July 23, 2003

Internal Revenue Service
CC:ITA: RU (REG-1223804-02), Room 5226
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Comments in Response to Department of Treasury Advance Notices of Proposed Rule Making to Amend the Regulations Governing Practice Before the Internal Revenue Service (Treasury Department Circular No. 230) REG-122380-02 (December 18, 2002) and Announcement 2003-5, REG-1223804-02 (February 3, 2003)

Dear Ladies and Gentlemen:

The following comments are submitted by the American College of Tax Counsel in response to the Advance Notices of Proposed Rulemaking dated December 18, 2002 and February 3, 2003 (Announcement 2003-5) (the "Advance Notices"), 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").

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

The College supports efforts by the Treasury Department and the Internal Revenue Service to raise the level of professionalism among tax practitioners. The College has previously submitted comments in response to prior proposals to amend Circular 230.

We are commenting only on selected portions of the Advance Notices. Our detailed comments, which are set forth below, are labeled and numbered to correspond with the request for comments as set forth in Announcement 2003-5.

Director of Practice

1. Whether section 10.1 should be revised to rename the Director of Practice as the Director of the Office of Professional Responsibility.

In News Release IR-2003-3, January 8, 2003, the Service announced that it had renamed the Director of Practice as the Director of the Office of Professional Responsibility ("OPR"). The College supports this step.

2. Whether the authority to appoint the Director of the OPR should be delegated to the office or person who supervises the Director of the OPR. If not, to whom should the Secretary delegate the authority to appoint the Director of the OPR?

The College believes it is very important to maintain the independence and impartiality of the Director of the OPR, both in substance and in appearance, to the greatest extent feasible. We strongly believe that the Director of the OPR should be supervised a person who is wholly independent of the Internal Revenue Service. We would favor delegating authority to appoint the Director to the General Counsel of the Treasury Department, who would also supervise the Director.

Given the extraordinary power which resides in the Director of the OPR under Circular 230, we recommend that the Director and his staff be supervised by the General Counsel of the Treasury Department. We believe that the conflict that now exists between the Commissioner's frequent role as the taxpayer's adversary and his role as regulator of the conduct of the taxpayer's representative is obvious and invites the perception that proceedings may be brought in the latter context to influence the former. Placing the Director of the OPR under the supervision of the General Counsel would lessen these concerns.

Ideally, appeals from ALJ decisions would be resolved by someone wholly independent of both the Commissioner and the person who supervises the Director. The person who appoints the Director is somewhat less critical in this regime. Regardless of who appoints the Director, it is important that the Director not be supervised by the Commissioner of Internal Revenue or any other employee of the Internal Revenue Service. For this reason, we strongly recommend that the Director be supervised by the General Counsel of the Department of the Treasury.

3. Whether the review of an Administrative Law Judge's decision under section 10.78 should be delegated to the office or person who supervises the Director of the Office of Professional Responsibility. If not, to whom should the Secretary delegate the authority under

section 10.78 to review the Administrative Law Judge's decision in disciplinary proceedings when these decisions are appealed?

The decision as to whether a practitioner should be sanctioned for alleged violations of Circular 230 is an extremely serious matter. It is our understanding that the typical Administrative Law Judge ("ALJ") assigned to these cases is not experienced in tax practice or tax law. Therefore, there is a real risk that even a highly competent ALJ may make an inappropriate decision in cases involving arguments--made by either the Director or the practitioner--that are based on complex issues of tax law or tax practice. Accordingly, we recommend that appeals from the decision of an ALJ should be heard by an individual who not only is independent and impartial but also has some experience in tax practice. Ideally, that person would be independent of both the person who appoints and the person who supervises the Director. However, based on the current organizational structure of the Department of the Treasury and the Internal Revenue Service, it is not apparent how this ideal could be achieved. Therefore, we recommend that appeals from the ALJ's decision should be heard by the General Counsel of the Department of the Treasury. Under no circumstances should such appeals be heard by any individual who directly or indirectly reports to the Commissioner.

Definition of Practice and Who May Practice

1. Whether the definition of practice before the Service and the definition of practitioner in section 10.2 should be modified to specifically provide that return preparation by an individual not described in section 10.3 (a) through (d) ("unenrolled return preparer") is practice before the Service and that an unenrolled return preparer is a practitioner under Circular 230.

Unenrolled return preparers, though presently not within the definition of a "practitioner" under Circular 230, nevertheless are subject to preparer penalties under various provisions of the Internal Revenue Code, including Sections 6694, 6695, 6696 and 6701, as well as provisions of the Internal Revenue Code and other law imposing criminal penalties on certain kind of conduct. We believe the Internal Revenue Service has not adequately employed existing law to sanction unenrolled return preparers who engage in inappropriate conduct. Until the IRS acts more vigorously to enforce existing penalties, we are opposed to subjecting unenrolled return preparers to regulation under Circular 230. We recommend that the Service prioritize the kinds of misconduct by unenrolled preparers that are of greatest concern and then train the appropriate Service employees to identify and assert sanctions against the perpetrators.

We also oppose subjecting unenrolled return preparers to regulations under Circular 230 at this time for another reason. In recent years the staffing of the Director's office has prevented the Director from processing many of the cases referred to the Director for possible sanctions. Following the adoption of last year's amendments to Circular 230 and the anticipated promulgation of final regulations governing issuance of certain tax shelter opinions, the Director and his or her staff will be expected to begin taking action on cases having a much higher degree of sophistication and complexity that has been required in recent years. We believe the efforts of the Director to enforce

these rules would be greatly diluted if the Director and his staff also had to establish and administer new programs affecting hundreds of thousands of additional "practitioners."

Sanctions and Disciplinary Proceedings

1. Whether the regulations should be amended to authorize a practitioner and the Director of the Office of Professional Responsibility to enter into settlement agreements, with such agreements enforceable through the expedited procedures of section 10.82.

Section 10.61(b) and section 10.61(c) currently appear to provide a mechanism equivalent to a "settlement agreement." Presumably, censure, suspension, disbarment, or offer of resignation or disqualification pursuant to these provisions is enforceable against the affected practitioner, in accordance with the terms of that agreement and the otherwise applicable provisions of Circular 230. At this time, it is unclear to us what additional advantage would be obtained by authorizing "settlement agreements" enforceable through the procedures of section 10.82. We believe the expedited proceedings of section 10.82 should be used sparingly and therefore see no compelling reason to subject all "settlement agreements" automatically to such expedited proceedings. On the other hand, we would be willing to consider application of section 10.82 procedures to cases where the conduct that is allegedly violative of the settlement terms is egregious and is established by clear and convincing evidence.

From the enactment of the income tax return preparer penalties by the 1976 Act until the enactment of RRA 1989, all cases in which such penalties were imposed upon income tax return preparers were automatically referred to the Director of Practice for consideration of the commencement of disciplinary proceedings. This practice was expressly disapproved, unless willful conduct is involved or the IRS can establish a pattern of failing to meet required standards in Administrative Recommendations to the IRS appearing in the Conference Report underlying RRA 1989. H.R. Rep. No. 101-386, 101st Cong., 1st Sess. 662 (Nov. 21, 1989).

2. Whether the definition in the regulations of disreputable conduct should be amended to specifically include the willful failure of a practitioner who is a preparer to sign a return.

Thus, if a practitioner who also is a return preparer engages in a pattern of willful failure to sign returns prepared by that practitioner, we believe that such conduct may constitute "disreputable conduct" subjecting the practitioner to sanctions under Circular 230. However, we would respectfully submit that a provision that would classify the failure of a practitioner to sign a single return, without more, as "disreputable conduct," is beyond the ambit of the Treasury's authority. We note that Section 6695(b) of the Code presently imposes penalties if an income tax return preparer required to sign a return fails to do so. We believe the class of return preparer represented by practitioners subject to Circular 230 constitutes a relatively small portion of income tax return preparers. Accordingly, we would prefer to see a more broad-based approach to this problem, including, if deemed appropriate, proposed legislation to increase the severity of the sanctions for willful failure to sign returns.

As we noted in our prior comments to the proposed regulations, the regulations currently contain no definition of "disreputable conduct." Rather, section 10.51 contains a series of nonexclusive examples of "incompetence and disreputable conduct." We believe this is a defect in the regulations. We repeat our prior recommendation that the first sentence of section 10.51 be amended by deleting the word "includes" and inserting in its place the following: "means any conduct that renders the practitioner unfit to practice before the Internal Revenue Service. Such disreputable conduct includes, but is not limited to . . .."

3. Whether, in order to facilitate the timely adjudication of disciplinary proceedings instituted under section 10.60, the regulations should be amended to provide that the failure of a practitioner to answer a complaint constitutes an automatic default in the proceeding, subject to a showing of good cause.

We believe strongly that the failure of a practitioner to answer a complaint should not constitute an automatic default in the proceeding. Sanctioning a practitioner under Circular 230 is an extremely serious matter. We believe the Director should be required to present very strong evidence to justify a sanction. The failure of a practitioner to file an answer (or to file a timely answer) to a complaint should carry little or no weight in determining whether or not a sanction is justified. The ALJ should be required to review evidence presented by the Director and should not decide the matter merely on the basis of the Director's unsupported allegations.

4. Whether the regulations should be amended to provide the parties to a proceeding instituted under section 10.60 the opportunity to obtain discovery through means such as interrogatories, requests for production of documents, and requests for admission, in addition to depositions. Whether the regulations should define what discovery should be permitted. Whether the regulations should place limits on discovery.

We would strongly support an amendment to Circular 230 that would facilitate discovery by the parties of facts relevant to the disposition of the proceedings instituted under section 10.60. The regulations should define the permitted discovery in such a way as to draw a reasonable balance between the need for the parties to obtain facts relevant to supporting their respective positions and the interests of the parties, and the tax system itself, in being able to conclude the matter without unreasonably burdening the parties or unreasonably prolonging the proceedings.

5. Whether the protection afforded in the current regulation--that a party in a disciplinary proceeding is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts--is sufficient, or whether changes should be made to afford greater protection in a disciplinary proceeding, including the opportunity to question, in the presence of the Administrative Law Judge, any person whose statement is offered by the opposing party.

We believe it would appropriate to amend the current regulations to provide greater opportunity to the parties to present oral or documentary evidence (including rebuttal evidence) and

to conduct cross-examination of material witnesses. We believe that such regulations could be drafted in such a way as to avoid imposing unreasonably burdensome costs on either of the parties and to avoid unreasonable delays in bringing the proceedings to a conclusion.

Contingent Fees

1. Whether contingent fees should be permitted in conjunction with a request for a private letter ruling or other pre-filing document.

As we have previously commented, we are concerned about the potential deterioration of professionalism standards in matters in which practitioners charge contingent fees for tax advice. These concerns must, however, be balanced against the legitimate interests of taxpayers who might not otherwise be able or willing to pay the substantial professional fees involved in pursuing meritorious claims for refund. Any amendment to section 10.27 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.

Section 27(b)(3) currently permits charging contingent fees for amended returns or refund claims, "but only if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended tax return or refund claim will receive substantive review by the Internal Revenue Service." Given the well publicized limitations on IRS resources for compliance activities, it is arguable that this standard can currently be satisfied in only a small percentage of situations where amended returns or refund claims are filed. However, when applying this standard to requests for private letter rulings, other pre-filing requests, and even post-filing submissions (such as, for example, requests for additional extensions of time to file S corporation elections), it should be reasonable for practitioners to believe that virtually every such submission will receive substantive review by the Service. Therefore, we support expanding the present regulation to permit the charging of reasonable contingent fees in connection with such submissions.

2. Whether the regulations should continue to permit a practitioner to charge a contingent fee for preparing, or for any advice rendered in connection with a position taken or to be taken on, an amended return or claim for refund.

We support continued permission for practitioners to charge contingent fees under circumstances permitted by the present regulations. Moreover, in light of the previously mentioned uncertainty as to when a practitioner might reasonably anticipate that the Service would substantively review such a submission, we support a clarification of the present standard to provide greater certainty as to the circumstances when practitioners could reasonably anticipate substantive review. We also suggest that Section 27(b)(3) should be amended so that it excludes “jurisdictional” refund claims that are excluded from the definition of “returns” by Code section 7701(a)(36)(B) from the contingent fee limitation provisions. Practitioners should be able to charge contingent fees for preparation of such refund claims, prepared after the IRS has examined the tax return for the tax year, in order to satisfy the jurisdictional prerequisites for commencement of a refund action.

3. Whether the prohibition of contingent fees should be expanded to permit contingent fees only for amended returns or claims for refund when the client's taxable income on the amended return or claim for refund is less than $50,000 (or another amount determined with reference to financial need).

We would oppose a change in the regulations designed to limit contingent fees to taxpayers having low or moderate income or net worth. Unless there is substantial evidence that the current rules are being abused, we see no reason to impose further restrictions on the use of contingent fees, subject to the general requirement they must be reasonable. If practitioners are making inappropriate submissions on behalf of taxpayers, it should be possible for the Service to address the problem by sanctioning such practitioners for their substantive misconduct rather than for the basis on which they are setting their fees. In many instances, the risks and uncertainties surrounding many tax issues may justify charging contingent fees even when large amounts are at issue.

Confidentiality Agreements

1. Whether the regulations should prohibit practitioners from entering into agreements that, in violation of applicable state professional rules or applicable state law, restrict a practitioner from providing relevant tax advice to other similarly situated taxpayers.

We oppose an amendment to the regulations that would prohibit agreements of the kind described. The criterion of whether such agreements violated professional rules or state law would be too difficult to administer. Any prohibition on agreements of the kind addressed in this section of the Advance Notices should be narrowly and specifically drawn.

2. Whether the regulations should prohibit, irrespective of applicable state professional rules or applicable state law, the agreements identified above.

We believe a practitioner's response to a client's request that the practitioner agree to conditions of the kind of restrictions described in the Advance Notices in connection with representation of the client in tax matters generally 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. If there is a class of confidentiality agreements that are thought to be particularly offensive to the tax system and that can be narrowly and clearly defined, it may be appropriate to prohibit such agreements. Therefore, we believe that Circular 230 should not prohibit a practitioner from agreeing to conditions of confidentiality.

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: N. Jerold Cohen, Chair

cc: The Honorable Mark Everson, Commissioner, Internal Revenue Service
The Honorable Pamela F. Olson, Assistant Secretary (Tax Policy), United States Department of the Treasury
The Honorable Eric Solomon, Deputy Assistant Secretary of the Treasury, Tax Policy, Regulatory Affairs
The Honorable Michael E. Shaheen, Senior Counselor to the Commissioner, Internal Revenue Service
The Honorable B. John Williams, Chief Counsel, IRS
The Honorable Brien T. Downing, Director, Office of Professional Responsibility, IRS