



Tax

IRS Nationwide

Forum

2022

Professional Responsibility: Procedures to Ensure Compliance in Times of Change

Thursday, August 4, 2022

Start Time: 2:00pm Eastern / 1:00pm Central
12:00pm Mountain / 11:00am Pacific

Note: You should be hearing music while waiting for webinar to start.

Having Technical Issues?

View the “Technical Issues” troubleshooting guide in the Materials drop-down menu on the left side of this page



Today our webinar will:

- Explain the framework for regulating those who practice before the Internal Revenue Service (IRS)
- Discuss key provisions of Circular 230 on that relate to procedures and best practices for running a tax practice.





31 USC §330

- Section 330 of Title 31 of the US Code authorizes the:
 - Regulation of the practice of representatives of persons before the Department of the Treasury, including the IRS, and determinations of practitioner "fitness" to practice. (31 USC §330(a));
 - Types of disciplinary action including monetary penalties. (31 USC §330(c));
 - Regulation of certain appraisers. (31 USC §330(d)); and
 - Standards for certain written advice. (31 USC §330(e)).

Regulatory and Other Authorities

- Section 330 of Title 31 of the US Code authorizes the:
- 31 CFR Subtitle A, Part 10
 - Treasury Circular No. 230
 - First issued as Circular 230 in 1921
 - Latest revision published 6/12/2014 (TD 9668)
- Delegation Order 25-16 (Rev. 1)
 - Rev. Proc. 81-38
 - Rev. Proc. 2014-42
- 31 CFR 10.1(a)(1)
 - Establishes the Office of Professional Responsibility



Office of Professional Responsibility (OPR)

- Administers the laws and regulations governing practice of tax professionals before the IRS;
- Interprets and applies the standards of practice for tax professionals in Circular 230 fairly and equitably;
- Investigates allegations of misconduct by practitioners in their practice before the IRS and imposes disciplinary sanctions if warranted; and
- Supports the IRS's strategy to enhance enforcement of the Internal Revenue Code by ensuring tax practitioners adhere to professional standards and follow the law.



Fitness to Practice

- In enacting Section 330 of Title 31, Congress contemplated that only individuals professionally and ethically fit to represent the interests of taxpayers, claimants, and others are eligible to practice before the Treasury Department:
 - Good character
 - Good reputation
 - Necessary qualifications to provide valuable service to the client
 - Competency to advise and assist persons in presenting their cases



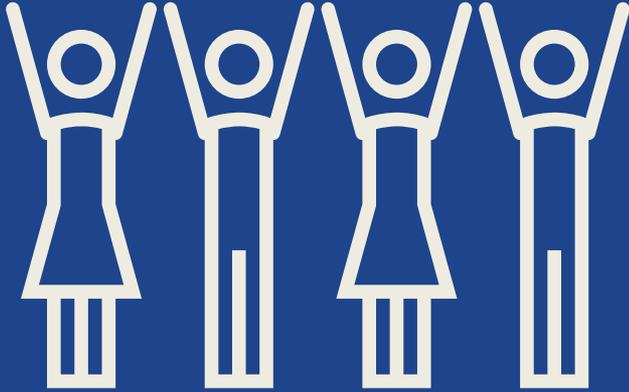


“Practice” before the IRS

- Practice is defined in §10.2(a)(4) — all matters under laws or regulations administered by the IRS relating to a taxpayer's rights, privileges, or liabilities
 - Advocating or representing a client in an audit, before IRS Collections, or appearing before IRS Appeals
 - Preparing or filing documents for submission to the IRS
 - Corresponding and communicating to the IRS regarding a taxpayer
 - Advising clients (including emails, texts) regarding tax positions
 - Providing appraisals for tax positions
- Not mere tax return preparation



Who are the “Practitioners”



- Regulated community is principally:
 - Attorneys
 - CPAs
 - Enrolled Agents
 - Enrolled Retirement Plan Agents
 - Enrolled Actuaries
 - Annual Filing Season Program Record of Completion Holders
 - Appraisers who submit appraisals supporting tax positions



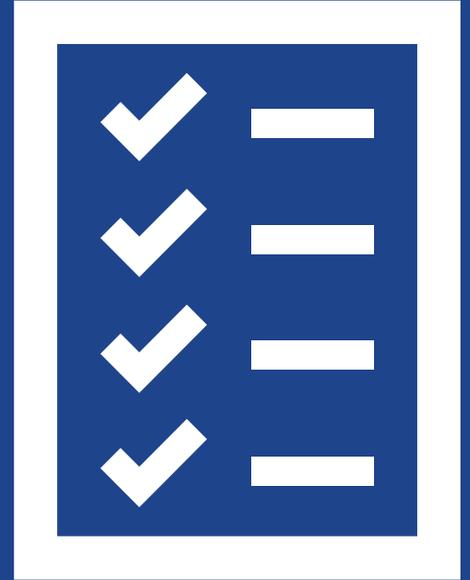
Other Relevant Authorities

- Although not enforced by OPR, the Internal Revenue Code imposes reporting and other requirements on practitioners who prepare returns or render advice, and other participants in the tax system (e.g., appraisers).
 - Violating these provisions could subject tax practitioners to discipline under Circular 230 as disreputable conduct.
- Most Circular 230 practitioners are also subject to rules governing attorneys, CPAs, enrolled agents, and appraisals issued by licensing authorities or other professional bodies. Discipline by those licensing authorities may prompt reciprocal action by OPR.



Running a Circular 230 Tax Practice

- Under section 10.36, *Procedures to Ensure Compliance*, of Circular 230, a firm that has a Circular 230 practice must have in place "adequate procedures" for compliance by its members, associates, or employees with Circular 230.
- This extends to ensuring technological competence by tax practitioners and support staff.



Best Practices (§10.33) & Procedures to Ensure Compliance

- Circular 230 sets forth the expectation that practitioners will provide clients with the highest quality representation by adhering to "best practices" in providing advice on Federal tax issues and preparing or assisting in the preparation of a submission to the IRS. Examples:
 - Clearly communicate with your client on engagement terms;
 - Establish the relevant facts, evaluate the reasonableness of any assumptions or representations, relate applicable law to relevant facts, and reach a conclusion supported by the law and the facts;
 - Advise clients regarding the import of conclusions reached; and
 - Act fairly and with integrity in practice before the IRS.
- §10.33 Best Practices are “aspirational” in effect.
 - Nevertheless, tax professionals are expected to observe best practices to preserve public confidence in the tax system

Procedures to Ensure Compliance (§10.36)

- A “responsible practitioner(s)” at a firm is subject to discipline if, through willfulness, recklessness, or gross incompetence, they:
 - Fail to take reasonable steps to ensure adequate procedures for compliance with Circular 230 are in place and properly followed, or
 - Individuals who are firm members, associates, or employees are or were engaged in a pattern or practice of failing to comply with Circular 230.
- Even if the responsible practitioner takes reasonable steps, they may be liable for violations if they:
 - Know or should know that one or more members, associates, or employees are or were engaged in a pattern or practice of not complying with Circular 230, and
 - Fail to take prompt action to correct the noncompliance.



Procedures to Ensure Competence (§10.35)

- Practitioners must have the knowledge, skill, thoroughness, and preparation — and the time — necessary for the matter for which they have been engaged.
 - Know when you are not competent.
- A practitioner can provide competent representation by:
 - Researching and educating themselves on an issue,
 - Consulting with another tax professional who has established competence in the field in question;
 - Retaining/bring in another tax professional who is competent in a matter and work with them.

Best Practices: Ensuring Competence (§10.35)

- Best practices to ensure competency can include:
 - Understand your limitations.
 - To gain competency, research, consult with colleagues who have the requisite knowledge and experience, bring in a consultant with the expertise and work with them to gain competence.
 - When a practitioner is not competent and cannot become competent to provide advice requested on a matter within the scope of Circular 230, the practitioner is expected to advise clients to obtain assistance elsewhere.
 - Sometimes you have to "just say no."
 - Routinely attend relevant continuing education.
 - Keep up with tax-related news and sign-up for IRS Alerts.



Best Practices: Ensuring Competence (§10.35) [continued]

- One facet of competence that has gained importance during the COVID-19 pandemic is the obligation to maintain sufficient technological competence to ensure:
 - Deadlines can be met
 - Client confidences are maintained, and
 - The practitioner can otherwise competently represent their clients, communicate relevant information, and safeguard client property.
- Safely secure client files, records, and workpapers in your workspace (e.g., when interviewing clients, clean crew arrives, etc.) and home office areas (e.g., other family members, guests, baby/house sitters, etc.)
- Establish a system of securing and safely transferring client information.



Procedures to Ensure Due Diligence (§ 10.22)

- A practitioner must exercise due diligence in:
 - Preparing, approving, or filing tax returns, documents, affidavits, etc., relating to IRS matters.
 - Determining correctness of oral/written representations made to the client or Treasury personnel.
- Willful blindness violates a practitioner's due diligence responsibilities under Circular 230.
- Note, while Circular 230 provides OPR with broad authority to discipline incompetence and disreputable conduct, OPR does not act on "foot faults" or "technicalities." Rather, OPR looks for *patterns* of misconduct.



Procedures to Ensure Due Diligence (§10.22) [continued]

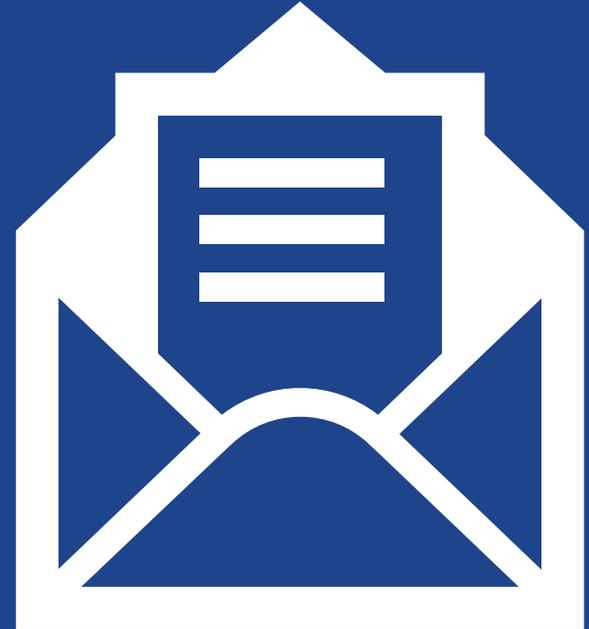


- Relying on information furnished by clients (§10.34(d))
 - Generally, a practitioner may rely in good faith without verification upon information furnished by the client.
 - Cannot ignore the implications of information furnished to or known by the practitioner, and
 - Must make reasonable inquiries if the information furnished appears incorrect, incomplete, or inconsistent with other facts or assumptions.



Procedures to Ensure Due Diligence (§10.22) [continued 2]

- Relying on another's work product
 - A practitioner may rely on other professionals' work product with reasonable care.
 - Cannot ignore other information furnished to you or known by you.
 - Duty to make reasonable inquiries if the information furnished appears incorrect, incomplete, or inconsistent with other facts or assumptions.





Best Practices: Ensuring Due Diligence

- Ask your client questions and make reasonable inquiries if the information given appears incorrect, inconsistent, or incomplete.
- Contemporaneously document questions and client responses.
 - There is no Circular 230 requirement to document information received from clients and others. However, a best practice would be to maintain a written record of such communications.
- Confirm the client has maintained appropriate books and records, and substantiation to support deductions and tax treatments.
- Create a Due Diligence checklist policy and enforce its use in the firm.
- Be mindful of changing legal requirements and circumstances (e.g., enactment of new laws, shift to a remote work environment, disruption of business, etc.).



Procedures to Ensure Standards on Tax Return/Documents (§10.34(a), (b))

- A practitioner may not sign a tax return or advise a position on a tax return willfully, recklessly, or through gross incompetence that:
 - Lacks reasonable basis
 - Is an unreasonable position (§6694(a)(2))
 - Is a willful attempt to understate liability (§6694(b)(2)(A))
 - Is a reckless, intentional disregard of rules and regulations (§6694(b)(2)(B))
- Patterns matter

Standards for Tax Returns and Other Documents

Reasonable Basis (25%)

When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least a 25% likelihood a position would be upheld on its merits. MUST be paired with disclosure.

Realistic Possibility of Success (33%)

When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least an approximately one-in-three likelihood a position would be upheld on its merits.

Tax Return Position

Substantial Authority

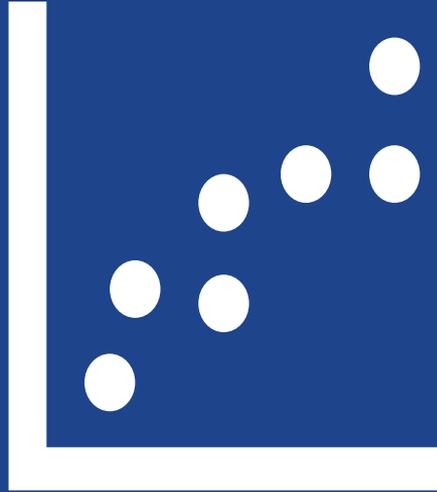
When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least a greater than 40% but less than 50% likelihood a position would be upheld on its merits.

More Likely Than Not (>51%)

When a reasonable and well-informed analysis by a person knowledgeable in the tax law concludes there is at least a greater than 50% likelihood a position would be upheld on its merits.



Procedures to Ensure Standards on Tax Return/Documents (§10.34(a), (b)) [continued]



- A practitioner may not advise taking frivolous positions
- A practitioner may not advise submissions:
 - Made to delay or impede tax administration,
 - That are frivolous, or
 - Contain or omit information that demonstrates an intentional disregard of rules or regulations
- Patterns matter again!



Procedures to Ensure Standards on Tax Return/Documents (§10.34(c))

- Must advise client of potential penalty exposure regarding:
 - A position taken on the return if the practitioner advised the client regarding the position OR the practitioner prepared or signed the return
 - Any document, affidavit, or other paper submitted to the IRS
- Must also advise client of penalty avoidance through disclosure

Procedures regarding Client's Error/Omission (§10.21)

- If a practitioner knows a client has not complied with US revenue laws or made an error in, or omission from, any return, affidavit, or other document the client submitted or executed under US revenue laws, the practitioner has a duty to:
 - Promptly inform the client of noncompliance, error, or omission, and
 - Advise the client regarding consequences under the Code and regulations of that noncompliance, error, or omission.



Best Practices: Client's Errors or Omission

- In addition to promptly informing a client of any noncompliance, error, or omission and of the consequences under the Code and regulations of that noncompliance, error, or omission —
 - Advise the client about what to do about the noncompliance, error, or omission.
 - Under the AICPA rules, CPAs are required to recommend correcting the error (e.g., filing an amended return).
- If the error or omission is attributable to a prior preparer's misconduct, discuss whether the client wants to make a referral (Form 14157) to OPR regarding the prior preparer.
- Document the conversation with the client, especially if the client declines to correct the error. Because of the duty of confidentiality, the practitioner may not be able to report the error or omission without the client's consent.
 - If the client declines to correct the error, consider whether withdrawing from the engagement is necessary.



Procedures to Avoid Conflicting Interests (§10.29)

- Circular 230 prohibits conflicts of interest.
- A conflict of interest exists if:
 - One client's interest is directly adverse to another
 - There is a significant risk of material limitation of responsibilities to—
 - Another client or former client,
 - A third-person, OR
 - Personal interests of the practitioner



Procedures to Avoid Conflicting Interests (§ 10.29) [continued]

- A practitioner may represent if:
 - The practitioner has a reasonable belief in their ability to provide competent, diligent representation to each affected client;
 - The representation is not legally prohibited; and
 - Each affected client waives conflict by giving informed consent in writing *at the time* the conflict is known (i.e., within 30 days).
 - The practitioner must retain the written waivers for 36 months after representation ceases and make them available to the IRS upon request.

Best Practices: Avoiding Conflicting Interests

- Conduct conflict checks before accepting an engagement.
- Use an engagement letter or contract for services to define who the client is and describe and limit the nature and scope of services to be provided to the client.
- Communicate clearly with the client regarding the terms of the engagement.
- Be mindful that a conflict may arise after engagement.
- In considering whether there is a significant risk of material limitation due to your personal interest, apply a reasonable person standard
 - Would a reasonable practitioner in your position reasonably believe they could provide competent, diligent representation to each affected client?

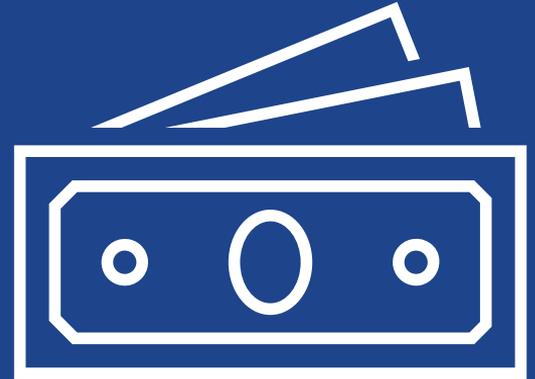
Best Practices: Avoiding Conflicting Interests [continued]

- In determining whether a conflict exists, do not be afraid to seek assistance from your state licensing authority, malpractice carrier, or an objective and knowledgeable third party
- In seeking a waiver from each affected client, make sure you have provided them with information to give their informed consent (balanced with confidentiality)
- Waivers must be obtained within 30 days from when conflict is known, kept for 36 months after representation ceases, and provided to the IRS upon request.
- If you cannot provide competent, diligent representation to each affected client, or the conflict is legally prohibited, you must withdraw from representation.



Procedures on Setting Fees (§10.27)

- A practitioner may not charge an unconscionable fee in connection with any matter before the IRS.
 - Unreasonably excessive; grossly unfair
 - Generally, section 10.27 violations involve charging high fees for lousy advice (e.g., raising numerous trivial arguments long-rejected by the IRS and by case law).
- Limitations on contingency fees.



Procedures on Setting Fees (§10.27)

[continued]

- A contingent fee is:
 - Based in whole or in part on whether the position taken by the taxpayer is sustained by the IRS; and
 - Any fee arrangement requiring a practitioner to reimburse the client for all or portion of a fee if a position is challenged by IRS or not ultimately sustained in an IRS exam.
- Contingent fees can be charged in limited situations.
 - In connection with an IRS examination or challenge to an original return, amended return, or refund claim;
 - For services rendered in connection with the determination of statutory interest or penalties assessed by the IRS; or
 - For services in connection with any judicial proceeding arising under the Code.

Procedures on Returning Client's Records (§10.28)

- At the request of the client, a practitioner must promptly return all records of the client that are necessary for the client to comply with any federal tax obligations
 - Practitioner may retain copies of the records returned to client.
 - Existence of a fee dispute does not relieve practitioners of their obligation to return client records.



Client Records

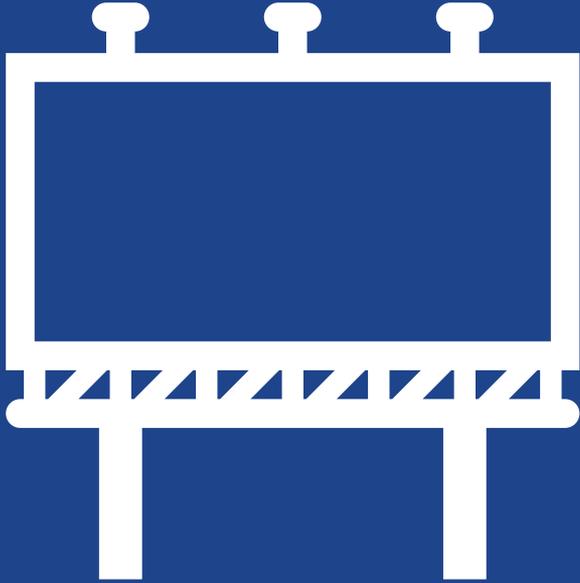


Procedures on Returning Client's Records (§10.28) [continued]

- Client's records include:
 - Documents or records obtained by a practitioner from a client or another source that preexisted the representation of client;
 - Materials prepared by a client or third-party at any time and provided to practitioner relating to the subject matter of the representation; and
 - Any return, claim for refund, schedule, affidavit, appraisal, or any other document prepared by the practitioner (or their employee or agent) that was presented to the client in a prior engagement if necessary for the client to comply with current federal tax obligations.



Procedures on Solicitation (§10.30)



- Practitioners are prohibited from using any form of public communication or private solicitation containing a false, fraudulent, or deceptive statement or claim.
- Practitioners making an uninvited written or oral solicitation related to a federal tax matter must clearly identify the solicitation as such and identify the source of the information used in choosing the recipient.

Procedures on Solicitation (§10.30)

[continued]

- Practitioners may publish a fee schedule and disseminate this fee information to the public. The fee schedule can include:
 - Amount of a fixed fee for a specific, routine service
 - Hourly rates
 - Range of fees for particular services, and
 - Fee charged for an initial consultation.
- If costs are to be charged to the client (e.g., phone charges, copy charges, filing fees, etc.), any statement of fee information must include a statement disclosing whether the client will be responsible for such costs.
- Practitioners can charge no more than the published rates for at least 30 days after the last publication of the fee schedule.

Procedures on Taxpayer Refunds (§10.31)

- Practitioners may NOT direct or accept payment from IRS to a taxpayer into an account owned or controlled by that person. That means—
 - No cashing, endorsing, or negotiating the client’s refund
 - No depositing the client’s refund to the practitioner’s trust account
 - No split electronic transfers from the IRS
- Client consent is irrelevant
- IRC §6695(f) penalty exposure
- Form 2848 was revised to omit authority to receive client’s refund check.

Best Practices: Communication with Clients

- Consistent with the aspirational “best practices” (§10.33(a)(1)) goal of communicating clearly with clients, practitioners should, by means of an engagement letter or otherwise, inform the client of the terms of the engagement, including —
 - Form and scope of advice or assistance to be rendered (§10.33(a)(1));
 - Fees (§10.27) and responsibility for expenses (§10.30(b));
 - Procedures for return of client records (§10.28); and
 - Obligation to inform the client of any errors or omissions identified during the engagement (§10.21), as well as any penalties that are reasonably likely to apply with respect to any positions taken on a tax return and the opportunity to avoid any such penalties by disclosure (§10.34(c)).



Procedures on Expectations of Employee Conduct

- Section 10.51 identifies incompetent and disreputable conduct for which a practitioner can be sanctioned.
- Disreputable conduct includes willfully failing to make a Federal tax return in violation of the Federal tax laws, or the willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax. (§10.51(a)(6))
 - When a referral is made to OPR, the practitioner's tax compliance is always checked.
- A practitioner's general conduct and personal tax compliance is pertinent to practicing before the IRS.
 - Tied to 31 USC §330's focus on the practitioner's "fitness to practice" (i.e., whether the practitioner has the requisite character, reputation, and competence).



Procedures on Expectations of Employee Conduct [continued]

- Disreputable conduct also includes:
 - Conviction of any criminal offense under Federal tax laws (§10.51(a)(1)).
 - Conviction of any criminal offense involving dishonesty or breach of trust (§10.51(a)(2)).
 - Conviction of any felony under Federal or State law where the conduct involved renders the practitioner unfit to practice (§10.51(a)(3)).
 - Disbarment or suspension from practice as an attorney or CPA (§10.51(a)(10), §10.82(b)(1)).
 - Conviction of any crime under Title 26, any crime involving dishonesty or breach of trust, or any felony that renders the practitioner unfit to practice (§10.82(b)(2)).



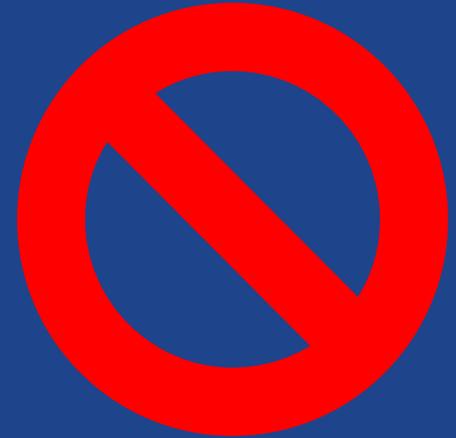
Procedures on Expectations of Employee Conduct [continued 2]

- When interacting with tax authorities, a practitioner must not participate in any manner in giving false/misleading information to the Treasury or any officer/employee thereof. (§10.51(a)(4))
 - Testimony
 - Federal tax returns
 - Financial statements
 - Applications
 - Affidavits, declarations, and any other document or statement (written or oral)



Procedures on Expectations of Employee Conduct [continued 3]

- Section 10.51(a)(7) provides that when interacting with clients, a practitioner must not willfully assist, counsel, encourage, suggest to a client/prospective client:
 - An illegal plan to evade federal taxes or payment thereof
 - Violation of any federal tax law



Best Practices: Employee Training Procedures

- **Have regular employee training programs on written office procedures and data security policies that include:**
 - Expecting employees to timely meet their personal tax filing and payment obligations, and refrain from disreputable conduct
 - Dealing with tax authority personnel in a professional manner
 - Meeting their continuing education requirements and staying connected with the IRS (e.g., e-News for Tax Professionals, QuickAlerts, etc.)
 - Data Security/Confidentiality
 - Limiting access to taxpayer data to individuals who need to know
 - Conducting final reviews of return information, especially direct deposit information, prior to e-filing
 - Routinely checking IRS e-Services account for number of returns filed with practitioner's EFIN
 - Encrypting all sensitive files and emails, and recognizing and avoiding phishing email schemes
 - Disabling smart speakers (e.g., Alexa, Siri) when teleworking

Best Practices: Data Security Procedures

- Install anti-malware/anti-virus security software on all devices (laptops, desktops, routers, tablets, and phones), keep software set to automatically update, and routinely perform deep scans
- Use strong passwords of 8 or more characters, including special and alphanumeric characters or phrases, use different passwords for each account, password protect wireless devices, and consider a password manager program
- Back up sensitive data to a safe and secure external source not connected full-time to a network
- Create an action plan in the event of a data theft and report any data theft or data loss to the appropriate IRS Stakeholder Liaison
- Wipe clean or destroy old computer hard drives and printers that contain sensitive data
- Use the IRS's Tax Pro Account to create and sign authorizations forms (e.g., POA, TIA) and encourage clients to create IRS Online Accounts to access their account information.



Contacting and Referrals to OPR

- **Office of Professional Responsibility**
 - 1111 Constitution Ave., NW, SE:OPR Rm. 7238, Washington, DC 20224
 - Efax: (855) 814-1722
 - Visit <http://www.irs.gov/> and search "Circular 230 Tax Professionals"
- **Referrals**
 - To make a referral regarding a return preparer, file Form 14157. It will go to RPO and, if the preparer is under OPR's jurisdiction or has representational activities, the information will be routed to OPR.
 - For practitioners covered under Circular 230, send Form 8484 via fax to OPR's eFax.



Resources and Guidance

- Treasury Department Circular No. 230 (Rev. 6-2014)
- IRS Pub. 947, *Practice Before the IRS and Power of Attorney*
- IRS Pub. 4557, *Safeguarding Taxpayer Data: A Guide for Your Business*
- IRS Form 2848, *Power of Attorney and Declaration of Representative*
- IRS Form 8275, *Disclosure Statement*
- IRS Form 8867, *Paid Preparer's Due Diligence Checklist*
- OPR Website
- News & Updates from the Office of Professional Responsibility
- Rights and Responsibilities of Practitioners in Circular 230 Disciplinary Cases
- Guidance on Restrictions During Suspension or Disbarment from Practice Before the Internal Revenue Service



Recursos y guías en Español

- Formulario 2848, *Poder Legal y Declaracion del Representante y Instrucciones para el Formulario 2848(SP)*
- Formulario 8821, *Autorización para recibir Información Tributaria y Instrucciones para el Formulario 8821*
- Pub. 947, *Como Ejercer ante el Servicio de Impuestos Internos (IRS) y el Poder Legal*
- Circular 230 del Departamento del Tesoro (Rev. 6-2014), *Reglamentos que rigen el ejercicio ante el Servicio de Impuestos Internos*