



July 25, 2011

The Honorable Douglas Shulman  
Commissioner  
Internal Revenue Service  
Room 3000 IR  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Re: Comments on Final Circular 230 Regulations

Dear Commissioner Shulman:

These comments are submitted on behalf of the American College of Tax Counsel (“ACTC”) regarding the final Circular 230 regulations issued on May 31, 2011 (the “Regulations”).<sup>1</sup> ACTC is a nonprofit professional association of tax lawyers in private practice, law school teaching positions, and government service, who have been licensed for at least 15 years at the time of their admission and who are recognized for their excellence in tax practice and for their substantial contributions and commitment to the profession. This letter was prepared by the Board of Regents of ACTC and does not necessarily reflect the views of all members of ACTC, including those who are government employees. None of the members of the Board of Regents who participated in the drafting of this letter has been retained by clients to lobby the Treasury Department or the IRS regarding the Regulations.

The Regulations were issued in proposed form on August 23, 2010 (the “Proposed Regulations”). The final version of the Regulations includes significant changes with respect to which there was no opportunity to comment because those changes were not included in the Proposed Regulations. In addition to our procedural concerns about making significant revisions to the Regulations without an opportunity for comment, we have substantive concerns regarding the removal of references to the Office of Professional Responsibility (“OPR”) from the Regulations.

The preamble to the final Regulations (the “Preamble”) salutes OPR’s critical role in enforcing “the Circular 230 provisions relating to practitioner conduct and discipline” and the need for OPR to “operate independently from IRS functions enforcing Title 26 requirements.” The Preamble seems to indicate there is no intention to change either OPR’s role with respect to regulating practitioner conduct and discipline or its independence from the IRS’s enforcement function. We strongly concur with these sentiments as expressed in the Preamble. As we indicated in our 2003 comments regarding Circular 230 (a copy of which is attached), we believe that “it is very important to maintain the independence and impartiality of the Director of OPR, both in substance and in appearance, to the greatest extent feasible. We strongly believe that the Director of OPR should be supervised [by] a person who is wholly independent of the Internal Revenue Service. . . . 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

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<sup>1</sup> T.D. 9527.

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representative is obvious and invites the perception that proceedings may be brought in the latter context to influence the former.”<sup>2</sup>

Despite the expressions in the Preamble regarding the continuing role of OPR in regulating practitioner conduct and discipline, the final Regulations delete all references to OPR in the section that addresses such matters. These deletions are a change from both the prior Circular 230 regulations and the Proposed Regulations. The Preamble explains the rationale for deleting the references to OPR in a manner that is ambiguous as to the preservation of OPR’s current role:

The final regulations accommodate the internal structure by generally removing references to the Office of Professional Responsibility. The final regulations allow the flexibility to adjust responsibility appropriately between the offices as the return preparer initiative is implemented. The Commissioner may delegate necessary authorities to appropriate offices.

The deletion of the references to OPR in the final Regulations, when read in conjunction with this Preamble language, appears to provide the Commissioner with the flexibility to materially change OPR’s role, or even disband it, without amending the Regulations.

Prior to the issuance of the final Regulations, the specific references to OPR in Circular 230 ensured that practitioner disciplinary powers were exercised only by OPR. We recognize the need to coordinate the responsibilities of OPR with the new return preparer office (“RPO”) established to administer the return preparer initiative. We respectfully submit, however, that removing references to OPR in Subparts C and D of the Regulations creates doubt as to whether OPR (or a similarly independent body) will continue to regulate practitioner conduct and be responsible for disciplinary proceedings. Under the final Regulations, the Commissioner apparently has the authority, without providing the opportunity for notice and comment that is inherent in amending regulations, to delegate those duties to IRS personnel who are not associated with OPR and, therefore, do not have a similar level of independence from the IRS’s enforcement function. The prospect of disciplinary powers being exercised by the same personnel, offices, or branches that are charged with enforcement of Title 26 raises concerns both about the independence of those exercising the disciplinary powers and about the ability of practitioners to advocate zealously on behalf of their clients when interacting with IRS representatives.

For many years, tax practitioners have relied on OPR’s independence and impartiality in handling disciplinary matters. To assure the continued integrity and independence of the disciplinary process, we respectfully recommend that the IRS add a provision to the Regulations requiring the delegation of all practitioner disciplinary authority to either OPR or another body with a similar level of independence from the IRS’s enforcement function. The following is an example of the sort of language that might be used for this purpose:

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<sup>2</sup> ACTC Comments in Response to Department of Treasury Advance Notices of Proposed Rule Making to Amend the Regulations Governing Practice Before the Internal Revenue Service, July 23, 2003, p. 2.

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**§ 10.83 Delegation of Disciplinary Authority and Functions.**

Subparts C and D of this part provide the Commissioner with the authority to delegate responsibility for practitioner disciplinary matters, functions, and proceedings. The Internal Revenue Service recognizes that the person or office to whom such responsibility is delegated must operate independently from the Internal Revenue Service functions enforcing compliance with Title 26. The initial delegation of responsibility for all practitioner disciplinary matters, functions, and proceedings shall be to the Director of the Office of Professional Responsibility. The Commissioner may reallocate responsibility for some or all of such matters, functions, and proceedings to another person or office, but only if such person or office has a level of independence from the Internal Revenue Service's Title 26 compliance and enforcement functions that is similar to (or greater than) that currently possessed by the Director of the Office of Professional Responsibility.

We believe that a provision of this sort would be entirely consistent with, and would appropriately effectuate, the Preamble language regarding administering and enforcing Circular 230.

We appreciate your consideration of these comments. Representatives of ACTC would be pleased to discuss this matter with you or your staff. Please contact me at (804)788-8793 or [ghowell@hunton.com](mailto:ghowell@hunton.com) should you have questions about these comments or wish to arrange such a discussion.

Sincerely,



George C. Howell, III  
Chair

cc: The Honorable William J. Wilkins  
Chief Counsel  
Internal Revenue Service  
Room 3026 IR  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Deborah A. Butler, Esq.  
Associate Chief Counsel (Procedure and Administration)  
Internal Revenue Service  
Room 5503 IR  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

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Matthew D. Lucey, Esq.  
Special Counsel  
Office of the Associate Chief Counsel (Procedure and Administration)  
Internal Revenue Service  
Room 5217 IR  
1111 Constitution Avenue, N.W.  
Washington, DC 20224

Karen L. Hawkins, Esq.  
Director  
Office of Professional Responsibility  
Internal Revenue Service  
Room 7238 IR  
1111 Constitution Avenue, N.W.  
Washington, DC 20224