

# ARTICLE

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## Circular 230: New Rules Governing Practice Before the IRS

**Abstract.** This Article addresses the issue of tax preparer oversight. Currently, anyone may prepare a tax return for a fee. However, those preparers who are not lawyers, certified public accountants, or authorized to practice before the IRS are not required to meet a minimum standard of education, knowledge, training, or skill. After recent government studies revealed that these non-trained tax return preparers were making costly, egregious mistakes, the IRS proposed mandating oversight over any individual who prepares a tax return for compensation. This Article discusses, in depth, the Department of the Treasury's proposed regulations to broaden the authorities of IRS Circular 230 and the Office of Professional Responsibility. Such proposals would adequately ensure the timeliness, accuracy, and completeness of tax returns.

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## ARTICLE CONTENTS

I. Introduction.....	286
II. Brief History of Circular 230 .....	292
III. Practice Before the IRS .....	294
IV. Proposed Regulations .....	300
V. Conclusion.....	305

## I. INTRODUCTION

A majority of taxpayers in the United States rely upon tax return preparers to meet their income tax obligations.<sup>1</sup> “The IRS estimates that there are between 900,000 and 1.2 million”<sup>2</sup> individuals preparing more than 87 million tax returns for a fee.<sup>3</sup> Preparers assist with return preparation, identify unclear tax issues, and apprise taxpayers of potential civil or criminal penalties for taking an erroneous position. Competent and knowledgeable preparers can prevent taxpayers from making costly errors, as well as relieve the IRS of costly examination and collection burdens.<sup>4</sup>

The level of tax return preparer oversight depends on whether the preparer holds a professional license or has been enrolled to practice before the IRS. “All paid tax return preparers are subject to civil [and criminal] penalties” for misconduct;<sup>5</sup> however, only attorneys, certified public accountants, and other “practitioners” authorized to practice before the IRS are subject to the stringent standards of practice promulgated in part 10 of title 31 of the Code of Federal Regulations—reprinted in Treasury Department Circular 230.<sup>6</sup> Practitioners who violate Circular 230 may be

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1. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 14,539, 14,542 (proposed Mar. 26, 2010) (codified at 26 C.F.R. pt. 1).

2. IRS, PUBL’N 4832, RETURN PREPARER REVIEW, at 8 (Dec. 2009) (citing IRS OFFICE OF PROGRAM EVALUATION AND RISK ANALYSIS, PAID PREPARER REVIEW FOR NATIONAL PUBLIC LIAISON (Sept. 2007)), available at <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.

3. See *id.* at 7–8 (discussing the prevalence of American taxpayers’ reliance on outside assistance).

4. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 14,539, 14,542.

5. IRS, PUBL’N 4832, RETURN PREPARER REVIEW, at 1 (Dec. 2009), available at <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.

6. Compare I.R.C. § 6694 (2006) (imposing penalties upon income tax return preparers who knew or reasonably should have known of an understatement), *id.* § 6695 (implementing additional penalties against preparers regarding various aspects of tax preparation), *id.* § 6701 (establishing penalties for persons who knowingly aid or assist in preparing portions of returns that, if used, “would result in an understatement of the liability for tax of another person”), *id.* § 6713 (imposing penalties for tax return preparers who “disclose[ ] any information furnished to [them] for, or in connection with, the preparation of any such return, or use[ ] any such information for any purpose other than to prepare, or assist in preparing, any such return”), and *id.* § 7701(a)(36) (defining an income tax return preparer as “any person who prepares for compensation, or who employs one or more persons to prepare for compensation, any return of tax imposed”), with 31 C.F.R. § 10.2 (2010), reprinted in Treas. Dep’t Circular 230 (Rev. 4-2008) (defining what “attorney,” “certified public accountant,” and “practitioner” mean pursuant to the Code), and *id.* § 10.50 (authorizing the Secretary of the Treasury to censure, suspend or disbar attorneys, certified public accountants, and

censured, suspended, or disbarred from practice.<sup>7</sup> The IRS Office of Professional Responsibility is charged with investigating allegations of practitioner misconduct and conducting disciplinary proceedings where warranted.<sup>8</sup>

Presently, any individual may prepare a tax return.<sup>9</sup> Preparers who are not attorneys, certified public accountants, or authorized to practice before the IRS are not required to have a minimum level of education, knowledge, training, or skill.<sup>10</sup> Although non-practitioner preparers are not subject to such scrutiny,<sup>11</sup> preparers and taxpayers remain subject to substantial civil and criminal penalties for tax compliance violations.<sup>12</sup>

In 2009, the IRS published the results of return preparer studies in Publication 4832.<sup>13</sup> According to the report, the Government

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other practitioners for being incompetent or disreputable). *See also* IRS, PUBL'N 4832, RETURN PREPARER REVIEW, at 2 (Dec. 2009), *available at* <http://www.irs.gov/pub/irs-pdf/p4832.pdf> (discussing the industry of the tax return preparer); IRS, *Preparer Penalties*, IRS.GOV, <http://www.irs.gov/efile/article/0,,id=205568,00.html> (last updated Dec. 8, 2010) (explaining the various penalties provided in the I.R.C. which may be asserted against individuals and firms that meet the definition of a tax preparer); IRS, *Responsibilities of a Tax Return Preparer—Filing Season 2011*, IRS.GOV, <http://www.irs.gov/businesses/small/article/0,,id=231827,00.html> (last updated Jan. 14, 2011) (noting that tax return preparers are required to understand substantive law pertaining to income and deductions as well as the consequences for inaccurate tax return preparation).

7. 31 C.F.R. § 10.50.

8. *Id.* § 10.1(b).

9. IRS, PUBL'N 4832, RETURN PREPARER REVIEW, at 1 (Dec. 2009), *available at* <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.

10. *See id.* at 17 (describing the existing oversight of tax return preparers and stating that unenrolled agents are not required to possess a minimum education or training).

11. *See id.* (asserting that unenrolled tax return preparers are generally not regulated by the IRS).

12. *See* I.R.C. § 6694 (2006) (imposing a \$250 penalty on tax return preparers for filing an understated return based upon an unrealistic position, and escalating the penalty to \$1,000 if the tax return preparer acted willfully or recklessly); *id.* § 6695(e) (providing fines in \$50 increments for various failures of conduct required of a tax preparer); *id.* § 6701 (fining \$1,000 to any person who aids or abets in the understatement of a tax return, or setting the same at \$10,000 with respect to a corporate tax return); *id.* § 6713 (assessing a \$250 fine for each incident where a professional tax return preparer disclosed or used “information furnished for any purpose other than to prepare, or assist in preparing” a tax return); *see also* IRS, *Overview—Abusive Return Preparer*, IRS.GOV, <http://www.irs.gov/compliance/enforcement/article/0,,id=106712,00.html> (last updated Oct. 12, 2010) (addressing the concept of tax fraud by unscrupulous preparers and cautioning taxpayers to use discretion when selecting someone to prepare their return); IRS, *Tax Preparer Fraud*, IRS.GOV, <http://www.irs.gov/newsroom/article/0,,id=134094,00.html> (last updated Nov. 2, 2007) (providing introductory material to taxpayers on how to avoid fraudulent tax return preparers and summarizing cases where preparers were fined or sentenced to prison time for tax fraud).

13. *See* IRS, PUBL'N 4832, RETURN PREPARER REVIEW, at 13–17 (Dec. 2009), *available at* <http://www.irs.gov/pub/irs-pdf/p4832.pdf> (publishing the results of its tax return preparer

Accountability Office (GAO) reviewed paid tax return preparer services as part of a study in 2006.<sup>14</sup> By posing as taxpayers, GAO staff conducted an internal compliance audit of several metropolitan chain commercial tax preparation firms.<sup>15</sup> The Treasury Inspector General for Tax Administration (TIGTA) also conducted its own review of paid non-practitioner tax return preparers two years later.<sup>16</sup> “Although . . . these studies precluded GAO and TIGTA from generalizing their results and drawing conclusions about all paid tax return preparers, the results of these ‘shopping visits’ are illuminating.”<sup>17</sup>

As part of the GAO study, nineteen outlets of chain commercial tax return preparation firms were asked to prepare federal tax returns based on one of two different scenarios.<sup>18</sup> These same tax returns had previously been completed by staff at the GAO, the Senate Committee on Finance, and the Joint Committee on Taxation, and the content and correct amount of taxes owed had already been agreed upon.<sup>19</sup>

According to the GAO, only two of the [nineteen] tax return preparers had the correct tax liability and refund amounts on the return they prepared and all [nineteen] tax return preparers made a mistake on the prepared returns. Although most of the [nineteen] tax return preparers included all income for which a payor had an information reporting requirement, three tax return preparers reported incorrect amounts of ordinary dividends or capital gain income. Eight of [nineteen] tax return preparers reported the shopper’s prior year’s state tax refund incorrectly. Several tax return preparers did not ask about income from sources other than wages and, although all tax return preparers were told that there was income from casual self-employment arrangements, [ten] of the [nineteen] tax return preparers did not report this income as required. Several of the tax return preparers who did report this income on the returns they completed did not provide

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compliance studies).

14. *Id.* at 13 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-06-563T, PAID TAX RETURN PREPARERS: IN A LIMITED STUDY, CHAIN PREPARERS MADE SERIOUS ERRORS (Apr. 4, 2006)).

15. *Id.*

16. *Id.* at 14 (citing TREAS. INSPECTOR GEN. FOR TAX ADMIN., REP. # 2008-40-171, MOST TAX RETURNS PREPARED BY A LIMITED SAMPLE OF UNENROLLED PREPARERS CONTAINED SIGNIFICANT ERRORS (Sept. 3, 2008)).

17. *Id.* at 13.

18. *Id.*

19. *Id.*

the shopper with correct information. One tax return preparer told the shopper that she did not have to report the income unless it was more than \$3,200. Others advised that the shopper had discretion on whether to report this income because the IRS would not know about the income unless it was reported.<sup>20</sup>

Mistakes were also made regarding the proper amount of credits and deductions.<sup>21</sup>

For example, [ten] shoppers were entitled to a credit for child care expenses for their shopper, but none of the tax return preparers who prepared a return for these shoppers claimed the credit. Although nine shoppers would have benefitted by itemizing their deductions, two of the nine tax return preparers who prepared their returns only claimed the standard deduction. Of the seven tax return preparers who did itemize their shopper's deductions, five prepared returns claiming an incorrect amount of deductions. Six of these nine tax return preparers also erred in determining the amount of education credit to claim for the shopper. The [ten] tax return preparers who were presented with an earned income tax credit scenario also made significant errors. Only one of these [ten] tax return preparers asked all of the required questions and half of the [ten] tax return preparers incorrectly reported that GAO's shopper was entitled to the earned income tax credit for two children when the shopper was only entitled to claim the credit for one of her children.<sup>22</sup>

Aside from these computational errors, some of the tax return preparers omitted the required identifying information.<sup>23</sup> Of the nineteen tax return preparers, four did not include their signature on the prepared returns, two failed to include their identifying number, and one did not include a company name or employer identification number.<sup>24</sup>

The TIGTA study reviewed twenty-eight unenrolled tax return preparers in which twelve worked at "chain commercial tax return preparation firms and [sixteen] worked at, or owned, small, independent

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20. *Id.*

21. *Id.*

22. *Id.* at 13–14.

23. *Id.* at 14.

24. IRS, PUBL'N 4832, RETURN PREPARER REVIEW, at 14 (Dec. 2009), available at <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.

tax return preparation firms.”<sup>25</sup> The preparers were asked to complete federal tax returns based on one of five scenarios.<sup>26</sup> Because each of these scenarios was “specific, straightforward, and not dependent on interpretation,” TIGTA did not consider them to be complex tax topics.<sup>27</sup>

Each of the shopped tax return preparers used commercial tax preparation software to assist them in the preparation of the tax returns.

According to TIGTA, most of the [twenty-eight] tax return preparers asked probing questions before and during the preparation of the tax returns and [sixteen] of the [twenty-eight] tax return preparers asked the shoppers to complete an information worksheet. Tax return preparers who did not ask probing questions generally made assumptions or relied upon tax return preparation software to make eligibility determinations. The use of probing questions or an information worksheet was not an indication, however, of the accuracy of the resulting return. TIGTA found that [eleven] of the [sixteen] tax return preparers who had the shopper complete a worksheet prepared an incorrect return. And, at least one tax return preparer who did not ask the shopper any probing questions nevertheless prepared a correct tax return.

Seven tax return preparers did not exercise due diligence when determining whether the shopper was eligible to receive the earned income tax credit. Although all seven tax return preparers completed the required Form 8867, *Paid Preparer's Earned Income Credit Checklist*, none asked any or all of the probing questions on the form. One tax return preparer complained to the shopper that the tax return preparation software prompts slowed down the preparation process.

Seventeen tax return preparers did not show the correct amount of tax owed or refund due on the returns they prepared. Although all tax return preparers correctly reported income from savings account interest, wages, and self-employment, no tax return preparer correctly calculated the expenses relating to self-employment income.

If taxpayers had filed the [seventeen] returns that did not show the correct amount of tax owed or refund due, the net effect would have been \$12,828 in understated taxes.

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25. *Id.*

26. *Id.*

27. *Id.*

TIGTA also found that the preparers of six of the [seventeen] returns prepared incorrectly acted willfully or recklessly during the preparation of the shopped returns. These tax return preparers added or increased deductions without permission and, in some situations, did so after the shopper questioned whether they were entitled to receive the deductions. Examples include a tax return preparer who increased the child care expenses claimed on the return after the shopper explained to the tax return preparer that child care expenses were paid in cash and a tax return preparer who completed a return claiming a deduction for charitable contributions after the shopper stated that no charitable contributions were made. These six individuals prepared more than 950 tax returns during the 2008 filing season.<sup>28</sup>

Similar to the GAO study, some of the tax return preparers in the TIGTA study did not provide the required identifying information.<sup>29</sup> Of the twenty-eight tax return preparers, five did not sign the shopper's tax return and two failed to include their identification numbers.<sup>30</sup> Additionally, three of the tax return preparers unnecessarily exposed their client's confidential tax information by repeating their client's social security numbers out loud or making their client's return information "visible on the computer screen or desk when other individuals were present in the office."<sup>31</sup>

In response to this study, the IRS recommended that "all individuals who prepare returns for compensation and are required to sign those returns to register and obtain a preparer tax identification number."<sup>32</sup> In order to procure such number, the preparer must submit to competency testing, suitability checks, and continuing professional education.<sup>33</sup> Furthermore, the IRS proposed including all paid tax return preparers under Treasury Department Circular 230<sup>34</sup> and increasing the staffing of the Office of Professional Responsibility to allow for increased

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28. *Id.* at 15–16 (footnotes omitted).

29. *Id.* at 16.

30. *Id.*

31. *Id.* at 16–17.

32. *Id.* at 33.

33. *See id.* at 34–36 (recommending measures and noting the general support of such requirements by commentators on the issue).

34. IRS, PUBL'N 4832, RETURN PREPARER REVIEW, at 37 (Dec. 2009), available at <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.



investigations of tax return preparer misconduct.<sup>35</sup>

On March 26, 2010, based primarily on the recommendations made in Publication 4832, the Department of the Treasury published proposed regulations that establish “Registered Tax Return Preparers” as a new class of practitioners subject to the dictates of Circular 230.<sup>36</sup> Return preparers will be required to procure a unique identification number.<sup>37</sup>

## II. BRIEF HISTORY OF CIRCULAR 230

Following the Civil War, Congress permitted citizens to make claims against the government for the value of horses and property lost during the war.<sup>38</sup> The provision was subject to much abuse.<sup>39</sup> In response, Congress passed the Horse Act of 1884,<sup>40</sup> which granted the Secretary of the Treasury the authority to regulate the admission of agents representing claimants before the Treasury Department, and to penalize agents who failed to comply with those regulations.<sup>41</sup> Between 1886 and 1921, the Treasury published circulars that provided guidance to agents.<sup>42</sup> In 1921, those circulars were combined with other statutes into a singular governing circular—Treasury Department Circular 230.<sup>43</sup> Circular 230 addressed

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35. *Id.* at 38.

36. See Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 14,539, 14,541 (proposed Mar. 26, 2010) (codified at 26 C.F.R. pt. 1) (discussing the proposed regulations concerning eligibility standards and the use of preparer tax identification numbers by tax return preparers).

37. *Id.* (“After a transition period, . . . it is intended that only individuals who satisfy the eligibility standards may obtain and use a PTIN [(preparer tax identification number)] as a tax return preparer.”); IRS, PUBL’N 4832, RETURN PREPARER REVIEW, at 33 (Dec. 2009), available at <http://www.irs.gov/pub/irs-pdf/p4832.pdf> (“The IRS, therefore, intends to require all individuals who prepare returns for compensation and are required to sign those returns to register and obtain a preparer tax identification number.”).

38. Larry Orahod, *History of Enrolled Agents*, KINGOFTAXES.NET, <http://www.kingoftaxes.net/images/Docs/History-of-Enrolled-Agents.pdf> (last visited May 9, 2011).

39. See *id.* (stating “that more claims had been submitted than horses lost”).

40. Act of July 7, 1884, ch. 334, 23 Stat. 236, 258, reprinted in part in Treas. Dep’t Circular 230, 4-1600A C.B. 408 (1921).

41. See *id.* at 258–59 (authorizing the Secretary of the Treasury to regulate the admission of persons who may represent claimants before the Treasury Department and granting correlative disciplinary power).

42. See Larry Orahod, *History of Enrolled Agents*, KINGOFTAXES.NET, <http://www.kingoftaxes.net/images/Docs/History-of-Enrolled-Agents.pdf> (last visited May 9, 2011) (providing a timeline detailing the evolution of enrolled agents and indicating that “[a] number of circulars [were published] dating back as far as 1886”).

43. See Treas. Dep’t Circular 230, 4-1600A C.B. 408, 412 (1921) (stating that various

the “Laws and Regulations Governing the Recognition of Attorneys and Agents and Other Persons Representing Claimants Before the Treasury Department.”<sup>44</sup> Applicants were required to show that they were of good reputation, possess necessary qualifications, and take an oath of allegiance.<sup>45</sup> In 1936, largely because of lobbying efforts by the American Bar Association and the predecessor to the American Institute of Certified Public Accountants (AICPA), Circular 230 was revised to allow only lawyers and certified public accountants to represent taxpayers before the IRS.<sup>46</sup> In 1951, the National Society of Public Accountants and others lobbied to have these restrictions removed.<sup>47</sup> Circular 230 was subsequently revised to allow all “qualified persons” to practice before the Treasury Department.<sup>48</sup> However, “qualified persons” were to be determined by an entrance examination prepared by the AICPA.<sup>49</sup> By 1957, it was clear that the demand for qualified return preparers surpassed supply.<sup>50</sup> Therefore, Circular 230 was overhauled in 1959 to ease the burden of enrollment.<sup>51</sup> Individuals other than attorneys and CPAs were allowed to represent taxpayers provided they could pass a new Special Enrollment Exam developed by the Treasury Department.<sup>52</sup>

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regulations promulgated by former circulars would be superseded by the proposed regulations of Circular 230).

44. *Id.* at 408.

45. *Id.*

46. *See* Laws and Regulations Governing the Recognition of Agents, Attorneys, and Other Persons Representing Claimants Before the Treasury Department and Offices Thereof, 1 Fed. Reg. 1413, 1414 (Sept. 22, 1936) (requiring that only enrolled attorneys and agents “shall be eligible to practice before the Treasury Department”); *see also* Larry Orahhood, *History of Enrolled Agents*, KINGOFTAXES.NET, <http://www.kingoftaxes.net/images/Docs/History-of-Enrolled-Agents.pdf> (last visited May 9, 2011) (attributing the revision of Circular 230 to lobbying efforts of the “American Bar Association and the American Institute of Accountants”).

47. *See* Larry Orahhood, *History of Enrolled Agents*, KINGOFTAXES.NET, <http://www.kingoftaxes.net/images/Docs/History-of-Enrolled-Agents.pdf> (last visited May 9, 2011) (noting the lobbying efforts of the National Society of Public Accountants and others in revising Circular 230).

48. *Id.*

49. *Id.*

50. *Id.*

51. *See, e.g.*, Appearance of Unenrolled Preparers of Returns, 24 Fed. Reg. 1157, 1157–58 (Feb. 14, 1959) (codified as amended at 31 C.F.R. § 10.7(a) (amending the requirements for tax return preparers by eliminating the enrollment requirement).

52. *See* IRS, *Enrolled Agent Information*, IRS.GOV, <http://www.irs.gov/taxpros/agents/article/0,,id=100710,00.html> (last updated Jan. 12, 2011) (instructing that, presently, to become an enrolled agent, applicants must register and pass the Special Enrollment Examination produced by

Circular 230 has subsequently been revised on many occasions. Most recently, it was revised to include best practices and to address abusive tax shelters.<sup>53</sup> With minor exceptions, the new provisions require qualified practitioners who offer written tax advice to provide a complete and detailed opinion regarding all federal tax matters affecting a transaction, or to state explicitly that it is not such an opinion and, thus, cannot be relied upon for the purpose of avoiding penalties provided under the Internal Revenue Code.<sup>54</sup> These requirements may have curtailed abusive tax shelters, but they substantially increased the cost to taxpayers seeking to take a favorable tax position.

### III. PRACTICE BEFORE THE IRS

The Treasury has authority to issue regulations that govern practice before the IRS.<sup>55</sup> The main body of these regulations is Treasury Department Circular 230.<sup>56</sup> The Treasury Secretary can impose a monetary penalty or censure, suspend, or disbar from practice any representative found to be incompetent or disreputable, or who “willfully and knowingly misleads or threatens the person being represented or a prospective person to be represented,” or otherwise violates Circular

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the IRS); Larry Orahoad, *History of Enrolled Agents*, KINGOFTAXES.NET, <http://www.kingoftaxes.net/images/Docs/History-of-Enrolled-Agents.pdf> (last visited May 9, 2011) (indicating the first implementation of the Special Enrollment Exam).

53. See 31 C.F.R. § 10.33(a) (2010) (listing the best practice requirements for tax advisors, including clear communication, evaluating facts, and acting fairly).

54. See *id.* § 10.35(b)(4) (directing practitioners to inform taxpayers as to the intended use of written advice).

55. See 31 U.S.C. § 330(a) (2006) (authorizing the Secretary of the Treasury to issue IRS regulations). Specifically, § 330(a) provides:

[T]he Secretary of the Treasury may . . . regulate the practice of representatives of persons before the Department of the Treasury; and . . . 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.

*Id.*

56. See 31 C.F.R. pt. 10 (providing the same regulations contained in Treasury Department Circular 230). In addition to Circular 230, the Treasury Secretary has issued regulations designated “Conference and Practice Requirements,” which address issues such as powers of attorney, changing representation, delivery of refund checks, evidence required to substantiate factual allegations made in conferences, and disputes between representatives. See generally IRS, PUBL’N 216, CONFERENCE AND PRACTICE REQUIREMENTS, at 5–8 (1992), available at <http://www.irs.gov/pub/irs-pdf/p216.pdf> (supplementing Circular 230).

230.<sup>57</sup> Furthermore, the Secretary “may impose a monetary penalty on the employer . . . [of any representative if the employer] knew, or reasonably should have known of such conduct.”<sup>58</sup>

The Office of Professional Responsibility (OPR) is authorized to enforce Circular 230.<sup>59</sup> The OPR was formed in 2003 and has twice the staff of its predecessor, the Office of the Director of Practice.<sup>60</sup> The OPR reviews applications for enrollment to practice, institutes disciplinary proceedings, and makes inquiries into various ethical matters under its jurisdiction.<sup>61</sup> Additionally, it maintains enrollment rosters, issues enrollment cards, authorizes any person to represent another without enrollment for the purpose of a particular matter, and reviews petitions for reinstatement from representatives who have been disbarred or appraisers who have been disqualified.<sup>62</sup>

The Secretary of the Treasury appoints the Director of the Office of Professional Responsibility, who is technically within the Office of the Secretary of the Treasury.<sup>63</sup> However, the Director of the OPR falls under the jurisdiction of the IRS and reports to the head of the Services and Enforcement division, who reports directly to the Commissioner.<sup>64</sup>

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57. See 31 U.S.C. § 330(b) (authorizing the Secretary to penalize representatives who fail to abide by the regulations); 31 C.F.R. § 10.50 (granting enforcement powers to the Secretary). Disreputable conduct includes willful failure “to sign a tax return prepared by the practitioner,” and the unauthorized disclosure of return information. *Id.* § 10.51.

58. See 31 C.F.R. § 10.50(c)(1)(ii) (directing practitioners to inform taxpayers as to the intended use of written advice).

59. See *id.* (stating the duties of the Office of Professional Responsibility, which include anything necessary to carry out Circular 230).

60. See IRS, *IRS Establishes Office of Professional Responsibility*, IRS.GOV, <http://www.irs.gov/newsroom/article/0,,id=105533,00.html> (last updated July 12, 2004) (describing the Office of Professional Responsibility and noting that it replaced the Office of the Director of Practice).

61. See IRS, *About the Office of Professional Responsibility*, IRS.GOV, <http://www.irs.gov/taxpros/agents/article/0,,id=176297,00.html> (last updated Nov. 9, 2010) (exploring what the OPR is entitled to do according to Circular 230).

62. See 31 C.F.R. § 10.1(b) (detailing the OPR’s duties, which include managing enrollment, disciplinary proceedings, and whatever is necessary or ordered by the Secretary).

63. See *id.* § 10.1(a) (establishing the OPR and noting that the Director of the OPR will be appointed by the Secretary of Treasury).

64. See IRS, *About the Office of Professional Responsibility*, IRS.GOV, <http://www.irs.gov/taxpros/agents/article/0,,id=176297,00.html> (last updated Nov. 9, 2010) (pointing out that the Director of the OPR is “a ‘dual report’ to the Commissioner, IRS, and to the Deputy Commissioner for Services and Enforcement”).

The Office of the Director of the OPR is comprised of four units.<sup>65</sup> The Case Development and Licensure Branch “reviews disciplinary cases for jurisdiction, recommends the disposition of questionable applications for enrollment, and oversees OPR’s Office of Practitioner Enrollment.”<sup>66</sup> The Enforcement & Oversight Branch I unit “investigates practitioner misconduct with respect to possible violations of the Circular 230 regulations, recommends disciplinary sanctions, negotiates settlements, and assists the IRS Associate Chief Counsel (General Legal Services) in presenting contested cases before administrative law judges and with appeals to the Appellate Authority.”<sup>67</sup>

[The] Enforcement & Oversight Branch II . . . unit provides administrative support to the Joint Board for the Enrollment of Actuaries, an independent Federal board established pursuant to the Employee Retirement Income Security Act of 1974 by the Secretary of Labor and the Secretary of the Treasury. The Joint Board, pursuant to its authority under ERISA, acts on applications for enrolled actuary status and, as appropriate, suspends or terminates the enrollment of actuaries who violate the Joint Board’s regulations.<sup>68</sup>

The Office of Practitioner Enrollment unit “processes applications for initial enrollment as an enrolled agent or as an enrolled retirement plan agent and, on three-year cycles, processes applications for renewal of enrollment.”<sup>69</sup>

“Practitioners”<sup>70</sup> must seek authorization from OPR to practice before the IRS.<sup>71</sup> Authorization is required to ensure that practitioners are competent and to protect the best interests of taxpayers and the IRS.<sup>72</sup>

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65. *See id.* (outlining the four units that comprise the staff of the Director of the OPR).

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *See* 31 C.F.R. § 10.2(a)(5) (2010) (identifying attorneys, certified public accountants, enrolled agents, enrolled actuaries and enrolled retirement plan agents as “practitioners” for purposes of Circular 230).

71. *See* IRS, *About the Office of Professional Responsibility*, IRS.GOV, <http://www.irs.gov/taxpros/agents/article/0,,id=176297,00.html> (last updated Nov. 9, 2010) (proving the OPR Director with the “responsibility to act on applications for enrollment to practice before the IRS”).

72. *See, e.g.,* *Salman v. Swanson*, No. CV-R-79-258-ECR, 1980 WL 1616, at \*2 (D. Nev. May 30, 1980) (noting that both taxpayers and the IRS have an interest in qualified representatives for IRS proceedings), *aff’d*, 672 F.2d 923 (9th Cir. 1982).

Qualified practitioners include attorneys,<sup>73</sup> certified public accountants,<sup>74</sup> enrolled agents,<sup>75</sup> enrolled actuaries,<sup>76</sup> and those given temporary recognition to practice, those representing themselves or immediate family members, and agents for private and governmental entities.<sup>77</sup> “Practice before the Internal Revenue Service” has a very broad scope.<sup>78</sup>

Practice . . . comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion, and representing a client at conferences, hearings, and meetings.<sup>79</sup>

Practice before the IRS, therefore, includes giving written tax guidance to a client regardless of the practitioner’s physical presence “before” any IRS tribunal or agent. Nevertheless, the OPR does not have the authority to regulate return preparers who are presently regulated by the Compliance Division of the IRS.<sup>80</sup>

Circular 230 imposes certain basic duties upon practitioners. Practitioners may not use any false or misleading statements in advertising or soliciting clients in any IRS matter, and enrolled agents are prohibited from suggesting they are employed by the IRS or representing themselves

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73. See 31 C.F.R. § 10.3(a) (declaring attorneys “not currently under suspension or disbarment from practice before the Internal Revenue Service” are among those able to practice before the IRS after they file a written declaration that they are qualified as an attorney).

74. See *id.* § 10.3(b) (“Any certified public accountant who is not currently under suspension or disbarment from practice . . . may practice before the Internal Revenue Service by filing . . . written declaration that . . . [they are] qualified.”).

75. See *id.* § 10.3(c) (reporting that enrolled agents may practice before the IRS as long as they are not disbarred or suspended); *id.* § 10.4(a) (indicating that enrolled agent status may be achieved by showing, through a written examination, competence in tax matters).

76. See *id.* § 10.3(d) (authorizing enrolled actuaries to practice before the IRS).

77. See *id.* § 10.7 (providing the regulation that allows individuals to represent themselves and, under limited practice, those representing family members and private or governmental entities).

78. See *id.* § 10.2(a)(4) (outlining the various areas that encompass practicing before the IRS).

79. *Id.*

80. Cf. IRS, *About the Office of Professional Responsibility*, IRS.GOV, <http://www.irs.gov/taxpros/agents/article/0,,id=176297,00.html> (last updated Nov. 9, 2010) (indicating a future plan to expand OPR’s jurisdiction to include tax return preparers).

to be “certified.”<sup>81</sup> Practitioners may not charge unreasonable fees<sup>82</sup> but may disclose the methods used for calculating and billing for costs.<sup>83</sup> When preparing returns, practitioners are required to exercise due diligence in the preparation of such returns and related documents, as well as in vetting the representations made to the IRS.<sup>84</sup> “[P]ractitioner[s] may not unreasonably delay the prompt disposition of any matter before the [IRS].”<sup>85</sup> Furthermore, upon request by an IRS agent, practitioners must promptly submit unprivileged information or make reasonable inquiries to the client regarding the identity of those persons who have possession or control of such information.<sup>86</sup> Practitioners must advise a client of the consequences of any known error, omission, or instance of non-compliance with the revenue laws.<sup>87</sup> In addition, practitioners must avoid conflicts of interest,<sup>88</sup> promptly return all records to a client upon

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81. 31 C.F.R. § 10.30(a)(1) (prohibiting practitioners from engaging in false solicitations and enrolled agents from claiming they are certified to work for the IRS).

82. *See* 31 C.F.R. § 10.27(a) (2010) (forbidding practitioners from charging an “unconscionable fee” when working on IRS matters). Generally, practitioners are not to charge contingent fees except in limited circumstances, including: examining an original tax return or an amended return if filed 120 days after notice; services rendered in connection with “statutory interest or penalties assessed by the [IRS]”; and services rendered regarding IRS judicial proceedings. *Id.* § 10.27(b).

83. *See id.* § 10.30(b) (allowing practitioners to disclose fee information and mandating that “[a]ny statement of fee information concerning matters in which costs may be incurred must include a statement disclosing whether clients will be responsible for such costs”).

84. *See id.* § 10.22 (requiring practitioners to use due diligence to ensure accuracy in the performance of their functions). Except for purposes of tax shelters and return positions, practitioners using reasonable care are “presumed to have exercised due diligence” when relying on the work of other persons. *Id.* § 10.22(b); *see also id.* § 10.34(d) (“A practitioner advising a client to take a position on a tax return . . . may rely in good faith without verification upon information furnished by the client.”).

85. *Id.* § 10.23.

86. *See id.* § 10.20(a)(1)–(2) (regulating the information that must be provided to the IRS). A practitioner may not interfere with any effort by the IRS or the OPR to obtain unprivileged information. *See id.* § 10.20(c) (prohibiting a practitioner from interfering with the IRS’s efforts to gather information). Furthermore, a practitioner must provide unprivileged information in response to an inquiry regarding alleged Circular 230 violations and be willing to testify with respect to the unprivileged information. *See id.* § 10.20(b) (emphasizing that a practitioner must either testify that requested information is privileged or disclose it to the Director of the OPR).

87. 31 C.F.R. § 10.21 (2010) (stating that a practitioner must inform a client about any known revenue law violation).

88. *See id.* § 10.29 (prohibiting lawyers from representing clients before the IRS when a conflict of interest exists).

A conflict of interest exists if . . . [t]he representation of one client will be directly adverse to another client; or . . . [t]here is a significant risk that the representation of one or more clients

request,<sup>89</sup> and adhere to the best practices described in Circular 230.<sup>90</sup>

Circular 230 also imposes specific standards upon practitioners who prepare returns or render written tax advice. A practitioner preparing returns may, in good faith, rely on information provided by a client without verification; however, a practitioner must make reasonable inquiries if the information appears to be incorrect, incomplete, or inconsistent with other known facts.<sup>91</sup> A practitioner is prohibited from advising a client to submit a tax return that is frivolous, intended to delay or impede the administration of federal tax law, or intentionally omits information in disregard of a rule or regulation.<sup>92</sup> Furthermore, a practitioner must inform a client of reasonably-likely penalties that may be the result of a return prepared or signed by the practitioner or a position taken pursuant to the advice of the practitioner.<sup>93</sup>

“Covered” tax opinions must comport with specific requirements under Circular 230. A covered opinion is written advice provided by a practitioner concerning: (1) a specific “listed transaction” that is often associated with tax avoidance; (2) any entity plan or arrangement that has a principal purpose of tax avoidance or evasion; or (3) any entity plan or arrangement with a significant purpose of tax evasion if the advice is a “marketed” or “reliance” opinion, or is subject to terms of confidentiality or contractual protection.<sup>94</sup> A reliance opinion is written advice wherein the practitioner concludes that one or more significant tax issues are, “more likely than not,” to be resolved in the taxpayer’s favor.<sup>95</sup> A marketed opinion is written advice where the practitioner knows, or reasonably should know, that the advice is intended to promote, market,

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will be materially limited by the practitioner’s responsibilities to another client, a former client or a third person, or by a personal interest of the practitioner.

*Id.* § 10.29(a)(1)–(2).

89. *Id.* § 10.28(a).

90. *See id.* § 10.33(a) (identifying several standards of best practices to include: (1) “communicating clearly with the client”; (2) establishing the relevant facts, researching applicable law, and ultimately arriving at a conclusion based on the facts and law; (3) advising the client of the lawyer’s conclusion; and (4) practicing with integrity before the IRS).

91. *Id.* § 10.34(d).

92. *Id.* § 10.34(b)(2).

93. *Id.* § 10.34(c)(1).

94. *Id.* § 10.35(b)(2).

95. *Id.* § 10.35(b)(4)(i).



or recommend a certain tax position.<sup>96</sup> The dictates of Circular 230 do not apply to such opinions when the practitioner “prominently discloses in the written advice that . . . [it] was not intended or written by the practitioner to be used, and that it cannot be used by any taxpayer, for the purpose of avoiding penalties.”<sup>97</sup> Additionally, the practitioner must disclose that “[t]he advice was written to support the promotion or marketing of the transaction” and the taxpayer should seek advice from an independent tax advisor.<sup>98</sup>

A practitioner issuing covered opinions has several duties. “The practitioner must use reasonable efforts to identify and ascertain [all] the [relevant] facts.”<sup>99</sup> An opinion cannot be based on unreasonable factual assumptions.<sup>100</sup> Any factual assumptions that a practitioner does rely on must be listed in a separate section of the opinion.<sup>101</sup> The practitioner must then relate the law and applicable judicial doctrines to the facts identified.<sup>102</sup> The practitioner must conclude that it is more likely than not that the taxpayer will prevail on the merits with respect to each significant federal tax issue considered, or must state why that conclusion cannot be reached.<sup>103</sup> The practitioner must then provide an overall conclusion that it is more likely than not that the position will prevail if challenged, or must prominently state that the opinion does not reach such a confidence level and may not be used by the taxpayer for the purposes of avoiding penalties.<sup>104</sup>

#### IV. PROPOSED REGULATIONS

The IRS has a significant interest in identifying and monitoring the activity of return preparers. The Tax Code authorizes the Secretary of the

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96. 31 C.F.R. § 10.35(b)(5)(i) (2010).

97. *Id.* § 10.35(b)(5)(ii)(A).

98. *Id.* § 10.35(b)(5)(ii)(B)–(C).

99. *Id.* § 10.35(c)(1)(i).

100. *See id.* § 10.35(c)(1)(ii) (describing an unreasonable factual assumption as one that includes any assumption that the lawyer would know, or should know, is incomplete, in error, or relies on future events, such as a financial forecast or appraisal).

101. *See id.* (noting that a covered opinion must also include a section that lists any financial assumptions that were relied upon by the lawyer in preparing the opinion).

102. *Id.* § 10.35(c)(2)(i).

103. *See id.* § 10.35(c)(3)(ii) (explaining that the practitioner’s conclusion must also contain an analysis of the facts and reasoning which led to the opinion).

104. *Id.* § 10.35(c)(3)(iv), (d)(4)(ii).

Treasury to prescribe a tax preparer number and “to require such information as may be necessary to assign an identifying number to any person.”<sup>105</sup> Treasury regulations currently allow a preparer to use a social security number as a preparer number.<sup>106</sup>

On March 26, 2010, the Department of the Treasury published proposed regulations that would amend the definition of “practitioner” under Circular 230 to include a new category of “registered tax return preparers.”<sup>107</sup> The proposed regulations do not change the existing authority for attorneys, certified public accountants, and enrolled agents authorized to practice before the IRS under Circular 230. This new class of registered tax return preparers (registered preparers) is estimated to include 900,000 to 1.2 million individuals.<sup>108</sup> Registered preparers will include “any individual who is compensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax.”<sup>109</sup> A registered preparer’s practice will be “limited to preparing tax returns, claims for refund, and other documents for submission to the Internal Revenue Service.”<sup>110</sup> A registered preparer may not provide tax advice to a taxpayer.<sup>111</sup> The Treasury and the IRS believe the proposed regulations “will increase tax compliance and allow taxpayers to be confident that the tax return preparers to whom they turn for assistance are knowledgeable, skilled, and ethical.”<sup>112</sup>

Under existing regulations, preparers must sign a return or tax refund claim “after it is completed and before it is presented to the taxpayer (or nontaxable entity) for signature.”<sup>113</sup> Under the proposed regulations, for

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105. I.R.C. § 6109(c) (2006).

106. IRS, PUBL’N 4832, RETURN PREPARER REVIEW, at 33 (Dec. 2009), *available at* <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.

107. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. 14,539, 14,541 (proposed Mar. 26, 2010) (codified at 26 C.F.R. pt. 1). “Registered tax return preparer” is defined with reference to Internal Revenue Code § 7701(a)(36)(A) and Treasury Regulation 301.7701-15(a). I.R.C. § 7701(a)(36)(A) (2006 & Supp. III 2009); 26 C.F.R. § 301.7701-15(a) (2010).

108. IRS, PUBL’N 4832, RETURN PREPARER REVIEW, at 1 (Dec. 2009), *available at* <http://www.irs.gov/pub/irs-pdf/p4832.pdf>.

109. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 14,544.

110. Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51,713, 51,727 (proposed Aug. 23, 2010) (to be codified at 31 C.F.R. pt. 10).

111. *Id.* at 51,728.

112. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 14,540.

113. 26 C.F.R. § 1.6695-1(b) (2010).

tax returns filed after December 31, 2010, preparers must also include a unique preparer tax identification number (PTIN).<sup>114</sup> Unless the failure is due to reasonable cause and not willful neglect, preparers who fail to comply with the proposed regulations are subject to penalties under section 6695(c) of the Tax Code.<sup>115</sup> The use of a unique identifying number will allow the IRS to more easily identify return preparers and monitor their activity.<sup>116</sup> The IRS will use the number to track the number of return preparers, identify their qualifications, and locate and review return preparers when misconduct is identified.<sup>117</sup>

To procure a PTIN, registered preparers must pay a \$50 fee, pass a minimum competency examination, and submit themselves to compliance and suitability checks.<sup>118</sup> Two competency examinations will be administered by the IRS and will be similar to the examination for enrolled agents.<sup>119</sup> One will cover wage and non-business income; the other will cover wage and small business income Form 1040 series returns.<sup>120</sup> Compliance checks will be used to determine if an applicant has filed all required personal and business tax returns, and whether the applicant has made proper arrangements to pay federal tax debts.<sup>121</sup> Suitability checks will be conducted by the OPR and will be used to determine if an individual has engaged in disreputable conduct or any conduct which would justify suspension or disbarment under Circular 230.<sup>122</sup> Failure to pass the competency exam, compliance check, or suitability check will

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114. Furnishing Identifying Number of Tax Return Preparer, 75 Fed. Reg. at 14,544.

115. *Id.* at 14,541.

116. *See id.* at 14,540 (recognizing that identifying numbers will allow the IRS to “timely process returns . . . centralize information . . . and effectively administer the rules relating to tax return preparers”); User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 43,110, 43,110 (proposed July 23, 2010) (to be codified at 26 C.F.R. pt. 300) (establishing the annual user fee).

117. *See* User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. at 43,110–11 (restating that data provided through PTIN registration will allow the IRS to easily track, locate, and review returns prepared by a tax return preparer).

118. *Id.* at 43,110; Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51,713, 51,715 (proposed Aug. 23, 2010) (to be codified at 31 C.F.R. pt. 10).

119. Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. at 51,715.

120. *Id.*

121. *Id.* at 51,716, 51,729.

122. *Id.*

preclude registration as a practitioner.<sup>123</sup>

The proposed regulations also provide for an appeal from denial of the application to become a registered preparer. Proposed regulation 10.5(f) provides that an applicant will be informed in writing of the reasons the application was denied.<sup>124</sup> “The applicant may, within 30 days after receipt of notice of denial . . . , file a written appeal of the denial . . . . A decision on the appeal will be rendered by the Secretary, or a delegate, as soon as practicable.”<sup>125</sup> The procedures for appeal, however, are not defined in the proposed regulations.

Under the proposed regulations, registered preparers must pay a \$50 annual fee and attend continuing education courses to maintain their PTIN.<sup>126</sup> A preparer will be required to attend fifteen hours of continuing education during each registration year, with a minimum of three hours of federal tax law updates and two hours of ethics.<sup>127</sup>

Section 10.34 of Circular 230 governs standards with respect to tax returns and support documents. Under the proposed regulations a practitioner, including registered preparers,

may not willfully, recklessly, or through gross incompetence, 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) (including the related regulations and other published guidance); or (C) is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2). . . .<sup>128</sup>

The proposed standards of section 10.34 remain consistent with the civil penalty standards for tax return preparers defined in section 6694 of the Tax Code, with limited differences.<sup>129</sup> First, the proposed regulations

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123. *Id.* at 51,716.

124. *Id.* at 51,729.

125. *Id.*

126. User Fees Relating to Enrollment and Preparer Tax Identification Numbers, 75 Fed. Reg. 43,110, 43,110 (proposed July 23, 2010) (to be codified at 26 C.F.R. pt. 300).

127. Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. at 51,730.

128. *Id.* at 51,717.

129. Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51,717 (proposed Aug. 23, 2010) (to be codified at 31 C.F.R. pt. 10).

ensure that a position meets the minimum threshold of a “reasonable basis.”<sup>130</sup> A practitioner may therefore be subject to discipline for failure to have a reasonable basis for a position, even if another position on the return eliminates a tax understatement.<sup>131</sup> Second, under section 6694, a preparer may be liable for civil penalties after one instance of misconduct.<sup>132</sup> Proposed section 10.34’s reference to a pattern of conduct suggests that the Circular 230 penalty would more often be applied to multiple instances of misconduct.<sup>133</sup> Third, unlike the penalties imposed by section 6694, multiple practitioners from the same firm may be disciplined if they engaged in misconduct.<sup>134</sup> Finally, section 6694 provides for a reasonable-cause defense to the imposition of civil penalties.<sup>135</sup> Circular 230 provides no such defense but instead requires the OPR to make an independent determination as to whether a practitioner acts willfully, recklessly, or through gross incompetence.<sup>136</sup> Thus, practitioners are not automatically subject to discipline under section 6694 and Circular 230.<sup>137</sup>

Proposed section 10.36 is in accord with existing section 10.36 but expands procedures to ensure compliance through self-regulation. Practitioners with principal authority for overseeing the preparation of returns must “take reasonable steps to ensure” adequate procedures for all employees to comply with Circular 230.<sup>138</sup> Such managerial practitioners are subject to discipline if adequate procedures are not employed, or if the

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130. *Id.* at 51,717.

131. *Compare id.* (stating that the elimination of a tax understatement by a secondary position, in a registered preparer’s opinion, does not assist the preparer in avoiding discipline), *with* I.R.C. § 6694(d) (2008) (providing that the IRS must refund or abate a penalty assessed on a preparer if a final judgment or administrative decision finds no understatement of liability).

132. I.R.C. § 6694(a).

133. *Compare id.* (allowing liability for civil penalties after one instance of misconduct), *with* Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. at 51,717 (providing that a pattern of conduct will be reviewed in determining whether a preparer acted within the scope of section 10.34).

134. Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. at 51,717.

135. I.R.C. § 6694(a)(3); Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. at 51,717.

136. Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. at 51,717.

137. *Id.*

138. *Id.* at 51,718.

practitioner knows or reasonably should know that agents of the firm are engaged in conduct that violates Circular 230.<sup>139</sup>

Finally, proposed section 10.51 expands the definition of “disreputable conduct.” Proposed regulation 10.51(a)(16) provides that failure to file an electronic tax return when required by section 6011(e)(3) of the Tax Code is considered disreputable conduct.<sup>140</sup> Proposed regulation 10.51(a)(17) includes as disreputable conduct the preparation of all or substantially all of, or the signing of a tax return or refund claim for compensation when the preparer does not have a valid PTIN.<sup>141</sup> Proposed regulation 10.51(a)(18) states that “it is disreputable conduct to willfully represent a taxpayer before an . . . [agent] of the IRS” unless authorized to do so by Circular 230.<sup>142</sup>

## V. CONCLUSION

Recent government studies illustrate that the tax return preparer industry is not properly regulated. Any person can presently prepare a tax return or refund claim for a fee. Although retroactively subject to civil penalties for misconduct, preparers who are not attorneys, certified public accountants, or authorized to practice before the IRS are not required to have a minimum level of education, knowledge, training, or skill. As a result, taxpayers seeking assistance preparing and filing a tax return are unnecessarily subjected to much abuse and incompetence. Inaccurate returns may cause taxpayers to overpay their respective share of tax. In addition, inaccurate returns increase the cost of enforcement and collection.

While the amount of unpaid tax on a single return may be relatively small, the cumulative effect is that a single unscrupulous or incompetent preparer may prepare hundreds of erroneous returns in a single filing season.<sup>143</sup> Taxpayers, frequently waged earners, are often complicit in

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139. *Id.*

140. Regulations Governing Practice Before the Internal Revenue Service, 75 Fed. Reg. 51,718 (proposed Aug. 23, 2010) (to be codified at 31 C.F.R. pt. 10).

141. *Id.*

142. *Id.*

143. *See, e.g., Promoter Convicted in \$70 Million Tax Fraud*, U.S. FED. NEWS, Feb. 28, 2008, 2008 WLNR 14012540 (reporting how an individual defrauded tax clients and the United States for five years).

these schemes. It is prohibitively expensive to correct these returns with subsequent examinations and deficiency procedures. Unscrupulous preparers therefore undermine the tax system with negative effects on compliance and taxpayer confidence.

The primary benefit of the proposed regulations is that they will improve the timeliness, accuracy, and completeness of tax returns. Requiring registered preparers to demonstrate a minimum level of competence and character through preliminary examination and screening will result in more competent and ethical return preparers. This will, in turn, prevent costly errors. As a result, the quality of taxpayer service will be improved, and the administrative burden placed on the IRS will be alleviated.

In addition, the use of unique identification numbers will aid in the identification of return preparers and the returns they have filed. Patterns of conduct will be more readily identifiable. Those preparers who need further training and instruction will have access to continuing education courses. Those preparers who lack the character appropriate to prepare returns and refunds can be censured, suspended, or disbarred from practice before the IRS.

Circular 230 and the Office of Professional Responsibility are clearly the appropriate solutions to this obvious problem. Circular 230 provides an established framework for registered preparer conduct. The Office of Professional Responsibility is unquestionably the appropriate agency to determine which individuals have the minimum qualification to serve as registered preparers. Its staff has been doubled in anticipation of a greatly increased enforcement role. While refinement is inevitable, the addition of registered preparers as practitioners under Circular 230 is a material and overdue improvement to our tax system.

2011]

*Circular 230: New Rules Governing the IRS*

307