Writer Suggests Changes to Proposed Circular 230 Regs

MAY 23, 2001

SUMMARY BY TAX ANALYSTS

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

N. Jerold Cohen of the American College of Tax Counsel, Washington, has recommended changes to the proposed Circular 230 regulations. (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, Cohen suggests (1) setting forth an analysis of the statutory authority in the preamble to the final regs on Treasury's authority to discipline individuals authorized to practice before the IRS; (2) allowing a practitioner who may not be competent or may have a conflict to refer a client to another practitioner who is competent and disinterested; (3) eliminating the requirement of written waivers for conflicts of interest and deleting the word "potential" from section 10.29; (4) providing guidance on the manner in which the IRS believes proposed reg. section 10.36 should be implemented; and (5) making proposed reg. section 10.36 effective after practitioners have had enough time to develop and implement the practices and procedures contemplated by that section.

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

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May 23, 2001

Richard W. Skillman, Esquire
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Internal Revenue Service
CC:M&SP:RU (REG-111835-99)
1111 Constitution Ave., N.W., Room 5226
Washington, DC 20224

Re: Comments on Proposed Regulations Governing Practice Before the Internal Revenue Service (Treasury Department Circular No. 230)-REG-111835-99

Dear Mr. Skillman:

The following comments on revisions to Circular 230 are submitted by the American College of Tax Counsel in response to proposed regulations issued January 11, 2001. We commend the Service and the Treasury for addressing much needed changes in a somewhat outdated Circular. The increased role of tax practitioners in devising and marketing highly questionable "tax products" deserves considerable attention on the part of the Service and the Treasury. We think that these revised rules will awaken practitioners to their responsibility to their profession and the tax system. While we have a number of comments concerning the proposed regulations, we believe that their tenor and the changes made in Circular 230 are both needed and responsible

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.

Background.

By letter dated July 27, 2000 addressed to Neil Wolin, Esquire, General Counsel, Department of the Treasury, the College submitted pre-issuance comments in response to the Advance Notice of Proposed Rulemaking on Circular 230 dated May 8, 2000. To the extent that the proposed regulations are consistent with our pre-issuance comments, those comments will not be reiterated here. We appreciate your consideration of our pre-issuance comments.

Overview of Comments.

The comments set forth below have been divided for convenience into three sections: tax shelter opinions (Sections 10.33 and 10.35), other substantive provisions (Sections 10.2(e), 10.20, 10.21(b), 10.26 [former Section 10.27], 10.28 [new], 10.29. 10.36, 10.50, 10.51, and 10.53) and procedural matters (including effective date concerns).

1. Tax Shelter Opinions.

1. We are making no technical comments on the proposed revisions to Sections 10.33 and 10.35 of Circular 230. In general we wish to associate ourselves with the comments submitted by the Section of Taxation of the American Bar Association.

2. We wish to emphasize, however, the importance of unequivocal rules that address the failure of professionalism that the proliferation of tax shelters represents. Without question, the opinions of tax professionals are a key ingredient to the alarming growth of the tax shelter "industry." Whether the opinion offers the hope of protection from penalties if the transaction is discovered on IRS audit, or simply provides a rationale for a course of conduct that a reasonable business person knows is suspect, the delivery of an opinion, or reasoned memorandum, in a tax-contrived undertaking demeans the entire tax practitioner community.

Most tax professionals earnestly want to comply with the letter and intent of the law. Clear ethical rules should be articulated specifying the normal due diligence that responsible tax professionals would undertake with respect to the facts--and factual assumptions--on which tax-driven transactions are based. When the tax professional knows or has reason to know the business purpose was secondary to the tax plan, it is appropriate to impose--and existing ethical principles already impose--a special duty on the tax professional to inquire into the facts, including the factual conclusions required under judicial interpretations of the law. In today's climate, unless such rules are clearly stated, the well-intentioned members of our profession are left without support, and the unscrupulous members drive the profession down. Worst of all, younger professionals are being taught that the invention of transactions that will reduce taxes--with the business or economic objective created as an after-thought--is the essence of a modern tax practice. The traditional duty of the professional to simply say "No" to artificially contrived tax-reduction schemes is sadly being forgotten.

If clear rules are promulgated setting forth the duties of a responsible tax practitioner in such situations, they will be largely self-enforcing. Such rules may of course be ignored by the unscrupulous practitioner, but the profession as a whole can reject such behavior and regain some of the self-respect it has clearly lost. Articulating such ethical rules of conduct is not a job for the courts since they regulate taxpayers and determine tax liabilities. It is a task for one with the authority to set standards of professional conduct. Because of our status as tax professionals, we possess the power to guide the practical application of the tax laws to businesses and individual taxpayers. It entirely appropriate for the Treasury Department to set clear--and in today's climate stringent--standards of conduct for those who play this vital role in the administration of our tax system.

Finally, the concern is frequently expressed that stringent ethical standards will impose an unreasonable burden on legitimate business transactions that involve significant tax planning. In such transactions the tax motives play a very important role even though the business and economic considerations are the driving force. Devising definitions that parse between the "good" and "bad" transactions is virtually impossible. Thus great care must be taken in applying any new (or newly articulated) ethical standards that they not be used inappropriately to threaten or intimidate tax

such transactions the tax motives play a very important role even though the business and economic considerations are the driving force. Devising definitions that parse between the "good" and "bad" transactions is virtually impossible. Thus great care must be taken in applying any new (or newly articulated) ethical standards that they not be used inappropriately to threaten or intimidate tax professionals involved in legitimate, tax-focused business arrangements. On the other hand, making it clear that there are special duties to examine the facts supporting tax conclusions which are a very significant feature to a legitimate transaction does not seem inappropriate. If the additional due diligence necessitated increases the burden on tax counsel and the cost of the tax opinion in "borderline" transactions, that does not seem too high a price to pay to bring ethical sanity back to the profession in its pivotal role of applying the tax rules to complex transactions. [1]

2. Other Substantive Provisions.

1. Section 10.2(e) defines practice before the Internal Revenue Service ("IRS"). Although the changes contemplated by the Proposed Regulations are relatively minor, we believe this is an important provision and deserves attention. Questions have been raised as to whether the statutory authority granted by Section 330 of Title 31 of the United States Code, authorizes the regulation of certain kinds of conduct covered by the current regulations and the Proposed Regulations, including proposed Section 10.35. We believe these questions are too important to be left unanswered until raised by practitioners in contested proceedings to enforce sanctions imposed by the Director of Practice. Therefore, we recommend that Treasury set forth explicitly, in the Preamble to the final regulations, Treasury's analysis of its statutory authority. In doing so, Treasury should draw on the experience gained when similar questions were raised in connection with the promulgation in 1980 and ultimate adoption in 1984 of Section 10.33. We have attached a suggested analysis as "Appendix A" to this letter.

2. Section 10.20--Information To Be Furnished

(1) Information Requests of Doubtful Legality. The Proposed Regulations would change the current regulations by requiring a practitioner to submit non-privileged information in response to requests from the IRS even under circumstances where the practitioner believes in good faith and on reasonable grounds that the request for information is of doubtful legality. The Preamble to the Proposed Regulations does not disclose the reason for making this change. We believe practitioners should not be subject to sanction for withholding information requested by the IRS if the practitioner believes that the request is of doubtful legality. If the IRS believes that requested information has not properly been provided to it, a summons enforcement proceeding could be initiated to test the legality of the request.

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[1] In this respect there are similarities to the role corporate counsel plays in an initial public offering. Substantial due diligence is routinely performed by counsel to make certain the facts and assumptions supporting counsel's conclusions are accurate.

(2) Obligation to Notify IRS as to Location and Control of Requested Information. Section 10.20(a) of the Proposed Regulations would add an affirmative duty to a practitioner to notify the IRS of the location and control of information requested by the IRS when that information is not in the possession or control of the practitioner or the practitioner's client. The practitioner would also be required to provide to the IRS information in the possession of either the practitioner or the practitioner's client regarding the identity of any person having possession or control of the requested information. We believe this proposed change should not be included in the final regulations. The provisions of current Section 10.20(a) already impose an obligation on practitioners to provide non-privileged information to the IRS unless the practitioner has a good faith belief as to the doubtful legality of the request for information. "Information" for this purpose presumably would include a request for information as to the location of information not directly in the possession of the practitioner or the practitioner's client.

3. Section 10.21--Knowledge of Client's Omission. The proposed regulations would add a requirement (which the College supports) that a practitioner advise his or her client as to the manner in which action may be taken to correct the client's non-compliance, error, or omission known to the practitioner and also the possible consequences of not taking corrective action. However, the Proposed Regulation fails to include the provision proposed by the Section of Taxation of the American Bar Association in its January 25, 1999 letter to the Commissioner permitting a practitioner under these circumstances to refer the client to another practitioner who is competent and disinterested for such purpose. We recommend that such a provision be included in the final regulations, to cover situations in which the practitioner in question may not be competent to render such advice or may have an actual or perceived conflict between the client's interests and the practitioner's interests.

4. Section 10.29--Conflicting Interests. The Proposed Regulations would substantially expand the provisions of the current regulations concerning conflicts of interest. We support the changes that would be made by the Proposed Regulations to the extent that they clarify the application of the rule by making it consistent with the current version of Model Rule 1.7(a) of the American Bar Association's Model Rules of Professional Conduct. However, we believe that the additional requirement of the Proposed Regulations that a practitioner obtain written waivers of conflicts of interest imposes an unreasonable burden on the relationship between the practitioner and his or her clients that is generally not imposed by applicable state law or other rules and regulations governing the practitioner-client relationship. Moreover, by requiring waivers of "potential" conflicts of interests, the Proposed Regulations would introduce a significant degree of uncertainty as to the circumstances under which waivers would be required and the scope of the information as to conflicts that the practitioner would be required to provide to his or her client. The Preamble to the Proposed Regulations does not make clear why these changes are being proposed. However, by using an example in Section 10.79(c) of censure of a practitioner for failure to advise clients about potential conflicts and obtain the written consents from the clients, the Proposed Regulations indicate that a substantial initiative by the Director of Practice in the area of conflicts of interest is contemplated. We seriously question the desirability of having the Director of Practice police this aspect of the practitioner-client relationship. Consequently, we recommend that the final regulations not include the requirement of written waivers of conflicts of interest and that the final regulations delete the word "potential" from Section 10.29

5. Section 10.36--Procedures to Ensure Compliance. Section 10.36 of the Proposed Regulations would add a broad new requirement for practitioners who practice with a firm to take steps to see that the firm has in effect adequate procedures for ensuring compliance by practitioners in the firm with Sections 10.33, 10.34 and 10.35 of the Proposed Regulations. We generally commend the intent of the proposed Section 10.36 to encourage firms that include practitioners to take steps to ensure that all practitioners in the firm comply with the requirements of Circular 230 in general and Sections 10.33, 10.34 and 10.35 in particular. However, we are concerned about the considerable uncertainty that the Proposed Regulations would create as to the types of procedures to be adopted and the degree of participation that each practitioner would be required to undertake to see that such procedures are adopted and followed. Neither the Preamble nor the Proposed Regulations themselves provide guidance on these subjects. Although some firms in which practitioners now practice may have already adopted policies and procedures that would comply with the Proposed Regulations, it is likely that it will take a significant period of time for the development of practices and procedures that will be generally accepted and for the promulgation of those practices and procedures and the training of personnel at practitioner firms in the manner in which these procedures should be implemented. Therefore, we recommend that the effective date of proposed Section 10.36 be postponed for a reasonable period (of not less than one year) following adoption of final regulations for this process to take place. We further recommend that the Service promulgate a draft form of revenue procedure or other guidance setting forth the manner in which the Service believes proposed Section 10.36 should be implemented, and permitting ample period for comments by practitioners, their firms, and their professional associations. In any event, we believe it would be inequitable to impose discipline under proposed Section 10.36(b) upon a practitioner who has not himself or herself violated Section 10.33, 10.30 or 10.35 unless discipline has been imposed upon those practitioners in the firm who have violated those provisions.

6. Section 10.50--Sanctions. In general, we support the changes that would be made in Section 10.50 by the Proposed Regulations, including specifically the addition of public censure as a sanction that may be imposed by the Director of Practice on a practitioner who violates the rules set forth in Circular 230. We do, however, have the following specific suggestions:

(1) Statutory Authority for Censure. Under 31 U.S.C. Section 330(b), authority is granted to "suspend or disbar from practice before the Department [of the Treasury] a practitioner who is incompetent or disreputable or who violates regulations prescribe under Section 330 [or who under specified circumstances misleads or threatens a client or prospective client]." Questions have been raised as to whether "censure" is an authorized sanction. If the censure sanction is retained in the final regulations, we recommend that Treasury clearly spell out in the Preamble to the final regulations the analysis relied upon for concluding that statutory authority exists for that sanction.

(2) Coordination with Section 10.52. Sections 10.50(a) and 10.52 both seem to deal with sanctions for violating Sections 10.33, 10.34 and 10.35 of the regulations. Because the type of sanctionable conduct described in Section 10.52 is more specific than the general language of Section 10.50, we believe the intent of the regulations (current and proposed) is that a practitioner will not be sanctioned for violating Section 10.33, 10.34, or 10.35 of the regulations unless the practitioner has recklessly or through gross incompetence violated one or more of those sections. A violation of other regulations is intended to be sanctionable if the violation was committed "wilfully," a lesser standard. We recommend that this be made explicit by inserting into Section 10.50 language that states that violations of Sections 10.33, 10.34 and 10.35 of the regulations are sanctionable only as set forth in Section 10.52.

(3) Private Reprimand. We believe that the changes that would be implemented by the Proposed Regulations do not and should not change the current practice whereby the Director of Practice may deliver a private reprimand to a practitioner if, following an investigation, the Director of Practice determines that more formal sanctions are not warranted but that the practitioner's conduct was nevertheless inappropriate. We recommend that the final version of Section 10.60 of the Proposed Regulations (Section 10.54 of the current regulations) clarify that there is no intent to change the current practice that such reprimands are private.

7. Section 10.51--Incompetence and Disreputable Conduct. According to the Preamble to the Proposed Regulations, "Section 10.51 of the Regulations defines disreputable conduct for which a practitioner may be disbarred or suspended," and later refers to "the definition of disreputable conduct." (Emphasis added.) However, a careful reading of Section 10.51 of the current regulations and the Proposed Regulations makes it clear that Section 10.51 does not **define** "disreputable conduct" but only gives non-exclusive examples of disreputable conduct. We recommend that the final regulations adopt the Section of Taxation of the American Bar Association's January 25, 1999 recommendation on this matter. That recommendation would delete the word "includes" and insert in its place "means any conduct that renders the practitioner unfit to practice before the Internal Revenue Service. Such disreputable conduct includes, but is not limited to. . . ."

8. Section 10.53--Receipt of Information Concerning Practitioner. We are disappointed that the Proposed Regulations did not adopt the Section of Taxation of the American Bar Association's January 25, 1999 recommendation concerning the provision of information to a practitioner when the Director of Practice has received a report alleging misconduct by the practitioner and has determined not to take action with regard to the report. We believe that a sentence should be added at the end of Section 10.53 as follows: "In any case in which the Director of Practice receives any such report, the Director shall either (i) determine that the report warrants no further action and immediately destroy the report and all documentation or reference relating thereto, or (ii) notify the practitioner of the nature of the claimed violation and, if appropriate, request the practitioner to submit a preliminary response." We believe that such a provision is required in order to be fair to a practitioner with respect to whom an allegation of misconduct has been filed with the Director of Practice. We understand that current procedures of the Office of the Director of Practice permit the Director of Practice to retain information about the report in the Practitioner's file for possible use in the event of future complaints about the practitioner. Unless an "accused" practitioner has an opportunity to respond promptly to an allegation of misconduct, information that the practitioner could utilize to rebut the allegation might become unavailable in the future, when the Director of Practice may seek to use the earlier allegation in connection with evaluating the propriety of or the degree of sanctions for a subsequent allegation of misconduct.

3. Procedural Concerns.

1. "Due Process" in Proceedings Involving Allegations of Misconduct Against a Practitioner. In general, we commend the announced intention of the Treasury and the Internal Revenue Service to expand significantly the staffing of the Office of the Director of Practice and the

increased vigilance contemplated by the Internal Revenue Service in the enforcement of the requirements of Circular 230. However, the seriousness to the practitioner of the sanctions for violations of Circular 230 require that extreme care be taken to see that those sanctions are imposed only in appropriate cases. We recommend that the Treasury and the Internal Revenue Service carefully examine all aspects of the procedures involved in asserting misconduct by a practitioner, evaluating the alleged misconduct, and determining whether or to what extent a sanction (whether private reprimand, public censure, suspension, or disbarment) should be imposed. This review should particularly include making sure that a practitioner against whom allegations of misconduct have been submitted is granted a presumption of innocence and that the burden be imposed on the IRS to establish misconduct by clear and convincing evidence. Steps also should be taken to ensure that administrative law judges before whom allegations of misconduct are presented receive specialized training in the application of Circular 230.

2. Effective Date of Final Regulations. Section 10.93 of the Proposed Regulations would make the final regulations effective on the date they are published in the Federal Register. As noted above, we believe that Section 10.36 should not become effective until practitioners and their firms have been given ample time to develop and implement the practices and procedures that are contemplated by Section 10.36 of the Proposed Regulations, to the extent these are included in the final regulations.

In view of the substantial change in the practice of practitioners with respect to conflicts of interest that would be imposed if Section 10.29 of the Proposed Regulations is adopted, we recommend that the effective date of that section also be deferred beyond the date of promulgation of the final regulations, so that practitioners have an opportunity to become educated as to the new requirements contemplated by this section of the Proposed Regulations and to implement appropriate policies to comply with whatever the final regulations require.

3. More Effective Enforcement of Circular 230. We reiterate the recommendation contained in our pre-issuance comments as to the adoption by Treasury and the IRS of a more and focused pro-active approach to enforcement of Circular 230. We recommend specifically that the following four steps be taken:

(1) Prioritize. Develop a prioritized list of practitioner violations of Circular 230 that have the most serious adverse effects upon the tax system.

(2) 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. Be sure that personnel in the Office of the Director of Practice are well trained in carrying out the important and sensitive responsibilities imposed upon them.

(3) Publicize Program. Publicize steps (a) and (b) 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.

(4) 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, public censure, suspensions, and disbarments or other sanctions). Also publish on a regular basis hypothetical fact scenarios describing representative types of behaviors that an be 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.

BOARD OF REGENTS OF THE AMERICAN
COLLEGE OF TAX COUNSEL

N. Jerold Cohen

By: N. Jerold Cohen, Chair

cc: The Honorable Charles O. Rossotti, Commissioner, Internal Revenue Service
The Honorable Mark A. Weinberger, Assistant Secretary (Tax Policy), Dept. of the Treasury
Pamela Olson, Deputy Assistant Secretary (Tax Policy), Department of the Treasury
Rita Cavanaugh, Office of the Tax Legislative Counsel, Dept of the Treasury
Richard Goldstein, Special Counsel, Administrative Provisions and Judicial Practice, Internal Revenue Service
Michael Shaheen, Senior Counselor, Internal Revenue Service
Patrick McDonough, Joint Board for the Enrollment of Actuaries & Practice Office, Internal Revenue Service

APPENDIX A

The issue of Treasury's authority to regulate the use of tax shelter opinions was addressed in the 40-month period from the September 4, 1980 publication of proposed rules regarding standards for "tax shelter opinions" to the February 14, 1984 adoption of Section 10.33. The result of the discussions that culminated with the adoption of Section 10.33 appears to resolve any similar questions that might arise concerning the current proposed amendments to Section 10.33 and the proposed addition of Section 10.35.

Treasury's authority to discipline individuals authorized to practice before the IRS derives from 31 U.S.C. Section 330(b), which permits the Secretary, after notice and opportunity for a proceeding, to suspend or disbar from practice before Treasury a representative who is incompetent, disreputable, violates regulations prescribed under Section 330, or, with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented. In the Preamble to the December 15, 1982, Notice of Proposed Rulemaking, 47 Federal Register 56144, containing modified proposed regulations to Circular 230 relating to tax shelter opinions, Treasury stated:

> "To the extent that a practitioner's opinion actively is used to encourage large numbers of taxpayers to claim tax benefits that the practitioners [sic] believes are unavailable, the foundations of the self-assessment system are eroded. Just as a lawyer has a duty to protect the integrity of the legal system as a whole, so the tax practitioner, in the Department's view, has a duty to protect the integrity and effectiveness of the tax system. Conduct which is inconsistent with this standard could be, in the Department's view, "disreputable" within the meaning of 26 [sic] U.S.C. 1026.[2]
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> A number of comments expressed the view that the proposed regulations would unduly interfere with the lawyer-client relationship, and that this relationship should not be regulated.
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> The proposed rule does not affect or regulate the practitioner's relationship with individual clients. It is drawn, with one exception, to

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[2] The proper statutory reference was 31 U.S.C. Section 1026 (subsequently recodified as 31 U.S.C. Section 330).

> apply to "tax shelter opinions"—defined as advice by a practitioner concerning the Federal tax aspects of a tax shelter either *appearing* in the offering materials or *used* in connection with sales promotion efforts directed to persons *other than the client who engaged the practitioner to give the advice.* It is thus the *use* of a tax shelter opinion that the proposed rule would regulate, not the rendering of an opinion by a lawyer to his client."
> Id. at 56136 (emphasis in original).

In response to these proposals, various concerns were raised, including preservation of State Bar disciplinary jurisdiction over attorneys who prepare "tax shelter opinions." More specifically, there was concern that, if the issuance of "tax shelter opinions" constituted "practice before the IRS" under 31 CFR Section10.2, State Bar disciplinary authority would be pre-empted under *Sperry v. Florida*, 373 U.S. 379 (1963).

In that regard, the legislative history of the Agency Practice Act[3] provided that, while it was being enacted to entitle professionals licensed under State law to practice before federal agencies without a showing of integrity or competence other than that manifested by their state license, "The committee again emphasizes that section 1(b), while it would eliminate the special enrollment requirements for certified public accountants in representing others before the Internal Revenue Service, is not intended to change the scope of service performed by certified public accountants in the practice of accountancy before the Internal Revenue Service." H.R. Rep. No. 1141, 89th Cong., 1st sess. (October 12, 1965), reprinted in 1965 U.S. Code Cong. & Ad. News, pp. 4170, 4171, and 4173. Indeed, 31 CFR Section 10.32 had provided for many years that nothing in Circular 230 shall be construed as authorizing persons not members of the bar to practice law.

Clarification was sought that adoption of proposed Section 10.33 would not cause issuance of "tax shelter opinions" to constitute "practice before the Internal Revenue Service" that would trigger *Sperry* pre-emption of State Bar disciplinary authority over practitioners engaging in the issuance of such opinions. The Preamble to the February 14, 1984, Notice of Rulemaking responded affirmatively to the these concerns. "However, the regulations in this final notice are not intended to preclude local law and regulation from governing the preparation, issuance, and dissemination of tax shelter opinions." 49 Federal Register 6722 (February 23, 1984). Similarly, though the final notice contained an amendment to the scope of "practice before the Internal Revenue Service" that made tax return preparation "practice before the Internal Revenue Service," that amendment did not cause the issuance of "tax shelter opinions" to constitute "practice before the Internal Revenue Service."

Under 31 U.S.C. Section 330(a)(2), integrity and competence are required of practitioners before the Internal Revenue Service as a general condition to entitlement to that practice. The Agency Practice Act merely makes State licensure prima facie evidence of the requisite integrity and competence. If Treasury determines that a practitioner lacks the necessary qualifications -- for example, by reason of a conviction for bank robbery or embezzlement-- Treasury may suspend or

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[3] Act of November 8, 1965, P.L. 89-332, 79 Stat. 1282.

disbar that practitioner from practice before the Internal Revenue Service, without regard to the fact the bank robbery or embezzlement occurred outside the scope of "practice before the Internal Revenue Service."

If proposed Sections 10.33 and 10.35 are promulgated as final regulations, the Treasury Department should reiterate in the Notice of Rulemaking that the issuance of those regulations does not pre-empt State law disciplinary authority over practitioners rendering such opinions nor cause the preparation and issuance of such opinions to constitute "practice before the Internal Revenue Service." Treasury's authority to discipline individuals authorized to practice before the Internal Revenue Service who issue such opinions is not dependent on that action constituting "practice before the Internal Revenue Service." Thus, it will be helpful to the practitioner community and to State regulators for Treasury explicitly to declare that the State regulators have concurrent jurisdiction with Treasury to discipline practitioners who engage in sanctionable opinion preparation.