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DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 10

[TD 9668]

RIN 1545-BF96

Regulations Governing Practice Before the Internal Revenue Service

AGENCY: Office of the Secretary, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations revising the regulations governing practice before the Internal Revenue Service (IRS). These final regulations affect individuals who practice before the IRS. These final regulations modify the standards governing written advice and update other related provisions of the regulations.

DATES: Effective date. These regulations are effective on **[INSERT DATE OF**

**PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Applicability date: For dates of applicability, see §§10.1(d), 10.3(j), 10.22(c), 10.31(b), 10.35(b), 10.36(b), 10.37(e), 10.81(b), 10.82(h), and 10.91.

FOR FURTHER INFORMATION CONTACT: Matthew D. Lucey at (202) 317-3400 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

**Background**

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives of persons before the Treasury Department (Treasury). The Secretary has published regulations governing practice before the IRS in 31 CFR part 10 and reprinted the regulations as Treasury Department Circular No. 230 (Circular 230).

Treasury and the IRS have consistently maintained that individuals subject to Circular 230 must meet minimum standards of conduct with respect to written tax advice, and those who do not should be subject to disciplinary action, including suspension or disbarment. In accordance with these principles, the regulations have been amended from time to time to address issues relating to tax opinions and written tax advice. These regulations modify the rules governing written tax advice as well as other related provisions of Circular 230 to ensure that practitioners meet certain standards of conduct when serving as representatives of persons before the IRS and modify the consequences of failing to meet those standards, such as the expedited suspension provisions.

On September 17, 2012, Treasury and the IRS published in the **Federal Register** (77 FR 57055) a notice of proposed rulemaking (REG-138367-06) proposing to amend Circular 230 by revising the rules governing written tax advice and other related provisions of Circular 230. Previously proposed amendments to the regulations regarding state or local bond opinions also were withdrawn. The proposed regulations sought to eliminate the complex rules governing covered opinions in current §10.35 and to expand the requirements for written advice under §10.37. The proposed regulations

also proposed to broaden the requirement for procedures to ensure compliance under §10.36 beyond the opinion writing and tax return preparation context by requiring that an individual who is subject to Circular 230 with principal authority for overseeing a firm's Federal tax practice take reasonable steps to ensure the firm has adequate procedures in place to comply with Circular 230. The proposed regulations further sought to clarify that practitioners must exercise competence when engaged in the practice of representing persons before the IRS and that the prohibition on a practitioner endorsing or otherwise negotiating any check issued to a taxpayer in respect of a Federal tax liability applies to government payments made by any means, electronic or otherwise. Additionally, the proposed regulations expanded the categories of violations subject to the expedited proceedings in §10.82 to include failures to comply with a practitioner's personal tax filing obligations that demonstrate a pattern of willful disreputable conduct and clarified the Office of Professional Responsibility's scope of responsibility.

Written comments responding to the proposed regulations were received. A public hearing on the proposed regulations was held on December 7, 2012. After consideration of the public comments, the proposed regulations are adopted as revised by this Treasury decision.

### **Summary of Comments and Explanation of Revisions**

The IRS received nineteen comments in response to the notice of proposed rulemaking. All comments were considered and are available for public inspection. Most of the comments addressing the proposed regulations are summarized in this

preamble. Comments addressing provisions of Circular 230 not covered by the notice of proposed rulemaking are not discussed in this preamble. Although these comments are not discussed in this preamble, they may be considered in connection with any future amendments to the relevant provisions of Circular 230.

The overwhelming majority of comments supported the proposed amendments to the regulations, including the removal of the covered opinion rules and introduction of one set of rules for all written tax advice in §10.37. The final regulations adopt the proposed rules with some revisions as discussed in further detail in this preamble.

The amended rules governing written tax advice contained in these final regulations apply to written tax advice rendered on or after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. The scope of these regulations is limited to practice before the IRS. These regulations do not alter or supplant other ethical or legal standards applicable to individuals subject to Circular 230.

## I. Amendments To Rules Governing Written Advice

### A. Elimination of Covered Opinion Rules in §10.35

Former §10.35 provided detailed rules for tax opinions that were “covered opinions” under Circular 230. As discussed in the notice of proposed rulemaking, Treasury and the IRS revisited the covered opinion rules because their application increased the burden on practitioners and clients, without necessarily increasing the quality of the tax advice that the client received. Commenters on the proposed regulations overwhelmingly supported the elimination of former §10.35 because the

former rules were burdensome and provided minimal benefit to taxpayers. Commenters agreed that the rules in former §10.35 contributed to overuse, as well as misleading use, of disclaimers on most practitioner communications even when those communications did not constitute tax advice.

The final regulations adopt the approach taken in the proposed regulations, eliminating the covered opinion rules in former §10.35 and instead subjecting all written tax advice to one standard under final §10.37, as described later in this preamble. Because former §10.35 is removed, these regulations also remove cross-references to former §10.35 in §§10.3 and 10.22. The burden reduction that should result from these regulations is consistent with the directions in Executive Order 13563 to remove or modify regulations that are outmoded, ineffective, insufficient, or too burdensome.

As discussed in the preamble to the proposed regulations, the elimination of the collection of information requirements in the covered opinion rules in these regulations should save tax practitioners a minimum of \$5,333,200. These savings come from the elimination of the provisions in the former regulations requiring practitioners to make certain disclosures in a covered opinion. In connection with the issuance of former §10.35 in 2004, we estimated that 100,000 practitioners would be required to comply with the disclosure provisions of §10.35. We estimated that each practitioner would spend 5 to 10 minutes complying with the provision at an average of 8 minutes for a total burden of 13,333 hours. This burden is no longer imposed on practitioners.

Specifically, the former regulations required a practitioner providing a covered

opinion to make certain disclosures in marketed opinions, limited scope opinions, and opinions that fail to conclude at a confidence level of at least more likely than not that the issue will be resolved in favor of the taxpayer (in other words, when the practitioner could not conclude that it was more likely than not that the taxpayer's position would be supported by the IRS). For example, a marketed opinion had to specifically contain a statement that the opinion was written to support the marketing of the transaction addressed in the opinion and that the taxpayer should seek advice from an independent tax advisor based on the taxpayer's particular circumstances. In addition, certain relationships between the practitioner and a person promoting or marketing a tax shelter were required to be disclosed. These final regulations do not include the above-referenced collection of information/disclosure requirements, and practitioners and taxpayers are relieved of the entire cost associated with those collection of information/disclosure requirements.

Please note that while we estimate that the elimination of this information collection would save tax practitioners and taxpayers a minimum of \$5,333,200, this estimate does not include the burden reduction, and the corresponding cost savings, associated with tax practitioners having to determine whether a covered opinion, and any related disclosure, is necessary. This determination can often take a tax practitioner many hours.

Treasury and the IRS anticipate that the elimination of the covered opinion rules will result in additional, significant savings for both tax practitioners and taxpayers. Practitioners consistently expressed dissatisfaction with the covered opinion rules due

the difficulty and cost of compliance with the rules. Practitioners operating under the former rules spent many hours each year determining whether they needed to prepare a covered opinion for a client, or if the advice fell into one of the exceptions. This required significant time to, among other things, research and review the covered opinion rules to determine the right course of action. If, after undertaking these activities, the practitioner decided that a covered opinion was necessary, the practitioner, to keep the client fully informed had to discuss the covered opinion rules with the client, including how the rules affected the scope of the work that the client had asked the practitioner to perform. This discussion would have also been appropriate because preparation of a covered opinion under former §10.35 would have generally resulted in an increased cost to the client to obtain the advice the client requested. The significant extra costs associated with these activities may, in some cases, have discouraged obtaining written advice. Because the final regulations remove the unnecessary burden related to the process of preparing a covered opinion, both practitioners and taxpayers will likely experience an overall decrease in the costs associated with obtaining written tax advice.

## B. Revision of Requirements for Written Advice

### 1. General Requirements for Written Advice

Robust and relevant standards for written tax advice remain appropriate because Treasury and the IRS continue to be aware of the risk for the issuance and marketing of written tax opinions to promote abusive transactions. Commenters overwhelmingly supported the rules in proposed §10.37 as providing practical, flexible rules that are well

suited to the issuance of quality written tax advice, provided in an ethical manner, in today's practice environment. Commenters agreed that the comprehensive, principles-based approach of these amendments is more straightforward, simpler, and can be applied to all written tax advice in a less burdensome manner. Overall, Treasury and the IRS have determined that these written advice rules strike an appropriate balance between allowing flexibility in providing written advice, while at the same time maintaining standards that require individuals to act ethically and competently.

Like the proposed regulations, final §10.37 replaces the covered opinion rules with principles to which all practitioners must adhere when rendering written advice. Specifically, §10.37 states affirmatively the standards to which a practitioner must adhere when providing written advice on a Federal tax matter. Section 10.37 requires, among other things, that the practitioner base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or reasonably should know. A practitioner must also use reasonable efforts to identify and ascertain the facts relevant to written advice on a Federal tax matter.

As under the proposed regulations, §10.37, unlike former §10.35, does not require that the practitioner describe in the written advice the relevant facts (including assumptions and representations), the application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts. Rather, the scope of the engagement and the type and specificity of the advice sought by the client, in addition to all other appropriate facts and circumstances, are factors in determining the extent to



which the relevant facts, application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts must be set forth in the written advice. Also, under §10.37, unlike former §10.35, the practitioner may consider these factors in determining the scope of the written advice. Further, the determination of whether a practitioner has failed to comply with the requirements of §10.37 will be based on all facts and circumstances, not on whether each requirement is addressed in the written advice.

Several commenters were concerned that the proposed regulations did not include a requirement that the practitioner consider relevant legal authorities and relate that law to the relevant facts. While this requirement was not expressly stated in the proposed regulations, Treasury and the IRS believed that it was implicit in the requirement that practitioners base the written advice on reasonable legal and factual assumptions. To further clarify, however, the final regulations add this requirement to §10.37. Although the final regulations, unlike former §10.35, do not impose a specific requirement for a practitioner to include in the written advice itself any particular piece of information or analysis, Treasury and the IRS encourage practitioners to describe all relevant facts, law, analysis, and assumptions in appropriate circumstances. As noted above, the determination of whether a practitioner complied with the requirements of §10.37 will be based on all facts and circumstances, including whether it was appropriate to describe all relevant facts, law, analysis, and assumptions in a particular piece of written tax advice. Treasury and the IRS also encourage practitioners to observe the aspirational best practices described in §10.33 of Circular 230.

Some commenters requested clarification that §10.37 will be applied on the basis of what is reasonable under the facts and circumstances. These commenters stated that the proposed regulations did not affirmatively provide that a practitioner should reasonably consider all facts and circumstances in determining their obligations under §10.37. Treasury and the IRS agree that practitioners should consider what is reasonable under the facts and circumstances when providing written advice. Although Treasury and IRS believe that proposed §10.37(a), (b), and (c) accurately reflected that principle, §10.37(a)(2)(ii) has been clarified to more explicitly include the requirement.

One commenter expressed concern that proposed §10.37's requirement for practitioners to rely on "reasonable" factual and legal assumptions is too onerous and would prefer that the rule provide that practitioners are required to rely on factual and legal assumptions that are not unreasonable. The commenter would have preferred a rule similar to former §10.37(a), which prohibits a practitioner from basing advice on unreasonable factual or legal assumptions. The commenter stated that requiring reasonableness puts the burden on the practitioner to prove reasonableness. Treasury and the IRS do not view the change from "not unreasonable" to "reasonable" to be a substantive alteration. This specific amendment is part of the larger effort undertaken in these regulations to affirmatively state the requirements and standards for practitioners rather than merely specifying prohibited conduct. Treasury and the IRS also disagree that a reasonableness standard is too burdensome. As other commenters stated, any advice based on invalid representations, incorrect facts, or unreasonable assumptions has little value. Thus, the final §10.37 adopts the requirement of proposed §10.37 that

practitioners rely on reasonable factual and legal assumptions. Several commenters also stated that requiring reasonable assumptions is aimed at eliminating informal advice, but Treasury and the IRS disagree. There is no particular correlation between the requirement to base advice on reasonable assumptions and the format of that advice. All forms of advice should be based on reasonable assumptions.

Many individuals currently use a Circular 230 disclaimer at the conclusion of every e-mail or other writing to remove the communication from the covered opinion rules in former §10.35. In many instances, these disclaimers are inserted without regard to whether the disclaimer is necessary or appropriate. These types of disclaimers are routinely inserted in any written transmission, including writings that do not contain any tax advice. The removal of former §10.35 eliminates the detailed provisions concerning covered opinions and disclosures in written opinions. Because amended §10.37 does not include the disclosure provisions in the current covered opinion rules, Treasury and the IRS expect that these amendments will eliminate the use of a Circular 230 disclaimer in e-mail and other writings. Although one commenter stated that the proposed regulations would result in increased use of the disclaimer, the rules in the final regulations are intended to eliminate the need for unnecessary disclaimers. Another commenter stated that the required disclaimer should be retained because it may be helpful in some circumstances. These rules do not, however, prohibit the use of an appropriate statement describing any reasonable and accurate limitations of the advice rendered to the client.

## 2. Definition of Written Advice Addressing Federal Tax Matters

The proposed regulations did not define written advice. Commenters on the proposed regulations agreed that a detailed definition of written advice in Circular 230 is unnecessary. Some commenters, however, requested clarification that certain items, such as submissions to a governmental entity and continuing education presentations, would not be considered written tax advice. The final regulations have been revised to clarify that government submissions on matters of general policy are not considered written tax advice on a Federal tax matter for purposes of §10.37. For example, if a law firm submitted comments on proposed regulations to Treasury and IRS on a client's behalf, that submission would not be considered written advice on a Federal tax matter because comments on proposed regulations are government submissions on matters of general policy. The final regulations also clarify that continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters, such as presentations at tax professional organization meetings, are not considered written advice for purposes of §10.37. Presentations marketing or promoting transactions will not be considered to be provided solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters. Including contact information on a continuing education presentation provided solely for the purpose of enhancing professional knowledge, without more, does not convert an educational presentation into an item of written tax advice governed by the final regulations. Even though continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters are not considered written advice, Treasury and the IRS

nonetheless expect that practitioners will follow the generally applicable diligence and competence standards under §§10.22 and 10.35 when engaged in those activities.

Former §10.35 governed written tax advice addressing Federal tax issues. Under the prior regulations, a Federal tax issue was defined as a question concerning the Federal tax treatment of an item of income, gain, loss, deduction, or credit, the existence or absence of a taxable transfer of property, or the value of property for Federal tax purposes. Because the final regulations eliminate former §10.35, this definition is no longer applicable.

Section 10.37 of the proposed regulations governed written advice addressing “Federal tax matters,” but did not define Federal tax matters. Some commenters requested clarification regarding the definition of a Federal tax matter, and Treasury and the IRS determined that it is appropriate to define Federal tax matter in the final regulations. Under final §10.37(d), a Federal tax matter is any matter concerning the application or interpretation of (1) a revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code (Code), (2) any provision of law impacting a person’s obligations under the internal revenue laws and regulations, including but not limited to the person’s liability to pay tax or obligation to file returns, or (3) any other law or regulation administered by the IRS. The definition of Federal tax matter in the final regulations reflects the broad nature of advice rendered by Federal tax practitioners in today’s practice environment.

Other commenters expressed interest in keeping the definition of Federal tax issue contained in former §10.35 for purposes of §10.37. The final regulations do not

retain the term Federal tax issue or its definition because practitioners provide advice on numerous tax related issues that are outside the scope of the definition of "Federal tax issue" contained in former §10.35 but nonetheless are Federal tax matters and should be subject to the reasonable practitioner standard embodied in final §10.37.

### 3. Consideration of Audit Risk and Likelihood of Settlement

Consistent with former §10.37, the final regulations provide that a practitioner must not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that an issue will not be raised on audit. Although commenters agreed with the retention of this rule, one commenter expressed concern that stating this rule only in the context of written advice improperly sends the message that oral advice could take audit risk into account. Treasury and the IRS agree that audit risk should not be considered by practitioners in the course of advising a client on a Federal tax matter, regardless of the form in which the advice is given. Because §10.37 addresses only written advice, Treasury and the IRS do not believe that the rule barring consideration of the possibility that a return or issue will be audited when giving written advice suggests that it may be considered when giving oral advice. Therefore, no change is made to §10.37 in response to the comment.

Proposed §10.37 sought to eliminate the provision in the former regulations that prohibits a practitioner from taking into account the possibility that an issue will be resolved through settlement if raised when giving written advice evaluating a Federal tax matter. Treasury and the IRS concluded that the former rule may have unduly restricted the ability of a practitioner to provide comprehensive written advice because

the existence or nonexistence of legitimate hazards that may make settlement more or less likely may be a material issue for which the practitioner has an obligation to inform the client. Commenters agreed that this amendment is appropriate, and the final regulations retain it.

#### 4. Standard for Significant Purpose Transactions

The proposed regulations provided that the IRS will apply a heightened standard of review to determine whether a practitioner has satisfied the written advice standards when the practitioner knows or has reason to know that the written advice will be used in promoting, marketing, or recommending an investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Code. Some commenters expressed concern that the term “heightened standard of review” was too vague and requested that Treasury and the IRS provide detailed rules and examples with respect to application of a heightened standard of review in these cases. The final regulations clarify in §10.37(c)(2) that the Commissioner, or delegate, will apply a reasonable practitioner standard that considers all facts and circumstances with an emphasis given to the additional risk associated with the practitioner's lack of knowledge of the taxpayer's particular circumstances.

#### 5. Reliance on Professionals

Proposed §10.37(b) addressed a practitioner's reliance on the advice of another practitioner. Commenters asked whether the standards in §10.37(b) should apply to a practitioner's reliance on advice from an appraiser or other individual not described as a practitioner in §§10.2 and 10.3 of Circular 230. Treasury and the IRS have determined

that the provisions of §10.37(b) should apply to a practitioner who relies on advice from any other person, including appraisers and other individuals not defined as practitioners under Circular 230. Final §10.37(b), therefore, reflects that the standards apply to a practitioner relying on advice from another person. This reliance provision in the final regulations is consistent with reliance standards in current §§10.22 and 10.34(d), and former §10.35(d). Commenters also requested special rules for reliance on certain professionals, but Treasury and the IRS have determined that the same standards should apply to all advice upon which a practitioner relies, bearing in mind that the reasonable practitioner standard under §10.37(c) will be applied considering all facts and circumstances.

Proposed §10.37(b)(1)-(3) provided that reliance is not reasonable when the practitioner “knows or should know” that the opinion of the other person should not be relied on, the other person is not competent to provide the advice, or the other person has a conflict of interest. Commenters suggested that the reliance provisions in proposed §10.37(b)(1)-(3) be revised to use a “knows or reasonably should know standard.” Treasury and the IRS agree. Accordingly, the final regulations revise §10.37(b)(1)-(3) to prohibit reliance when the practitioner “knows or reasonably should know” that the advice is disqualified as specified in each provision. The standard in final §10.37(a) for reliance on representations also has been amended in a consistent manner.

Commenters also suggested that the reliance provision in proposed §10.37(b)(2) is too broad because it imposes a duty on a practitioner to inquire into the skills and



experience of the person whose advice is being relied upon. While Treasury and the IRS do not believe this standard imposes an affirmative duty on a practitioner to inquire into the skills and experience of the other person when the practitioner is already aware of the other person's background, Treasury and the IRS believe practitioners should consider the skills and experience of a person when they are relying on the advice of that person. Relying on advice of another person without considering that person's expertise and qualifications to provide that advice is inconsistent with the obligation of diligence required in §10.22. Thus, a practitioner intending to rely on the advice of another person may have an obligation to inquire about that person's background if the practitioner is not familiar with the person's qualifications to render the advice on which the practitioner will be relying. Accordingly, the final regulations retain §10.37(b)(2), which provides that a practitioner cannot rely on the advice of another when the practitioner knows or reasonably should know that the other person is not competent or lacks necessary qualifications to provide the advice.

Some commenters expressed concern with proposed §10.37(b)(3), which provided that a practitioner could not rely on the advice of another when the practitioner knows or should know that the other practitioner has a conflict of interest as described in Circular 230. These commenters stated that this rule may prevent reliance when the other practitioner has a conflict of interest that has been properly waived by all affected clients, as permitted by §10.29 of Circular 230. Treasury and the IRS agree that a practitioner should be able to rely on the advice of another person who has a conflict of interest when the practitioner knows that the other person's conflict has been waived by

all affected clients through informed consent, the representation is not prohibited by law (for example, Federal law prohibits representation by a former government lawyer in certain circumstances), and all parties and practitioners reasonably believe that the practitioner with the conflict can provide competent advice. Final §10.37(b)(3), therefore, specifically provides that reliance is not permitted when the practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in Circular 230.

## II. Procedures to Ensure Compliance

Former §10.36(a) provided requirements for practitioners to establish procedures to ensure compliance with former §10.35. Because these regulations remove former §10.35, these regulations also remove former §10.36(a). As set forth in the notice of proposed rulemaking preceding these final regulations, Treasury and the IRS, however, amended §10.36 to ensure compliance with Circular 230 generally.

The procedures to ensure compliance have produced great success in encouraging firms to self-regulate without the burden often associated with a rigid one-size-fits-all approach. Treasury and the IRS expanded §10.36 in June 2011 to require firms to have procedures in place to ensure Circular 230 compliance with respect to a firm's tax return preparation practice (76 FR 32286). Under proposed §10.36, the requirement for procedures to ensure compliance were expanded to include all provisions in Subparts A (Rules Governing Authority to Practice), B (Duties and Restrictions Relating to Practice Before the Internal Revenue Service), and C

(Sanctions for Violation of the Regulations) of Circular 230. Section 10.36 is finalized as proposed, except for the clarifications described in this preamble.

Commenters generally agreed with the amendments to §10.36. One concern expressed by the commenters, however, was that the proposed rule would arguably permit firm management to be in compliance with Circular 230 if it had taken reasonable steps to ensure the firm had adequate procedures in place but did not take any steps to ensure those procedures are properly followed. Treasury and the IRS agree that §10.36 should be clarified to require both the existence and implementation of adequate procedures. Accordingly, §10.36(b)(2) of the final regulations is amended to provide this clarification.

Some commenters also expressed concern with the application of §10.36 when certain members of firm management are not practitioners under Circular 230. Treasury and the IRS recognize that there may be instances when one or more members of firm management have principal authority and responsibility for overseeing a firm's tax practice but are not practitioners under Circular 230. In these instances, other members of firm management may nonetheless be subject to the provisions of Circular 230. Accordingly, §10.36 is revised to apply to any member of firm management subject to Circular 230. Although Treasury and the IRS realize there may be some instances in which no member of firm management is subject to Circular 230, the overwhelming majority of firms will have one or more members of firm management who are subject to Circular 230. Treasury and the IRS believe it is reasonable to expect those members of firm management who are subject to Circular 230 to ensure that the

firm will have in place and implement adequate procedures to ensure compliance with Circular 230. The final regulations make clear that in the absence of a person or persons identified by the firm as having principal authority and responsibility, the IRS may identify one or more individuals subject to Circular 230 who will be held responsible for taking reasonable steps to ensure that the firm has adequate procedures in effect for all members for purposes of complying with Circular 230.

Because §10.36 is expanded to apply to all provisions in Subparts A, B, and C of Circular 230, including §10.51 (under which willful failure to file a tax return and willful evasion of the assessment or payment of tax is disreputable conduct), one commenter was concerned that §10.36 imposes a duty on firm management to ensure that members of the firm are compliant with their own tax obligations. Treasury and the IRS recognize that personal filing and payment obligations are an individual responsibility, and there are limitations on a firm's responsibility for the compliance of any member, associate, or employee with their personal tax obligations. But, Treasury and the IRS believe that firm management should not ignore the noncompliance with these obligations by any practitioner associated with the firm when such noncompliance is known or should be known to the firm.

One commenter stated that the expansion of §10.36 should be limited to the practice standards prescribed in Subpart B of Circular 230, which pertains to Duties and Restrictions Relating to Practice Before the Internal Revenue Service. Treasury and the IRS disagree that final §10.36 should be limited to Subpart B because Subparts A (Rules Governing Authority to Practice) and C (Sanctions for Violation of the

Regulations) also impose substantive standards with which firm members must comply. Treasury and the IRS, however, do agree that it is not necessary for a firm's procedures to ensure compliance with Subparts D (Rules Applicable to Disciplinary Proceedings) or E (General Provisions) of Circular 230, and have revised §10.36 accordingly.

One commenter suggested that firm management should be subject to discipline even when there is no subordinate individual whose conduct is subject to sanction. Another commenter suggested that §10.36 be expanded to govern contractual relationships occurring outside the firm or in-house context in which one party may supervise or manage the other party. Treasury and the IRS considered these comments and have determined that such authority is not necessary at this time because §10.36, as amended, is broad enough for the IRS to be able to determine whether firm management is taking reasonable steps to comply with Circular 230. Future consideration may be given to broadening the rules consistent with these comments, if experience shows that additional changes are necessary.

### III. General Standard of Competence

Section 10.35 of the proposed regulations provided that a practitioner must possess the necessary competence to engage in practice before the IRS and that competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

Some commenters expressed concern over whether the competence standard permits practitioners to become competent by consulting other practitioners with relevant expertise or learning governing law through research and study. In response to

these comments, the competence standard in final §10.35 contemplates that practitioners may become competent in a variety of ways, including, among other things, consulting with experts in the relevant area and studying the relevant law. Whether consultation and/or research are adequate to make a practitioner competent in a particular situation depends on the facts and circumstances of the particular situation.

The proposed regulations provided that competent practice requires “the knowledge, skill, thoroughness, and preparation” necessary for the matter. Commenters questioned whether it is appropriate to consider “thoroughness and preparation” in determining competency because, in some circumstances, the failure to thoroughly prepare does not necessarily show a lack of competence. Treasury and the IRS recognize that a practitioner who is highly experienced in a particular matter may require less preparation than a practitioner who is handling the same matter for the first time. Accordingly, the final regulations clarify that competence requires the “appropriate level of” knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

Commenters suggested that the competence standard may be too broad because it could apply to all advice given to a client. The provision is intended to apply to all advice a practitioner provides to a client on a matter within the scope of Circular 230. This competence standard in Circular 230 does not apply to acts that are outside the scope of Circular 230. Treasury and the IRS, and the public, expect practitioners to be competent when they engage clients in matters covered by Circular 230, including the provision of advice. It is also expected that practitioners will advise clients to obtain

other counsel when the practitioner is not competent or cannot become competent to provide advice requested on a matter within the scope of Circular 230. Treasury and the IRS, thus, believe the competence standard is not overbroad as it governs conduct within the purview of Circular 230. Accordingly, the final regulations retain the rules in the proposed regulations.

Some commenters noted that the proposed competency standard was nearly identical to the competency standard in the American Bar Association's Model Rules of Professional Conduct. And a few commenters expressed confusion about whether the proposed regulations permitted different competency standards depending on the practitioner's status as an attorney, CPA, enrolled agent, or other practitioner. The proposed regulations provided only one competency standard under Circular 230 and were clear that the same standard applies to all practitioners, regardless of the practitioner's status as an attorney, CPA, enrolled agent, or other practitioner. As commenters noted, the competency standard in §10.35 is nearly identical to the standard in the Model Rules of Professional Conduct for attorneys, but, unlike the Model Rules, §10.35 applies to all individuals subject to Circular 230, not just attorneys.

Further, some commenters asked Treasury and the IRS to further develop the standard that would apply under §10.52 for determining whether there is a violation of §10.35. Section 10.52 provides the governing standards for determining whether any violation of a Circular 230 provision subjects an individual to sanction. Treasury and the IRS do not believe the standards in §10.52 need to be expanded upon at this time. Section 10.52 already specifies that a practitioner will be subject to sanction under

§10.52 for violating §10.35 by behaving recklessly or through gross incompetence. A pattern or practice of incompetent conduct may establish a violation of §10.35. Under current practice, the IRS considers the presence of aggravating and mitigating factors in determining whether a sanction for a violation of Circular 230 is appropriate (see Notice 2007-39). Therefore, Treasury and the IRS do not believe additional guidance related to §10.52 is necessary at this time.

Additionally, some commenters requested that the regulations include examples demonstrating practitioner competence. Treasury and the IRS have determined that the inclusion of examples in the regulations is not necessary because competence is not a new standard or concept, and whether the required standard is met must always be based on the relevant facts and circumstances. Although not binding on the IRS, Treasury and the IRS believe that the comments to Rule 1.1 of the Model Rules of Professional Conduct, State Bar opinions addressing the competence standard, and the American Institute of Certified Public Accountant's competency standard are generally informative on the standard of competency expected of practitioners under Circular 230.

#### IV. Electronic Negotiation of Taxpayer Refunds

Proposed and final §10.31 provide that a practitioner may not endorse or otherwise negotiate any check issued to a client by the government in respect of a Federal tax liability, including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated. This prohibition on practitioner negotiation of taxpayer refunds is intended to provide guidance in the modern-day



electronic environment in which practitioners, taxpayers, and the IRS operate.

Proposed and final §10.31 also amend former §10.31 to apply to all individuals who practice as representatives of persons before the IRS, not just those practitioners who are tax return preparers.

Most commenters on the proposed regulations agreed with Treasury and the IRS that these revisions to §10.31 are an appropriate standard for all practitioners as well as a necessary step in protecting taxpayers in today's electronic commerce environment. Commenters recognized this is an area of abuse, and observed that the amendments to §10.31 will improve public confidence in the profession. Accordingly, the final regulations retain this rule.

One commenter expressed concern that §10.31 prohibits certain arrangements permissible under section 6695(f) of the Code, which imposes a penalty on a tax return preparer for endorsing or otherwise negotiating (directly or through an agent) a taxpayer's check. Section 1.6695(f)-1(f)(2) of the Income Tax Regulations sets forth certain arrangements between a "tax return preparer-bank" and a taxpayer to which section 6695(f) does not apply. Treasury and the IRS do not believe that the rule in proposed §10.31 prohibits the arrangements described in the section 6695 regulations or any arrangement that is not subject to the penalty under the section 6695(f), and therefore no change to finalized §10.31 was made in this regard.

One commenter raised the concern that the administration of a trust or estate may be impaired due to the prohibition on practitioner check negotiation. Section 10.31 does not apply to an individual acting solely in the capacity of a trustee of a trust, or

administrator/executor of an estate because that person is acting as the taxpayer, not as the taxpayer's representative. See §10.7(e) of Circular 230.

#### V. Expedited Suspension Procedures

Section 10.82 authorizes the immediate suspension of a practitioner who has engaged in certain conduct. The proposed and final regulations extend the expedited disciplinary procedures to disciplinary proceedings against practitioners who have willfully failed to comply with their Federal tax filing obligations.

Amended §10.82 only permits the use of expedited procedures in the limited circumstances when a tax noncompliant practitioner demonstrates a pattern of willful disreputable conduct by (1) failing to make an annual Federal tax return during four of five tax years immediately before the institution of an expedited suspension proceeding, or (2) failing to make a return required more frequently than annually during five of seven tax periods immediately before the institution of an expedited suspension proceeding. For purposes of §10.82, the phrase "make a return" has the same meaning as used in sections 6011 and 6012 of the Code and §10.51(a)(6) of Circular 230. Additionally, the practitioner must be noncompliant with a tax filing obligation at the time the notice of suspension is served on the practitioner for the expedited procedures to apply.

Commenters generally agreed that a practitioner's willful non-filing is an appropriate grounds for expedited suspension, and that the final regulations are narrowly tailored to achieve the desired result. One commenter, however, opined that the amendments to §10.82 should only apply to failures with respect to the requirement

to file income tax returns. Treasury and the IRS do not agree with this comment because repeated instances of non-filing demonstrates a practitioner's willfulness and potential harm to the tax system regardless of the type of return at issue.

Some commenters suggested that the periods of noncompliance for which expedited suspension may apply in the case of non-filing (four of five years for annual returns, or five of seven tax periods) are too short. Treasury and the IRS do not agree. Four of five tax years, or five of seven tax periods, of practitioner non-filing shows a level of disregard for the tax system beyond negligence. Practitioners engaging in this repeated pattern of non-filing demonstrate a high level of disregard for the Federal tax system and a level of willfulness sufficient for practitioner sanction under Circular 230.

Some commenters expressed concern that the failure to file four out of five years (or five of seven periods, as applicable) rule deems willfulness without providing the practitioner an opportunity to respond or explain any legitimate basis for the non-filing. A similar comment stated that expedited suspension would not be appropriate if a practitioner and the IRS may have a legitimate dispute as to whether employment tax returns were required to be filed. Section 10.82, however, provides the practitioner with an opportunity to file a response explaining any circumstances surrounding the failure to file prior to the suspension.

Accordingly, Treasury and the IRS have determined that the proposed amendments to §10.82 are appropriate because practitioners demonstrating this high level of disregard for the Federal tax system are unfit to represent others who are making a good faith attempt to comply with their own Federal tax obligations. Expedited

action in these cases will likely prevent harm to taxpayers and the Federal tax system. Furthermore, these changes to the regulations provide appropriate procedures to ensure due process for practitioners.

Prior to these regulations, Circular 230 did not otherwise provide guidance with respect to the length of suspension or the time period in which the practitioner is permitted to apply for reinstatement. Section 10.81, however, formerly provided that a disbarred practitioner (or disqualified appraiser) was eligible to apply for reinstatement after five years following the practitioner's disbarment or disqualification. Proposed §10.81 extended this standard to suspended practitioners. Consistent with proposed §10.81, final §10.81 makes the rules for disbarred and suspended practitioners consistent and applies the same five-year time period for both disbarred and suspended practitioners. One commenter observed that it also should be appropriate for a suspended practitioner to apply for reinstatement when the suspension expires, even if the suspension expires before the end of five years. Treasury and the IRS agree with this observation, and have revised §10.81 accordingly.

Consistent with proposed §10.82, final §10.82 includes several non-substantive changes that will help practitioners distinguish between the expedited suspension procedures of §10.82 and otherwise generally applicable procedures for sanctions instituted under §10.60. For example, to begin an expedited suspension under these regulations, the IRS would issue a "show cause order" instead of a "complaint" and the practitioner would submit a "response" instead of an "answer." Prior to the issuance of the proposed regulations, the terms "complaint" and "answer" described the documents

used for both expedited suspensions under §10.82 and regular proceedings under §10.60. The changes made in the proposed regulations, which are retained in the final regulations, do not substantively change the expedited suspension procedures, or the contents of what must be included in the underlying documents, but are intended to make it easier to understand §10.82.

Proposed §10.82(d) provided that an individual subject to a proposed expedited suspension must file a response within 30 days of the show cause order proposing to suspend the individual. One commenter expressed concern that 30 days is not sufficient time for an individual out of the country to respond to the show cause order. As noted in the preceding paragraph, the proposed regulations sought to amend §10.82 to assist in clarifying the distinction between expedited suspension procedures and the procedures generally applicable to disciplinary proceedings instituted under §10.60. The 30-day period was not a change from the prior time period contained in §10.82(d). The IRS has not experienced that individuals outside the country are defaulting on expedited suspension show cause orders (formerly referred to as complaints) or requesting additional time more frequently, as a general matter, than individuals inside the country to whom a show cause order has been issued. Therefore, Treasury and the IRS do not believe that it is necessary to extend the 30-day period for responding to show cause orders for those outside the United States at this time.

Section 10.82(g), as amended, clarifies that practitioners subject to an expedited proceeding may demand a complaint under §10.60. Former §10.82(g) provided that the IRS has 30 days to issue a complaint after receiving the practitioner's demand for a

complaint. In some cases, extra time may be necessary to provide the practitioner and Administrative Law Judge with the most current information regarding the practitioner's fitness to practice as a representative of persons before the IRS. The proposed regulations increased the time to file the requested complaint to 45 days. No comments were received on this proposal. But, after further consideration, Treasury and the IRS have determined that, in some cases, more than 45 days may be needed for the IRS to provide the Administrative Law Judge with the most current information regarding the practitioner's fitness to practice. Treasury and the IRS believe that 60 days will provide the IRS with sufficient time to ensure the complaint complies with the requirements in §10.62. Accordingly, final §10.82(g) provides that the IRS has 60 days to issue a complaint after receiving a demand for a complaint from a practitioner suspended under the expedited procedures.

Commenters expressed concern about what would happen if the IRS does not file a complaint within the period provided in §10.82(g). In response to this concern, revised §10.82 is clarified to provide that if the IRS does not issue a complaint within 60 days of receiving the demand, the suspension is lifted automatically. Lifting the suspension in these circumstances will not, however, preclude the Commissioner, or delegate, from instituting a proceeding under §10.60.

#### VI. Scope of the Office of Professional Responsibility

Proposed §10.1(a)(1) clarified that the Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions. Commenters stated this amendment would

abate previously expressed concerns that other IRS offices may be authorized to handle practitioner disciplinary proceedings. Accordingly, the final regulations retain this clarification. However, the effective date provision of §10.1(d) is revised to clarify that the only provision of §10.1 that has an effective date of **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]** is §10.1(a)(1).

#### **Effect on Other Documents**

Notice 2005-47 (2005-1 CB 1373) will be obsolete beginning on **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. Notice 2005-47 provided interim guidance and information concerning State or local bond opinions under §10.35 of Circular 230, and is obsolete because §10.35 is removed.

#### **Availability of IRS Documents**

IRS notices cited in this preamble are made available by the Superintendent of Documents, U.S. Government Printing Office, Washington, DC 20402.

#### **Special Analyses**

This rule has been designated a “significant regulatory action” although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The final rule affects individuals who practice as representatives of persons before the IRS. Persons authorized to practice before the IRS have long been required to comply with certain standards of conduct, and those who provide written tax advice currently must comply with specific rules for this advice.

Because the final regulations replace rigid rules for written tax advice with more flexible rules and eliminate the necessity to provide disclaimers in certain written tax advice, the rules will reduce the burden imposed on small entities that issue written tax advice. Therefore, the amendments and requirements for written advice imposed by these regulations will not have a significant economic impact on a substantial number of small entities, and a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking published on September 17, 2012 was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses, and no comments were received. These regulations are necessary to provide practitioners and taxpayers with immediate guidance and to inform taxpayers and practitioners of the burden reduction associated with these regulations at the earliest possible date. Accordingly, good cause is found for dispensing with a delayed effective date pursuant to 5 U.S.C. 553(d).

### **Drafting Information**

The principal author of these regulations is Matthew D. Lucey of the Office of the Associate Chief Counsel (Procedure and Administration).

### **List of Subjects in 31 CFR Part 10**

Accountants, Administrative practice and procedure, Lawyers, Reporting and recordkeeping requirements, Taxes.

### **Adoption of Amendments to the Regulations**

Accordingly, 31 CFR part 10 is amended as follows:



## **PART 10—PRACTICE BEFORE THE INTERNAL REVENUE SERVICE**

Paragraph 1. The authority citation for 31 CFR part 10 continues to read as follows:

Authority: Sec. 3, 23 Stat. 258, secs. 2-12, 60 Stat. 237 et. seq.; 5 U.S.C. 301, 500, 551-559; 31 U.S.C. 321; 31 U.S.C. 330; Reorg. Plan No. 26 of 1950, 15 FR 4935, 64 Stat. 1280, 3 CFR, 1949-1953 Comp., p. 1017.

Par. 2. Section 10.1 is amended by revising paragraphs (a)(1) and (d) to read as follows:

### §10.1 Offices.

(a) \* \* \*

(1) The Office of Professional Responsibility, which shall generally have responsibility for matters related to practitioner conduct and shall have exclusive responsibility for discipline, including disciplinary proceedings and sanctions; and

\* \* \* \* \*

(d) Effective/applicability date. This section is applicable beginning August 2, 2011, except that paragraph (a)(1) is applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Par. 3. Section 10.3 is amended by revising paragraphs (a), (b), (g), and (j) to read as follows:

### §10.3 Who may practice.

(a) Attorneys. Any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal

Revenue Service by filing with the Internal Revenue Service a written declaration that the attorney is currently qualified as an attorney and is authorized to represent the party or parties. Notwithstanding the preceding sentence, attorneys who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under §10.37, but their rendering of this advice is practice before the Internal Revenue Service.

(b) Certified public accountants. Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the certified public accountant is currently qualified as a certified public accountant and is authorized to represent the party or parties. Notwithstanding the preceding sentence, certified public accountants who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under §10.37, but their rendering of this advice is practice before the Internal Revenue Service.

\* \* \* \* \*

(g) Others. Any individual qualifying under §10.5(e) or §10.7 is eligible to practice before the Internal Revenue Service to the extent provided in those sections.

\* \* \* \* \*

(j) Effective/applicability date. Paragraphs (a), (b), and (g) of this section are

applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. Paragraphs (c) through (f), (h), and (i) of this section are applicable beginning August 2, 2011.

Par. 4. Section 10.22 is amended by revising paragraphs (b) and (c) to read as follows:

§10.22 Diligence as to accuracy.

\* \* \* \* \*

(b) Reliance on others. Except as modified by §§10.34 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

(c) Effective/applicability date. Paragraph (a) of this section is applicable on September 26, 2007. Paragraph (b) of this section is applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Par. 5. Section 10.31 is revised to read as follows:

§10.31 Negotiation of taxpayer checks.

(a) A practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

(b) Effective/applicability date. This section is applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Par. 6. Section 10.35 is revised to read as follows:

§10.35 Competence.

(a) A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.

(b) Effective/applicability date. This section is applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Par. 7. Section 10.36 is revised to read as follows:

§10.36 Procedures to ensure compliance.

(a) Any individual subject to the provisions of this part who has (or individuals who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B, and C of this part, as applicable. In the absence of a person or persons identified by the firm as having the principal authority and

responsibility described in this paragraph, the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.

(b) Any such individual who has (or such individuals who have or share) principal authority as described in paragraph (a) of this section will be subject to discipline for failing to comply with the requirements of this section if--

(1) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that the firm has adequate procedures to comply with this part, as applicable, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable;

(2) The individual through willfulness, recklessness, or gross incompetence does not take reasonable steps to ensure that firm procedures in effect are properly followed, and one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, of failing to comply with this part, as applicable; or

(3) The individual knows or should know that one or more individuals who are members of, associated with, or employed by, the firm are, or have, engaged in a pattern or practice, in connection with their practice with the firm, that does not comply with this part, as applicable, and the individual, through willfulness, recklessness, or gross incompetence fails to take prompt action to correct the noncompliance.

(c) Effective/applicability date. This section is applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Par. 8. Section 10.37 is revised to read as follows:

§10.37 Requirements for written advice.

(a) Requirements. (1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations marketing or promoting transactions.

(2) The practitioner must--

(i) Base the written advice on reasonable factual and legal assumptions (including assumptions as to future events);

(ii) Reasonably consider all relevant facts and circumstances that the practitioner knows or reasonably should know;

(iii) Use reasonable efforts to identify and ascertain the facts relevant to written advice on each Federal tax matter;

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if

reliance on them would be unreasonable;

(v) Relate applicable law and authorities to facts; and

(vi) Not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.

(3) Reliance on representations, statements, findings, or agreements is unreasonable if the practitioner knows or reasonably should know that one or more representations or assumptions on which any representation is based are incorrect, incomplete, or inconsistent.

(b) Reliance on advice of others. A practitioner may only rely on the advice of another person if the advice was reasonable and the reliance is in good faith considering all the facts and circumstances. Reliance is not reasonable when--

(1) The practitioner knows or reasonably should know that the opinion of the other person should not be relied on;

(2) The practitioner knows or reasonably should know that the other person is not competent or lacks the necessary qualifications to provide the advice; or

(3) The practitioner knows or reasonably should know that the other person has a conflict of interest in violation of the rules described in this part.

(c) Standard of review. (1) In evaluating whether a practitioner giving written advice concerning one or more Federal tax matters complied with the requirements of this section, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, including, but not limited to, the scope of the engagement and the type and specificity of the advice sought by the client.

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

(d) Federal tax matter. A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of---

(1) A revenue provision as defined in section 6110(i)(1)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.

(e) Effective/applicability date. This section is applicable to written advice rendered after **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Par. 9. Section 10.81 is revised to read as follows:



§10.81 Petition for reinstatement.

(a) In general. A practitioner disbarred or suspended under §10.60, or suspended under §10.82, or a disqualified appraiser may petition for reinstatement before the Internal Revenue Service after the expiration of 5 years following such disbarment, suspension, or disqualification (or immediately following the expiration of the suspension or disqualification period, if shorter than 5 years). Reinstatement will not be granted unless the Internal Revenue Service is satisfied that the petitioner is not likely to engage thereafter in conduct contrary to the regulations in this part, and that granting such reinstatement would not be contrary to the public interest.

(b) Effective/applicability date. This section is applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

Par 10. Section 10.82 is amended by:

1. Revising paragraph (a) and paragraph (b) introductory text.
2. Adding paragraph (b)(5).
3. Revising paragraphs (c), (d), (e), (f), (g), and (h).

The revisions and additions read as follows:

§10.82 Expedited suspension.

(a) When applicable. Whenever the Commissioner, or delegate, determines that a practitioner is described in paragraph (b) of this section, the expedited procedures described in this section may be used to suspend the practitioner from practice before the Internal Revenue Service.

(b) To whom applicable. This section applies to any practitioner who, within 5

years prior to the date that a show cause order under this section's expedited suspension procedures is served:

\* \* \* \* \*

(5) Has demonstrated a pattern of willful disreputable conduct by--

(i) Failing to make an annual Federal tax return, in violation of the Federal tax laws, during 4 of the 5 tax years immediately preceding the institution of a proceeding under paragraph (c) of this section and remains noncompliant with any of the practitioner's Federal tax filing obligations at the time the notice of suspension is issued under paragraph (f) of this section; or

(ii) Failing to make a return required more frequently than annually, in violation of the Federal tax laws, during 5 of the 7 tax periods immediately preceding the institution of a proceeding under paragraph (c) of this section and remains noncompliant with any of the practitioner's Federal tax filing obligations at the time the notice of suspension is issued under paragraph (f) of this section.

(c) Expedited suspension procedures. A suspension under this section will be proposed by a show cause order that names the respondent, is signed by an authorized representative of the Internal Revenue Service under §10.69(a)(1), and served according to the rules set forth in §10.63(a). The show cause order must give a plain and concise description of the allegations that constitute the basis for the proposed suspension. The show cause order must notify the respondent—

(1) Of the place and due date for filing a response;

(2) That an expedited suspension decision by default may be rendered if the

respondent fails to file a response as required;

(3) That the respondent may request a conference to address the merits of the show cause order and that any such request must be made in the response; and

(4) That the respondent may be suspended either immediately following the expiration of the period within which a response must be filed or, if a conference is requested, immediately following the conference.

(d) Response. The response to the show cause order described in this section must be filed no later than 30 calendar days following the date the show cause order is served, unless the time for filing is extended. The response must be filed in accordance with the rules set forth for answers to a complaint in §10.64, except as otherwise provided in this section. The response must include a request for a conference, if a conference is desired. The respondent is entitled to the conference only if the request is made in a timely filed response.

(e) Conference. An authorized representative of the Internal Revenue Service will preside at a conference described in this section. The conference will be held at a place and time selected by the Internal Revenue Service, but no sooner than 14 calendar days after the date by which the response must be filed with the Internal Revenue Service, unless the respondent agrees to an earlier date. An authorized representative may represent the respondent at the conference.

(f) Suspension--(1) In general. The Commissioner, or delegate, may suspend the respondent from practice before the Internal Revenue Service by a written notice of expedited suspension immediately following:

(i) The expiration of the period within which a response to a show cause order must be filed if the respondent does not file a response as required by paragraph (d) of this section;

(ii) The conference described in paragraph (e) of this section if the Internal Revenue Service finds that the respondent is described in paragraph (b) of this section; or

(iii) The respondent's failure to appear, either personally or through an authorized representative, at a conference scheduled by the Internal Revenue Service under paragraph (e) of this section.

(2) Duration of suspension. A suspension under this section will commence on the date that the written notice of expedited suspension is served on the practitioner, either personally or through an authorized representative. The suspension will remain effective until the earlier of:

(i) The date the Internal Revenue Service lifts the suspension after determining that the practitioner is no longer described in paragraph (b) of this section or for any other reason; or

(ii) The date the suspension is lifted or otherwise modified by an Administrative Law Judge or the Secretary of the Treasury, or delegate deciding appeals, in a proceeding referred to in paragraph (g) of this section and instituted under §10.60.

(g) Practitioner demand for §10.60 proceeding. If the Internal Revenue Service suspends a practitioner under the expedited suspension procedures described in this section, the practitioner may demand that the Internal Revenue Service institute a

proceeding under §10.60 and issue the complaint described in §10.62. The demand must be in writing, specifically reference the suspension action under §10.82, and be made within 2 years from the date on which the practitioner's suspension commenced. The Internal Revenue Service must issue a complaint demanded under this paragraph (g) within 60 calendar days of receiving the demand. If the Internal Revenue Service does not issue such complaint within 60 days of receiving the demand, the suspension is lifted automatically. The preceding sentence does not, however, preclude the Commissioner, or delegate, from instituting a regular proceeding under §10.60 of this part.

(h) Effective/applicability date. This section is generally applicable beginning **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**, except that paragraphs (b)(1) through (4) of this section are applicable beginning August 2, 2011.

Par. 11. Section 10.91 is revised to read as follows:

§10.91 Saving provision.

Any proceeding instituted under this part prior to **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**, for which a final decision has not been reached or for which judicial review is still available is not affected by these revisions. Any proceeding under this part based on conduct engaged in prior to **[INSERT DATE OF PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**, which is instituted after that date, will apply subpart D and E of this part as revised, but the conduct engaged in prior to the effective date of these revisions will be judged by the regulations in effect at the time the conduct occurred.

John Dalrymple  
Deputy Commissioner for Services and Enforcement.

Approved: June 3, 2014

Christopher J. Meade  
General Counsel.

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