

**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, a CPA and an appraiser. Three members of the Subgroup are completing their fourth year on the Subgroup and they all greatly appreciate the opportunity they have had to work together and with the staff of the Office of Professional Responsibility. This year has been very rewarding from a professional standpoint because of the significant changes resulting from the promulgation of the final Regulations under Circular 230.

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 the Office of Professional Responsibility were extremely cooperative and forthcoming.

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

### **1. Exclusive Authority over Discipline**

The Circular 230 regulations ("Regulations") were issued in proposed form on August 23, 2010. The final version of the Regulations, which became effective August 2, 2011, includes significant changes to which there was no opportunity to comment because these changes were not included in the Proposed Regulations. These include changes to §§10.20, 10.50, 10.60 and 10.62, wherein the Commissioner retained authority to delegate the power to sign disciplinary complaints under §10.62 to other

offices of the Internal Revenue Service. These changes were made to provide "flexibility" to adjust disciplinary responsibility between offices of the Internal Revenue Service. For example, under §10.62, as it existed before the final Regulations, only the Director of the Office of Professional Responsibility was authorized to sign a complaint against a practitioner charging disreputable conduct or other violation of Circular 230. Under the final Regulations, §10.62 has been changed to provide that "any authorized representative of the Internal Revenue Service" may sign such a complaint.

As a matter of sound tax administration policy, we believe that the authority to sign complaints and discipline practitioners should remain exclusively under the Office of Professional Responsibility.

## **2. Coordination of Administrative Responsibility over Discipline**

OPR and RPO are in the process of reconciling the PTIN and the E-File processes to reduce duplication, eliminate conflicts, and improve efficiency. Under this new regime, it is anticipated that certain E-file violations will be referred to RPO for an initial review. RPO, where appropriate, will refer all alleged *ethical* violations to OPR.

RPO and OPR are developing protocols respecting the referral of all disciplinary matters to OPR. Under the new protocols, RPO will refer certain specified types of practitioner misconduct cases to OPR. For example, OPR will process and determine appeals from denials of initial PTINs and denials and renewals for compliance and deficient CPE issues. OPR will also receive and process Circular 230 conduct referrals from RPO, Business Operating Divisions (BoD's), Treasury Inspector General for Tax

Administration (TIGTA), Criminal Investigations (CI), Department of Justice (DOJ), and other federal and state agencies.

We strongly support these allocations of responsibility which we understand have been approved by the Commissioner. We also concur that coordination should also continue in the ongoing reconciliation between the E-File Program and RPO. We believe that these functions and the CAF function should be consolidated in a single office.

### 3. **Additional Guidance to Tax Practitioners**

With the extension of the Office of Professional Responsibility's disciplinary authority to paid tax return preparers, the practitioner population subject to discipline has increased by the over 500,000 unlicensed individuals who have registered as tax return preparers, as well as innumerable individuals who qualify as non-signing preparers under Treas. Reg. §301.7701-15(b)(2).<sup>1</sup> Many of these newly designated practitioners may be unfamiliar with the ethical and professional obligations under Treasury Circular 230 and the Internal Revenue Code. As noted in the letter dated May 26, 2011, addressed to The Honorable William Wilkins and attached as Exhibit B, many practitioners now subject to OPR's jurisdiction are not familiar with administrative proceedings.

We believe that the Internal Revenue Service should expand the guidance available to all tax practitioners concerning their ethical and professional obligations. We also believe that the Office of Professional Responsibility should provide information to

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<sup>1</sup> Circular 230 § 10.8(c) applies the standards of conduct in Circular 230 Subpart B to "[a]ny individual who for compensation prepares, or assists in the preparation of, all or a substantial portion of a document pertaining to any taxpayer's tax liability for submission to the Internal Revenue Service," regardless of whether that individual is a registered tax return preparer or falls under another category of "practitioner" under Circular 230 § 10.2(a) (5).

practitioners subject to a disciplinary proceeding under Circular 230 concerning the notice and review procedures under the enforcement provisions of Treasury Circular 230.

#### 4. **Recision of Changes to the Final Regulations**

As indicated previously, certain changes were made to the final Regulations which were intended to permit the Commissioner flexibility to allocate disciplinary authority under Circular 230 to other offices of the Internal Revenue Service. These changes were made without the opportunity for public participation and comment. This may have violated the Administrative Procedures Act (APA), as well as existing Executive Orders which encourage the opportunity for public participation and comment. Furthermore, the American Bar Association, Tax Section, and the American College of Tax Counsel have written comments which call into question the delegation of disciplinary authority to the offices of the Internal Revenue Service that enforce the Internal Revenue Code. In light of actions already in progress within the Service, the changes made in the final Regulations appear to be unnecessary. We believe that sound tax administration policy requires that OPR have exclusive authority to review alleged ethical violations and impose discipline for those violations. We therefore recommend that the changes made to §§10.20, 10.50, 10.60 and 10.62 in the final Regulations be rescinded.

#### 5. **Suggested Adoption of USPAP by OPR in Judging Appraiser Conduct**

Under the “Summary of Comments and Explanation of Revisions” section of the final Regulations relating to Treasury Circular 230, various provisions relate to appraiser conduct. Appraisers have only recently been included in Treasury Circular 230 and there

is very little in the way of documented evidence or guidance on this subject. The OPR subcommittee proposes that IRSAC recommends to OPR that it adopt the Uniform Standards of Professional Appraisal Practice (“USPAP”), or equivalent, as one of the standards for judging appraiser conduct.

## **ISSUE ONE: EXCLUSIVE AUTHORITY OVER DISCIPLINE**

### **Executive Summary**

The Circular 230 regulations ("Regulations") were issued in proposed form on August 23, 2010. The final version of the Regulations, which became effective August 2, 2011, includes significant changes with respect to which there was no opportunity to comment because these changes were not included in the Proposed Regulations. These include changes to §§10.20, 10.50, 10.60 and 10.62, wherein the Commissioner retained authority to delegate the power to sign disciplinary complaints under §10.62 to other offices of the Internal Revenue Service. These changes were made to provide "flexibility" to adjust disciplinary responsibility between offices of the Internal Revenue Service. For example, under §10.62, as it existed before the final Regulations, only the Director of the Office of Professional Responsibility was authorized to sign a complaint against a practitioner charging disreputable conduct or other violation of Circular 230. Under the final Regulations, §10.62 has been changed to provide that "any authorized representative of the Internal Revenue Service" may sign such a complaint.

As a matter of sound tax administration policy, we believe that the authority to sign complaints and discipline practitioners should remain exclusively under the Office of Professional Responsibility.

### **Background**

Circular 230, which is found in Title 31 of the US Code, governs practice before the Internal Revenue Service. These Regulations define who may practice before the Internal Revenue Service. The Regulations also proscribe ethical standards required of

such persons. Finally, Circular 230 provides the procedural rules which govern the discipline of practitioners who violate the standards. These include the authority to seek suspension or disbarment from practice through a notice and adjudication process.

Heretofore, the Director of the Office of Professional Responsibility (“OPR”) has had exclusive authority to institute disciplinary procedures by issuing a "complaint" alleging violations of Circular 230. Under the final Regulations, certain provisions of Circular 230, namely §§10.20, 10.50, 10.60 and 10.62, were revised to provide "flexibility" so that the Commissioner could delegate the power to sign a complaint to discipline practitioners to other employees of the Internal Revenue Service. The Preamble to the final Regulations acknowledges, however, that OPR "is central to the IRS' goal of maintaining high standards of ethical conduct for all practitioners and must operate independently from IRS functions enforcing Title 26 requirements."<sup>2</sup> Notwithstanding the statement in the Preamble, the Commissioner, if he or she chose to, could delegate authority to sign complaints to any operational division within the Internal Revenue Service. We believe such delegation would be highly undesirable.

We believe that it is crucial that the Office of Professional Responsibility remain totally independent of the personnel and offices within the Internal Revenue Service that enforce the Internal Revenue Code (Title 26 of the US Code). OPR must also be seen to be independent and objective. Our belief is based on the same factors that encourage the independence of Appeals, but on an even greater scale. The prospect of disciplinary

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<sup>2</sup> 2011-27 I.R.B. 3.

proceedings being instituted by the same offices that enforce the Internal Revenue Code has the wrong appearance and may stifle practitioners from advocating zealously on behalf of their clients when interacting with Internal Revenue Service representatives.

The authority to discipline a practitioner must, therefore, be exercised independently and objectively, because the Circular 230 sanctions could result in denying a practitioner the ability to engage in his or her chosen profession resulting in substantial collateral harm. Such enormous power must be exercised in a manner that is independent of the Internal Revenue Service's primary mission of collecting the proper amount of tax from taxpayers. The IRSAC strongly believes that independence of OPR is crucial to the objectivity required in the administration of discipline. Referrals to OPR should be based on conduct that is contrary to "generally understood standards of practitioner service and professionalism" rather than as punishment for a single act of aggressive or other misconduct.<sup>3</sup>

Accordingly, we believe that the independence of OPR is crucial to objectivity and to the appearance of objectivity required for the effective administration of discipline.

### **Recommendation**

Circular 230 should be revised to provide that OPR shall have exclusive authority over the administration of practitioner discipline under Circular 230 and shall remain independent and separate from IRS offices enforcing the Internal Revenue Code.

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<sup>3</sup> Compare, IRM 20.1.6.11.3.6 and 20.1.6.11.3.14

**ISSUE TWO: COORDINATION OF ADMINISTRATIVE RESPONSIBILITY  
OVER DISCIPLINE**

**Executive Summary**

OPR and RPO are in the process of reconciling the PTIN and the E-File processes to reduce duplication, eliminate conflicts, and improve efficiency. Under this new regime, it is anticipated that certain E-file violations will be referred to RPO for an initial review. RPO, where appropriate, will refer all alleged *ethical* violations to OPR.

RPO and OPR are developing protocols respecting the referral of all disciplinary matters to OPR. Under the new protocols, RPO will refer certain specified types of practitioner misconduct cases to OPR. For example, OPR will process and determine appeals from denials of initial PTINs and denials and renewals for compliance and deficient CPE issues. OPR will also receive and process Circular 230 conduct referrals from RPO, BoD's TIGTA, CI, DOJ, and other federal and state agencies.

We strongly support these allocations of responsibility which we understand have been approved by the Commissioner. We also concur that coordination should also continue in the ongoing reconciliation between the E-File Program and RPO. We believe that these functions and the CAF function should be consolidated in a single office.

**Background**

**Expansion of Authority**

The final Circular 230 regulations greatly expand the authority of the Internal Revenue Service to regulate the preparation and filing of tax returns. The new §10.2(a) expands the definition of practitioner to include those who prepare tax returns and

provide tax advice for compensation. Section 10.34 provides authority to ensure that tax returns and tax advice meet certain minimum certainty and disclosure requirements.

Sections 10.51(a) (16) and (17) provide authority to sanction those who "willfully" fail to file returns on magnetic or other required electronic media and compensated preparers who "willfully" prepare all or substantially all of or sign a tax return or claim for refund where the preparer does not possess a current or otherwise valid PTIN or other required identifying number.

#### Identifying Ethical Violations

The Service recognizes that Circular 230 sets forth ethical standards which are generally meant to apply to "willful" misconduct. Willful misconduct is generally described as "the intentional violation of a known legal duty."<sup>4</sup> Willful misconduct is therefore distinguishable from misconduct which is merely negligent, mistaken or inadvertent. The Internal Revenue Manual recognizes this distinction by requiring that Code Section 6694(a) referrals to OPR be based upon a "pattern" of misconduct.<sup>5</sup> A "pattern" of misconduct is the legally recognized sign or indicator of willfulness. Thus, Circular 230 is not intended to be utilized as an enforcement tool for isolated acts of incompetence or disreputable conduct. Instead, it is intended to more broadly protect the tax system from those practitioners who have demonstrated a clear pattern of failing to meet generally recognized standards of professional conduct.

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<sup>4</sup> *United States v. Pomponio*, 97 S.Ct. 22, 23 (1976)

<sup>5</sup> *Id.* fn. 1

Reconciliation of the Expanded Authority

The current challenge for the Internal Revenue Service is the "reconciliation" of these expanded powers with existing IRS processes. The Service should seek to ensure uniformity and efficiency in the administration of the PTIN and E-File requirements and eliminate duplication and burden. Thus, the first challenge is to coordinate the entry of practitioners into the system. We note that practitioners may now enter through three doors: through RPO by obtaining a PTIN; through the E Filing program by obtaining an EFIN, and through the CAF function by the submission of a Power of Attorney, Form 2848.

We understand that the Service is presently addressing these concerns. A GAO Report (link: <http://www.gao.gov/Products/GAO-11-344>) recommends that the IRS consider use of the PTIN as the authorizing number for E-file and eliminate use of the EFIN. The Service has established a multi function "Reconciliation Team" to review and reconcile the PTIN and the E-Filing regimes so that a preparer will not have to duplicate the requirements that apply to both, such as the requirement to obtain fingerprints, a criminal background check and a check on personal tax compliance.

The E-Filing and PTIN processes are to remain separate until the RPO office is fully staffed and "stands-up." At that point, it is anticipated that a person who obtains a PTIN will be automatically eligible to E-File.

Existing E-file rules contain a long list of items that are considered "violations" of the E-file rules which can result in the imposition of various "sanctions," including loss

of E-file privileges.<sup>6</sup> Some of these violations are “technical violations” while others involve ethical misconduct within the scope of Circular 230. Violations that do not involve professional misconduct, such as violations by E-File transmitters or other E-Filers who are not paid tax preparers, and technical electronic filing violations or security violations such as returned mail will not be referred to RPO. It is anticipated that such violations will be handled according to the existing process. In those instances, the review process will be through E-File management and ultimately to Appeals under the existing procedures which are set forth in Publications 3112 and 1345.

It is anticipated that E-file violations involving ethical misconduct will be referred to RPO for an initial review and, where appropriate, will be referred on to OPR for possible disciplinary action and implementation of the Circular 230 adjudication process. Ultimately, only cases requiring adjudication under Circular 230 (i.e., ethical violations) will be referred by E-File to RPO. RPO will process those referrals and, as appropriate, transmit those matters to OPR for adjudication of the alleged violations.

#### *Referrals to OPR*

We are informed that OPR and RPO are in the process of developing protocols respecting the referral of disciplinary matters to OPR. Attached hereto as Exhibit A is a chart which reflects the preliminary allocation of responsibility between these offices. The chart reflects, in pertinent part, that RPO will oversee the vendor PTIN operation, process enrollment applications and confirm such things as CPE requirements and

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<sup>6</sup> See Internal Revenue Manual 3.42.10, *Authorized IRS E-file Providers*, Publication 3112 and Publication 1345

requirements for renewals. OPR will receive referrals from RPO and process and determine appeals from denials of initial PTINs, denials and renewals for compliance and deficient CPE issues. OPR will also receive and process Circular 230 conduct referrals from RPO, BoD's TIGTA, CI, DOJ, and other federal and state agencies. We strongly support these allocations of responsibility which we understand have been approved by the Commissioner.

**Recommendation**

We concur that coordination should also occur between the RPO and the E-File Program. We think that these offices should be consolidated. We also believe that the CAF function should be consolidated with RPO. We also strongly support the requirement that all ethical violations be referred to OPR for evaluation and, where appropriate, the institution of disciplinary proceedings under Circular 230.

## **ISSUE THREE: GUIDANCE RESPECTING THE NOTICE AND REVIEW**

### **PROCEDURES UNDER THE ENFORCEMENT PROVISIONS OF**

#### **CIRCULAR 230, SUBPART B**

##### **Executive Summary**

With the extension of the Office of Professional Responsibility's disciplinary authority to paid tax return preparers, the practitioner population subject to discipline has increased by the over 500,000 unlicensed individuals who have registered as tax return preparers, as well as innumerable individuals who qualify as non-signing preparers under Treas. Reg. §301.7701-15(b)(2).<sup>7</sup> Many of these newly designated practitioners may be unfamiliar with the ethical and professional obligations under Treasury Circular 230 and the Internal Revenue Code. As noted in the letter dated May 26, 2011, addressed to The Honorable William Wilkins and attached as Exhibit B, many practitioners now subject to OPR's jurisdiction are not familiar with administrative proceedings.

We believe that the Internal Revenue Service should expand the guidance available to all tax practitioners concerning their ethical and professional obligations. We also believe that the Office of Professional Responsibility should provide information to practitioners subject to a disciplinary proceeding under Circular 230 concerning the notice and review procedures under the enforcement provisions of Treasury Circular 230.

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<sup>7</sup> Circular 230 §10.8(c) applies the standards of conduct in Circular 230 Subpart B to "[a]ny individual who for compensation prepares, or assists in the preparation of, all or a substantial portion of a document pertaining to any taxpayer's tax liability for submission to the Internal Revenue Service," regardless of whether that individual is a registered tax return preparer or falls under another category of "practitioner" under Circular 230 §10.2(a) (5).

## **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.

The changes to Circular 230 that became effective August 2, 2011, have 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.<sup>8</sup> Approximately 500,000 individuals who are not attorneys, certified public accountants, or enrolled with the Internal Revenue Service have registered as tax return preparers. These individuals are less likely to understand the obligations imposed by Circular 230 and by the Code. Even some licensed practitioners who understand their ethical obligations under general rules of conduct applicable to their profession may not be fully aware of these obligations if they do not regularly engage in tax practice.

Tax practitioners’ awareness of their ethical and professional obligations under the Internal Revenue Code and Circular 230 would be enhanced by providing a publication that enumerates in reasonable detail the various obligations of practitioners

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<sup>8</sup> Circular 230 §10.2(a) (8).

under Circular 230 and of “tax return preparers” under the Internal Revenue Code. The Service regularly provides this type of guidance to taxpayers and tax preparers in its publications. For example, comprehensive information for individual taxpayers is available in Publication 17, *Your Federal Income Tax*, published in both *.html* and *.pdf* format at the [www.irs.gov](http://www.irs.gov) website.

Similarly, tax practitioners’ understanding of the procedures under Circular 230 Subpart D for responding to an allegation against them could be promoted by providing a publication that describes in reasonable detail the practitioner’s due process and appeal rights, as well as potential sanctions if the practitioner is ultimately found to have violated Circular 230. Again, the Service provides similar procedural information to taxpayers in Publication 1, *Your Rights as a Taxpayer*.

In providing the recommended publications described above, it is critical that practitioners be aware of their existence and be able to easily locate them at the [www.irs.gov](http://www.irs.gov) website. At the *Tax Information for Tax Professionals* section on the Service’s website, there are 25 links in the main body of the page. The link to Circular 230 is the 20<sup>th</sup> link, and the Section 7216 Information Center is the 21<sup>st</sup>, too far down the page to attract the viewer’s attention. And while the terms “Circular 230” and “Section 7216” may be familiar to some attorneys, CPAs, and enrolled agents, they may have little meaning to a newly registered tax return preparer. A majority of 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 located near the top of the page and used titles that more readily identified the subject matter to less experienced or

unlicensed practitioners (*e.g.*, “Ethical and Professional Obligations of Tax Professionals”).

The Service provides practitioners with information concerning tax matters via continuing professional education programs, and these programs have addressed practitioners’ obligations. The Service should continue to employ these programs to promote practitioners’ awareness and understanding of their ethical and professional obligations.

### **Recommendations**

We reaffirm the request by IRSAC that Chief Counsel provide additional guidance respecting the notice and review procedures under the enforcement provisions of Circular 230, Subpart D. We offer the following specific recommendations:

1. We recommend that the Service issue a publication describing the obligations of a practitioner under Circular 230 and those of a preparer under the Internal Revenue Code. 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 Circular 230 for violating these standards.

2. We recommend that the publication described in paragraph 1 be made available in *.html* format on the [www.irs.gov](http://www.irs.gov) website in the section *Tax Information for Tax Professionals* via a single link. The link to the *.html* document should clearly convey the subject matter of the publication, such as “Ethical and Professional Obligations of Tax Professionals,” and the link should be placed in a location near the top of the *Tax Information for Tax Professionals* section. A *.pdf* version of this publication should also be downloadable from the *.html* page.
3. We recommend that the Service allow tax professionals to “subscribe” to changes in the publication described in paragraph 1 via RSS feed or other means.
4. We recommend that the Service issue a separate publication describing the procedures for a proceeding under Subpart D or Circular 230 and related due process rights, including the right to notice, time periods for responding to allegations, the right to representation, the right to submit evidence relevant to the proceeding, administrative hearings, administrative appeals, appeal rights to U.S. District Court, and the potential sanctions if the practitioner is ultimately found to have violated Circular 230. This publication should accompany any notice of an allegation sent to the practitioner and any complaint served on the practitioner under Circular 230 §10.63.
5. We recommend that the Service address the ethical and professional obligations of practitioners in one or more web-based continuing education sessions in its various CPE programs.

## **ISSUE FOUR: RESCISSION OF CHANGES TO THE FINAL REGULATIONS**

### **Executive Summary**

As indicated previously, certain changes were made to the final Regulations which were intended to permit the Commissioner flexibility to allocate disciplinary authority under Circular 230 to other offices of the Internal Revenue Service. These changes were made without the opportunity for public participation and comment. This may have violated the Administrative Procedures Act (APA), as well as existing Executive Orders which encourage the opportunity for public participation and comment. Furthermore, the American Bar Association, Tax Section, and the American College of Tax Counsel have written comments which call into question the delegation of disciplinary authority to the offices of the Internal Revenue Service that enforce the Internal Revenue Code. In light of actions already in progress within the Service, the changes made in the final Regulations appear to be unnecessary. We believe that sound tax administration policy requires that OPR have exclusive authority to review alleged ethical violations and impose discipline for those violations. We therefore recommend that the changes made to §§10.20, 10.50, 10.60 and 10.62 in the final Regulations be rescinded.

### **Background**

The Regulations were issued in proposed form on August 23, 2010. The final version of the Regulations effective August 2, 2011, includes significant changes with respect to which there was no opportunity to comment because these changes were not included in the proposed regulations. These include changes to §§10.20, 10.50, 10.60

and 10.62, wherein the Commissioner retained authority to delegate the power to sign disciplinary complaints under §10.62 to other offices of the Internal Revenue Service.

The manner of the adoption of the final Regulations without the opportunity for public participation and comment violates public policy and appears to violate the APA and an existing Executive Order. APA §§553(b) and (c) require publication of notice containing the substance of the proposed rule as well as an opportunity to comment.<sup>9</sup>

Executive Order 13563 (Improving Regulation and Regulatory Review), issued January 18, 2011, states in pertinent part that "Our regulatory system...must allow for public participation and the open exchange of ideas." To this end, Section 2 of the Executive Order provides:

Sec. 2. Public Participation.

(a) Regulations shall be adopted through a process that involves public participation. To that end, regulations shall be based, to the extent feasible and consistent with law, on the open exchange of information and perspectives among State, local, and tribal officials, experts in relevant disciplines, affected stakeholders in the private sector, and the public as a whole.

(b) To promote that open exchange, each agency, consistent with Executive Order 12866 and other applicable legal requirements, shall endeavor to provide the public with an opportunity to participate in the regulatory process. To the extent feasible and permitted by law, each agency shall afford the public a

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<sup>9</sup> 5 USC §553

meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.

We note that the American Bar Association, Tax Section, has recommended that "disciplinary authority not be shifted to the new RPO or to any other office within the Service."<sup>10</sup> The Tax Section comments include the following reasons for the recommendation:

For many years, tax practitioners have relied on the independence and care exercised by OPR in handling discipline of all practitioners authorized to practice before the Service before the advent of the new return preparer registration process. In order to ensure both the actual and the perceived integrity and independence of the disciplinary process, we respectfully recommend that the Service delegate authority to OPR to exercise all disciplinary authority under the final Regulations.

The American College of Tax Counsel ("ACTC") has also commented on the changes in the final Regulations. The ACTC comments include the following:

Prior to the issuance of the final Regulations, the specific references to OPR in Circular 230 ensured that practitioner disciplinary powers were exercised only by OPR. We recognize the need to coordinate the responsibilities of OPR with the new return preparer office ("RPO") established to administer the return preparer initiative. We respectfully submit, however, that removing references to OPR in Subparts C and D

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<sup>10</sup> See Exhibit C

[§§10.50, 10.60 and 10.62] of the Regulations creates doubt as to whether OPR (or a similarly independent body) will continue to regulate practitioner conduct and be responsible for disciplinary proceedings.<sup>11</sup>

The ACTC also stated that:

...we believe that 'it is very important to maintain the independence and impartiality of the Director of OPR, both in substance and in appearance to the greatest extent feasible. We strongly believe that the Director of OPR should be supervised [by] a person who is wholly independent of the Internal Revenue Service. ... We believe that the conflict that now exists between the Commissioner's frequent role as the taxpayer's adversary and his role as regulator of the conduct of the taxpayer's representative is obvious and invites the perception that proceedings may be brought in the latter context to influence the former.'<sup>12</sup>

To assure continued integrity and independence of the disciplinary process, ACTC recommends that a new §10.83 be added to the Regulations. This proposed §10.83 would state the following:

The initial delegation of responsibility for all practitioner disciplinary matters, functions, and proceedings shall be to the Director of the Office of Professional Responsibility. The Commissioner may reallocate responsibility for some or all of such matters, functions, and proceedings

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<sup>11</sup> See Exhibit D

<sup>12</sup> Id.

to another person or office, but only if such person or office has a level of independence from the Internal Revenue Service's Title 26 compliance and enforcement functions that is similar to (or greater than) that currently possessed by the Director of the Office of Professional Responsibility.

Clearly, there was no opportunity for public comment or participation in the changes made to Circular 230, §§10.20, 10.50, 10.60 and 10.62. Here it is also clear that the experts in the relevant disciplines and the affected stakeholders in the private sector have now expressed fundamental and substantive reasons for opposition to the changes.

It appears that the Service is in the course of implementing changes which are designed to preserve the independence of OPR and its exclusive authority over discipline. We support this action. Because of these actions by the Service, it therefore appears that the changes in the final Regulations were unnecessary. Because the changes appear to be unnecessary, we do not agree that the changes should be retained or that a new §10.83 be added to assure the independence of any office administering discipline.

### **Recommendation**

For the above reasons, we believe that the changes to the final Regulations were unnecessary and contrary to sound tax administration. We, therefore, recommend that the changes to Circular 230, §§10.20, 10.50, 10.60 and 10.62 be rescinded.

## **ISSUE FIVE: SUGGESTED ADOPTION OF USPAP BY OPR IN JUDGING**

### **APPRAISER CONDUCT**

#### **Executive Summary**

Under the “Summary of Comments and Explanation of Revisions” section of the final Regulations relating to Treasury Circular 230, various provisions relate to appraiser conduct. Appraisers have only recently been included in IRS Circular 230 and there is very little in the way of documented guidance on this subject. IRSAC recommends to OPR that it adopt the Uniform Standards of Professional Appraisal Practice (“USPAP”), or equivalent, as one of the standards for judging appraiser conduct.

#### **Background**

In published guidance in the charitable contributions area, the Treasury Department and IRS refer to “generally accepted appraisal standards” in determining what constitutes a “qualified appraisal” and indicate that appraisals will be treated as having been conducted in accordance with generally accepted appraisal standards if “consistent with the substance and principals of the Uniform Standards of Professional Appraisal Practice (USPAP).”<sup>13</sup> We believe that having USPAP as an objective and widely accepted standard as a key component of OPR’s due process would be mutually beneficial to both OPR and the appraisal community. USPAP could serve as a guide for both judging conduct and professional practice remediation. In addition, in a proceeding

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<sup>13</sup> Prop. Reg. §1.170A-17(a)(2) and IRS Notice 2006-96 – Guidance Regarding Appraisal Requirements for Noncash Charitable Contributions.

before an administrative law judge, the ability to reference an objective and widely accepted standard would be of great benefit.

**Recommendation**

We recommend that OPR utilize USPAP or equivalent, as a frame of reference in making determinations regarding appraiser due diligence.

**EXHIBIT A: SUMMARY OF OPR/RPO ROLES AND RESPONSIBILITIES UNDER CIRCULAR 230**

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> <li>• PTIN Registration – Return Preparers</li> <li>• Enrollments– EA’s, ERPA’s, and Actuaries</li> <li>• Renewals</li> </ul>	<ul style="list-style-type: none"> <li>• Oversee vendor PTIN operation</li> <li>• Process enrollment applications</li> <li>• Oversee compliance and suitability determinations</li> <li>• Confirm CE requirements met for renewals</li> <li>• Maintain practitioner on-line database</li> <li>• Liaison with CAF re: representation (PoA) issues</li> </ul>	<ul style="list-style-type: none"> <li>• Maintain database of enjoined/convicted practitioners and feed to PTIN vendor monthly</li> <li>• Process and determine appeals from denials of initial PTIN, denials of renewals for compliance AND deficient CPE issues</li> <li>• Final Agency Determinations re: PTIN ISSUANCE</li> </ul>
<ul style="list-style-type: none"> <li>• Testing – Return Preparer</li> <li>• Special Enrollment Exam (OPE)</li> <li>• Aire Exam (ERPA)</li> <li>• Actuary Exams (Joint Board)</li> <li>• Fingerprinting / Background Checks – RTRP’s</li> </ul>	<ul style="list-style-type: none"> <li>• Oversee vendor relationships</li> <li>• Hear appeals from protest to vendors on questions and other test issues</li> <li>• Annual review of RTP and SEE test questions for accuracy, currency and relevance</li> <li>• Former employee SEE waivers</li> <li>• Preliminary determinations re: PTIN/Enrollment denials/terminations</li> </ul>	<ul style="list-style-type: none"> <li>• Provide annual guidance and review for ethics questions on exams</li> <li>• Process and determine appeals from Notices of proposed denials/terminations of PTIN, Enrolled status</li> <li>• Process and determine appeals from former employees re: limited enrollment</li> <li>• Process and determine appeals of PTIN/enrollment denial based on felony convictions</li> </ul>
<ul style="list-style-type: none"> <li>• Complaints</li> </ul>	<ul style="list-style-type: none"> <li>• Receive and Process complaints from taxpayers</li> <li>• Conduct preliminary case building /gathering of information necessary to make determination whether to investigate further or to pass to OPR for additional disciplinary action</li> <li>• Log all referrals into centralized database for tracking</li> <li>• Communicate with referral source to provide appropriate updates on referral actions</li> </ul>	<ul style="list-style-type: none"> <li>• Receive and process referrals from RPO</li> <li>• Issue pre-allegation/letters; allegation letters as appropriate</li> <li>• Hold conferences and recommend discipline- issue reprimands</li> <li>• Negotiate case resolution with practitioners</li> <li>• Prepare complaint and administrative file for unresolved cases</li> <li>• Transmit admin file to GLS and provide hearing support</li> </ul>

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> <li>• Validate Professional Designations</li> <li>• Monitor Supervised PTIN Holders</li> </ul>	<ul style="list-style-type: none"> <li>• Liaison with CAF re: professional designations on PoA's</li> <li>• Communicate with Supervisory PTIN holders</li> <li>• Refer violations to TIGTA or OPR</li> </ul>	<ul style="list-style-type: none"> <li>• Receive and process referrals from RPO re: Supervisory PTIN holders for Cir 230 violations as per "REFERRALS"</li> </ul>
<ul style="list-style-type: none"> <li>• Referrals</li> </ul>	<ul style="list-style-type: none"> <li>• Receive referrals from BODs (for specific issues)</li> <li>• Conduct preliminary case building /gathering of information necessary to make determination whether to investigate further or to pass to OPR for additional disciplinary action</li> <li>• Log all referrals into centralized database for tracking</li> <li>• Communicate with referral source to provide appropriate updates on referral actions</li> </ul>	<ul style="list-style-type: none"> <li>• Receive and process Cir 230 conduct referrals from RPO, BoD's, TIGTA, CI, DoJ, other federal and state agencies</li> <li>• Issue pre-allegation/letters; allegation letters as appropriate</li> <li>• Hold conferences and recommend discipline- issue reprimands</li> <li>• Negotiate case resolution with practitioners and prepare settlement docs</li> <li>• Prepare complaint and administrative file for unresolved cases</li> <li>• Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support</li> <li>• Prepare administrative file for Appeals to Appellate Authority and assist with briefing</li> </ul>
<ul style="list-style-type: none"> <li>• Continuing Professional Education – RPO's and Enrolled Persons</li> <li>• Continuing Education Vendors</li> </ul>	<ul style="list-style-type: none"> <li>• Receive and process data for renewals and vendor programs</li> <li>• Deny PTIN/enrollment status if deficient CE credits</li> <li>• Deny vendor CPE program status in appropriate circumstances</li> </ul>	<ul style="list-style-type: none"> <li>• Process and determine appeals of denials of PTIN/Enrollment status for deficient CPE</li> <li>• Process and determine appeals of denials Vendor CPE status</li> </ul>

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> <li>• State Licensing</li> <li>• Federal and State Court Actions – Felonies and Injunctions</li> </ul>	<ul style="list-style-type: none"> <li>• N/A</li> </ul>	<ul style="list-style-type: none"> <li>• Research state databases for disciplined practitioners</li> <li>• Monitor DoJ inventory for permanent injunctions and convictions involving Title 26</li> <li>• Obtain and review case materials to confirm status</li> <li>• Prepare Expedited Suspension complaint and letter to practitioner</li> <li>• Hold conference if requested</li> <li>• Issue final determination with recourse rights to 10.60 procedure</li> <li>• Draft 10.60 complaint and prepare administrative file for administrative hearing- on practitioner timely request</li> <li>• Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support Prepare administrative file for Appeals to Appellate Authority and assist with briefing</li> </ul>
<ul style="list-style-type: none"> <li>• Contemptuous Conduct</li> <li>• RTRP Deceptive Advertising</li> <li>• Undue Influence/Threats/Coercion</li> <li>• Return of Records</li> <li>• Failure to Sign Return</li> <li>• Failure to Use PTIN</li> <li>• Failure to E-file</li> <li>• Representing without Authorization</li> </ul>	<ul style="list-style-type: none"> <li>• Receive and Process complaints and referrals</li> <li>• Conduct preliminary case building /gathering of information necessary to make determination whether to investigate further or to pass to OPR for additional disciplinary action</li> <li>• Log all referrals into centralized database for tracking</li> <li>• Communicate with referral source to provide appropriate updates on referral actions</li> <li>• Attempt resolution of issues with Practitioner.</li> <li>• Refer cases to OPR as necessary for disciplinary</li> </ul>	<ul style="list-style-type: none"> <li>• Receive and process referrals from RPO</li> <li>• Issue pre-allegation letters; allegation letters as appropriate</li> <li>• Hold conferences and recommend discipline- issue reprimands</li> <li>• Negotiate case resolution with practitioners</li> <li>• Prepare complaint and administrative file for unresolved cases</li> <li>• Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support</li> <li>• Prepare administrative file for Appeals to Appellate Authority and assist with briefing</li> </ul>

ACTIVITY	RPO ROLE	OPR ROLE
<ul style="list-style-type: none"> <li>• Contingent Fees</li> <li>• Incompetence and Disreputable Conduct (10.51)</li> <li>• False And Misleading Information to IRS</li> <li>• Refund Splitting/Stealing</li> <li>• Aiding and Abetting Practice By Disciplined Practitioner</li> <li>• Penalties Asserted (6694, 6701, etc.)</li> <li>• Willful Evasion of Payment</li> <li>• Aiding and Abetting Evasion</li> <li>• Written Opinions (10.35, 10.37)</li> <li>• Principal Authority – Opinions and Preparation (10.36)</li> </ul>		<ul style="list-style-type: none"> <li>• Receive and process Cir 230 conduct referrals from RPO, BoD's, TIGTA, CI, DoJ, other federal and state agencies</li> <li>• Issue pre-allegation letters; allegation letters as appropriate</li> <li>• Hold conferences and recommend discipline- issue reprimands</li> <li>• Negotiate case resolution with practitioners and prepare settlement docs</li> <li>• Prepare complaint and administrative file for unresolved cases</li> <li>• Transmit admin file to GLS and provide on-going settlement and/or admin. hearing support</li> <li>• Prepare administrative file for Appeals to Appellate Authority and assist with briefing</li> </ul>

### Additional Notes

- **Violations subject to sanction - §10.52(a)(1) and (2):** *(a) A practitioner may be sanctioned under §10.50 if the practitioner — (1) Willfully violates any of the regulations (other than §10.33) contained in this part; or (2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§ 10.34, 10.35, 10.36 or 10.37*
- **Receipt of information concerning practitioner - §10.53(a):** *(a) Officer or employee of the Internal Revenue Service. If an officer or employee of the Internal Revenue Service has reason to believe a practitioner has violated any provision of this part, the officer or employee will promptly make a written report of the suspected violation. The report will explain the facts and reasons upon which the officer's or employee's belief rests and must be submitted to the office(s) of the Internal Revenue Service responsible for administering or enforcing this part*
- **Practice:** All matters connected with a presentation to the IRS relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the IRS. Preparing or filing documents, corresponding and communicating with the IRS, rendering written advice, and representing a client at conferences, hearings and meetings. Legacy Cir 230  
Practitioners: Practice = Tax Return Preparation

**EXHIBIT B**