

**INTERNAL REVENUE SERVICE
ADVISORY COUNCIL**

**OFFICE OF PROFESSIONAL RESPONSIBILITY
SUBGROUP REPORT**

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INTRODUCTION/EXECUTIVE SUMMARY

The IRSAC OPR Subgroup (hereafter "Subgroup") is comprised of a diverse group of tax professionals, including lawyers, CPAs and an enrolled agent. This year has been very rewarding from a professional standpoint because of the OPR Subgroup participation in the promulgation of new guidance for practitioners. This new guidance was the direct result of recommendations made by the 2011 IRSAC.

The Subgroup has always enjoyed a very good working relationship with the Director of the Office of Professional Responsibility and this year was no exception as all the personnel from OPR were extremely cooperative and forthcoming.

IRSAC was asked to provide feedback and recommendations on the following three topics included in this report. Please find following a brief summary regarding each of these three issues, followed by a more complete analysis of each issue.

1. **Guidance Respecting Obligations of Tax Practitioners Under Treasury Circular 230 and of Preparers Under The Internal Revenue Code**

With the extension of the application of Treasury Circular 230 to paid tax return preparers, an additional 500,000 unlicensed individuals who have registered as tax return preparers are now subject to the conduct rules of Treasury Circular 230 Subpart B. As we noted in our 2011 IRSAC Report, many of these newly designated practitioners may be unfamiliar with the ethical and professional obligations under Treasury Circular 230 and the Internal Revenue Code. We believe that the IRS should continue its efforts to expand and improve the guidance available to all tax practitioners concerning their ethical and professional obligations under both Treasury Circular 230 and the Internal Revenue Code. We also believe that the *For Tax Pro* section of the www.irs.gov website should

more prominently display the links to information concerning practitioner obligations under Treasury Circular 230 and the Internal Revenue Code. We recommend that the IRS consider the addition of an acknowledgement of the applicability of Treasury Circular 230 to certain application and renewal forms for preparer tax identification numbers and for enrollment before the IRS as an enrolled agent or an enrolled retirement plan agent.

2. **Practitioner Competency**

Proposed Regulations to Treasury Circular 230 were issued on September 17, 2012 (hereafter “Regulations”). For the first time, the Regulations will impose a separate competency requirement upon all practitioners covered by Treasury Circular 230. The requirement that representatives be competent is found in 31 U.S.C. § 330(a)(2)(D). We support this addition which now aligns Treasury Circular 230 with ethical rules governing certified public accountants and attorneys. While the concept of competency is to a certain extent embodied in the due diligence requirements described in Section 10.22 of the current version of Treasury Circular 230, we believe that a separate section in Treasury Circular 230 specifically addressing competency is warranted. Section 10.35 of the Proposed Regulations provides a much needed requirement of competency and we urge the IRS to adopt it in final form.

3. **Expedited Suspension Procedures For Practitioners who Demonstrate a Pattern of Failing To File Required Federal Tax Returns**

The IRS has also proposed changes to Treasury Circular 230 which would permit the expedited suspension of a practitioner who has a pattern of not complying with federal tax filing obligations and who persists in that disreputable conduct after contact by OPR. We believe the proposed safeguards to the expedited suspension process are sufficient to

provide adequate due process while protecting the public from possible harm. We therefore recommend that the proposed changes be adopted in the Final Regulations.

**ISSUE ONE: GUIDANCE RESPECTING OBLIGATIONS OF TAX
PRACTITIONERS UNDER TREASURY CIRCULAR 230 AND OF PREPARERS
UNDER THE INTERNAL REVENUE CODE**

Executive Summary

With the extension of the application of Treasury Circular 230 to paid tax return preparers, an additional 500,000 unlicensed individuals who have registered as tax return preparers are now subject to the conduct rules of Treasury Circular 230 Subpart B. As we noted in our 2011 IRSAC Report, many of these newly designated practitioners may be unfamiliar with the ethical and professional obligations under Treasury Circular 230 and the Internal Revenue Code. We believe that the IRS should continue its efforts to expand and improve the guidance available to all tax practitioners concerning their ethical and professional obligations under both Treasury Circular 230 and the Internal Revenue Code. We also believe that the *For Tax Pros* section of the www.irs.gov website should more prominently display the links to information concerning practitioner obligations under Treasury Circular 230 and the Internal Revenue Code. We recommend that the IRS consider the addition of an acknowledgement of the applicability of Treasury Circular 230 to certain application and renewal forms for preparer tax identification numbers and for enrollment before the IRS as an enrolled agent or an enrolled retirement plan agent.

We are pleased to note that the IRS has implemented the recommendation in our 2011 IRSAC Report to develop a publication which will provide practitioners subject to a disciplinary proceeding under Treasury Circular 230 with information concerning the notice and review procedures under the enforcement provisions of Treasury Circular 230.

We commend the IRS for completing this publication as an important step in providing information to practitioners.

Background

Tax practitioners have ethical obligations to their clients under Treasury Circular 230, as well as obligations to the tax system under the Internal Revenue Code. Taxpayer confidence in the tax system and sound tax administration are enhanced when tax practitioners understand and fulfill their ethical and professional obligations. The first step toward promoting compliance with these obligations is to ensure that affected professionals are aware of and understand them.

As we noted in our 2011 IRSAC Report, the changes to Treasury Circular 230 that became effective in 2011 greatly expanded the reach of the conduct rules in Subpart B to apply to registered tax return preparers and to individuals meeting the definition of a “tax return preparer” under Treasury Regulation §301.7701-15.¹ Approximately 500,000 individuals who are not attorneys, certified public accountants, or enrolled with the IRS have registered as tax return preparers. Because they were not subject to Treasury Circular 230 prior to 2011, many of these individuals do not yet fully understand their obligations under Treasury Circular 230 and the Internal Revenue Code. And there remain licensed practitioners who are not fully aware of their obligations under Treasury Circular 230.

The IRS has begun taking steps to increase awareness of Treasury Circular 230 obligations among tax practitioners:

¹ Circular 230 § 10.2(a) (8).

- A significant portion of unlicensed tax return preparers will be required to pass a competency examination to maintain their status as registered tax return preparers after 2013, and they will be exposed to Treasury Circular 230 in preparing for and taking this examination.
- Many unlicensed tax return preparers, as well as individuals enrolled to practice before the IRS, are subject to continuing education requirements under Treasury Circular 230, including a requirement to complete two hours of ethics training each year.
- Presentations regarding practitioner obligations under Treasury Circular 230 have been offered at the annual IRS Nationwide Tax Forums.
- OPR in collaboration with SB/SE, has filmed a 75-minute webinar on Treasury Circular 230 which has aired twice with 35 minutes of live Q&A with the Director, OPR. The webinar will be presented with live Q&A on a quarterly basis into 2012 and has been archived for independent viewing by practitioners.

One recommendation in our 2011 IRSAC Report was that the IRS provide practitioners subject to a disciplinary proceeding under Treasury Circular 230 with information concerning the notice and review procedures under the enforcement provisions of Treasury Circular 230. We are pleased to note that the IRS has developed such a publication. This publication will be made available on the www.irs.gov website, and it will be provided in printed form together with communications from OPR informing a practitioner of the initiation of a disciplinary proceeding. We commend the IRS for completing this publication as an important step in providing information to practitioners.

Recommendations

1. We recommend that the IRS continue its efforts to inform practitioners regarding Treasury Circular 230 at the IRS Nationwide Tax Forums and through presentations in the SB/SE webinars. We also support the recording and archiving of these presentations in order to make them available to the entire population of tax practitioners.

We note that while the steps described above will reach many practitioners, they are not likely to reach all the practitioners subject to Treasury Circular 230. A significant number of practitioners are exempt from the Treasury Circular 230 competency examination and continuing education requirements, and not all practitioners will attend either a tax forum or an SB/SE webinar.

2. Accordingly, we continue to recommend that the IRS develop a publication that enumerates in reasonable detail the obligations of practitioners under Treasury Circular 230 and of “tax return preparers” under the Internal Revenue Code. This publication should be available in both *.html* and *.pdf* format at the www.irs.gov website. The publication should describe in reasonable detail both ethical responsibilities and administrative obligations, including due diligence, PTIN requirements, tax return preparation and signing, tax advice (and the limitations on tax advice by registered tax return preparers), confidentiality, conflicts of interest, contingent fees, client records, solicitation, and the responsibilities under §§ 6060, 6107, 6109, and 6695. The publication should also describe in general terms the possible sanctions under the Internal Revenue Code or Treasury

Circular 230 for violating these standards. We recommend that the IRS allow tax professionals to subscribe to changes in this publication via RSS feed or other means.

We recognize that the development of this proposed publication constitutes a significant undertaking for the IRS. Our recommendation is based on our belief that the first step in promoting compliance with practitioners' obligations under Treasury Circular 230 and the Internal Revenue Code is to ensure that all practitioners are aware of these obligations and can readily access guidance to help practitioners understand them.

In our 2011 IRSAC Report, we noted that the links to information concerning Treasury Circular 230 and Internal Revenue Code section 7216 at the *Tax Information for Tax Professionals* section on the IRS' website were not effective in attracting a viewer's attention, due both to location on the site and to the terminology used. The *For Tax Pros* section of the website has been redesigned, and it now features prominent links to information concerning testing, continuing education, and maintaining a PTIN. However, the link to Treasury Circular 230 remains at the bottom of the page under the heading "Responsibility and Oversight." We reiterate our belief that tax practitioners would be far more likely to locate (and therefore read) important guidance concerning ethical and professional obligations if the links to the guidance were displayed more prominently and used descriptions that more readily identified the subject matter to less experienced or unlicensed practitioners (*e.g.*, "Ethical and Professional Obligations of Tax Professionals").

3. We recommend that the IRS consider adding an acknowledgement of the applicability of Treasury Circular 230 to the following forms:
- Form W-12, *IRS Paid Preparer Tax Identification Number (PTIN) Application and Renewal*;
 - Form 23, *Application for Enrollment to Practice Before the Internal Revenue Service*;
 - Form 23-EP, *Application for Enrollment to Practice Before the Internal Revenue Service as an Enrolled Retirement Plan Agent*;
 - Form 8554, *Application for Renewal of Enrollment to Practice Before the Internal Revenue Service*; and
 - Form 8554-EP, *Application for Renewal of Enrollment to Practice Before the Internal Revenue Service as an Enrolled Retirement Plan Agent*.

Forms 23 and 23-EP each instruct the applicant to read Treasury Circular 230 before completing the application, and the instructions to both Form 8554 and 8554-EP state that a false statement on the form are grounds for disbarment under Treasury Circular 230. But none of the forms listed above include an affirmative acknowledgement by the applicant that Treasury Circular 230 will apply to their activities as practitioners or tax return preparers.

Requiring an affirmative acknowledgement of the applicability of Treasury Circular 230 to their activities in tax practice should prompt applicants to review Treasury Circular 230 at the time of an original application and at renewal. A regular review of Treasury Circular 230 would be expected to raise awareness of, and compliance with, the ethical and professional obligations in tax practice.

There is a precedent for the inclusion of such an affirmative acknowledgement. Form 2848, *Power of Attorney and Declaration of Representative*, contains a declaration by the representative indicating awareness of regulations contained in Treasury Circular 230 concerning practice before the IRS. We suggest an approach similar to the Form 2848, but one which specifically enumerates tax return preparation and tax advice as constituting “practice before the IRS.” Including this express enumeration of activities may be helpful to the many practitioners who are as yet unfamiliar with the scope of the Treasury Circular 230 definition of “practice before the IRS” in section 10.2(a)(4). We offer the following as an example of the affirmative acknowledgement contemplated by our recommendation:

I am aware of the regulations contained in Treasury Circular 230 (31 CFR, Part 10), as amended, concerning practice before the Internal Revenue Service. I understand that my activities in preparing federal tax returns, in providing written advice concerning federal tax matters, in representing taxpayers before the Internal Revenue Service, and in other activities constituting “practice before the IRS” under Treasury Circular 230 section 10.2(a)(4) are subject to the requirements of Treasury Circular 230.

ISSUE TWO: PRACTITIONER COMPETENCY

Executive Summary

Proposed Regulations to Treasury Circular 230 were issued on September 17, 2012. For the first time, the Regulations impose a separate competency requirement upon all practitioners covered by Treasury Circular 230. The requirement that representatives be competent is found in 31 U.S.C. § 330(a)(2)(D). We support this addition which now aligns Treasury Circular 230 with ethical rules governing certified public accountants and attorneys. While the concept of competency is to a certain extent embodied in the due diligence requirements described in Section 10.22 of the current version of Treasury Circular 230, we believe that a separate section in Treasury Circular 230 specifically addressing competency is warranted. Section 10.35 of the Proposed Regulations provides a much needed requirement of competency and we urge the IRS to adopt it in final form.

Discussion

The United States system of income taxation is based on voluntary compliance and self-assessment. Each taxpayer has the responsibility to assess his or her proper tax liability annually. In determining his or her tax liability, the taxpayer is hampered by the complexity and uncertainty of the tax law. Taxpayers not only must ascertain the correct provisions of the tax law that apply to them, but also must properly apply those provisions to their individual situations. The intricate nature of the tax law and the uncertainty of applying what appear to be clear legal provisions to complicated facts make this process difficult if not impossible for many taxpayers. Therefore, many taxpayers look to tax practitioners for assistance in complying with the tax laws and assessing their tax liability. In order to protect the integrity of the system, it is crucial that tax practitioners achieve a minimum level of

competence in order to satisfy their duties to their clients and to the system. In fact, 31 U.S.C. § 330(a)(2)(D) imposes a competency requirement upon all persons who represent taxpayers before the Department of Treasury. The statute requires that all such representatives be competent to advise and assist persons in presenting their cases. The Regulations, by providing guidance and reinforcing this statutory requirement, properly recognize the importance of competency in the practitioner community by the addition of a specific competency requirement in Section 10.35, thereby aligning Treasury Circular 230 with the ethical standards governing certified public accountants and attorneys.

Section 52 of The Restatement of the Law—The Law Governing Lawyers imposes a competency standard upon attorneys. The comments to the section define competence as the skill and knowledge normally possessed by members of the trade or profession in good standing. The comments note that competency must be reasonable in the circumstances.

The AICPA Code of Professional Conduct, (hereafter "AICPA Code") ET Section 56 Article V—Due Diligence acknowledges a competency standard for certified public accountants. The AICPA Code notes that a certified public accountant must discharge his or her duties with competence and diligence. The AICPA Code further provides that competency is a synthesis of education and experience. Competence, in the view of the AICPA Code, represents the attainment and maintenance of a level of understanding and knowledge that enables a member to render services with facility and acumen.

Accordingly, the AICPA Code notes that it may be appropriate in certain circumstances that a consultation or referral may be required if a professional engagement exceeds the

personal competence of a member. The AICPA Code provides that each member is responsible for assessing his or her own competence.

Section 10.22 of Treasury Circular 230 imposes a due diligence obligation upon practitioners in (a) preparing tax returns (b) determining the correctness of oral or written representations made by the practitioner to the Department of Treasury and (c) determining the correctness of representations made by the practitioner to clients regarding any matter administered by the IRS. Arguably, the concept of competence is imbedded in the due diligence obligation imposed upon practitioners; the practitioner must be competent in order to properly achieve the required level of due diligence. However, Section 10.22 does not specifically impose a competency requirement upon practitioners and we firmly believe Treasury Circular 230 should do so.

Section 10.35 as revised in the Regulations clearly imposes a separate competency requirement upon practitioners. The section, in our view, adopts a sensible, proportional and workable definition of competence. Rather than attempting to narrowly establish a competency standard, the Regulation broadly defines competence to include "knowledge, skill, and thoroughness of preparation necessary for the matter for which the practitioner is engaged." The proposed standard properly notes that competence is a function of the matter the practitioner is handling. Accordingly, complex matters require a higher degree of competence than routine matters. The proposed standard also implicitly acknowledges that through adequate preparation, a practitioner can achieve the required level of competence. Requiring that practitioners acquire the necessary knowledge to properly advise clients is vital to protect the integrity of our tax system.

Recommendation

We strongly endorse of the proposed revision to Section 10.35 of Treasury Circular 230 and urge the IRS to adopt it in final form.

We also recommend that the IRS continue its efforts to provide additional guidance respecting competency. The guidance should include specific examples of minimal competency requirements similar to the examples which now exist explaining the due diligence requirements under Reg. § 1.6694-1(d)(3).

**ISSUE THREE: EXPEDITED SUSPENSION PROCEDURES FOR
PRACTITIONERS WHO DEMONSTRATE A PATTERN OF FAILING TO FILE
REQUIRED FEDERAL TAX RETURNS**

Executive Summary

The IRS has also proposed changes to Treasury Circular 230 which would permit the expedited suspension of a practitioner who has a pattern of not complying with federal tax filing obligations and who persists in that disreputable conduct after contact by OPR. We believe the proposed safeguards to the expedited suspension process are sufficient to provide adequate due process while protecting the public from possible harm. We therefore recommend that the proposed changes be adopted in the Final Regulations.

Background

Proposed changes to § 10.82 of Treasury Circular 230 provide for expedited suspension of a practitioner who has demonstrated a pattern of willful disreputable conduct by failing to make an annual federal income tax return for four of the five tax years immediately preceding the issuance of a show cause order by the Director of OPR. A practitioner is also subject to expedited suspension procedures if the practitioner has failed to make a return required more frequently than annually during five of the seven periods preceding the institution of proceedings.

The Proposed Regulations clearly limit the expedited suspension procedures to practitioners who remain noncompliant with any of the practitioner's federal tax filing

obligations at the time of the issuance of a show cause order². Thus, a practitioner may avoid the expedited suspension procedures by promptly filing all delinquent federal tax returns after an initial contact by OPR. Based upon past practices by OPR, it is anticipated that a practitioner who indicates a willingness to promptly become compliant will be given a reasonable period to file delinquent returns before the issuance of the show cause order.

A practitioner suspended under the expedited suspension procedures may, within two years of the suspension, demand that the IRS institute a proceeding under § 10.60 and issue a complaint described in § 10.62. This complaint procedure provides the practitioner with the full administrative due process proceedings, including a hearing before an administrative law judge and the opportunity for an appeal to the Treasury Appellate Authority.

Discussion

The proposed changes to § 10.82 are consistent with federal criminal law and with the statutory requirements for practice before the Treasury, 31 USC 330. Under Section 7203 of the Internal Revenue Code willful failure to file a federal tax return at the time required by law is a misdemeanor criminal violation, subject to imprisonment upon conviction, for up to one year for each violation.

The requirement of a pattern of failures to file is also consistent with federal criminal law. The courts have held that a pattern of conduct, generally consisting of failing to file for two or three consecutive years, is sufficient to establish an inference that

² A show cause order must give a plain and concise description of the allegations that constitute the basis of the proposed suspension.

the failure to file was willful. *United States v. Greenlee*, 517 F.2d 899, 903 (3rd Cir. 1975); *See also United States v. Turk*, 722 F.2d 1439, 1441 (9th Cir. 1983) (failure to file income taxes in two years prior admissible to show intent); *United States v. Street*, No. 06-659-1, 2008 WL 4560678 (E.D. Pa. Oct. 10, 2008) (failure to file taxes from 2002-2004 was sufficient to establish willfulness citing *United States v. Smith* 698 F.Supp. 589, 592-92 (E.D. Pa. 1988)); and *United States v. Hartmann*, 86 F.3d 1153 (4th Cir. 1996) (court found evidence that the defendant did not file taxes in the years 1990, 1991 and 1992 sufficient to establish that he “voluntarily and intentionally violated his known legal duty to make and file tax returns....”).

Other pertinent factors to be considered include the practitioners’ knowledge and experience, including the preparation of returns for others. The courts would consider these factors as a further indication of willfulness. *See e.g., United States v. Ostendorff*, 371 F.2d 729, 731 (4th Cir. 1967); *United States v. MacLeon*, 436 F.2d 947, 949 (8th Cir. 1971); *United States v. Lord*, No. 09-4924, 2010 WL 5129152 (4th Cir. Dec. 13, 2010) (experience as an accountant for almost 20 years and testimony that defendant was in charge of ensuring the filing of previous employers’ payroll taxes demonstrated willfulness).

It should be noted that many courts have held that a failure to file tax returns is an offense involving moral turpitude. For example, in *The Board of Law Examiners of the State of Texas v. Stevens*, 828 S.W.2d 773 (Tex. 1994), the Texas Supreme Court held that the Law Examiners’ denial of petitioner’s application for admission to the State Bar due to lack of good moral character was supported by evidence of the petitioner’s

persistent failure to meet his financial obligations, including the petitioner's failure to file his federal tax returns for 14 years.

A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation *that legitimately could call a lawyer's overall fitness to practice into question.*

The court also noted that failure to file a tax return is generally recognized as a crime of moral turpitude in disbarment proceedings, citing *In re Pohlman*, 248 N.W.2d 833, 835 (N.D. 1976); *State Bd. of Law Exam. v. Holland*, 484 P.2d 196, 197 (Wyo. 1972); *In re McKechnie*, 214 Or. 531, 330 P.2d 727, 728 (1958); *Attorney Grievance Comm. v. Barnes*, 286 Md. 474, 408 A.2d 719, 723 (1979); *State v. Fitzgerald*, 165 Neb. 212, 85 N.W.2d 323 327 (1957); *In re Norrid*, 100 N.M. 326, 326, 670 P.2d 580, 580 (1983); *In re Rohan*, 21 Cal.3d 195, 578 P.2d 102, 104 (1978); and *People v. Borchard*, 825 P.2d 999, 100 (Colo. 1992).

The explanation to the proposed changes to § 10.82 reflects that in 2006 an expedited suspension procedure were proposed but not finalized because of practitioner concerns that the proposed procedures would erode due process rights. The explanation reflects, however, that the Treasury and the IRS continue to encounter practitioners who repeatedly fail to comply with their tax obligations.

The current proposal differs from the 2006 proposed rule in several respects. First, the current proposed rule does not apply to delinquent payment obligations. Second, the current rule requires a pattern of non-compliance extending to four of the five tax years immediately preceding the show cause order. Importantly, the expedited procedures will not apply if a practitioner files all delinquent federal tax returns after the

initial contact by OPR and before the issuance of the show cause order. Finally, within two years of an expedited suspension, the practitioner has the opportunity to request the full due process procedure by demanding that the IRS institute a proceeding under § 10.60.

As indicated in our previous discussion regarding competency to practice, the statutory authority for the regulation of practitioners requires that a practitioner demonstrate good character, good reputation, the necessary qualifications to provide a valuable service and competency to advise and assist persons in representing their cases before the IRS. 31 USC 330. Thus, the proposed changes are consistent with the statutory requirements set forth in Title 31 of the United States Code.

In the final analysis, the question is whether a practitioner's persistent failures to file Federal tax returns are a sufficient indication of poor moral character to justify expedited suspension procedures. For otherwise, the expedited suspension procedures could be viewed as overreaching by the IRS, a mere use of Treasury Circular 230 as a tax compliance enforcement tool.

We think it is clear from the above cases that persistent failure to file one's own federal tax returns is a clear indication of a lack of good character. Whether such failures arise from psychological impediments, fear of the IRS, mere negligence or fraud, this moral defect is a clear indication that the person does not have the judgment and moral capacity to provide tax advice and prepare federal tax returns for the public, especially where that person persists in noncompliant behavior after contact by OPR.

Furthermore, the public expects more from a practitioner and a registered tax return preparer. It is reasonable to expect that the IRS would not permit a disreputable

person to hold himself out to the public as a person competent to give tax advice and prepare tax returns for others. These considerations, in our view, justify the proposed expedited suspension procedures.

We also believe that the safeguards in the present proposed amendment to § 10.82 are sufficient to balance due process concerns with the IRS reasonable concerns that disreputable persons are not continuing to give tax advice and prepare returns for others.

Recommendation

We believe the proposed change to § 10.82 balances the need to protect the public from practitioners who demonstrate a lack of good character, while providing adequate due process procedures. We, therefore, recommended adoption of the proposed changes to § 10.82 of Treasury Circular 230.