



American College of Tax Counsel Suggests Changes to Proposed Regs on Circular 230

APR. 9, 2002

SUMMARY BY TAX ANALYSTS

N. Jerold Cohen of the American College of Tax Counsel, Washington, has suggested additional changes to the proposed regs amending 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.) The college had submitted comments on May 23, 2001. (For a summary of the American College of Tax Counsel's May 23, 2001 comment letter, see Tax Notes, June 4, 2001, p. 168; for the full text, see Doc 2001-15321 (11 original pages), or 2001 TNT 105-29 )

Cohen says that section 10.36's "reasonable steps" requirement is vague, and that Treasury should specify what kinds of steps would be regarded as reasonable. Cohen says that the obligation to establish such steps should be imposed on the members of a firm's tax practice with management responsibility.

Cohen also says that, given the powers which reside in the Director of Practice, the director and his staff should report to the General Counsel of the Treasury Department, as has been the case in the past.



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REG-111835-99
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Re: Proposed Regulations Amending Circular 230

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ROBERT A. WHERRY, JR.
DENVER, CO

Dear Madam/Sir:

I am enclosing an original and eight copies of comments by the American College of Tax Counsel on the proposed regulations amending Circular 230 concerning practice before the Internal Revenue Service. These comments are in addition to comments previously submitted by ACTC. If there are any questions or if you would like any additional copies, please let me know.

Very truly yours,

AMERICAN COLLEGE OF TAX COUNSEL

By: N. Jerold Cohen
N. Jerold Cohen, Chair

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NJC/mjr
Enclosures
cc (w/enc.):

The Honorable Charles O. Rossotti, Commissioner, Internal Revenue Service
The Honorable Mark A. Weinberger, Asst. Secretary (Tax Policy) Dept. of Treasury
Pamela F. Olson, Deputy Asst. Secretary (Tax Policy), Dept. of Treasury
Eric Solomon, Deputy Asst. Secretary (Regulatory Affairs), Dept. of Treasury
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Comments on Proposed Regulations Governing Practice Before The Internal Revenue Service (Treasury Department Circular No. 230)

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Proposed Section 10.36

In our May 23, 2001, comment on these proposed regulations, we noted with respect to Section 10.36 that "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." Upon further reflection, we believe that the final regulations should not include Section 10.36(b), which would impose vicarious liability on practitioners for the actions of other practitioners in their firms that constitute a "pattern or practice" of not complying with the Proposed Sections 10.33 (marketed tax shelter opinions), 10.34 (advising on return positions) and 10.35 (more likely than not tax shelter opinions). Section 10.36(b) would impose such liability notwithstanding the fact that the practitioner has taken "reasonable steps" to assure compliance by the firm with the three sections.

Sections 10.33, 10.34, and 10.35 present significant ambiguities. Section 10.36 then would impose an obligation on each member, associate or employee of a firm to take "reasonable steps consistent with his or her authority and responsibility for the firm's practice . . . to make certain that the firm has adequate procedures in effect for the purposes of ensuring compliance" with those three sections. The Proposed Regulations offer no guidance concerning what "reasonable steps" might be. Further, no guidance is offered on how disagreements among firm members concerning what constitutes "reasonable steps" should be resolved or what action a junior partner or associate is required to take if he or she disagrees with the judgment of a firm's management on the steps to be taken. Thus, in its current form, Section 10.36(a) threatens loss of a practitioner's livelihood for failure to take unspecified "reasonable steps" to comply with ambiguous rules of conduct.

While we believe that the vagueness of the current Section 10.36 "reasonable steps" requirement is unacceptable, we believe that the Treasury could specify what kinds of steps (*e.g.*, opinion review requirements) would be regarded as reasonable and resolve this problem in the next draft of the regulations. We believe that such an obligation to establish such steps is most sensibly imposed on those members of a firm's tax practice with management responsibility and that the obligation of more junior members ought to be to comply with the procedures so established.



As stated above, however, we do not believe that greater specificity can cure the fundamental problems inherent in Section 10.36(b). Requirements of "willfulness, recklessness, or gross incompetence" may prevent the Government from bringing disciplinary action under such a provision for foot faults, but these "higher misconduct" standards are not a substitute for an adequate definition of the conduct proscribed. For example, suppose Practitioner B discovers that his firm relied on the opinion of an expert in rendering a series of tax opinions to several clients and he believes that that error violated Section 10.35. We do not understand what steps would be open to B to correct such a "pattern or practice" consistent with his obligations to the firm's clients. Even if he succeeds in halting the practice, the decision as to whether to disclose or correct lies with the client, not the attorney. Equally to the point, the phrase "duty to correct" contains no specification of what the corrective actions might be; this leaves practitioners who have fully complied with Sections 10.33, 10.34, 10.35, and 10.36 in their own conduct and who have taken steps to assure that their firm has "reasonable standards" in place nevertheless subject to discipline for the violations of others based on the failure to take "corrective actions" that the Director of Practice will apparently determine to have been required on an *ad hoc*, after-the-fact basis.

The vagueness in Section 10.36(b) is simply unacceptable in any disciplinary rule and is particularly inappropriate where standards on which liability would be premised are as indefinite as those set forth in Sections 10.33, 10.34, 10.35 and the current "reasonable steps" requirement of Section 10.36. For these reasons, we believe that Section 10.36 should be redrafted to provide guidance concerning the nature of the reasonable steps to be required and that Section 10.36(b) should be deleted. So redrafted, the rule would make practitioners liable for their own failure to comply with adequately-defined reasonable standards. It would not, however, permit disciplinary action against those who have complied but are unable to "undo," in some unspecified manner, the failures of others.

Organizational Position of the Director of Practice

Given the extraordinary power which resides in the Director of Practice under these rules, we strongly recommend that the Director and his staff report to the General Counsel of the Treasury Department, as was the case in the past. We believe that the conflict between the Commissioner's frequent role as the taxpayer's adversary and his role as regulator of the taxpayer's advocate's conduct is obvious and will inevitably result in the perception that proceedings can be brought in the latter context to influence the former. Placing the Director of Practice outside the Internal Revenue Service and under the supervision of the General Counsel of the Treasury would lessen these concerns.