Current Ethics Issues: Circular 230 Proposed Revisions and Privilege Developments

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He was formerly a Trial Attorney at the Tax Division of the Department of Justice, Associate Tax Legislative Counsel at the Treasury Department, a member and General Counsel at Caplin & Drysdale Chtd., and an Adjunct Professor teaching tax administrative procedure in the LL.M. program at Georgetown University Law Center.

He also served for six years as a member and Chairman of the Anne Arundel County (Maryland) Ethics Commission.

Panelists

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Mr. Comisky is the Chair of International Compliance with the law firm of Fox Rothschild LLP. Mr. Comisky concentrates his practice in the areas of civil and criminal tax litigation, anti-money laundering compliance and complex corporate and commercial litigation. Mr. Comisky is the co-author of Tax Fraud and Evasion, which was reissued in December of 2023 and contains chapters dealing with money laundering, the Anti-Money Laundering Act of 2020 and domestic and international compliance issues.

Mr. Comisky represents both corporations and individuals in criminal tax investigations, both administrative and grand jury. Mr. Comisky has also been retained on banking and other corporate compliance matters primarily relating to Bank Secrecy Act and involving money laundering and asset forfeiture issues. Mr. Comisky has also been retained by directors and officers in civil and criminal securities litigation, involving tax and accounting issues. Mr. Comisky has further handled other commercial litigation including RICO class action and other complex commercial disputes primarily in federal courts in Philadelphia and Florida.

Mr. Comisky is a member of the American College of Tax Counsel, and is Chambers rated. Mr. Comisky is also an adjunct professor at the University of Penn Carey Law teaching a course on anti-money laundering compliance.

Agenda

- Proposed Circular 230 Regulations
  - Statutory authority and background
  - Return preparer regulation
  - Select proposed regulations
- Current privilege issues
- Questions and comments

Statutory Authority

- There are two statutes authorizing practice before Treasury and the IRS.
- 5 U.S.C. § 500 applies to all federal agencies, with a special rule for Treasury and IRS.
- 31 U.S.C. § 330 was initially enacted to regulate “claims agents” who pursued claims for compensation in the post-Civil War, Reconstruction era. It relates exclusively to Treasury.

5 U.S.C. §500 - Administrative practice; general provisions

(b) An individual who is a member in good standing of the bar of the highest court of a State may represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

(c) An individual who is duly qualified to practice as a certified public accountant in a State may represent a person before the Internal Revenue Service of the Treasury Department on filing with that agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.

5 U.S.C. §500 – (con't)

(d) This section does not—

(1) grant or deny to an individual who is not qualified as provided by subsection (b) or (c) of this section the right to appear for or represent a person before an agency or in an agency proceeding;

(2) authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency;

(3) authorize an individual who is a former employee of an agency to represent a person before an agency when the representation is prohibited by statute or regulation; or

(4) prevent an agency from requiring a power of attorney as a condition to the settlement of a controversy involving the payment of money.

Points to note re: 5 U.S.C. § 500

- Any licensed attorney or CPA may represent a taxpayer before the IRS, subject to getting a power of attorney.
- Attorneys can represent clients before any "agency" per para. (b), but CPAs can represent them only before Treasury/the IRS per para. (c).
- This section does *not* authorize the practice of law or of accounting. Those are still matters of state licensing.
- (d)(2): This provision does not authorize or limit discipline of individuals appearing before an agency. That's also a function of state law (or … of 31 U.S.C. § 330?).

31 U.S.C. §330 – Practice Before the Department

(a) Subject to section 500 of title 5, the Secretary of the Treasury may—

(1) regulate the practice of representatives of persons before the Department of the Treasury; and

(2) before admitting a representative to practice, require that the representative demonstrate—

(A) good character;

(B) good reputation;

(C) necessary qualifications to enable the representative to provide to persons valuable service; and

(D) competency to advise and assist persons in presenting their cases.

* * *

31 U.S.C. §330 (cont'd)

(c) After notice and opportunity for a proceeding, the Secretary may suspend or disbar from practice before the Department, or censure, a representative who—

(1) is incompetent;

(2) is disreputable;

(3) violates regulations prescribed under this section; or

(4) with intent to defraud, willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented.

The Secretary may impose a monetary penalty on any representative described in the preceding sentence. If the representative was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to such penalty, the Secretary may impose a monetary penalty on such employer, firm, or entity if it knew, or reasonably should have known, of such conduct. Such penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty and may be in addition to, or in lieu of, any suspension, disbarment, or censure of the representative.

* * *

(e) Nothing in this section or in any other provision of law shall be construed to limit the authority of the Secretary of the Treasury to impose standards applicable to the rendering of written advice with respect to any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion.

Points to note re: 31 U.S.C. § 330

- Authority to admit and regulate practice before Treasury under (a) is expressly made "subject to" 5 U.S.C. § 500. But 5 U.S.C. § 500 is broader, not narrower; and § 500(d) expressly states that § 500 does not "authorize or limit the discipline, including disbarment, of individuals who appear in a representative capacity before an agency." So where does that authority come from?
- Treasury has authority to "regulate practice before" it per § 330(a). And under (a)(2) it can require good character, good reputation, and other qualifications *before* admitting people to practice.
- Finally, under (b) it has the statutory authority to suspend or disbar "incompetent" or "disreputable" representatives, and anyone who violates procedural regulations.

Points to note re: 31 U.S.C. § 330 (cont'd)

- Thus, willfully failing to file your own tax returns means you can be disbarred from practice before the IRS. Why? It doesn't have anything to do with your practice before the IRS. But it's "disreputable conduct."
  - (But stay tuned: we'll return to this concept later on!)
- There are of course numerous defenses – *e.g.*, whether the failure to file was "willful" – but the point is just that "incompetence or disreputable conduct" can result in revocation of your ability to practice before the IRS.

Points to note re: 31 U.S.C. § 330 (cont'd)

- The language in § 330(e) relates to shelter opinions. It was added by Congress in 2004, in response to the argument that Treasury couldn't regulate opinion-writing because it wasn't "practice before the IRS."
- But it is also perplexing:
  - It's written in the negative: it doesn't add authority, it just says nothing here or elsewhere affects that authority. So where is that authority?!
  - It indicates Treasury can impose standards for written advice regarding "any entity, transaction plan or arrangement, or other plan or arrangement, which is of a type which the Secretary determines as having a potential for tax avoidance or evasion."
  - But what about *non*-tax shelter opinions or "other written advice"? Is even this authority *limited* to tax shelter advice?

What do 5 U.S.C. § 500 and 31 U.S.C. § 330 mean then?

- 5 U.S.C. § 500 authorizes lawyers or CPAs "to represent" a person before Treasury.
- And 31 U.S.C. §330 refers to "regulat[ing] the practice of representatives of persons" before the Treasury.
- They don't answer the question of what that "practice of representatives of persons" before the Treasury really is.
- BUT that question was answered in Loving, Ridgely, and Sexton.

Historical detour: prior Circular 230 regulations

- Two (sets of) regulations in (prior) Circular 230 were at issue in the three most important cases.
- The IRS generally barred contingent fees for tax services in 2007 amendments to Circular 230, §10.27. There were some subsequent clarifications in Notices and proposed regulations, *e.g.* regarding limited types of refund claims and whistleblower claims.
- The IRS proposed regulations in 2011 to regulate tax return preparers broadly – requiring initial certification and continuing education, imposing annual fees, and making them otherwise subject to Circular 230. These were never finalized due to the litigation discussed next.

Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014)

- Three preparers challenged the return preparer regulations on the grounds they exceeded the Treasury's authority under the statute. "The precise question is whether the IRS's statutory authority to 'regulate the practice of representatives of persons before the Department of the Treasury' encompasses authority to regulate tax-return preparers." (Kavanagh, J.)
- Even after stating that it was applying Chevron deference to the agency's interpretation, the Court unanimously held for the plaintiffs, stating, "In our view, at least six considerations foreclose the IRS's interpretation of the statute."
- The six points follow.

Loving v. IRS (cont'd)

1. **Tax return preparers are not "representatives" of persons before the Treasury.**

   - "The term 'representative' is traditionally and commonly defined as an agent with authority to bind others, a description that does not fit tax-return preparers."

   - "Simply put, tax-return preparers are not agents. They do not possess legal authority to act on the taxpayer's behalf. They cannot legally bind the taxpayer by acting on the taxpayer's behalf.… The tax-return preparer certainly *assists* the taxpayer, but the tax-return preparer does not *represent* the taxpayer."

2. **Tax return preparers do not "practice ... before" the Treasury.**

   - "'Practice before' a court or agency ordinarily refers to practice during an investigation, adversarial hearing, or other adjudicative proceeding…. That is quite different from the process of filing a tax return."

   - The statute requires "competency to advise and assist persons *in presenting their cases*," and filing a return is not "presenting a case."

Loving v. IRS (cont'd)

3. **The history of the statute.**

- Congress used the words "agents," "attorneys," "claimants," "otherwise," and "presentation of their cases" in the original version of the statute, and then expressly stated in the statute itself that it intended no change in meaning when it streamlined the provision in 1982 to just use the term "representatives."

4. **The statutory context of regulating return preparers.**

- "Over the years, Congress has enacted a number of targeted provisions specific to tax-return preparers, covering precise conduct ranging from a tax-return preparer's failing to sign returns to knowingly understating a taxpayer's liability…. Under the IRS's view here, however, all of Congress's statutory amendments would have been unnecessary."

- "[M]ultiple Congresses have acted as if Section 330 did not extend so broadly as to cover tax-return preparers."

Loving v. IRS (cont'd)

5. **The nature and scope of the authority being claimed.**

- Courts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political significance to agencies.

- Nothing in the statute's text or the legislative record contemplates the "vast expansion of the IRS's authority" to "regulate hundreds of thousands of individuals in the multi-billion dollar tax-preparation industry."

6. **The IRS's past approach to this statute.**

- "Until 2011, the IRS never interpreted the statute to give it authority to regulate tax-return preparers. Nor did the IRS ever suggest that it possessed this authority but simply chose, in its discretion, not to exercise it….. we find it rather telling."

- "In light of the text, history, structure, and context of the statute, it becomes apparent that the IRS never before adopted its current interpretation for a reason: It is incorrect."

Points to note re Loving

- Did the Loving court get it right?
- Each of its 6 reasons is at least debatable – especially that "representatives" are "agents," or that IRS had not previously said it could regulate submitters of returns.
- But most importantly for the long run of OPR and Cir. 230, Loving held that return preparation is not "practice before" the IRS. Ergo, the IRS cannot regulate it.
- So, are all activities that do not involve "representation" before the IRS beyond the scope of regulation under 31 U.S.C. § 330? Think: return preparation standards, opinion writing and advice (re tax shelters?), conflicts, firm procedures and practices, etc.? That's where Ridgely goes…

Ridgely v. Lew, 55 F.Supp.3d 89 (D.D.C. 2014)

- Ridgely, a Texas CPA at the Ryan firm, performed tax credit studies for clients and then prepared any resulting refund claims, all on a contingent fee basis. (They were characterized as "ordinary" refund claims because they preceded any examination or other action by the IRS.)
- He challenged the provisions of section 10.27 in Circular 230, arguing that the prohibition on contingent fees for refund claim preparation was beyond the IRS's authority under 31 U.S.C. § 330.

Ridgely v. Lew (cont'd)

- Once Loving was decided, the result was predictable: the D.C. District Court (Cooper, J.) held that refund claim preparation (like original return preparation) was not "representation" before the IRS and thus that the IRS did not have authority to regulate the fees charged for it.
- Ergo the prohibition on contingent fees for routine refund claims was invalid.
- This effectively means that, even for persons who do otherwise undoubtedly "practice before" the Treasury (*e.g.* a CPA like Ridgely), only their *actual representational activities* are subject to regulation pursuant to section 330(a)(1).
- The court enjoined the IRS from regulating contingent fees under § 10.27.

Sexton v. Hawkins, 2017 WL 1042464 (D. Nev. 2017)

- Sexton was an attorney who was convicted of mail fraud and money laundering. Thereafter he had been disbarred, and then correspondingly suspended by OPR from practice before the IRS. He nevertheless continued to advise taxpayers, offer tax opinions, and prepare returns.
- OPR got a complaint about it and began investigating, sending an information request under Cir. 230, § 10.20.
- Sexton sought declaratory and injunctive relief on the grounds that, after Loving and Ridgely, OPR lacked jurisdiction over him and could not enforce the information request.

Sexton v. Hawkins (cont'd)

- On OPR's motion for summary judgment, the District Court in Nevada (Boulware, J.) held for Sexton on all issues.
- Among other holdings, the order specifically holds that, notwithstanding §330(e), the IRS cannot regulate the provision of written advice because it is not "representation."
- The Court thus *permanently enjoined* OPR from further enforcement efforts v. Sexton.
- This effectively means OPR lacks even the *jurisdiction to investigate* alleged violations of Circular 230 that do not involve representational activities.

Section 330 recap after the cases

- Paragraph (a)(1) says Treasury may "regulate the practice of representatives of persons before the Department."
  - Turns out, in the wake of these cases, that it can only regulate *actual representational activities* under this authority.
- Paragraph (a)(2) says that, "*before* admitting a representative to practice," Treasury can require that the representative demonstrate good character, good reputation, necessary qualifications, and competency.
  - "Necessary qualifications" are set out in 5 U.S.C. § 500 – just admission as a lawyer or CPA.
  - And as a practical matter, the other requirements are regulated by the admitting states, and Treasury generally doesn't try to duplicate that.

Section 330 recap (cont'd)

- Subsection (c) says Treasury may suspend, disbar, or censure, a representative who is incompetent or disreputable, or violates regulations under this section, or fraudulently misleads or threatens a client.
  - Note that to form the basis for discipline, the regulations have to be (lawfully prescribed?) "under this section," *i.e.* the Circular 230 regulations.
  - Incompetence and disreputable conduct are more common bases for discipline.
  - The last one – defrauding your own client – is vanishingly rare.
- Finally, as we've seen, subsection (e) says nothing in § 330 *limits* the IRS's authority to regulate tax shelter opinions. *But it doesn't say what the source of that authority is.* Is a shelter opinion incompetent/disreputable conduct under (c)? Or even a representational activity under (a)? (Sexton suggest not.)

Legislation proposed

- Recognizing after the Loving and Ridgely losses that section 330 did not authorize the regulation of return preparation, Treasury repeatedly sought legislation.
- *E.g.*, almost immediately after Loving was decided, the 2015 Green Book (March, 2014) acknowledged that, "The Court of Appeals for the District of Columbia Circuit determined that [the return preparer] regulations exceeded the IRS' authority," and stated that "[t]he proposal would explicitly provide that the Secretary has the authority to regulate all paid tax return preparers."

Legislation proposed (cont'd)

- Even as recently as the 2025 Green Book (March 11, 2024), Treasury was still seeking new statutory authority. "The proposal would amend Title 31, U.S. Code (Money and Finance) to provide the Secretary with explicit authority to regulate all paid preparers of Federal tax returns, including by establishing mandatory minimum competency standards."
- Literally hundreds of bills or amendments have been introduced in Congress, but none have passed.

Proposed regulations

- So the IRS just went ahead and proposed regulations effectively claiming the authority to regulate return preparation and numerous other activities so long as they are "in connection with" a representational activity before the IRS. Regulations Governing Practice Before the Internal Revenue Service, Reg.-116610-20 (Dec. 26, 2024).
- Thus, for instance, the standards for accuracy on returns (§10.34), due diligence (§10.22), and errors or omissions (§10.21) are linked to "a matter before" the IRS. But oddly, the written tax advice standards are still *not*.
- Other changes – notably, contingent fees – are linked to new usage of the "disreputable conduct" authority.
- There are also a large number of changes in provisions regarding enrolled agents, appraisers, and the disciplinary process.

Questions to ask in reviewing the proposed regulations

- Are the changes consistent with the statute? Are they consistent with Loving, Ridgely, and Sexton? With other law (re: fees, amended returns, *etc.*)?
- Have the proposed provisions been adequately justified?
  - For instance, what justifies characterizing contingent fees as "disreputable conduct?" IRS claims they "encourage evasion or abuse of Federal tax laws by incentivizing practitioners to take unduly aggressive tax positions for their clients," and give the practitioner a financial stake in the client's tax benefits, which is "incompatible with ethical practice." Is that any different from any other contingent fee arrangement?
  - Or, the preamble states: "The scope of the proposed regulations is limited to practice before the IRS. Therefore the proposed regulations would not alter or supplant other ethical standards applicable to practitioners." Isn't "supplanting other ethical standards" the whole point? Especially given the narrow definition of "practice" in the cases?
- Are there other non-ethics, tax enforcement reasons lying behind the proposals? *E.g.*, regarding the ERC? Or to require amended returns?

§	Existing text	Proposed text
10.37	**Requirements for written tax advice.**	**Requirements for written tax advice.**
	(b) Reliance on advice of others. A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when –	(b) [UNCHANGED].
	* * *	
	(2) The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice;	(2) The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice, or is unaware of all relevant facts and circumstances;

§	Existing text	Proposed text
10.37	**Requirements for written tax advice. [cont'd]**	**Requirements for written tax advice. [cont'd]**
	(c) *Standard of review.* (1) In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.	(c) *Standard of review.* In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement, the practitioner's knowledge of the client's particular circumstances, and the type and specificity of the advice sought by the client.

§	Existing text	Proposed text
10.37	**Requirements for written tax advice. [cont'd]**	**Requirements for written tax advice. [cont'd]**
	(c) *Standard of review.*	[DELETED]
	* * *	
	(2) In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances, when determining whether a practitioner has failed to comply with this section.	

§	Existing text	Proposed text
10.37	**Requirements for written tax advice. [cont'd]**	**Requirements for written tax advice. [cont'd]**
	(d) Federal tax matter. A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of---	(d) Federal tax matter. A Federal tax matter, as used in this section, is any transaction, plan, arrangement, or other matter (whether prospective or completed), which is of a type that the Internal Revenue Service determines as having a potential for tax avoidance or evasion, concerning the application or interpretation of—
	(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;	(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;
	(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or	(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax, ability to take a specific return position (whether prospective or completed), or obligation to file returns; or
		* * * * *

§	Existing text	Proposed text
10.8	**Return preparation and application of rules to other individuals.** (a) *Preparing all or substantially all of a tax return.* Any individual who for compensation prepares or assists with the preparation of all or substantially all of a tax return or claim for refund must have a preparer tax identification number. Except as otherwise prescribed in forms, instructions, or other appropriate guidance, an individual must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer to obtain a preparer tax identification number. Any individual who for compensation prepares or assists with the preparation of all or substantially all of a tax return or claim for refund is subject to the duties and restrictions relating to practice in subpart B, as well as subject to the sanctions for violation of the regulations in subpart C.	**Participation in IRS proceedings by non-practitioners.** (a) *Furnishing Information.* Any individual, except appraisers who have been disqualified pursuant to §10.61(a), including non-practitioners, may appear as a witness before the Internal Revenue Service, or furnish information at the request of the Internal Revenue Service or any of its officers or employees.

§	Existing text	Proposed text
10.34	**Standards with respect to tax returns and documents, affidavits and other papers.**	**§10.34 Standards with respect to tax returns, documents, affidavits, and other papers prepared or submitted while representing a client before the Internal Revenue Service.**
	(a) Tax returns.	**(a) Tax returns prepared or submitted while representing a client in a matter before the IRS.**
	(1) A practitioner may not willfully, recklessly, or through gross incompetence --	(1) A practitioner may not willfully, recklessly, or through gross incompetence –
	(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that — (A) Lacks a reasonable basis; (B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or	(i) Prepare, while representing a client in a matter before the Internal Revenue Service or, for tax returns prepared by the practitioner prior to the representation, including returns already filed with the Internal Revenue Service, submit a tax return or claim for refund or a claim for a credit that the practitioner knows or reasonably should know contains a position that—(A) Lacks a reasonable basis; (B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

§	Existing text	Proposed text
10.34	**Standards with respect to tax returns and documents, affidavits and other papers. [cont'd]**	**§10.34 Standards with respect to tax returns, documents, affidavits, and other papers prepared or submitted while representing a client before the Internal Revenue. [cont'd]**
	(c) Advising clients on potential penalties —	**(c) Advising clients on potential penalties —**
	(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —	(1) A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —
	(i) A position taken on a tax return if—	(i) A position taken on a tax return that is relevant to the representation of a client in a matter before the Internal Revenue Service if—
	(A) The practitioner advised the client with respect to the position; or (B) The practitioner prepared or signed the tax return; and	(A) The practitioner provided written advice, as defined under §10.37, to the client with respect to the position; or (B) The practitioner prepared and submitted the tax return while representing the client in a matter before the IRS.
	(ii) Any document, affidavit or other paper submitted to the Internal Revenue Service.	(ii) Any document, affidavit or other paper submitted in a matter before the Internal Revenue Service.

§	Existing text	Proposed text
10.34	**Standards with respect to tax returns and documents, affidavits and other papers. [cont'd]**	**§10.34 Standards with respect to tax returns, documents, affidavits, and other papers prepared or submitted while representing a client before the Internal Revenue Service. [cont'd]**
	(d) Relying on information furnished by clients. A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.	**(d) Relying on information furnished by clients.** A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted in a matter before the Internal Revenue Service, generally may rely in good faith without verification upon information furnished by the client. However, the practitioner may not ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

§	Existing text	Proposed text
10.22	**Diligence as to accuracy.**	**Diligence as to accuracy.**
	(a) In general. A practitioner must exercise due diligence —	[Same]
	(1) In preparing or assisting in the preparation of, approving, and filing tax returns, documents, affidavits, and other papers relating to Internal Revenue Service matters; (2) In determining the correctness of oral or written representations made by the practitioner to the Department of the Treasury; and (3) In determining the correctness of oral or written representations made by the practitioner to clients with reference to any matter administered by the Internal Revenue Service.	(1) In preparing or assisting in the preparation of, approving, or submitting documents, affidavits, and other papers, including tax returns prepared, approved or submitted in connection with representing a client in a matter before the Internal Revenue Service; (2) In determining the correctness of oral or written representations made by the practitioner when representing a client in a matter before the Internal Revenue Service; and (3) In determining the correctness of oral or written representations made by the practitioner to clients when representing clients in a matter before the Internal Revenue Service.

§	Existing text	Proposed text
10.27	**Fees.**	**§10.51 Fees that constitute disreputable conduct.**
	(a) *In general*. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.	(a) *Unconscionable fees.* Charging an unconscionable fee is disreputable conduct.
	(b) *Contingent fees*.	(b) *Contingent fees*.
	(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.	Charging a contingent fee in connection with the preparation of an original or amended tax return or claim for refund or credit prepared prior to the examination of the tax return is disreputable conduct. (1) *Preparation of an original or amended tax return or claim for refund or credit* includes providing advice that is directly relevant to determining the existence, character, or amount of an item, entry, or another portion of a tax return or claim for refund, including any schedules that are part of the tax return or claim for refund or credit.

§	Existing text	Proposed text
10.27	**Fees.**	**§10.51 Fees that constitute disreputable conduct.**
	[DELETED] (2) A practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to—	[NOTHING COMPARABLE]
	(i) An original tax return; or	
	(ii) An amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.	
	(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service.	
	(4) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.	

§	Existing text	Proposed text
10.31	**Negotiation of taxpayer checks.** (a) A practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.	**Negotiation of payments to clients.** (a) *In general*. A practitioner may not endorse or otherwise negotiate or transfer any paper or electronic check, prepaid or debit card, phone or mobile payment, or other form of payment issued to a client by the government in respect of a Federal tax liability. *Negotiate or transfer* includes directing or accepting payment by any means, electronic or otherwise, into an account owned, controlled by, or held for the benefit of the practitioner or any firm or other entity with which the practitioner is associated.

§	Existing text	Proposed text
10.21	**Knowledge of client's omission.** A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.	**Knowledge of error or omission.** (a) *In general.* A practitioner who, while representing a client in a matter before the Internal Revenue Service, knows that either the client, the practitioner, or a prior practitioner has not complied with the revenue laws of the United States and regulations, or has made an error in or omission from any return, document, affidavit, or other paper that the client submitted or executed under the revenue laws of the United States and regulations, must advise the client promptly of the fact of such noncompliance, error, or omission. The practitioner must advise the client of the consequences of the noncompliance, error, or omission, as provided under the internal revenue laws of the United States and regulations, and recommend the corrective actions, such as disclosure, to be taken.

§	Existing text	Proposed text
10.21	**Knowledge of client's omission. [cont'd]**	**Knowledge of error or omission. [cont'd]**
	NONE	(b) Disclosure and continued representation. If a practitioner is representing a client in a matter before the Internal Revenue Service, the practitioner should request the client's agreement to disclose the noncompliance, error, or omission to the Internal Revenue Service. The practitioner must also take reasonable steps to ensure that the noncompliance, error, or omission is not repeated in subsequent submissions to the Internal Revenue Service. If the client does not agree to disclose the noncompliance, error, or omission, the practitioner should consider whether the practitioner can continue to represent the client before the Internal Revenue Service and meet the obligation to ensure diligence as to accuracy under §10.22.

§	Existing text	Proposed text
10.33	**Best practices for tax advisors.**	**Best practices for tax practitioners.**
	(a) Best practices. Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:	[UNCHANGED]
	(1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.	(1) Communicating clearly with the client regarding the terms of the engagement, including those relating to fees, expenses, and payment. For example, the practitioner should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

§	Existing text	Proposed text
10.33	**Best practices for tax advisors. [cont'd]**	**Best practices for tax practitioners. [cont'd]**
	(4) Acting fairly and with integrity in practice before the Internal Revenue Service. [DELETED]	(4) Maintaining a policy related to data security safeguards with respect to a client's tax return or other confidential information. Practitioners should also consider developing an incident response plan with specific procedures for responding to a data breach and for disclosure of data breaches to clients. (5) Identifying, evaluating, and addressing a mental impairment, whether chronic or temporary, arising out of or related to age, substance abuse, a physical or mental health condition, or other circumstance that may have an adverse impact on a tax practitioner's ability to provide the highest quality representation of a client before the Internal Revenue Service.

§	Existing text	Proposed text
10.33	**Best practices for tax advisors. [cont'd]**	**Best practices for tax practitioners. [cont'd]**
		(6) Establishing a business continuity and succession plan that addresses procedures and safeguards in the event of the sale or cessation of the practitioner's practice, the practitioner's death or disability, or the occurrence of extraordinary events such as a natural disaster, cyberattack, or pandemic.

§	Existing text	Proposed text
10.36	**Procedures to ensure compliance.**	**Procedures to ensure compliance.**
	(a) Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B, and C of this part, as applicable. In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in this paragraph, the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.	(a) Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including, while representing a client, the provision of advice concerning Federal tax matters or the preparation or submission of documents in a matter before the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees (whether or not those individuals are otherwise subject to this part) for purposes of complying with subparts A through C of this part, as applicable (including the best practices described in §10.33(a)). In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in this paragraph (a), the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.

§	Existing text	Proposed text
10.35	**Competence.**	**Competence.** [TEXT IS SAME BUT ADDS THE FOLLOWING] Competency includes understanding the benefits and risks associated with relevant technology that is used by the practitioner to provide services to clients or to store and transmit tax return and other confidential information.

Discussion

- The proposed regs are here: https://www.regulations.gov/docket/IRS-2024-0063/document
- Comments were due by February 24, 2025, and a hearing was held March 6, 2025. There were many comments (over 700), and about a dozen witnesses at the hearing, but so far the press coverage has been scant.
- Comments (selected) and the hearing agenda can also be reviewed here: https://www.regulations.gov/docket/IRS-2024-0063
- An informal hearing transcript is available here: https://www.taxnotes.com/tax-notes-today-federal/practice-and-procedure/transcript-available-irs-hearing-practitioner-regs/2025/03/07/7rl2c?highlight=%22Circular%20230%22

Most recent developments

- The IRS issued a bulletin regarding practitioners' ability to obtain taxpayer information when they are representing another practitioner before OPR. "Requesting IRC 6103 Information from the OPR," Issue No. 2025-7 (May 28, 2025) retrievable at Requesting IRC 6103 Information from the OPR .
  - Unfortunately the very first citation to the IRC is to "section 6013" not "6103." (6013 is "Joint Returns of Income Tax for Husband and Wife.")
  - The alert also misstates the criminal restrictions on re-disclosure set forth in section 7213(a); and it includes a link to a form letter requiring the practitioner to repeat those misstatements in requesting information.
  - It correctly notes, however, that re-disclosure can be "incompetence and disreputable conduct" under Cir. 230, § 10.51(a)(15).

Most recent developments

- The House version of the "One Big Beautiful Bill" contained a provision on the very last page regarding contingent fees:

> **SEC. 112211. RESTRICTION ON REGULATION OF CONTINGENCY FEES WITH RESPECT TO TAX RETURNS, ETC.**
>
> The Secretary of the Treasury may not regulate, prohibit, or restrict the use of a contingent fee in connection with tax returns, claims for refund, or documents in connection with tax returns or claims for refund prepared on behalf of a taxpayer.

H.Rep. 119-106 (May 20, 2025) at 1196.

- The AICPA recommended this provision be deleted, claiming, "Allowing contingent fee arrangements … is an open invitation to abuse the tax system." Tax Notes Doc. 2025-15688. This is consistent with their comments on the proposed regulations.
- The language was dropped from the Senate version of the bill and wasn't enacted.

Thank you

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