to the specific types of conduct that they must be careful to avoid, and it would likely deter other practitioners from engaging in similar conduct out of fear of being disciplined themselves. To accomplish these objectives, we recommend (i) that brief summaries of the circumstances leading to sanctions under Circular 230 be provided along with the name of each practitioner subject to sanction under Circular 230; (ii) that a summary of the facts and circumstances leading to the sanction under Circular 230 be sent by the Director of Practice to the applicable regulatory authority (if any) for each jurisdiction in which the practitioner is licensed to practice and to each professional practitioner organization in which the practitioner is a member; (iii) that the same information be included in the Service's electronic practitioner newsletters; and (iv) that the same information be provided to local news media in the practitioner's community of residence and in the community in which the practitioner conducts his or her practice. If necessary, the statutory provisions governing the confidentiality of tax return information should be amended to permit this publicity. The Director of Practice should have discretion over the extent of the publicity appropriate for each instance in which a practitioner is sanctioned under Circular 230.

E. GENERAL ISSUES.

1. EXPANSION OF LIMITED PRACTICE. Section 10.7(c)(1) of Circular 230 sets forth limited circumstances under which an individual who is not a "practitioner" may nevertheless represent a taxpayer before the Internal Revenue Service. Section 10.7(c)(1)(viii) currently permits representation "before officers and employees of the Examination Division of the Internal Revenue Service by a tax return preparer with respect to the tax liability of the taxpayer for the taxable year or period covered by that return." We recommend that this provision be modified to permit representation before the Collection Division as well as the Examination and that, if appropriate, the terminology be changed to conform with the current Modernization of the Internal Revenue Service. In addition, this provision should be expanded to make clear that communications between the Internal Revenue Service and a tax return preparer of the kind contemplated by the Service's recent "check box" initiative should be permitted without subjecting the practitioner to potential sanction for violation of Circular 230.

2. PRACTITIONER'S OBLIGATIONS UPON DISCOVERY OF AN ERROR OR OMISSION ON A RETURN OR OTHER DOCUMENT. Section 10.21 of Circular 230 currently requires a practitioner retained by a client with respect to a matter administered by the Internal Revenue Service who knows that the client has not complied with the revenue laws in the United States or has made an error or omission from any return, document, etc. to "advise the client promptly of the fact of such noncompliance, error or omission." The ABA Tax Section Task Force Comment recommended the addition of the following sentence to Section 10.21:

"The practitioner shall also advise the client of the manner in which corrective action concerning such noncompliance, error or

omission may be taken and the possible consequences of either taking or not taking corrective action; or, if appropriate, the practitioner shall promptly advise the client to consult another practitioner who is competent and disinterested for such purpose."
We endorse this recommendation.

3. DEFINITION OF DUE DILIGENCE UNDER SECTION 10.22 OF CIRCULAR 230. The ABA Tax Section Task force Comments recommended two changes to Section 10.22 of Circular 230. The first change would provide that a practitioner who utilizes or relies on the work product of other persons would be presumed to have exercised due diligence in connection with the preparation, approval and filing of returns, documents, affidavits and other papers based on such work product if the practitioner used reasonable care in engaging, supervising and/or training such other person and in evaluating such person's work product. The second recommendation was that a practitioner advising a client to take a position on a return or preparing or signing a return as a preparer would be presumed to have exercised due diligence to the extent that the practitioner acted in accordance with the principles set forth in Section 10.34(a)(3) of Circular 230, dealing with reliance on information furnished by clients. We endorse both of these recommendations.

4. DEFINITION OF CONFLICTING INTERESTS AND INFORMED CONSENT UNDER SECTION 10.29 OF CIRCULAR 230. Section 10.29 of Circular 230 presently prohibits a practitioner from representing conflicting interests in practice before the IRS "except by express consent of all directly parties after full disclosure has been made.") The ABA Tax Section Task Force Comments would amend Section 10.29(i) to require an addition that "such practitioner reasonably believes that no represented party's representation by such practitioner will be adversely affected" [by the representation of conflicting interests] and (ii) by substituting the phrase "such represented parties" for the phrase "directly interested parties" found in the current rule. We endorse both of these recommendations. In addition, as previously noted, in Section C.2 above, we recommend that Section 10.29 be expanded to deal with situations where the practitioner's interests may conflict with those of his or her client.

5 & 6. UNINVITED SOLICITATIONS; ELECTRONIC COMMUNICATIONS. The ABA Tax Section Task Force Comments recommend certain modifications to Section 10.30 of Circular 230 to conform with the opinion of the United States Supreme Court in Edenfield v. Fane, 507 U.S. 761 (1993) and to address electronic forms of communications. Another recommendation is that both public communication and private solicitation would be prohibited only if and to the extent they contain either a false, fraudulent, unduly influencing, coercive or unfair statement or claim, or a misleading or deceptive statement or claim. In addition, Section 10.30(c) would be expanded to include electronic communications in the definition of "communications." We endorse these recommendations.

7. POSSIBLE EXPANSION OF THE DEFINITION OF "DISREPUTABLE CONDUCT" TO INCLUDE CONVICTION OF ANY FELONY. Section 10.51 of Circular 230 currently includes as an example of "disreputable conduct" for which a practitioner may be suspended or disbarred "conviction of any criminal offense under the revenue laws of the United States, or of any offense involving dishonesty, or breach of trust." The ABA Tax Section Taxation Comments recommend expanding this example of disreputable

conduct to include "conviction of any other criminal offense if the Secretary of the Treasury determines that the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service." We believe that this recommendation, which gives the Secretary of the Treasury and the Director of Practice discretion to determine which criminal offenses indicate that a practitioner is unfit to practice before the Internal Revenue Service, is preferable to a blanket rule that includes all felony convictions as "disreputable conduct." Accordingly, we endorse this recommendation of the Task Force.

F. ADDITIONAL COMMENTS AND RECOMMENDATIONS.

The following comments and recommendations are made in response to the invitation in the Advance Notice of Proposed Rulemaking for comments "on any other changes that are necessary or appropriate to carrying out the purpose of Circular 230."

1. MORE EFFECTIVE ENFORCEMENT OF CIRCULAR 230. It was recently announced that in connection with the current Modernization of the Internal Revenue Service, the Office of the Director of Practice would be moved out of the Appeals Division of the Internal Revenue Service and would report to a newly created office directly under the Commissioner of Internal Revenue. It was also announced that the staff of the Office of the Director of Practice would be significantly increased. We are optimistic that these steps reflect the recognition by the Department of the Treasury and the Internal Revenue Service that the prior organizational placement and staffing of the Office of the Director of Practice have had significant adverse impact on the ability of the Office of the Director of Practice to carry out its responsibilities to enforce Circular 230. We believe that, by enforcing Circular 230 in a more focused and pro-active manner, the Internal Revenue Service could significantly reduce both unprofessional behavior by tax practitioners and also noncompliance with the tax laws by clients of practitioners subject to regulation under Circular 230. To accomplish these goals, we recommend adoption and implementation of the following five-step program:

(i) PRIORITIZE. Develop a prioritized list of practitioner behaviors that have the most serious adverse effects upon the tax system. Concentrate on behaviors that are currently covered by Circular 230, but also propose amendments to Circular 230 that would be required to address behaviors not currently covered, or to clarify current provisions. Recommend additional legislation if necessary.

(ii) TRAINING. Design and implement a training program for Service personnel aimed at encouraging them to identify the most serious violations of Circular 230 and teaching them how to make effective referrals to the Director of Practice.

(iii) PUBLICIZE PROGRAM. Publicize steps 1 and 2 widely among tax practitioners subject to Circular 230. This should encourage tax practitioners to curtail noncompliant behavior voluntarily, and would give fair warning that noncompliant behavior of the targeted types will no longer be tolerated. To the extent that practitioners voluntarily reduce targeted behaviors that result in clients' noncompliance with their tax obligations, voluntary compliance should increase.

(iv) PUBLICIZE OUTCOMES. Regularly publicize the types of alleged violations of Circular 230 that are referred to the Director of Practice, including statistics showing geographical and functional sources

of referrals for the major types of alleged violations, and the dispositions of such referrals (no action, private reprimand, suspensions, and disbarments or other sanctions). Also publish on a regular basis hypothetical fact scenarios describing representative types of behaviors that have been subject to action by the Director of Practice, with a summary of the significant considerations that result in different levels of sanctions for behaviors found to violate Circular 230.

Adoption and implementation of the foregoing proposal should result in a significant reduction in practitioner noncompliance with Circular 230 and, indirectly, in a significant reduction in taxpayer noncompliance with the tax laws. If the proposal can be implemented with scrupulous regard for the rights of accused practitioners, so that there is no "witch-hunt" atmosphere created, there is a very good chance that the suggested approach would be supported by major tax practitioner organizations. To improve the chances of success, input from such organizations should be sought in designing and implementing the program.

2. CLARIFICATION OF SECTIONS 10.50, 10.51, 10.52 AND 10.53 OF CIRCULAR 230. The ABA Tax Section Task Force Comments contain a series of recommendations to modify Sections 10.50, 10.51, 10.52 and 10.53 of Circular 230. The proposed amendments are intended to accomplish the following objectives: (i) eliminate the ambiguity presently existing regarding the proper standard for discipline under Circular 230 under different circumstances; (ii) impose less forgiving standard for discipline for violations of Section 10.33 (tax shelter opinions); (iii) make explicit the authority of the Director of Practice to forbid a practitioner subject to discipline under Circular 230 from serving as a compensated tax return preparer; (iv) provide an explicit definition of "disreputable conduct;" and (v) require the Director of Practice to notify a practitioner when the Director receives a recommendation that the practitioner be subject to discipline for a possible violation of Circular 230.

We endorse both the objectives of these recommendations of the Task Force and the language of the proposed amendments designed to carry out these objectives.

We thank you for your consideration of the foregoing comments and recommendations. We would welcome the opportunity to discuss these matters with you at a mutually convenient time.

BOARD OF REGENTS OF THE AMERICAN
COLLEGE OF TAX COUNSEL
By: James E. Merritt, Chair
American College of Tax Counsel
Washington, D.C.
cc: The Honorable Charles O. Rossotti, Commissioner, Internal Revenue Service
The Honorable Jonathan Talisman, Acting Assistant Secretary (Tax Policy), United States Department of the Treasury