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## Ethical Problems in Tax Practice

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# **ETHICAL PROBLEMS IN TAX PRACTICE**

by

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## **I. INTRODUCTION**

### **A. The Obligations of Tax Practitioners to Practice Ethically.**

1. A tax practitioner who practices before the Internal Revenue Service must conduct his or her practice in accordance with a variety of professional rules and standards drawn from several different sources.
2. Both the American Institute of Certified Public Accountants (“AICPA”) and the American Bar Association (“ABA”) have promulgated model standards to assist practitioners in analyzing their obligations to practice ethically and in a professional manner. For example, the AICPA has adopted the AICPA Statements on Responsibilities in Tax Practice. The ABA originally adopted the Code of Professional Responsibility but that code has now been superseded by the Model Rules of Professional Conduct. The Model Rules have been interpreted and amplified by Formal Opinions which are issued on occasion by the ABA Standing Committee on Ethics and Professional Responsibility. See, Formal Opinions 314, 346, and 85-352 which deal with ethical issues and problems that arise in tax practice.
3. State licensing boards often adopt the model standards and require professionals licensed in that state to adhere to them. Failure to do so can subject the professional to discipline.
4. There is no uniformity in state licensing requirements. Consequently, a professional authorized to practice in more than one jurisdiction can find himself or herself subject to different rules governing the same situation.
5. Compounding this professional morass is the fact that federal agencies and courts promulgate their own rules of conduct.
  - a. Practice before the Internal Revenue Service is governed by regulations establishing standards of professional conduct for those who engage in practice before it. These regulations are found in 31 CFR Part

10, affectionately known as “Circular 230,” the name of the IRS publication containing them.

- b. The United States Tax Court has adopted, by rule, the ABA Model Rules with regard to professional conduct in the Tax Court. See, Tax Court Rule 201(a).

B. The Obligation of Tax Practitioners to Adhere to the Law.

1. In addition to the ethical standards referred to above, tax practitioners, like all citizens, are required to abide by the law. Specific legal requirements are imposed by statute that relate directly to the manner in which a tax professional conducts his or her practice.
2. The Internal Revenue Code contains preparer penalties which establish minimum standards for accuracy with respect to return positions taken on a federal tax return. See, IRC §§6692-6694, 6701.
3. The Internal Revenue Code also contains criminal provisions which prohibit, among other acts, engaging in acts of tax evasion, participating in the preparation or submission of false documents to the Internal Revenue Service, and corruptly endeavoring to impede the due administration of the tax laws. See, e.g., IRC §§7201, 7206(2), and 7212.
4. Other criminal laws prohibit a panoply of misconduct and have been used to prosecute practitioners engaged in allegedly unlawful acts. See, e.g., 18 U.S.C. §§2, 371, 1001, 1505 and 1621.

C. Purpose of this Presentation.

1. The purpose of this presentation is to explore the applicable professional standards which govern tax practice by exploring hypothetical fact patterns presenting realistic dilemmas faced by tax practitioners in everyday practice.
2. The discussion will focus on the practitioner’s obligation to balance his or her duties to the client with his or her duties to the tax system.

II. THE DUTY TO THE CLIENT -- CONFIDENTIALITY OF CLIENT COMMUNICATIONS

A. General Rule.

1. Most, if not all tax practitioners have an obligation imposed by their professional codes of conduct and/or state law to maintain the confidentiality of client confidences.
2. In order to demonstrate the scope and intent of the confidentiality requirement, this outline will refer to the applicable provisions of the ABA Model Rules.

B. ABA Model Rule 1.6.

1. Model Rule 1.6 provides, in pertinent part, that a lawyer shall not reveal information relating to the representation of a client without the client's consent except where disclosure is reasonably necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm" or "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in an proceeding concerning the lawyer's representation of the client."
2. This rule has been modified in some jurisdictions to permit a lawyer to disclose fraud under certain circumstances.
3. The confidentiality obligation imposed by Model Rule 1.6 is not the same as the attorney-client privilege, an evidentiary rule which protects against the production of confidential communications between a client and its lawyer in certain circumstances.

C. The Impact of Client Fraud on the Duty of Confidentiality.

1. The duty to maintain the confidentiality of client information often flies in the face of a practitioner's concern about a client's fraud. This ethical dilemma has been addressed in ABA Formal Opinion 314.
2. Opinion 314 provides guidance to tax practitioners who practice before the Service. According to Opinion 314,

- a. A lawyer may not mislead the Service deliberately either by misstatements or by permitting the client to mislead the Service.
- b. However, a lawyer representing a client before the Service may stress the strong points of a client's case and is not obligated to disclose the weak points in the case.
- c. If, during the course of the proceedings before the Service, the client makes misstatements to the Service, the lawyer must counsel the client to correct the misstatements. If the client refuses to do so, the lawyer may have a duty to withdraw if "the lawyer believes that the Service relies on him as corroborating statements of his clients which he knows to be false . . . unless it is obvious that the very act of disassociation" effectively would disclose the confidential communications. The lawyer, however, may not disclose the misstatement without the client's permission.
- d. Other ABA Formal Opinions also provide guidance although they do not deal with tax practice directly. *See, e.g.*, ABA Opinion 92-366 (dealing with a lawyer's obligations with respect to the ongoing fraud of a client), and ABA Opinion 93-375 (dealing with the obligations of a lawyer representing a client in a regulatory agency examination).

### III. THE DUTY TO CLIENT -- AVOIDING CONFLICTS OF INTEREST

#### A. General Rule.

1. Under the ABA Model Rules, a client is entitled to a practitioner's loyalty.
  - a. Model Rule 1.7(a) provides, in pertinent part, that "a lawyer shall not represent a client if the representation will be directly adverse to another client, unless (1) the lawyer reasonably believes the representation will no adversely affect the relationship with the other client; and (2) each client consents after consultation.
  - b. Model Rule 1.7(b) provides that a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless the

lawyer reasonably believes that the representation will not be adversely affected and the client consents after consultation.

- c. Model Rule 1.9(a) prohibits a lawyer from representing another client in a matter that is the same as, or is substantially related to, a matter for a former client where the present client's interests are materially adverse to the former client's interests unless the former client consents after consultation.
2. Section 10.29 of Circular 230 also prohibits a practitioner who is authorized to practice before the Service from representing conflicting interests except with the express consent of all interested persons after full disclosure.
3. The Tax Court has adopted a special rule designed to emphasize a tax practitioner's obligation of loyalty under the Model Rules and to prevent a possible or actual conflict of interest from adversely affecting the Tax Court litigation. See, Tax Court Rule 24(f).

#### IV. CIRCULAR 230 -- PRACTICE BEFORE THE SERVICE

##### A. Obligations Imposed on Practitioners by Circular 230.

1. The Treasury Department is authorized to issue regulations governing practice before the Internal Revenue Service. 31 U.S.C. §330. The regulations are published in the Code of Federal Regulations. See, 31 CFR, Subtitle A, Part 10, attached hereto as Appendix B.
2. The main body of regulations applicable to practitioners is also published in Treasury Department Circular No. 230 ("Circular 230"). Circular 230 sets forth rules governing a practitioner's authority to practice before the Internal Revenue Service, a practitioner's duties and responsibilities relating to IRS practice, and disciplinary proceedings and procedures.
  - a. Practice before the Service refers to matters involving the presentation to the Service or any of its officers or employees relating to a client's rights, privileges or liabilities under the laws or regulations administered by the Service. It includes the preparation and filing of documents, correspondence with and communications to the Service, and the representation of clients at conferences, hearings and meetings.
  - b. Circular 230 governs practitioners who are eligible to practice before the Service. They include the following:

- (1) Attorneys - Any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia.
  - (2) CPA's - Any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth or the District of Columbia.
  - (3) Enrolled Agents - Any person who is enrolled by the Treasury Department to practice before the Internal Revenue Service.
  - (4) Enrolled Actuaries - Any individual who is enrolled as an actuary pursuant to 29 U.S.C. §1242.
3. Among the duties imposed by Circular 230 on an attorney, CPA, enrolled agent, or enrolled actuary authorized to practice before the IRS (hereinafter referred to as "practitioner") are the following:
- a. No practitioner "shall neglect or refuse promptly to submit records or information in any matter before the [IRS], upon proper and lawful request by a duly authorized officer or employee of the [IRS]... unless he believes, in good faith and on reasonable grounds, that the record or information is privileged or that the request for, or effort to obtain, such record or information is of doubtful legality." Circular 230, §10.20.
  - b. No practitioner "shall interfere, or attempt to interfere, with any proper and lawful effort by the [IRS] or its officers or employees to obtain any such record or information, unless he believes in good faith and on reasonable grounds that such record or information is privileged or that the request for, or effort to obtain, such record or information is of doubtful legality." *Id.*
  - c. Each practitioner, retained to represent a client in an IRS matter, who "knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client is required by the revenue laws of the United States to execute, shall advise the client promptly of the fact of such noncompliance, error, or omission." *Id.* at §10.21.



- d. Each practitioner is required to exercise “due diligence” in preparing or assisting in the preparation of returns and other documents in IRS matters, in determining the correctness of oral and written representation made by him to the Department of the Treasury and in determining the correctness of oral and written representations made by him to clients regarding IRS matters. Id. at §10.22.
  - e. A practitioner “may not sign a return as a preparer if the practitioner determines that the return contains a position that does not have a realistic possibility of being sustained on its merits ... unless the position is not frivolous and is adequately disclosed to the Service.” Id. at §10.34(a)(1).
  - f. A practitioner “may not advise a client to take a position on a return, or prepare the portion of a return on which a position is taken unless --
    - (i) The practitioner determines that the position satisfies the realistic possibility standard; or
    - (ii) The position is not frivolous and the practitioner advises the client of any opportunity to avoid the accuracy-related penalty in section 6662 of the Internal Revenue Code of 1986 by adequately disclosing the position and of the requirements for adequate disclosure.” Id.
4. Failure to adhere to the duties listed above can subject a practitioner to disciplinary action by the Director of Practice who has authority to suspend or disbar a practitioner who is shown to be incompetent or disreputable, who refuses to comply with any regulation governing practice, or who, with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client. Id. at §10.50.
5. “Disreputable conduct” includes, but is not limited to, the following:
- a. Conviction of a criminal offense under the federal tax law or of any offense involving dishonesty or breach of trust;
  - b. Giving false or misleading information, or participating in any way in supplying false or misleading information to the Treasury Department or to any tribunal authorized to act on tax matters, in connection with any matter pending, or likely to be

pending, before them, knowing such information to be false or misleading;

- c. Disbarment by any state, federal court or federal agency, body or board. *Id.* at §10.51.

## V. THE TAXPAYER'S OBLIGATIONS REGARDING RETURN ACCURACY

### A. The Accuracy-Related Penalty.

1. Section 6662 imposes an accuracy related penalty in the amount of 20% of an underpayment of tax attributable to one or more of the following:
  - a. Negligence - If a taxpayer asserts a tax return position which lacks a reasonable basis or the taxpayer does not make a reasonable attempt to comply with the tax law or the taxpayer does not keep adequate books and records to substantiate items on a return, negligence may be found. Reg. §1.6662-3(b).
  - b. Disregard of rules and regulations - "Disregard" includes any careless, reckless or intentional disregard of the Code, regulations, revenue rulings, or notices. Reg. §1.6662-3(b)(2). However, a taxpayer may take a position contrary to a ruling or notice if the position have a "realistic possibility of being sustained on its merits."
  - c. Substantial understatement of income tax - A substantial understatement of income tax occurs when an income tax underpayment exceeds the greater of 10% of the tax due or \$5,000 (\$10,000 for corporations) and the position resulting in the underpayment is not supported by "substantial authority." IRC §6662(d); Reg. §1.6662-4(d)(2).
    - (1) Substantial authority for a position exists if an analysis supporting the position takes into account the relevant facts and circumstances and relevant authority and concludes that the weight of authority supporting the position is substantial. Reg. §1.6662-4(d)(3)(i); Notice 90-20, 1990-10 IRB at 18.
    - (2) The substantial authority standard is "an objective standard involving an analysis of the law and an application of the law to relevant facts."

- (3) It is less stringent than the “more likely than not” standard but more stringent than the “reasonable basis” standard.
- (4) A return position that is arguable but not likely to prevail in court does not satisfy the substantial authority standard but does satisfy the reasonable basis standard. Reg. §1.6662-4(d)(2).
- (5) Reg. §1.6662-4(d)(3)(ii) provides that “there may be substantial authority for the tax treatment of an item despite the absence of certain types of authority. Thus, a taxpayer may have substantial authority for a position that is supported only by a well-reasoned construction of the applicable statutory provision.”

**Practice Pointer:** Determining the existence of substantial authority is never easy and becomes even more difficult in factual disputes. E.g., Osteen v. Commissioner, 62 F.3d 356 (11th Cir. 1995) in which the Eleventh Circuit reversed the Tax Court’s determination that the accuracy penalty applied holding that substantial authority exists if a lower court decision in favor of the taxpayers would have been affirmed as not clearly erroneous.

- d. Valuation misstatements - If there is a valuation misstatement within the meaning of Section 6662, the accuracy related penalty will apply. IRC §6662(e), (f) and (g).
2. In some instances, the taxpayer may avoid some parts of the accuracy-related penalty by adequate disclosure. However, disclosure is not effective unless there exists a reasonable basis for the position. Reg. §1.6662-1.
    - a. IRC §6662(d)(2)(B) provides that the amount of the understatement (for purposes of the substantial understatement prong of the accuracy related penalty) must be reduced by that portion of the understatement that is attributable to any item as to which the relevant facts affect the item's tax treatment are adequately disclosed in the return or in the statement attached to the return. See also, Reg. §1.6662-4(e)(1).

**NOTE:** Disclosure does not avoid the penalty if the item or position is frivolous, attributable to a tax shelter or is not properly substantiated or the taxpayer failed to keep adequate books and records with respect to the item or position. Reg. §1.6662-4(e)(2).

- b. **Adequate disclosure does not avoid the negligence prong of the accuracy-related penalty for returns due after December 31, 1993.** Reg. §§1.6662-1 and 1.6662-7(b).
- c. Adequate disclosure does not avoid the valuation misstatement prong of the accuracy-related penalty. Reg. §1.6662-5(a).
- d. Adequate disclosure continues to avoid the "disregard of rules and regulations" prong of the accuracy-related penalty even after the 1993 Act as long as the reasonable basis requirement is met. Reg. §1.6662-3(c)(1).
- e. Disclosure is adequate for purposes of the substantial understatement prong of the accuracy-related penalty (and for the negligence penalty prior to amendment by the 1993 Act) if made in accordance with Reg. §1.6662-3(c)(2).
  - (1) Reg. §1.6662-4(f)(1) provides that disclosure is adequate if --
    - (a) disclosure is made on a properly completed form attached to the return or to a qualified amended return as defined by Reg. §1.6664-(c)(3);
    - (b) in the case of an item or position other than one that is contrary to a regulation, disclosure is made on Form 8275 (Disclosure Statement);
    - (c) in the case of an item or position that is contrary to a regulation, disclosure is made on Form 8275-R (Regulation Disclosure Statement).
  - (2) Reg. §1.6662-4(f)(3) requires that disclosure with respect to a recurring item must be made for each taxable year in which the item is taken into account.
  - (3) Reg. §1.6662-4(f)(4) sets forth special disclosure rules involving carrybacks and carryovers.
  - (4) Reg. §1.6662-5(f)(5) sets forth special rules involving pass-through entities.
- f. Disclosure is also adequate for purposes of the substantial understatement prong, but not the negligence prong, if it is

made by disclosure of information on a return or qualified amended return in accordance with applicable forms and instructions to the extent specified by the Commissioner in an annual revenue procedure or other means.

Reg. §1.6662-4(f)(2).

3. The accuracy-related penalty may also be avoided if the taxpayer establishes that there was reasonable cause for the underpayment and the taxpayer acted in good faith. IRC §6664(c); Reg. §1.6664-4.
  - a. The determination of reasonable cause and good faith is made on the basis of all of the facts and circumstances. The most important factor is the extent of the taxpayer's effort to assess its proper tax liability. Reg. §1.6664-4(b).
  - b. Reasonable reliance in good faith on advice provided by a professional may suffice if that advice is based on all pertinent facts and circumstances and is not based on unreasonable assumptions. Reg. §1.6664-4(b), (c).
  - c. A special rule applies to tax shelter positions taken by corporate taxpayers. In order to satisfy the reasonable cause/good faith exception, a corporate taxpayer must establish that there was substantial authority for the position and that the taxpayer reasonably believed that there was a greater than 50% likelihood that the position would be sustained if challenged by the Service. The taxpayer's belief can be based on either the taxpayer's own belief or the opinion of a professional tax advisor. Reg. §1.6664-4(e).
  - d. The substantial and gross valuation prongs of the accuracy-related penalty can also be avoided if reasonable cause/good faith exception is satisfied. Reg. §6662-5(a). However, the mere fact that there is an appraisal does not satisfy the test. Rather, the Service will examine the methodology and assumptions of the appraisal, the circumstances under which the appraisal was obtained, and the appraiser's relationship to the taxpayer or the relevant activity. Reg. §1.6664-4(b).

**Note:** Special rule applies to charitable deduction property. Reg. §1.6664-4(g); Reg. §1.170A-13(c)(3), (5).
  - e. Special rules have also been enacted with respect to the transfer-pricing valuation provisions of Section 6662(e). Reg. §§1.6662-6 and 1.6664-4T.

B. Other Statutory Restrictions.

1. Both the Internal Revenue Code and other provisions of the United States Code prohibit the willful preparation and filing of false federal tax returns and other documents submitted to federal agencies.

VI. THE TAX PRACTITIONER'S OBLIGATIONS REGARDING RETURN ACCURACY

A. The RPOS Standard.

1. The Preparer Penalties. Section 6694(a) authorizes the imposition of a \$250 penalty on any preparer who prepares for compensation an income tax return which understates a taxpayer's federal income tax liability and the understatement is attributable to a position that does not have a realistic possibility of being sustained on the merits if litigated.
  - a. The RPOS standard is satisfied if a position has a one-in-three chance of success if litigated. Reg. §1.6694-2(b) provides that, in order to meet the standard, a reasonable and well-informed person, knowledgeable in the tax law would conclude, upon analysis, that the position has approximately a one in three or greater likelihood of being sustained on its merits.
  - b. The Section 6694(a) penalty does not apply if the position was adequately disclosed on the return and is not frivolous. Reg. §1.6694-2(c).
  - c. The penalty also does not apply if the preparer establishes that the understatement was due to reasonable cause. Reg. §1.6694-2(d).
  - d. Section 6694(b) authorizes the imposition of a \$1,000 penalty if a preparer willfully attempts to understate a taxpayer's tax liability or recklessly or intentionally disregards rules and regulations.
    - (1) Disclosure does not avoid the penalty if the preparer willfully attempted to understate liability. However, disclosure will avoid the disregard prong if the taxpayer is engaged in a good faith challenge to the validity of the regulation. Reg. §1.6694-3(e).

(2) Although neither the statute or the applicable regulations provide for an exception to the Section 6694(b) penalty for reasonable cause, common sense indicates that, if a practitioner had reasonable cause for the return position, the penalty should not apply.

2. Circular 230. Circular 230 has adopted the RPOS standard. It defines the standard in the same way that the preparer penalty regulations do. Circular 230, Sec. 10.34(a)(4).
  - a. Circular 230 differentiates between a signing preparer and a non-signing preparer.
  - b. A preparer may not sign a return that contains a position which does not satisfy the RPOS standard unless the position is not frivolous **and** is adequately disclosed on the return.
  - c. A non-signing preparer may not advise a taxpayer to take a position on a tax return or prepare any part of a return unless the position satisfies the RPOS standard or the position is not frivolous and the preparer advises the taxpayer of the opportunity to avoid the penalty by adequate disclosure.
3. Professional Ethical Standards. ABA Formal Opinion 85-352 and AICPA Statement No. 1 adopt the RPOS standard as the standard for return accuracy with respect to their members.

B. The Aiding and Abetting Penalty.

1. Section 6701 imposes a penalty on any person who assists in the preparation or presentation of any document knowing (or having reason to believe) that the document will be used for tax purposes and who knows that the document, if used, will result in the understatement of the tax liability of another person.
2. The penalty is \$1,000 (\$10,000 if the document involves the tax liability of a corporation).

C. Other Statutory Provisions.

1. 26 U.S.C. §7206(2)
2. 18 U.S.C. §2

# **APPENDIX A**



## APPENDIX A

### DISCUSSION HYPOTHETICALS

1. You represent the sole proprietor of a business under audit by the Internal Revenue Service. The audit has been progressing smoothly and you have been able to respond in a reasonable way to requests for information which you have received from the revenue agent conducting the audit. However, in response to the most recent information document request, you have discovered that the client sold a few items as casual sales, the proceeds from which do not appear to have been deposited in the corporate bank account or reported as income for federal or state income tax purposes.

- a. What if any obligation do you have to your client with regard to your discovery?
- b. What if any obligation do you have to disclose the omission to the agent conducting the audit?
- c. What do you respond to the client when the client asks you if she has an obligation to disclose the omission to the Service?
- d. Can you continue to represent the client in the audit if the client decides not to disclose the omission to the Service?
- e. Does it make a difference if the client tells you that the omission was merely an oversight and was not intentional?

2. You are representing a corporate client in an administrative appeal before the IRS Appeals Office following a hotly contested audit. One of the issues involved is a very large, "bet the business" issue that the sole shareholder and chief executive officer would like to put to bed as quickly as possible. After filing your protest, the appeals conference is held. The CEO insists on attending the conference. During the conference, the Appeals Officer, with whom you have always had an extremely cordial and professional relationship, summarizes the facts regarding the issue erroneously. The error is a material one and results in the Appeals Officer offering to concede the issue in favor of your client. The CEO perpetuates the problem by confirming that the Appeals Officer's summary of the facts is correct. You do not correct the factual summary at the Appeals Conference. However, you raise it with the CEO when you leave the conference and he acknowledges that he knew the Appeals Officer had made a mistake but "that was his problem." The CEO refuses to authorize you to correct the factual summary.

- a. Can you continue to represent the taxpayer in this matter? Should you?

b. Does it make a difference that the factual summary of the Appeals Officer was based on erroneous facts set forth in the protest which you prepared?

c. Suppose the mistake in favor of your client is based on the erroneous or incomplete legal analysis of the Appeals Officer?

3. You have represented Mr. and Mrs. Jones for many years. Approximately one year ago, you were contacted by Mr. Jones, who asked you to represent him and his wife in connection with an IRS audit. The audit is long and arduous. The Revenue Agent's Report raises a number of issues including alleged unreported income with respect to Mr. Jones' professional practice and the fraud penalty. You contact Mr. Jones to arrange a meeting to discuss the RAR and you are surprised to learn that he is separated from his wife and that he and Mrs. Jones expect to get a divorce although no divorce proceeding has yet been filed. When you suggest that Mrs. Jones attend the meeting to plan the administrative appeal, you are told by Mr. Jones that it is not necessary for Mrs. Jones to be present since he has full authority to handle the tax matters and he has agreed to pay any deficiencies which result.

a. Can or should you continue to represent both Mr. and Mrs. Jones? Under what circumstances?

b. Does it make a difference that Mrs. Jones signed the power of attorney and knew about the audit when it first started?

c. Does it make a difference whether Mrs. Jones has already received a copy of the RAR (it is her address which appears on the report)?

4. During its prior tax year, your client acquired from a third party a license granted by the federal government. The client tells you that he/she believes that the license has a useful life of 8 years and produces a report, prepared by another firm, supporting that useful life. You look at the report and do not believe that it is very convincing.

a. What are the penalty risks to your client, your own firm, and the firm that prepared the report as to the useful life of the license?

5. The Service has recently promulgated a final regulation that would preclude your client from taking a certain return position. Both you and your client believe that the regulation may be held invalid if the issue is litigated.

a. What penalty risks do your client and your firm assume if the position is taken on the return?

b. To what extent will disclosure protect or mitigate against any potential penalties?

6. Same facts as above except that the Service published a revenue ruling instead of a regulation. But, for the revenue ruling, there is no direct authority on the issue. However, there is at least one well-known tax professional who has published an article stating that the ruling is wrong.

7. Your client desires to take a position on its tax return that you do not believe is supported by substantial authority. You have prepared the return with the position on the return and have attached a completed Form 8275 fully disclosing the position. The client states that it will not include the Form 8275 in the filed return but otherwise will file the return as you have prepared it.

- a. What action do you take, if any?
- b. What penalty risks exist if the client does as it has indicated?

8. Your client approaches you with a position that you do not believe is supported by substantial authority but that you do believe has a greater than one-in-three chance of prevailing if litigated.

- a. How do you advise your client in this case?
- b. What risk if any do you have with respect to possible penalties?

9. Same facts as above except that you believe that the position has only a one-in-four chance of success if litigated.

10. A lawyer whom you are representing in connection with his departure from his prior law firm advises you that the law firm has failed to pay substantial amounts of trust fund taxes over the years when he was there. Although he was a partner and had authority to sign checks, your client advises you that the firm was run as a not-so-benevolent tyranny, that the managing partner controlled all disbursements and expenditures, and that your client did not know that the taxes were being paid until just a few months before he departed. He has just been contacted by a revenue officer who is conducting a responsible person interview and he asks you to represent him before the Service. You meet with the revenue officer and you supply the information requested, which includes disclaimers concerning your client's involvement with the firm's finances and his lack of responsibility and willfulness. After the Form 4180 is prepared and executed by your client, you discover that your client signed checks for the firm and appears to have directed when and to whom some payments were made. What do you do?

11. You represent a corporation with substantial unpaid tax liabilities. You have been working with a revenue officer ("RO") who has been extremely difficult. The RO has proposed to file a federal tax lien with respect to the liabilities. You have filed a request that the Service refrain from doing so, offering instead to give the Service a voluntary security agreement in the principal business assets. The reason for this is that the filing of a tax lien

will cause the business to lose its line of credit with its principal suppliers and will force the business to close. The RO rejects your request and threatens to close down your client if it does not pay a substantial part of the liability within 5 days. You lose your temper and advise the RO that you will come down to his office and give him a taste of his own medicine. The RO hangs up on you. When you calm down, you telephone the RO and apologize for your fit of temper. The RO does not tell you that he has referred the incident to the Office of the Director of Practice.

- a. Is the practitioner subject to discipline?
- b. If so, on what grounds and to what degree?

12. You represent an estate with respect to an IRS audit of its federal estate tax return. The estate tax return showed that the decedent owned several pieces of antique furniture which were valued on the return at \$200,000. The personal representative informs you after the audit has gone on for some time that he has "discovered" additional pieces which were not included on the return. The value of the additional pieces is \$100,000. However, if the antiques are sold as a package, the total value would probably exceed \$350,000.

- a. Are you obligated to disclose the additional antiques to the agent?
- b. If you are required or permitted to disclose, what position can you take regarding valuation?
- c. Does the fact that you were the preparer of the return affect your answers?
- d. Assume that you determine that the additional pieces must be disclosed. If the personal representative refuses to make the disclosure, can you continue to represent the estate?
- e. If you decide that you should not continue to represent the estate, what if anything are you permitted or required to tell successor counsel?

13. Your client is the sole shareholder of a corporation. In 1997, the corporation receives an IRS summons for all of its records for 1994, including all invoices for the year 1994 and all cash disbursements records. The client delivers the records to your office. All of the invoices delivered by the client are dated in 1994. However, your client advises you that several of the invoices (8 or 9) are completely false and were created in 1994. Several others were created substantially after 1994 (in fact, after the summons was received) to cover up the destruction of certain other invoices prior to the beginning of the audit.

- a. What must and should be produced?

- b. What cannot be produced?
- c. Should any explanation or statement be given with the production?

# **APPENDIX B**

**Treasury  
Department  
Circular No. 230  
(Revised 3-86)**

**Regulations Governing the  
Practice of Attorneys,  
Certified Public Accountants  
Enrolled Agents,  
Enrolled Actuaries and  
Appraisers before the  
Internal Revenue Service**

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**Department  
of the  
Treasury  
Internal  
Revenue  
Service**

**31 Code of Federal Regulations  
Subtitle A, Part 10, as amended  
through February 23, 1984 and  
changes appearing in the Federal  
Register dated October 17, 1985  
(Vol. 50, No. 201) and in the Federal  
Register dated January 26, 1986  
(Vol. 51, No. 14)**

**Regulations Governing  
the Practice of Attorneys,  
Certified Public Accountants,  
Enrolled Agents, Enrolled  
Actuaries and Appraisers  
before the Internal  
Revenue Service**

**Treasury  
Department  
Circular  
No. 230  
(Rev. 3-86)**

This publication contains the revision of Department Circular No. 230, dated August 9, 1966, appearing in 31 F.R. 10773, dated August 13, 1966, and includes the following amendments:

Amendment appearing in 31 F.R. 12638, dated September 27, 1966, which adds omitted section heading § 10.58.

Amendments dated October 28, 1966, appearing in 31 F.R. 13992, dated November 2, 1966, which adds subparagraphs (b) and (c) to § 10.57 and adds a sentence at the end, and as a continuation, of paragraph (c) of § 10.51.

Amendments dated August 14, 1970, appearing in 31 F.R. 13205, dated August 19, 1970, which are intended primarily to clarify the language of certain provisions of the regulations, strengthen certain conflict of interest and disciplinary provisions, and update statutory references.

Amendment appearing in 36 F.R. 8671, dated May 11, 1971, corrected error in the August 19, 1970, amendment, which incorrectly added a new sentence to subparagraph 10.3 (c) rather than subparagraph 10.3 (e).

Amendments appearing in 42 F.R. 38350, dated July 28, 1977, which are editorial, eliminate outdated terms and provisions, and which increase the restrictions on practice by former Government employees.

Amendments appearing in 44 F.R. 4940, dated January 24, 1979, prescribe rules permitting the expansion of advertising and solicitation provisions of the regulations governing practice by attorneys, certified public accounts, enrolled agents and others who represent clients before the Internal Revenue Service.

Amendments appearing in 44 F.R. 4944, dated January 24, 1979, prescribe rules to permit enrolled actuaries to engage in practice before the Internal Revenue Service in connection with the provisions of the Internal Revenue Code involving pension plans under the Employee Retirement Income Security Act of 1974 (ERISA).

Amendments appearing in 49 F.R. 6719, dated February 23, 1984, clarify who may prepare a tax return and furnish information to the Internal Revenue Service, and set standards for providing opinions used in the promotion of tax shelter offerings.



Amendments appearing in 50 F.R. 42014, dated October 17, 1985, implement section 156 of the Deficit Reduction Act of 1984, 98 Stat. 695, to provide for the disqualification of appraisals and appraisers' testimony in connection with Treasury Department or Internal Revenue Service proceedings with respect to any appraiser who has been assessed an aiding and abetting penalty under 26 U.S.C. 6701(a) after July 18, 1984.

Amendments appearing in 51 F.R. 2875, dated January 22, 1986, require that those who are enrolled to practice before the Internal Revenue Service renew their enrollment on a periodic basis. A condition of eligibility for renewal of enrollment will be the satisfaction of continuing professional education requirements. In addition, the amendments modify the regulations reflecting the transfer to the Office of Director of Practice certain functions formerly performed by the Commissioner of Internal Revenue relative to the enrollment of individuals who wish to practice before the Internal Revenue Service.

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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. 1026; Reorg. Plan No. 28 of 1950, 15 F.R. 4935,65 Stat. 1280,3 CFR, 1949-1953 Comp., except as otherwise noted.

SOURCE: Department Circular 230, Revised 31 F.R. 10773, Aug. 13, 1956, unless otherwise noted.

## **§ 10.0 Scope of part.**

This part contains rules governing the recognition of attorneys, certified public accountants, enrolled agents, and other persons representing clients before the Internal Revenue Service. Subpart A of this part sets forth rules relating to authority to practice before the Internal Revenue Service; Subpart B of this part prescribes the duties and restrictions relating to such practice; Subpart C of this part contains rules relating to disciplinary proceedings; and Subpart D of this part contains general provisions, including provisions relating to availability of official records.

[42 F.R. 38352, July 28, 1977]

## **Subpart A-Rules Governing Authority To Practice**

### **§ 10.1 Director of Practice.**

(a) *Establishment of office.* There is established in the Office of the Secretary of the Treasury the Office of Director of Practice. The Director of Practice shall be appointed by the Secretary of the Treasury.

(b) *Duties.* The Director of Practice shall act upon applications for enrollment to practice before the Internal Revenue Service; institute and provide for the conduct of disciplinary proceedings relating to attorneys, certified public accountants, enrolled agents, enrolled actuaries and appraisers; make inquiries with respect to matters under his jurisdiction; and perform such other duties as are necessary or appropriate to carry out his functions under this part or as are prescribed by the Secretary of the Treasury.

(c) *Acting Director.* The Secretary of the Treasury will designate an officer or employee of the Treasury Department to act as Director of Practice in the

event of the absence of the director or of a vacancy in that office.

### **§ 10.2 Definitions.**

As used in this part, except where the context clearly indicates otherwise, the term:

(a) "Practice before the Internal Revenue Service" comprehends all matters connected with presentation to the Internal Revenue Service or any of its officers or employees relating to a client's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include the preparation and filing of necessary documents, correspondence with and communications to the Internal Revenue Service, and the representation of a client at conferences, hearings, and meetings.

(b) "Attorney" means any person who is a member in good standing of the bar of the highest court of any State, possession, territory, Commonwealth, or the District of Columbia.

(c) "Certified public accountant" means any person who is duly qualified to practice as a certified public accountant in any State, possession, territory, Commonwealth, or the District of Columbia.

(d) "Commissioner" refers to the Commissioner of Internal Revenue.

[3] F.R. 10773, Aug. 13, 1966, as amended at 37 F.R. 1017, Jan. 21, 1972; 42 F.R. 38352, July 28, 1977; 49 F.R. 6719, Feb. 23, 1984]

### **§ 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 Service upon filing with the Service a written declaration that he is currently qualified as an attorney and is authorized to represent the particular party on whose behalf he acts. An

enrollment card issued to such person before the effective date of this regulation shall be invalid and may not be used in lieu of such written declaration.<sup>1</sup>

(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 Service upon filing with the Service a written declaration that he is currently qualified as a certified public accountant and is authorized to represent the particular party on whose behalf he acts. An enrollment card issued to such person before the effective date of this regulation shall be invalid and may not be used in lieu of such written declaration.<sup>1</sup>

(c) *Enrolled agents.* Any person enrolled as an agent pursuant to this part may practice before the Internal Revenue Service.

(d) *Enrolled Actuaries.* (1) Any individual who is enrolled as an actuary by the Joint Board for the Enrollment of Actuaries pursuant to 29 U.S.C. 1242 may practice before the Internal Revenue Service upon filing with the Service a written declaration that he/she is currently qualified as an enrolled actuary and is authorized to represent the particular party on whose behalf he/she acts. Practice as an enrolled actuary is limited to representation with respect to issues involving the following statutory provisions.

Internal Revenue Code (Title 26 U.S.C.) sections: 401 (qualification of employee plans), 403(a) (relating to whether an annuity plan meets the requirements of section 404(a)(2)), 404 (deductibility of employer contributions), 405 (qualification on bond purchase plans), 412 (funding requirements for certain employee plans), 413 (application of qualification requirements to collectively bargained plans and to plans maintained by more than one employer), 414 (containing definitions

and special rules relating to the employee plan area), 4971 (relating to excise taxes payable as a result of an accumulated funding deficiency under section 412), 6057 (annual registration of plans), 6058 (information required in connection with certain plans of deferred compensation), 6059 (periodic report of actuary), 6652(e) (failure to file annual registration and other notifications by pension plan), 6652(f) (failure to file information required in connection with certain plans of deferred compensation), 6692 (failure to file actuarial report), 7805(b) (relating to the extent, if any, to which an Internal Revenue Service ruling or determination letter coming under the herein listed statutory provisions shall be applied without retroactive effect), and 29 U.S.C. 1083 (relating to waiver of funding for non-qualified plans).

(2) An individual who practices before the Internal Revenue Service pursuant to this subsection shall be subject to the provisions of this part in the same manner as attorneys, certified public accountants and enrolled agents.

(e) *Others.* Any person qualifying under § 10.7 or § 10.5(c) may practice before Internal Revenue Service.

(f) *Government officers and employees; others.* No officer or employee of the United States in the executive, legislative, or judicial branch of the Government, or in any agency of the United States, including the District of Columbia, may practice before the Service, except that such officer or employee may, subject to the conditions and requirements of these regulations and of 18 U.S.C. 205, represent a member of his immediate family or any other person or estate for which he serves as guardian, executor, administrator, trustee, or other personal fiduciary. No Member of Congress or Resident Commissioner (elect or serving) may practice before the Service in connection with any matter for which

he directly or indirectly receives, agrees to receive, or seeks any compensation. 18 U.S.C. 203, 205. Nothing herein shall be construed as prohibiting an officer or employee of the United States as aforesaid, who is otherwise eligible to practice under the provision of this part, from representing others before the Internal Revenue Service when doing so in the proper discharge of his official duties.

(g) *State officers and employees.* No officer or employee of any State, or subdivision thereof, whose duties require him to pass upon, investigate, or deal with tax matters of such State or subdivision, may practice before the Service, if such State employment may disclose facts or information applicable to Federal tax matters.

[3] F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. §3205. Aug. 19, 1970; 36 F.R. 8671, May 11, 1971; 44 F.R. 4944, Jan. 24, 1979]

#### **§ 10.4 Eligibility for enrollment.**

(a) *Enrollment upon examination.* The Director of Practice may grant enrollment to an applicant who demonstrates special competence in tax matters by written examination administered by the Internal Revenue Service and who has not engaged in any conduct which would justify the suspension or disbarment of any attorney, certified public accountant, or enrolled agent under the provisions of this part.

(b) *Enrollment of former Internal Revenue Service employees.* The Director of Practice may grant enrollment to an applicant who has not engaged in any conduct which would justify the suspension or disbarment of any attorney, certified public accountant, or enrolled agent under the provisions of this part and who, by virtue of his past service and technical experience in the Internal Revenue Service has qualified for such enrollment, as follows:

(1) Application for enrollment on account of former employment in the Internal Revenue Service shall be made to the Director of Practice. Each applicant will be supplied a form by the Director of Practice which shall indicate the information required respecting the applicant's qualifications. In addition to the applicant's name, address, educational experience, etc., such information shall specifically include a detailed account of the applicant's employment in the Internal Revenue Service, which account shall show (i) positions held, (ii) date of each appointment and termination thereof, (iii) nature of services rendered in each position, with particular reference to the degree of technical experience involved, and (iv) name of supervisor in such positions, together with such other information regarding the experience and training of the applicant as may be relevant.

(2) Upon receipt of each such application, it shall be transmitted to the appropriate officer of the Internal Revenue Service with the request that a detailed report of the nature and rating of the applicant's services in the Internal Revenue Service, accompanied by the recommendation of the superior officer in the particular unit or division of the Internal Revenue Service that such employment does or does not qualify the applicant technically or otherwise for the desired authorization, be furnished to the Director of Practice.

(3) In examining the qualification of an applicant for enrollment on account of employment in the Internal Revenue Service, the Director of Practice will be governed by the following policies:

(i) Enrollment on account of such employment may be of unlimited scope or may be limited to permit the presentation of matters only of the particular class or only before the particular unit or division of the Internal Revenue Service for which his former employment

in the Internal Revenue Service has qualified the applicant.

(ii) Application for enrollment on account of employment in the Internal Revenue Service must be made within 3 years from the date of separation from such employment.

(iii) It shall be requisite for enrollment on account of such employment that the applicant shall have had a minimum of 5 years continuous employment in the Service during which he shall have been regularly engaged in applying and interpreting the provisions of the Internal Revenue Code and the regulations thereunder relating to income, estate, gift, employment, or excise taxes.

(iv) For the purposes of paragraph (b)(3)(iii) of this section an aggregate of 10 or more years of employment, at least 3 of which occurred within the 5 years preceding the date of application, shall be deemed the equivalent of 5 years continuous employment.

(c) *Natural persons.* Enrollment to practice may be granted only to natural persons.

(d) *Attorneys; certified public accountants.* Enrollment is not available to persons who qualify to practice under § 10.3(a) or (b).

[3] F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13205, Aug. 19, 1970; 42 F.R. 38352, July 28, 1977; 51 F.R. 2875, Jan. 26, 1986]

#### § 10.5 Application for enrollment.

(a) *Form; fee.* An applicant for enrollment shall file with the Director of Practice an application on Form 23, properly executed under oath or affirmation. Such application shall be accompanied by a check or money order in the amount set forth on Form 23, payable to the Internal Revenue Service, which amount shall constitute a fee which shall be charged to each applicant for enrollment. The fee shall be retained by the United States whether or not the applicant is granted enrollment.

(b) *Additional information; examination.* The Director of Practice, as a condition to consideration of an application for enrollment, may require the applicant to file additional information and to submit to any written or oral examination under oath or otherwise. The Director of Practice shall upon written request, afford an applicant the opportunity to be heard with respect to his application for enrollment.

(c) *Temporary recognition.* Upon receipt of a properly executed application, the Director of Practice may grant the applicant temporary recognition to practice pending a determination as to whether enrollment to practice should be granted. Such temporary recognition shall not be granted if the application is not regular on its face; if the information stated therein, if true, is not sufficient to warrant enrollment to practice; if there is any information before the Director of Practice which indicates that the statements in the application are untrue; or which indicates that the applicant would not otherwise qualify for enrollment. Issuance of temporary recognition shall not constitute enrollment to practice or a finding of eligibility for enrollment, and the temporary recognition may be withdrawn at any time by the Director of Practice.

(d) *Appeal from denial of application.* The Director of Practice, in denying an application for enrollment, shall inform the applicant as to the reason(s) therefor. The applicant may, within 30 days after receipt of the notice of denial, file a written appeal therefrom, together with his/her reasons in support thereof, to the Secretary of the Treasury. A decision on the appeal will be rendered by the Secretary of the Treasury as soon as practicable.

(Sec. 501. Pub. L. 82-137, 8b Stat. 290: 31 U.S.C. 483a).

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38352, July 28, 1977; 51 F.R. 2875, Jan. 26, 1986]

**§ 10.6 Enrollment.**

(a) *Roster.* The Director of Practice shall maintain rosters of all individuals:

(1) Who have been granted active enrollment to practice before the Internal Revenue Service;

(2) Whose enrollment has been placed in an inactive status for failure to meet the requirements for renewal of enrollment;

(3) Whose enrollment has been placed in an inactive retirement status;

(4) Who have been disbarred or suspended from practice before the Internal Revenue Service;

(5) Whose offer of consent to resignation from enrollment to practice before the Internal Revenue Service has been accepted by the Director of Practice under section 10.55 of this part; and

(6) Whose application for enrollment has been denied.

(b) *Enrollment card.* The Director of Practice will issue an enrollment card to each individual whose application for enrollment to practice before the Internal Revenue Service is approved after the effective date of this regulation. Each such enrollment card will be valid for the period stated thereon. Enrollment cards issued individuals before February 1, 1987 shall become invalid after March 31, 1987. An individual having an invalid enrollment card is not eligible to practice before the Internal Revenue Service.

(c) *Term of enrollment.* Active enrollment to practice before the Internal Revenue Service is accorded each individual enrolled, so long as renewal of enrollment is effected as provided in this part.

(d) *Renewal of enrollment.* To maintain active enrollment to practice before the Internal Revenue Service, each individual enrolled is required to have his/her enrollment renewed as set forth herein. Failure by an individual to receive

notification from the Director of Practice of the renewal requirement will not be justification for circumvention of such requirement.

(1) All individuals enrolled to practice before the Internal Revenue Service before November 1, 1986 shall apply for renewal of enrollment during the period between November 1, 1986 and January 31, 1987. Those who receive initial enrollment between November 1, 1986 and January 31, 1987 shall apply for renewal of enrollment by March 1, 1987. The first effective date of renewal will be April 1, 1987.

(2) Thereafter, applications for renewal will be required between November 1, 1989 and January 31, 1990, and between November 1 and January 31 of every third year subsequent thereto. Those who receive initial enrollment during the renewal application period shall apply for renewal of enrollment by March 1 of the renewal year. The effective date of renewed enrollment will be April 1, 1990, and April 1 of every third year subsequent thereto.

(3) The Director of Practice will notify the individual of renewal of enrollment and will issue a card evidencing such renewal.

(4) A reasonable nonrefundable fee may be charged for each application for renewal of enrollment filed with the Director of Practice.

(5) Forms required for renewal may be obtained from the Director of Practice, Internal Revenue Service, Washington, DC 20224.

(e) *Condition for renewal: Continuing Professional Education.* In order to qualify for renewal of enrollment, an individual enrolled to practice before the Internal Revenue Service must certify, on the application for renewal form prescribed by the Director of Practice, that he/she has satisfied the following

continuing professional education requirements.

(1) *For renewed enrollment effective April 1, 1987.*

(i) A minimum of 24 hours of continuing education credit must be completed between January 1, 1986 and January 31, 1987.

(ii) An individual who receives initial enrollment between January 1, 1986 and January 31, 1987 is exempt from the continuing education requirement for the renewal of enrollment effective April 1, 1987, but is required to file a timely application for renewal of enrollment.

(2) *For renewed enrollment effective April 1, 1990 and every third year thereafter.*

(i) A minimum of 72 hours of continuing education credit must be completed between February 1, 1987 and January 31, 1990, and during each three year period subsequent thereto. Each such three year period is known as an enrollment cycle.

(ii) A minimum of 16 hours of continuing education credit must be completed in each year of an enrollment cycle.

(iii) An individual who receives initial enrollment during an enrollment cycle must complete two (2) hours of qualifying continuing education credit for each month enrolled during such enrollment cycle. Enrollment for any part of a month is considered enrollment for the entire month.

(f) *Qualifying continuing education.*

(1) *In General.* To qualify for continuing education credit, a course of learning must:

(i) Be a qualifying program designed to enhance the professional knowledge of an individual in Federal taxation or Federal tax related matters, i.e. programs comprised of current subject matter in Federal taxation or Federal tax related matters to include accounting,

financial management, business computer science and taxation; and

(ii) Be conducted by a qualifying sponsor.

(2) *Qualifying Programs.*

(i) *Formal programs.* Formal programs qualify as continuing education programs if they:

(A) Require attendance;

(B) Require that the program be conducted by a qualified instructor, discussion leader or speaker, i.e. a person whose background, training, education and/or experience is appropriate for instructing or leading a discussion on the subject matter of the particular program; and

(C) Require a written outline and/or textbook and certificate of attendance provided by the sponsor, all of which must be retained by the attendee for a three year period following renewal of enrollment.

(ii) *Correspondence or individual study programs (including taped programs).* Qualifying continuing education programs include correspondence or individual study programs completed on an individual basis by the enrolled individual and conducted by qualifying sponsors. The allowable credit hours for such programs will be measured on a basis comparable to the measurement of a seminar or course for credit in an accredited educational institution. Such programs qualify as continuing education programs if they:

(A) Require registration of the participants by the sponsor;

(B) Provide a means for measuring completion by the participants (e.g., written examination); and

(C) Require a written outline and/or textbook and certificate of completion provided by the sponsor which must be retained by the participant for a three year period following renewal of enrollment.



(iii) *Serving as an instructor, discussion leader or speaker.*

(A) One hour of continuing education credit will be awarded for each contact hour completed as an instructor, discussion leader or speaker at an educational program which meets the continuing education requirements of this part.

(B) Two hours of continuing education credit will be awarded for actual subject preparation time for each contact hour completed as an instructor, discussion leader or speaker at such programs. It will be the responsibility of the individual claiming such credit to maintain records to verify preparation time.

(C) The maximum credit for instruction and preparation may not exceed 50% of the continuing education requirement for an enrollment cycle.

(D) Presentation of the same subject matter in an instructor, discussion leader or speaker capacity more than one time during an enrollment cycle will not qualify for continuing education credit.

(iv) *Credit for published articles, books, etc.*

(A) Continuing education credit will be awarded for publications on Federal taxation or Federal tax related matters to include accounting, financial management, business computer science, and taxation, provided the content of such publications is current and designed for the enhancement of the professional knowledge of an individual enrolled to practice before the Internal Revenue Service.

(B) The credit allowed will be on the basis of one hour credit for each hour of preparation time for the material. It will be the responsibility of the person claiming the credit to maintain records to verify preparation time.

(C) The maximum credit for publications may not exceed 25% of the continuing education requirement of any enrollment cycle.

(3) *Periodic examination.* Individuals may establish eligibility for renewal of enrollment for any enrollment cycle by:

(i) Achieving a passing score on each part of the Special Enrollment Examination administered under this part during the three year period prior to renewal; and

(ii) Completing a minimum of 16 hours of qualifying continuing education during the last year of an enrollment cycle.

(g) *Sponsors.* (1) Sponsors are those responsible for presenting programs.

(2) To qualify as a sponsor, a program presenter must:

(i) Be an accredited educational institution;

(ii) Be recognized for continuing education purposes by the licensing body of any State, possession, territory, Commonwealth, or the District of Columbia responsible for the issuance of a license in the field of accounting or law;

(iii) Be recognized by the Director of Practice as a professional organization or society whose programs include offering continuing professional education opportunities in subject matter within the scope of this part; or

(iv) File a sponsor agreement with the Director of Practice to obtain approval of the program as a qualified continuing education program.

(3) A qualifying sponsor must ensure the program complies with the following requirements:

(i) Programs must be developed by individual(s) qualified in the subject matter;

(ii) Program subject matter must be current;

(iii) Instructors, discussion leaders, and speakers must be qualified with respect to program content;

(iv) Programs must include some means for evaluation of technical content and presentation;

(v) Certificates of completion must be provided those who have successfully completed the program; and

(vi) Records must be maintained by the sponsor to verify completion of the program and attendance by each participant. Such records must be retained for a period of three years following completion of the program. In the case of continuous conferences, conventions, and the like, records must be maintained to verify completion of the program and attendance by each participant at each segment of the program.

(4) Professional organizations or societies wishing to be considered as qualified sponsors shall request such status of the Director of Practice and furnish information in support of the request together with any further information deemed necessary by the Director of Practice.

(5) Sponsor agreements and qualified professional organization or society sponsors approved by the Director of Practice shall remain in effect for one enrollment cycle. The names of such sponsors will be published on a periodic basis.

(h) *Measurement of continuing education coursework.*

(1) All continuing education programs will be measured in terms of contact hours. The shortest recognized program will be one contact hour.

(2) A contact hour is 50 minutes of continuous participation in a program. Credit is granted only for a full contact hour, i.e. 50 minutes or multiples thereof. For example, a program lasting more than 50 minutes but less than 100 minutes will count as one contact hour.

(3) Individual segments at continuous conferences, conventions and the like will be considered one total program. For example, two 90-minute segments (180 minutes) at a continuous conference will count as three contact hours.

(4) For university or college courses, each semester hour credit will equal 15 contact hours and a quarter hour credit will equal 10 contact hours.

(i) *Recordkeeping requirements.*

(1) Each individual applying for renewal shall retain for a period of three years following the date of renewal of enrollment the information required with regard to qualifying continuing professional education credit hours. Such information shall include:

(i) The name of the sponsoring organization;

(ii) The location of the program;

(iii) The title of the program and description of its content, e.g., course syllabi and/or textbook;

(iv) The dates attended;

(v) The credit hours claimed;

(vi) The name(s) of the instructor(s), discussion leader(s), or speaker(s), if appropriate; and

(vii) The certificate of completion and/or signed statement of the hours of attendance obtained from the sponsor.

(2) To receive continuing education credit for service completed as an instructor, discussion leader, or speaker, the following information must be maintained for a period of three years following the date of renewal of enrollment:

(i) The name of the sponsoring organization;

(ii) The location of the program;

(iii) The title of the program and description of its content;

(iv) The dates of the program; and

(v) The credit hours claimed.

(3) To receive continuing education credit for publications, the following information must be maintained for a period of three years following the date of renewal of enrollment:

(i) The publisher;

(ii) The title of the publication;

(iii) A copy of the publication; and

(iv) The date of publication.

(j) *Waivers.* (1) Waiver from the continuing education requirements for a

given period may be granted by the Director of Practice for the following reasons:

(i) Health, which prevented compliance with the continuing education requirements;

(ii) Extended active military duty;

(iii) Absence from the United States for an extended period of time due to employment or other reasons, provided the individual does not practice before the Internal Revenue Service during such absence; and

(iv) Other compelling reasons, which will be considered on a case-by-case basis.

(2) A request for waiver must be accompanied by appropriate documentation. The individual will be required to furnish any additional documentation or explanation deemed necessary by the Director of Practice. Examples of appropriate documentation could be a medical certificate, military orders, etc.

(3) A request for waiver must be filed no later than the last day of the renewal application period.

(4) If a request for waiver is not approved, the individual will be so notified by the Director of Practice and placed on a roster of inactive enrolled individuals.

(5) If a request for waiver is approved, the individual will be so notified and issued a card evidencing such renewal.

(6) Those who are granted waivers are required to file timely applications for renewal of enrollment.

(k) *Failure to comply.* (1) Compliance by an individual with the requirements of this part shall be determined by the Director of Practice. An individual who fails to meet the requirements of eligibility for renewal of enrollment will be notified by the Director of Practice at his/her last known address by first class mail. The notice will state the basis for the non-compliance and will provide

the individual an opportunity to furnish in writing information relating to the matter within 60 days of the date of the notice. Such information will be considered by the Director of Practice in making a final determination as to eligibility for renewal of enrollment.

(2) The Director of Practice may require any individual, by first class mail to his/her last known mailing address, to provide copies of any records required to be maintained under this part. The Director of Practice may disallow any continuing professional education hours claimed if the individual concerned fails to comply with such requirement.

(3) An individual who has not filed a timely application for renewal of enrollment, who has not made a timely response to the notice of non-compliance with the renewal requirements, or who has not satisfied the requirements of eligibility for renewal will be placed on a roster of inactive enrolled individuals for a period of three years. During this time, the individual will be ineligible to practice before the Internal Revenue Service.

(4) During inactive enrollment status or at any other time an individual is ineligible to practice before the Internal Revenue Service, such individual shall not in any manner, directly or indirectly, indicate he or she is enrolled to practice before the Internal Revenue Service, or use the term "enrolled agent," the designation "E.A.," or other form of reference to eligibility to practice before the Internal Revenue Service.

(5) An individual placed in an inactive status may satisfy the requirements for renewal of enrollment during his/her period of inactive enrollment. If such satisfaction includes completing the continuing education requirement, a minimum of 16 hours of qualifying continuing education hours must be completed in the 12 month period preceding

the date on which the renewal application is filed. Continuing education credit under this subsection may not be used to satisfy the requirements of the enrollment cycle in which the individual has been placed back on the active roster.

(6) An individual placed in an inactive status must file an application for renewal of enrollment and satisfy the requirements for renewal as set forth in this section within three years of being placed in an inactive status. The name of such individual otherwise will be removed from the inactive enrollment roster and his/her enrollment will terminate. Eligibility for enrollment must then be reestablished by the individual as provided in this part.

(7) Inactive enrollment status is not available to an individual who is the subject of a discipline matter in the Office of Director of Practice.

(l) *Inactive retirement status.* An individual who no longer practices before the Internal Revenue Service may request being placed in an inactive status at any time and such individual will be placed in an inactive retirement status. The individual will be ineligible to practice before the Internal Revenue Service. Such individual must file a timely application for renewal of enrollment at each applicable renewal of enrollment as provided in this part. An individual who is placed in an inactive retirement status may be reinstated to an active enrollment status upon filing an application for renewal of enrollment and providing evidence of the completion of the required continuing professional education hours for the enrollment cycle. Inactive retirement status is not available to an individual who is the subject of a discipline matter in the Office of Director of Practice.

(m) *Renewal while under suspension or disbarment.* An individual who is ineligible to practice before the Internal Revenue Service by virtue of disciplinary

action is required to meet the requirements for renewal of enrollment during the period of ineligibility.

(n) *Verification.* The Director of Practice may review the continuing education records of an enrolled individual and/or qualified sponsor in a manner deemed appropriate to determine compliance with the requirements and standards for renewal of enrollment as provided in this part. (Approved by the Office of Management and Budget under Control No. 1545-0946.)

(31 U.S.C. 483a)

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38352, July 28, 1977]

[51 F.R. 2875, Jan. 26, 1986]

#### **§ 10.7 Limited practice; special appearances; return preparation and furnishing information.**

(a) *In general.* Individuals may appear on their own behalf and may otherwise appear without enrollment, provided they present satisfactory identification, in the following classes of cases:

(1) An individual may represent another individual who is his regular full-time employer, may represent a partnership of which he is a member or a regular full-time employee, or may represent without compensation a member of his immediate family.

(2) Corporations (including parents, subsidiaries or affiliated corporations), trusts, estates, associations, or organized groups may be represented by bona fide officers or regular full-time employees.

(3) Trusts, receiverships, guardianships, or estates may be represented by their trustees, receivers, guardians, administrators or executors or their regular full-time employees.

(4) Any governmental unit, agency, or authority may be represented by an officer or regular employee in the course of his official duties.

(5) Unenrolled persons may participate in rule making as provided by section 4 of the Administrative Procedure Act, 60 Stat. 238 (5 U.S.C. 1003).

(6) Enrollment is not required for representation outside of the United States before personnel of the Internal Revenue Service.

(7) Any individual who is not under disbarment or suspension from practice before the Internal Revenue Service or other practice of his profession by any other authority (in the case of attorneys, certified public accountants, and public accountants) and who signs a return as having prepared it for the taxpayer, or who prepared a return with respect to which the instructions or regulations do not require that it be signed by the person who prepared the return for the taxpayer, may appear without enrollment as the taxpayer's representative, with or without the taxpayer, before revenue agents and examining officers of the Examination Division in the offices of District Directors with respect to the tax liability of the taxpayer for the taxable year or period covered by that return. Proper authorization from the taxpayer will be required. All such persons will be subject to such rules regarding standards of conduct, the extent of their authority, and other matters as the Director of Practice shall prescribe. Such persons will be permitted to represent taxpayers within those limits without enrollment, except that the Director of Practice may deny permission to engage in such limited practice to any person who has engaged in conduct which would justify suspension or disbarment of any attorney, certified public accountant, or enrolled agent under the provisions of this part.

(b) *Special appearance.* The Director of Practice, subject to such conditions as he deems appropriate, may authorize any person to represent another without

enrollment for the purpose of a particular matter.

(c) *Preparation of tax returns and furnishing information.* Any person may prepare a tax return, may appear as a witness for the taxpayer before the Internal Revenue Service, or furnish information at the request of the Internal Revenue Service or any of its officers or employees.

[3 F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13205, Aug. 19, 1970; 49 F.R. 6719, Feb. 23, 1984; 51 F.R. 2875, Jan. 26, 1986]

#### **§ 10.8 Customhouse brokers.**

Nothing contained in the regulations in this part shall be deemed to affect or limit the right of a customhouse broker, licensed as such by the Commissioner of Customs in accordance with the regulations prescribed therefor, in any customs district in which he is so licensed, at the office of the District Director of Internal Revenue or before the National Office of the Internal Revenue Service, to act as a representative in respect to any matters relating specifically to the importation or exportation of merchandise under the customs or internal revenue laws, for any person for whom he has acted as a customhouse broker.

### **Subpart B-Duties and Restrictions Relating to Practice Before the Internal Revenue Service**

#### **§ 10.20 Information to be furnished.**

(a) *To the Internal Revenue Service.* No attorney, certified public accountant, or enrolled agent shall neglect or refuse promptly to submit records or information in any matter before the Internal Revenue Service, upon proper and lawful request by a duly authorized officer or employee of the Internal

Revenue Service, or shall interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service or its officers or employees to obtain any such record or information, unless he believes in good faith and on reasonable grounds that such record or information is privileged or that the request for, or effort to obtain, such record or information is of doubtful legality.

(b) *To the Director of Practice.* It shall be the duty of an attorney or certified public accountant, who practices before the Internal Revenue Service, or enrolled agent, when requested by the Director of Practice, to provide the Director with any information he may have concerning violation of the regulations in this part by any person, and to testify thereto in any proceeding instituted under this part for the disbarment or suspension of an attorney, certified public accountant, or enrolled agent, unless he believes in good faith and on reasonable grounds that such information is privileged or that the request therefor is of doubtful legality.

#### **§ 10.21 Knowledge of client's omission.**

Each attorney, certified public accountant, or enrolled agent who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client is required by the revenue laws of the United States to execute, shall advise the client promptly of the fact of such noncompliance, error, or omission.

[42 F.R. 38352, July 28, 1977]

#### **§ 10.22 Diligence as to accuracy.**

Each attorney, certified public accountant, or enrolled agent shall exercise due diligence:

(a) In preparing or assisting in the preparation of, approving, and filing returns, documents, affidavits, and other papers relating to Internal Revenue Service matters;

(b) In determining the correctness of oral or written representations made by him to the Department of the Treasury; and

(c) In determining the correctness of oral or written representations made by him to clients with reference to any matter administered by the Internal Revenue Service.

[35 F.R. 13205, Aug. 19, 1970, as amended at 42 F.R. 38352, July 28, 1977]

#### **§ 10.23 Prompt disposition of pending matters.**

No attorney, certified public accountant, or enrolled agent shall unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.

#### **§ 10.24 Assistance from disbarred or suspended persons and former Internal Revenue Service employees.**

No attorney, certified public accountant or enrolled agent, shall, in practice before the Internal Revenue Service, knowingly and directly or indirectly:

(a) Employ or accept assistance from any person who is under disbarment or suspension from practice before the Internal Revenue Service.

(b) Accept employment as associate, correspondent, or subagent from, or share fees with, any such person.

(c) Accept assistance from any former government employee where the

provisions of § 10.26 of these regulations or any Federal law would be violated.

[31 F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13205, Aug. 19, 1970, 44 F.R. 4940, Jan. 1979]

**§ 10.25 Practice by partners of Government employees.**

No partner of an officer or employee of the executive branch of the U.S. Government, of any independent agency of the United States, or of the District of Columbia, shall represent anyone in any matter administered by the Internal Revenue Service in which such officer or employee of the Government participates or has participated personally and substantially as a Government employee or which is the subject of his official responsibility.

[31 F.R. 10773, Aug. 13 1966, as amended at 35 F.R. 13205, Aug. 19, 1970]

**§ 10.26 Practice by former Government employees, their partners and their associates.**

(a) *Definitions.* For purposes of § 10.26. (1) "Assist" means to act in such a way as to advise, furnish information to or otherwise aid another person, directly or indirectly.

(2) "Government employee" is another officer or employee of the United States or any agency of the United States, including a "special government employee" as defined in 18 U.S.C. 202(a), or the District of Columbia, or of any State, or a member of Congress or of any State legislature.

(3) "Member of a firm" is a sole practitioner or an employee or associate thereof, or a partner, stockholder, associate, affiliate or employee of a partnership, joint venture, corporation, professional association or other affiliation of two or more practitioners who represent non-Government parties.

(4) "Practitioner" is an attorney, certified public accountant, enrolled agent or any other person authorized to practice before the Internal Revenue Service.

(5) "Official responsibility" means the direct administrative or operating authority, whether intermediate or final, and either exercisable alone or with others, and either personally or through subordinates, to approve, disapprove, or otherwise direct Government action, with or without knowledge of the action.

(6) "Participate" or "participation" means substantial involvement as a Government employee by making decisions, or preparing or reviewing documents with or without the right to exercise a judgment of approval or disapproval, or participating in conferences or investigations, or rendering advice of a substantial nature.

(7) "Rule" includes Treasury Regulations, whether issued or under preparation for issuance as Notices of Proposed Rule Making or as Treasury Decisions, and revenue rulings and revenue procedures published in the Internal Revenue bulletin. "Rule" shall not include a "transaction" as defined in paragraph (a)(8) of this section.

(8) "Transaction" means any decision, determination, finding, letter ruling, technical advice, contract or approval or disapproval thereof, relating to a particular factual situation or situations involving a specific party or parties whose rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service, or other legal rights, are determined or immediately affected therein and to which the United States is a party or in which it has a direct and substantial interest, whether or not the same taxable periods are involved. "Transaction" does not include "rule" as defined in paragraph (a)(7) of this section.

(b) *General rules.* (1) No former Government employee shall subsequent to his Government employment, represent anyone in any matter administered by the Internal Revenue Service if the representation would violate 18 U.S.C. 207(a) or (b) or any other laws of the United States.

(2) No former Government employee who participated in a transaction shall, subsequent to his Government employment, represent or knowingly assist, in that transaction, any person who is or was a specific party to that transaction.

(3) No former Government employee who within a period of one year prior to the termination of his Government employment had official responsibility for a transaction shall, within one year after his Government employment is ended, represent or knowingly assist, in that transaction, any person who is or was a specific party to that transaction.

(4) No former Government employee shall, within one year after his Government employment is ended, appear before any employee of the Treasury Department in connection with the publication, withdrawal, amendment, modification, or interpretation of a rule in the development of which the former Government employee participated or for which, within a period of one year prior to the termination of his Government employment, he had official responsibility. However, this subparagraph does not preclude such former employee from appearing on his own behalf or from representing a taxpayer before the Internal Revenue Service in connection with a transaction involving the application or interpretation of such a rule with respect to that transaction: *Provided.* That such former employee shall not utilize or disclose any confidential information acquired by the former employee in the development of the rule, and shall not contend that the rule is invalid or illegal. In addition, this

subparagraph does not preclude such former employee from otherwise advising or acting for any person.

(c) *Firm representation.* (1) No member of a firm of which a former Government employee is a member may represent or knowingly assist a person who was or is a specific party in any transaction with respect to which the restrictions of paragraph (b)(1) (other than 18 U.S.C 207(b)) or (b)(2) of this section apply to the former Government employee, in that transaction, unless:

(i) No member of the firm who had knowledge of the participation by the Government employee in the transaction initiated discussions with the Government employee concerning his becoming a member of the firm until his Government employment is ended or six months after the termination of his participation in the transaction, whichever is earlier;

(ii) The former Government employee did not initiate any discussions concerning becoming a member of the firm while participating in the transaction or, if such discussions were initiated, they conformed with the requirement of 18 U.S.C. 208(b); and

(iii) The firm isolates the former Government employee in such a way that he does not assist in the representation.

(2) No member of a firm of which a former Government employee is a member may represent or knowingly assist a person who was or is a specific party in any transaction with respect to which the restrictions of paragraph (b)(3) of this section apply to the former employee, in that transaction, unless the firm isolates the former Government employee in such a way that he does not assist in the representation.

(3) When isolation of the former Government employee is required under paragraphs (c)(1) or (c)(2) of this section, a statement affirming the fact of such isolation shall be executed under



oath by the former Government employee and by a member of the firm acting on behalf of the firm, and shall be filed with the Director of Practice and in such other place and in the manner prescribed by regulation. This statement shall clearly identify the firm, the former Government employee, and transaction or transactions requiring such isolation.

(d) *Pending representation.* Practice by former Government employees, their partners and associates with respect to representation in specific matters where actual representation commenced before publication of this regulation is governed by the regulations set forth in the June 1972 amendments to the regulations of this part (published at 37 F.R. 11676): *Provided.* That the burden of showing that representation commenced before publication is with the former Government employees, their partners and associates.

[42 F.R. 38352, July 28, 1977]

#### § 10.27 Notaries.

No attorney, certified public accountant, or enrolled agent as notary public shall with respect to any matter administered by the Internal Revenue Service take acknowledgments, administer oaths, certify papers, or perform any official act in connection with matters in which he is employed as counsel, attorney, or agent, or in which he may be in any way interested before the Internal Revenue Service (26 Op. Atty. Gen. 236).

#### § 10.28 Fees.

No attorney, certified public accountant, or enrolled agent shall charge an unconscionable fee for representation of a client in any matter before the Internal Revenue Service.

#### § 10.29 Conflicting interests.

No attorney, certified public accountant, or enrolled agent shall represent

conflicting interests in his practice before the Internal Revenue Service, except by express consent of all directly interested parties after full disclosure has been made.

#### § 10.30 Solicitation.

(a) *Advertising and Solicitation restriction.* (1) No attorney, certified public accountant, enrolled agent, or other individual eligible to practice before the Internal Revenue Service shall, with respect to any Internal Revenue Service matter, in any way use or participate in the use of any form of public communication containing a false, fraudulent, misleading, deceptive, unduly influencing, coercive or unfair statement or claim. For the purposes of this subsection, the prohibition includes, but is not limited to, statements pertaining to the quality of services rendered unless subject to factual verification, claims of specialized expertise not authorized by State or Federal agencies having jurisdiction over the practitioner, and statements or suggestions that the ingenuity and/or prior record of a representative rather than the merit of the matter are principal factors likely to determine the result of the matter.

(2) No attorney, certified public accountant, enrolled agent or other individual eligible to practice before the Internal Revenue Service shall make, directly or indirectly, an uninvited solicitation of employment, in matters related to the Internal Revenue Service. Solicitation includes, but is not limited to, in-person contacts, telephone communications, and personal mailings directed to the specific circumstances unique to the recipient. This restriction does not apply to: (i) seeking new business from an existing or former client in a related matter; (ii) solicitation by mailings, the contents of which are designed for the general public; or (iii) non-coercive in-person solicitation by

those eligible to practice before the Internal Revenue Service while acting as an employee, member, or officer of an exempt organization described in sections 501(c)(3) or (4) of the Internal Revenue Code of 1954 (26 U.S.C.).

(b) *Permissible Advertising.* (1) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service, may publish, broadcast, or use in a dignified manner through any means of communication set forth in paragraph (d) of this section:

(i) The name, address, telephone number, and office hours of the practitioner or firm.

(ii) The names of individuals associated with the firm.

(iii) A factual description of the services offered.

(iv) Acceptable credit cards and other credit arrangements.

(v) Foreign language ability.

(vi) Membership in pertinent, professional organizations.

(vii) Pertinent professional licenses.

(viii) A statement that an individual's or firm's practice is limited to certain areas.

(ix) In the case of an enrolled agent, the phrase "enrolled to represent taxpayers before the Internal Revenue Service" or "enrolled to practice before the Internal Revenue Service."

(x) Other facts relevant to the selection of a practitioner in matters related to the Internal Revenue Service which are not prohibited by these regulations.

(2) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may use, to the extent they are consistent with the regulations in this section, customary biographical insertions in approved law lists and reputable professional journals and directories, as well as professional cards, letterheads and announcements:

*Provided.* That: (i) attorneys do not violate applicable standards of ethical conduct adopted by the American Bar Association, (ii) certified public accountants do not violate applicable standards of ethical conduct adopted by the American Institute of Certified Public Accountants, and (iii) enrolled agents do not violate applicable standards of ethical conduct adopted by either the National Society of Public Accountants or the National Association of Enrolled Agents.

(c) *Fee Information.* (1) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may disseminate the following fee information:

(i) Fixed fees for specific routine services.

(ii) Hourly rates.

(iii) Range of fees for particular services.

(iv) Fee charged for an initial consultation.

(2) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service may also publish the availability of a written schedule of fees.

(3) Attorneys, certified public accountants, enrolled agents and other individuals eligible to practice before the Internal Revenue Service shall be bound to charge the hourly rate, the fixed fee for specific routine services, the range of fees for particular services, or the fee for an initial consultation published for a reasonable period of time, but no less than thirty days from the last publication of such hourly rate or fees.

(d) *Communications.* Communications, including fee information, shall be limited to professional lists, telephone directories, print media, permissible mailings as provided in these regulations, radio and television. In the case

of radio and television broadcasting, the broadcast shall be pre-recorded and the practitioner shall retain a recording of the actual audio transmission.

(e) *Improper Associations.* An attorney, certified public accountant or enrolled agent may, in matters related to the Internal Revenue Service, employ or accept employment or assistance as an associate, correspondent, or sub-agent from, or share fees with any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section: *Provided.* That a practitioner does not, directly or indirectly, act or hold himself out as an Internal Revenue Service practitioner in connection with that relationship. Nothing herein shall prohibit an attorney, certified public accountant, or enrolled agent from practice before the Internal Revenue Service in a capacity other than that described above.

[44 F.R. 4940, Jan. 24, 1979]

#### § 10.31 Negotiation of taxpayer refund checks.

No attorney, certified public accountant or enrolled agent who is an income tax return preparer shall endorse or otherwise negotiate any check made in respect of income taxes which is issued to a taxpayer other than the attorney, certified public accountant or enrolled agent.

[42 F.R. 38353, July 28, 1977]

#### § 10.32 Practice of law.

Nothing in the regulations in this part shall be construed as authorizing persons not members of the bar to practice law.

[31 F.R. 10773, Aug. 13, 1966. Redesignated at 42 F.R. 38353, July 28, 1977]

#### § 10.33 Tax shelter opinions.

(a) *Tax shelter opinions and offering materials.* A practitioner who provides a tax shelter opinion analyzing the Federal tax effects of a tax shelter investment shall comply with each of the following requirements:

(1) *Factual matters.* (i) The practitioner must make inquiry as to all relevant facts, be satisfied that the material facts are accurately and completely described in the offering materials, and assure that any representations as to future activities are clearly identified, reasonable and complete.

(ii) A practitioner may not accept as true asserted facts pertaining to the tax shelter which he/she should not, based on his/her background and knowledge, reasonably believe to be true. However, a practitioner need not conduct an audit or independent verification of the asserted facts, or assume that a client's statement of the facts cannot be relied upon, unless he/she has reason to believe that any relevant facts asserted to him/her are untrue.

(iii) If the fair market value of property or the expected financial performance of an investment is relevant to the tax shelter, a practitioner may not accept an appraisal or financial projection as support for the matters claimed therein unless:

(A) The appraisal or financial projection makes sense on its face;

(B) The practitioner reasonably believes that the person making the appraisal or financial projection is competent to do so and is not of dubious reputation; and

(C) The appraisal is based on the definition of fair market value prescribed under the relevant Federal tax provisions.

(iv) If the fair market value of purchased property is to be established by reference to its stated purchase price,

the practitioner must examine the terms and conditions upon which the property was (or is to be) purchased to determine whether the stated purchase price reasonably may be considered to be its fair market value.

(2) *Relate law to facts.* The practitioner must relate the law to the actual facts and, when addressing issues based on future activities, clearly identify what facts are assumed.

(3) *Identification of material issues.* The practitioner must ascertain that all material Federal tax issues have been considered, and that all of those issues which involve the reasonable possibility of a challenge by the Internal Revenue Service have been fully and fairly addressed in the offering materials.

(4) *Opinion on each material issue.* Where possible, the practitioner must provide an opinion whether it is more likely than not that an investor will prevail on the merits of each material tax issue presented by the offering which involves a reasonable possibility of a challenge by the Internal Revenue Service. Where such an opinion cannot be given with respect to any material tax issue, the opinion should fully describe the reasons for the practitioner's inability to opine as to the likely outcome.

(5) *Overall evaluation.* (1) Where possible, the practitioner must provide an overall evaluation whether the material tax benefits in the aggregate more likely than not will be realized. Where such an overall evaluation cannot be given, the opinion should fully describe the reasons for the practitioner's inability to make an overall evaluation. Opinions concluding that an overall evaluation cannot be provided will be given special scrutiny to determine if the stated reasons are adequate.

(ii) A favorable overall evaluation may not be rendered unless it is based on a conclusion that substantially more than half of the material tax benefits, in terms

of their financial impact on a typical investor, more likely than not will be realized if challenged by the Internal Revenue Service.

(iii) If it is not possible to give an overall evaluation, or if the overall evaluation is that the material tax benefits in the aggregate will not be realized, the fact that the practitioner's opinion does not constitute a favorable overall evaluation, or that it is an unfavorable overall evaluation, must be clearly and prominently disclosed in the offering materials.

(iv) The following examples illustrate the principles of this paragraph:

*Example (1).* A limited partnership acquires real property in a sale-leaseback transaction. The principal tax benefits offered to investing partners consist of depreciation and interest deductions. Lesser tax benefits are offered to investors by reason of several deductions under Internal Revenue Code section 162 (ordinary and necessary business expenses). If a practitioner concludes that it is more likely than not that the partnership will not be treated as the owner of the property for tax purposes (which is required to allow the interest and depreciation deductions), then he/she may not opine to the effect that it is more likely than not that the material tax benefits in the aggregate will be realized, regardless of whether favorable opinions may be given with respect to the deductions claimed under Code section 162.

*Example (2).* A corporation electing under subchapter S of the Internal Revenue Code is formed to engage in research and development activities. The offering materials forecast that deductions for research and experimental expenditures equal to 75% of the total investment in the corporation will be available during the first two years of the corporation's operations, other expenses will account for another 15% of

the total investment, and that little or no gross income will be received by the corporation during this period. The practitioner concludes that it is more likely than not that deductions for research and experimental expenditures will be allowable. The practitioner may render an opinion to the effect that based on this conclusion, it is more likely than not that the material tax benefits in the aggregate will be realized, regardless of whether he/she can opine that it is more likely than not that any of the other tax benefits will be achieved.

*Example (3).* An investment program is established to acquire offsetting positions in commodities contracts. The objective of the program is to close the loss positions in year one and to close the profit positions in year two. The principal tax benefit offered by the program is a loss in the first year, coupled with the deferral of offsetting gain until the following year. The practitioner concludes that the losses will not be deductible in year one. Accordingly, he/she may not render an opinion to the effect that it is more likely than not that the material tax benefits in the aggregate will be realized, regardless of the fact that he/she is of the opinion that losses not allowable in year one will be allowable in year two, because the principal tax benefit offered is a one-year deferral of income.

*Example (4).* A limited partnership is formed to acquire, own and operate residential rental real estate. The offering material forecasts gross income of \$2,000,000 and total deductions of \$10,000,000, resulting in net losses of \$8,000,000 over the first six taxable years. Of the total deductions, depreciation and interest are projected to be \$7,000,000, and other deductions \$3,000,000. The practitioner concludes that it is more likely than not all of the depreciation and interest deductions will be allowable, and that it is more likely

than not that the other deductions will not be allowed. The practitioner may render an opinion to the effect that it is more likely than not that the material tax benefits in the aggregate will be realized.

(6) *Description of opinion.* The practitioner must assure that the offering materials correctly and fairly represent the nature and extent of the tax shelter opinion.

(b) *Reliance on other opinions—(1) In general.* A practitioner may provide an opinion on less than all of the material tax issues only if:

(i) At least one other competent practitioner provides an opinion on the likely outcome with respect to all of the other material tax issues which involve a reasonable possibility of challenge by the Internal Revenue Service, and an overall evaluation whether the material tax benefits in the aggregate more likely than not will be realized, which is disseminated in the same manner as the practitioner's opinion; and

(ii) The practitioner, upon reviewing such other opinions and any offering materials, has no reason to believe that the standards of paragraph (a) of this section have not been complied with. Notwithstanding the foregoing, a practitioner who has not been retained to provide an overall evaluation whether the material tax benefits in the aggregate more likely than not will be realized may issue an opinion on less than all the material tax issues only if he/she has no reason to believe, based on his/her knowledge and experience, that the overall evaluation given by the practitioner who furnished the overall evaluation is incorrect on its face.

(2) *Forecasts and projections.* A practitioner who is associated with forecasts or projections relating to or based upon the tax consequences of the tax shelter offering that are included in the offering materials, or are disseminated to potential investors other than

the practitioner's clients, may rely on the opinion of another practitioner as to any or all material tax issues, provided that the practitioner who desires to rely on the other opinion has no reason to believe that the standards of paragraph (a) of this section have not been complied with by the practitioner rendering such other opinion, and the requirements of paragraph (b)(1) of this section are satisfied. The practitioner's report shall disclose any material tax issue not covered by, or incorrectly opined upon, by the other opinion, and shall set forth his/her opinion with respect to each such issue in a manner that satisfies the requirements of paragraph (a) of this section.

(c) *Definitions.* For purposes of this section:

(1) "Practitioner" is any person authorized under § 10.3 of this part to practice before the Internal Revenue Service.

(2) A "tax shelter," as the term is used in this section, is an investment which has as a significant and intended feature for Federal income or excise tax purposes either of the following attributes: (i) Deductions in excess of income from the investment being available in any year to reduce income from other sources in that year, or (ii) credits in excess of the tax attributable to the income from the investment being available in any year to offset taxes on income from other sources in that year. Excluded from the term are municipal bonds; annuities; family trusts [but not including schemes or arrangements that are marketed to the public other than in a direct practitioner-client relationship]; qualified retirement plans; individual retirement accounts; stock option plans; securities issued in a corporate reorganization; mineral development ventures, if the only tax benefit would be percentage depletion; and real estate where it is anticipated that in no year is

it likely that deductions will exceed the tax attributable to the income from the investment in that year. Whether an investment is intended to have tax shelter features depends on the objective facts and circumstances of each case. Significant weight will be given to the features described in the offering materials to determine whether the investment is a tax shelter.

(3) A "tax shelter opinion," as the term is used in this section, is advice by a practitioner concerning the Federal tax aspects of a tax shelter either appearing or referred to in the offering materials, or used or referred to in connection with sales promotion efforts, and directed to persons other than the client who engaged the practitioner to give the advice. The term includes the tax aspects or tax risks portion of the offering materials prepared by or at the direction of a practitioner, whether or not a separate opinion letter is issued or whether or not the practitioner's name is referred to in the offering materials or in connection with the sales promotion efforts. In addition, a financial forecast or projection prepared by a practitioner is a tax shelter opinion if it is predicated on assumptions regarding Federal tax aspects of the investment, and it meets the other requirements of the first sentence of this subparagraph. The term does not, however, include rendering advice solely to the offeror or reviewing parts of the offering materials, so long as neither the name of the practitioner, nor the fact that a practitioner has rendered advice concerning the tax aspects, is referred to in the offering materials or in connection with the sales promotion efforts.

(4) A "material" tax issue as the term is used in this section is (i) any Federal income or excise tax issue relating to a tax shelter that would make a significant contribution toward sheltering from Federal taxes income from other

sources by providing deductions in excess of the income from the tax shelter investment in any year, or tax credits available to offset tax liabilities in excess of the tax attributable to the tax shelter investment in any year; (ii) any other Federal income or excise tax issue relating to a tax shelter that could have a significant impact (either beneficial or adverse) on a tax shelter investor under any reasonably foreseeable circumstances (e.g., depreciation or investment tax credit recapture, availability of long-term capital gain treatment, or realization of taxable income in excess of cash flow, upon sale or other disposition of the tax shelter investment); and (iii) the potential applicability of penalties, additions to tax, or interest charges that reasonably could be asserted against a tax shelter investor by the Internal Revenue Service with respect to the tax shelter. The determination of what is material is to be made in good faith by the practitioner, based on information available at the time the offering materials are circulated.

[49 F.R. 6719, Feb. 23, 1984]

### **Subpart C—Rules Applicable to Disciplinary Proceedings**

#### **§ 10.50 Authority to disbar or suspend.**

Pursuant to section 3 of the Act of July 7, 1884, 23 Stat. 258 (31 U.S.C 1026), the Secretary of the Treasury, after due notice and opportunity for hearing, may suspend or disbar from practice before the Internal Revenue Service any attorney, certified public accountant, or enrolled agent shown to be incompetent, disreputable or who refuses to comply with the rules and

regulations in this part or who shall, with intent to defraud, in any manner willfully and knowingly deceive, mislead, or threaten any claimant or prospective claimant, by word, circular, letter, or by advertisement.

[31 F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13205, Aug. 19, 1970]

#### **§ 10.51 Disreputable conduct.**

Disreputable conduct for which an attorney, certified public accountant, or enrolled agent may be disbarred or suspended from practice before the Internal Revenue Service includes, but is not limited to:

(a) Conviction of any criminal offense under the revenue laws of the United States, or of any offense involving dishonesty, or breach of trust.

(b) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, or any other document or statement, written or oral, are included in the term "information."

(c) Solicitation of employment as prohibited under § 10.30 of this part, the use of false or misleading representations with intent to deceive a client or prospective client in order to procure employment, or intimating that the practitioner is able improperly to obtain special consideration or action from the Internal Revenue Service or officer or employee thereof.

(d) Willfully failing to make a Federal tax return in violation of the revenue laws of the United States, or evading, attempting to evade, or participating in any way in evading or attempting to evade any Federal tax or payment thereof, knowingly counseling or suggesting a client or prospective client an illegal plan to evade Federal taxes or payment thereof, or concealing assets of himself or another to evade Federal taxes or payment thereof.

(e) Misappropriation of, or failure properly and promptly to remit funds received from a client for the purpose of payment of taxes or other obligations due the United States.

(f) Directly or indirectly attempting to influence, or offering or agreeing to attempt to influence, the official action of any officer or employee of the Internal Revenue Service by the use of threats, false accusations, duress or coercion, by the offer of any special inducement or promise of advantage or by the bestowing of any gift, favor or thing of value.

(g) Disbarment or suspension from practice as an attorney, certified public accountant, public accountant, or actuary by any duly constituted authority of any State, possession, territory, Commonwealth, the District of Columbia, any Federal court of record, or any Federal agency, body or board.

(h) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person. Maintaining a partnership for the practice of law, accountancy, or other related professional service with a person who is under disbarment from practice before the Service shall be presumed to be a violation of this provision.

(i) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use

of abusive language, making false accusations and statements knowing them to be false, or circulating or publishing malicious or libelous matter.

(j) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph include those which reflect or result from a knowing misstatement of fact or law; from an assertion of a position known to be unwarranted under existing law; from counseling or assisting in conduct known to be illegal or fraudulent; from concealment of matters required by law to be revealed; or from conscious disregard of information indicating that material facts expressed in the tax opinion or offering material are false or misleading. For the purpose of this paragraph, reckless conduct is a highly unreasonable omission or misrepresentation, involving not merely simple or inexcusable negligence, but an extreme departure from the standards of ordinary care that is either known or is so obvious that the competent practitioner must or should have been aware of it. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.

[Dept. Circ. 230, Rev., 31 F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13205, Aug. 19, 1970, 42 F.R. 38353, July 28, 1977; 44 F.R. 4944, Jan. 24, 1979; 49 F.R. 6719, Feb. 23, 1984]

#### § 10.52 Violation of regulations.

(a) *In General.* Any attorney, certified public accountant, or enrolled agent may be disbarred or suspended from practice before the Internal Revenue



Service for willful violation of any of the regulations contained in this part.

(b) *Tax shelter opinions.* An attorney, certified public accountant, enrolled agent or enrolled actuary may be disbarred or suspended from practice before the Internal Revenue Service for violating any part of § 10.33 of this part, if such violation is willfull, reckless or through gross incompetence (within the meaning of § 10.51(j) of this part); or if the violation is part of a pattern of providing tax shelter opinions that fail to comply with § 10.33 of this part.

**§ 10.53 Receipt of information concerning attorneys, certified public accountants and enrolled agents.**

If an officer or employee of the Internal Revenue Service has reason to believe that an attorney, certified public accountant, or enrolled agent has violated any provision of this part, or if any such officer or employee receives information to that effect, he shall promptly make a written report thereof, which report or a copy thereof shall be forwarded to the Director of Practice. If any other person has information of such violations, he may make a report thereof to the Director of Practice or to any officer or employee of the Internal Revenue Service.

**§ 10.54 Institution of proceeding.**

Whenever the Director of Practice has reason to believe that any attorney, certified public accountant, or enrolled agent has violated any provision of the laws or regulations governing practice before the Internal Revenue Service, he may reprimand such person or institute a proceeding for disbarment or suspension of such person. The proceeding shall be instituted by a complaint which names the respondent and is signed by the Director of Practice and filed in his office. Except in cases of willfulness, or

where time, the nature of the proceeding, or the public interest does not permit, a proceeding will not be instituted under this section until facts or conduct which may warrant such action have been called to the attention of the proposed respondent in writing and he has been accorded opportunity to demonstrate or achieve compliance with all lawful requirements.

**§ 10.55 Conferences.**

(a) *In general.* The Director of Practice may confer with an attorney, certified public accountant, or enrolled agent concerning allegations of misconduct irrespective of whether a proceeding for disbarment or suspension has been instituted against him. If such conference results in a stipulation in connection with a proceeding in which such person is the responent, the stipulation may be entered in the record at the instance of either party to the proceeding.

(b) *Resignation or voluntary suspension.* An attorney, certified public accountant, or enrolled agent, in order to avoid the institution or conclusion of a disbarment or suspension proceeding, may offer his consent to suspension from practice before the Internal Revenue Service. An enrolled agent may also offer his resignation. The Director of Practice, in his discretion, may accept the offered resignation of an enrolled agent and may suspend an attorney, certified public accountant, or enrolled agent in accordance with the consent offered.

[31 F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13206, Aug. 19, 1970]

**§ 10.56 Contents of complaint.**

(a) *Charges.* A complaint shall give a plain and concise description of the allegations which constitute the basis for the proceeding. A complaint shall be deemed sufficient if it fairly informs the

respondent of the charges against him so that he is able to prepare his defense.

(b) *Demand for answer.* In the complaint, or in a separate paper attached to the complaint, notification shall be given of the place and time within which the respondent shall file his answer, which time shall not be less than 15 days from the date of service of the complaint, and notice shall be given that a decision by default may be rendered against the respondent in the event he fails to file his answer as required.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38353, July 28, 1977]

#### § 10.57 Service of complaint and other papers.

(a) *Complaint.* The complaint or copy thereof may be served upon the respondent by certified mail, or first class mail as hereinafter provided; by delivering it to the respondent or his attorney or agent of record either in person or by leaving it at the office or place of business of the respondent, attorney or agent; or in any other manner which has been agreed to by the respondent. Where the service is by certified mail, the return post office receipt duly signed by or on behalf of the respondent shall be proof of service. If the certified matter is not claimed or accepted by the respondent and is returned undelivered, complete service may be made upon the respondent by mailing the complaint to him by first-class mail, addressed to him at the address under which he is enrolled or at the last address known to the Director of Practice. If service is made upon the respondent or his attorney or agent of record in person or by leaving the complaint at the office or place of business of the respondent, attorney or agent, the verified return by the person making service, setting forth the manner of service, shall be proof of such service.

(b) *Service of papers other than complaint.* Any paper other than the complaint may be served upon an attorney, certified public accountant, or enrolled agent as provided in paragraph (a) of this section or by mailing the paper by first-class mail to the respondent at the last address known to the Director of Practice, or by mailing the paper by first-class mail to the respondent's attorney or agent of record. Such mailing shall constitute complete service. Notices may be served upon the respondent or his attorney or agent of record by telegraph.

(c) *Filing of papers.* Whenever the filing of a paper is required or permitted in connection with a disbarment or suspension proceeding, and the place of filing is not specified by this subpart or by rule or order of the Administrative Law Judge, the paper shall be filed with the Director of Practice, Treasury Department, Washington, D.C. 20220. All papers shall be filed in duplicate.

[Dept. Circ. 230, Rev., 31 F.R. 10773 Aug. 13, 1966, as amended at 31 F.R. 13992, Nov. 2, 1966; 42 F.R. 38354, July 28, 1977]

#### § 10.58 Answer.

(a) *Filing.* The respondent's answer shall be filed in writing within the time specified in the complaint or notice of institution of the proceeding, unless on application the time is extended by the Director of Practice or the Administrative Law Judge. The answer shall be filed in duplicate with the Director of Practice.

(b) *Contents.* The answer shall contain a statement of facts which constitute the grounds of defense, and it shall specifically admit or deny each allegation set forth in the complaint, except that the respondent shall not deny a material allegation in the complaint which he knows to be true, or state that he is without sufficient information to form a belief when in fact he possesses

such information. The respondent may also state affirmatively special matters of defense.

(c) *Failure to deny or answer allegations in the complaint.* Every allegation in the complaint which is not denied in the answer shall be deemed to be admitted and may be considered as proved, and no further evidence in respect of such allegation need be adduced at a hearing. Failure to file an answer within the time prescribed in the notice to the respondent, except as the time for answer is extended by the Director of Practice or the Administrative Law Judge, shall constitute an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make his decision by default without a hearing or further procedure.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.59 Supplemental charges.**

If it appears that the respondent in his answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has no knowledge sufficient to form a belief when he in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his disbarment or suspension, the Director of Practice may thereupon file supplemental charges against the respondent. Such supplemental charges may be tried with other charges in the case, provided the respondent is given due notice thereof and is afforded an opportunity to prepare a defense thereto.

#### **§ 10.60 Reply to answer.**

No reply to the respondent's answer shall be required, and new matter in the answer shall be deemed to be denied, but the Director of Practice may file a

reply in his discretion or at the request of the Administrative Law Judge.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.61 Proof; variance; amendment of pleadings.**

In the case of a variance between the allegations in a pleading and the evidence adduced in support of the pleading, the Administrative Law Judge may order or authorize amendment of the pleading to conform to the evidence: *Provided*, That the party who would otherwise be prejudged by the amendment is given reasonable opportunity to meet the allegations of the pleading as amended; and the Administrative Law Judge shall make findings on any issue presented by the pleadings as so amended.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.62 Motions and requests.**

Motions and requests may be filed with the Director of Practice or with the Administrative Law Judge.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.63 Representation.**

A respondent or proposed respondent may appear in person or he may be represented by counsel or other representative who need not be enrolled to practice before the Internal Revenue Service. The Director may be represented by an attorney or other employee of the Internal Revenue Service.

#### **§ 10.64 Administrative Law Judge.**

(a) *Appointment.* An Administrative Law Judge appointed as provided by 5 U.S.C. 3105 (1966), shall conduct proceedings upon complaints for the disbarment or suspension of attorneys,

certified public accountants, or enrolled agents.

(b) *Powers of Administrative Law Judge.* Among other powers, the Administrative Law Judge shall have authority, in connection with any disbarment or suspension proceeding assigned or referred to him, to do the following:

(1) Administer oaths and affirmations;

(2) Make rulings upon motions and requests, which rulings may not be appealed from prior to the close of a hearing except, at the discretion of the Administrative Law Judge, in extraordinary circumstances;

(3) Determine the time and place of hearing and regulate its course and conduct;

(4) Adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of proceedings;

(5) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions;

(7) Receive and consider oral or written argument on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties;

(9) Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and

(10) Make initial decisions.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38353, 38354, July 28, 1977]

#### § 10.65 Hearings.

(a) *In general.* The Administrative Law Judge shall preside at the hearing on a complaint for the disbarment or suspension of an attorney, certified public accountant, or enrolled agent.

Hearings shall be stenographically recorded and transcribed and the testimony of witnesses shall be taken under oath or affirmation. Hearings will be conducted pursuant to 5 U.S.C. 556 (1966).

(b) *Failure to appear.* If either party to the proceeding fails to appear at the hearing, after due notice thereof has been sent to him, he shall be deemed to have waived the right to a hearing and the Administrative Law Judge may make his decision against the absent party by default.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### § 10.66 Evidence.

(a) *In general.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings on complaints for the disbarment or suspension of attorneys, certified public accountants, and enrolled agents. However, the Administrative Law Judge shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* The deposition of any witness taken pursuant to § 10.67 may be admitted.

(c) *Proof of documents.* Official documents, records and papers of the Internal Revenue Service and the Office of Director of Practice shall be admissible in evidence without the production of an officer or employee to authenticate them. Any such documents, records, and papers may be evidenced by a copy attested or identified by an officer or employee of the Internal Revenue Service or the Treasury Department, as the case may be.

(d) *Exhibits.* If any document, record, or other paper is introduced in evidence as an exhibit, the Administrative Law Judge may authorize the withdrawal of the exhibit subject to any conditions which he deems proper.

(e) *Objections.* Objections to evidence shall be in short form, stating the grounds of objection relied upon, and the record shall not include argument thereon, except as ordered by the Administrative Law Judge. Rulings on such objections shall be a part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

[31 F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13206, Aug. 19, 1970; 42 F.R. 38354, July 28, 1977]

#### **§ 10.67 Depositions.**

Depositions for use at a hearing may, with the written approval of the Administrative Law Judge, be taken by either the Director of Practice or the respondent or their duly authorized representatives. Depositions may be taken upon oral or written interrogatories, upon not less than 10 days' written notice to the other party before any officer duly authorized to administer an oath for general purposes or before an officer or employee of the Internal Revenue Service who is authorized to administer an oath in internal revenue matters. Such notice shall state the names of the witnesses and the time and place where the depositions are to be taken. The requirement of 10 days' notice may be waived by the parties in writing, and depositions may then be taken from the persons and at the times and places mutually agreed to by the parties. When a deposition is taken upon written interrogatories, any cross-examination shall be upon written interrogatories. Copies of such written interrogatories shall be served upon the other party with the notice, and copies of any written cross-interrogatories shall be mailed or delivered to the opposing party at least 5 days before the date of taking the depositions, unless the parties mutually agree otherwise. A party upon whose behalf a deposition

is taken must file it with the Administrative Law Judge and serve one copy upon the opposing party. Expenses in the reporting of depositions shall be borne by the party at whose instance the deposition is taken.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.68 Transcript.**

In cases where the hearing is stenographically reported by a Government contract reporter, copies of the transcript may be obtained from the reporter at rates not to exceed the maximum rates fixed by contract between the Government and the reporter. Where the hearing is stenographically reported by a regular employee of the Internal Revenue Service, a copy thereof will be supplied to the respondent either without charge or upon the payment of a reasonable fee. Copies of exhibits introduced at the hearing or at the taking of depositions will be supplied to the parties upon the payment of a reasonable fee (Sec. 501, Pub. L. 82-137, 65 Stat. 290 (31 U.S.C. 483a)).

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.69 Proposed findings and conclusions.**

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the Administrative Law Judge prior to making his decision, shall afford the parties a reasonable opportunity to submit proposed findings and conclusions and supporting reasons therefor.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.70 Decision of the Administrative Law Judge.**

As soon as practicable after the conclusion of a hearing and the receipt of

any proposed findings and conclusions timely submitted by the parties, the Administrative Law Judge shall make the initial decision in the case. The decision shall include (a) a statement of findings and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact, law, or discretion presented on the record, and (b) an order of disbarment, suspension, or reprimand or an order of dismissal of the complaint. The Administrative Law Judge shall file the decision with the Director of Practice and shall transmit a copy thereof to the respondent or his attorney of record. In the absence of an appeal to the Secretary of the Treasury, or review of the decision upon motion of the Secretary, the decision of the Administrative Law Judge shall without further proceedings become the decision of the Secretary of the Treasury 30 days from the date of the Administrative Law Judge's decision.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§10.71 Appeal to the Secretary.**

Within 30 days from the date of the Administrative Law Judge's decision, either party may appeal to the Secretary of the Treasury. The appeal shall be filed with the Director of Practice in duplicate and shall include exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions. If an appeal is filed by the Director of Practice, he shall transmit a copy thereof to the respondent. Within 30 days after receipt of an appeal or copy thereof, the other party may file a reply brief in duplicate with the Director of Practice. If the reply brief is filed by the Director, he shall transmit a copy of it to the respondent. Upon the filing of an appeal and a reply brief, if any, the Director of Practice shall transmit the entire record to the Secretary of the Treasury.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.72 Decision of the Secretary.**

On appeal from or review of the initial decision of the Administrative Law Judge, the Secretary of the Treasury will make the agency decision. In making his decision the Secretary of the Treasury will review the record or such portions thereof as may be cited by the parties to permit limiting of the issues. A copy of the Secretary's decision shall be transmitted to the respondent by the Director of Practice.

[31 F.R. 10773, Aug. 13, 1966, as amended at 42 F.R. 38354, July 28, 1977]

#### **§ 10.73 Effect of disbarment or suspension; surrender of card.**

In case the final order against the respondent is for disbarment, the respondent shall not thereafter be permitted to practice before the Internal Revenue Service unless and until authorized to do so by the Director of Practice pursuant to § 10.75. In case the final order against the respondent is for suspension, the respondent shall not thereafter be permitted to practice before the Internal Revenue Service during the period of suspension. If an enrolled agent is disbarred or suspended, he shall surrender his enrollment card to the Director of Practice for cancellation, in the case of disbarment, or for retention during the period of suspension.

#### **§ 10.74 Notice of disbarment or suspension.**

Upon the issuance of a final order disbaring or suspending an attorney, certified public accountant, or enrolled agent, the Director of Practice shall give notice thereof to appropriate officers and employees of the Internal Revenue Service and to interested departments

and agencies of the Federal Government. Notice in such manner as the Director of Practice may determine may be given to the proper authorities of the State by which the disbarred or suspended person was licensed to practice as an attorney or accountant.

**§ 10.75 Petition for reinstatement.**

The Director of Practice may entertain a petition for reinstatement from any person disbarred from practice before the Internal Revenue Service after the expiration of 5 years following such disbarment. Reinstatement may not be granted unless the Director of Practice is satisfied that the petitioner, thereafter, is not likely to conduct himself contrary to the regulations in this part, and that granting such reinstatement would not be contrary to the public interest.

[31 F.R. 10773, Aug. 13, 1966, as amended at 35 F.R. 13206, Aug. 19, 1970]

**§ 10.76 Advisory committee.**

For purposes of advising the Director of Practice whether an individual may have violated § 10.33 of this part, the Director of Practice is authorized to establish an Advisory Committee, composed of at least five individuals authorized to practice before the Internal Revenue Service. Under procedures established by the Director of Practice, such Advisory Committee shall, at the request of the Director of Practice, review and make recommendations with regard to alleged violations of § 10.33 of this part.

**Subpart D—Rules Applicable to Disqualification of Appraisers**

**§ 10.77 Authority to disqualify; effect of disqualification.**

(a) *Authority to disqualify.* Pursuant to section 156 of the Deficit Reduction

Act of 1984, 98 Stat. 695, amending 31 U.S.C. 330, the Secretary of the Treasury, after due notice and opportunity for hearing may disqualify any appraiser with respect to whom a penalty has been assessed after July 18, 1984, under section 6701(a) of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6701(a)).

(b) *Effect of disqualification.* If any appraiser is disqualified pursuant to 31 U.S.C. 330 and this Subpart:

(1) Appraisals by such appraiser shall not have any probative effect in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service; and

(2) Such appraiser shall be barred from presenting evidence or testimony in any such administrative proceeding. Paragraph (b)(1) shall apply to appraisals made by such appraiser after the effective date of disqualification, but shall not apply to appraisals made by the appraiser on or before such date. Notwithstanding the foregoing sentence, an appraisal otherwise barred from admission into evidence pursuant to paragraph (b)(1) may be admitted into evidence solely for the purpose of determining the taxpayer's reliance in good faith on such appraisal. Paragraph (b)(2) shall apply to the presentation of testimony or evidence in any administrative proceeding after the date of such disqualification, regardless of whether such testimony or evidence would pertain to any appraisal made prior to such date.

**§ 10.78 Institution of proceeding.**

(a) *In general.* Whenever the Director of Practice is advised or becomes aware that a penalty has been assessed against an appraiser under 26 U.S.C. 6701(a), he/she may reprimand such person or institute a proceeding for disqualification of such appraiser through the filing of a complaint. Irrespective of

whether a proceeding for disqualification has been instituted against an appraiser, the Director of Practice may confer with an appraiser against whom such a penalty has been assessed concerning such penalty.

(b) *Voluntary disqualification.* In order to avoid the initiation or conclusion of a disqualification proceeding, an appraiser may offer his/her consent to disqualification. The Director of Practice, in his/her discretion, may disqualify an appraiser in accordance with the consent offered.

#### **§ 10.79 Contents of complaint.**

(a) *Charges.* A proceeding for disqualification of an appraiser shall be instituted through the filing of a complaint, which shall give a plain and concise description of the allegations that constitute the basis for the proceeding. A complaint shall be deemed sufficient if it refers to the penalty previously imposed on the respondent under section 6701(a) of the Internal Revenue Code of 1954, as amended (26 U.S.C. 6701(a)), and advises him/her of the institution of the proceeding.

(b) *Demand for answer.* In the complaint, or in a separate paper attached to the complaint, notification shall be given of the place and time within which the respondent shall file his/her answer, which time shall not be less than 15 days from the date of service of the complaint, and notice shall be given that a decision by default may be rendered against the respondent in the event there is failure to file an answer.

#### **§ 10.80 Service of complaint and other papers.**

(a) *Complaint.* The complaint or a copy thereof may be served upon the respondent by certified mail, or first-class mail as hereinafter provided, by delivering it to the respondent or his/her

attorney or agent of record either in person or by leaving it at the office or place of business of the respondent, attorney or agent, or in any other manner that has been agreed to by the respondent. Where the service is by certified mail, the return post office receipt duly signed by or on behalf of the respondent shall be proof of service. If the certified mail is not claimed or accepted by the respondent and is returned undelivered, complete service may be made by mailing the complaint to the respondent by first-class mail, addressed to the respondent at the last address known to the Director of Practice. If service is made upon the respondent in person or by leaving the complaint at the office or place of business of the respondent, the verified return by the person making service, setting forth the manner of service, shall be proof of such service.

(b) *Service of papers other than complaint.* Any paper other than the complaint may be served as provided in paragraph (a) of this section or by mailing the paper by first-class mail to the respondent at the last address known to the Director of Practice, or by mailing the paper by first-class mail to the respondent's attorney or agent of record. Such mailing shall constitute complete service. Notices may be served upon the respondent or his/her attorney or agent of record by telegraph.

(c) *Filing of papers.* Whenever the filing of a paper is required or permitted in connection with a disqualification proceeding under this subpart or by rule or order of the Administrative Law Judge, the paper shall be filed with the Director of Practice, Treasury Department, Internal Revenue Service, Washington, D.C. 20224. All papers shall be filed in duplicate.

#### **§ 10.81 Answer.**

(a) *Filing.* The respondent's answer shall be filed in writing within the time



specified in the complaint or notice of institution of the proceeding, unless on application the time is extended by the Director of Practice or the Administrative Law Judge. The answer shall be filed in duplicate with the Director of Practice.

(b) *Contents.* The answer shall contain a statement of facts that constitute the grounds of defense, and it shall specifically admit or deny each allegation set forth in the complaint, except that the respondent shall not deny a material allegation in the complaint that he/she knows to be true, or state that he/she is without sufficient information to form a belief when in fact he/she possesses such information.

(c) *Failure to deny or answer allegations in the complaint.* Every allegation in the complaint which is not denied in the answer shall be deemed to be admitted and may be considered as proved, and no further evidence in respect of such allegation need be adduced at a hearing. Failure to file an answer within the time prescribed in the notice to the respondent, except as the time for answer is extended by the Director of Practice or the Administrative Law Judge, shall constitute an admission of the allegations of the complaint and a waiver of hearing, and the Administrative Law Judge may make his/her decision by default without a hearing or further procedure.

#### **§ 10.82 Supplemental charges.**

If it appears that the respondent in his/her answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has no knowledge sufficient to form a belief, when he/she in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his/her disqualification, the Director of Practice may thereupon file

supplemental charges against the respondent. Such supplemental charges may be tried with other charges in the case, provided the respondent is given due notice thereof and is afforded an opportunity to prepare a defense thereto.

#### **§ 10.83 Reply to answer.**

No reply to the respondent's answer shall be required, and any new matter in the answer shall be deemed to be denied, but the Director of Practice may file a reply in his/her discretion or at the request of the Administrative Law Judge.

#### **§ 10.84 Proof, variance, amendment of pleadings.**

In the case of a variance between the allegations in a pleading and the evidence adduced in support of the pleading, the Administrative Law Judge may order or authorize amendment of the pleading to conform to the evidence; provided, that the party who would otherwise be prejudiced by the amendment is given reasonable opportunity to meet the allegations of the pleading as amended, and the Administrative Law Judge shall make findings on any issue presented by the pleadings as so amended.

#### **§ 10.85 Motions and requests.**

Motions and requests may be filed with the Director of Practice or with the Administrative Law Judge.

#### **§ 10.86 Representation.**

A respondent may appear in person or may be represented by counsel or other representative. The Director of Practice may be represented by an attorney or other employee of the Department of the Treasury.

### § 10.87 Administrative Law Judge.

(a) *Appointment.* An Administrative Law Judge, appointed as provided by 5 U.S.C. 3105, shall conduct proceedings upon complaints for the disqualification of appraisers.

(b) *Powers of Administrative Law Judge.* Among other powers, the Administrative Law Judge shall have authority, in connection with any disqualification proceeding assigned or referred to him/her, to do the following:

(1) Administer oaths and affirmations;

(2) Make rulings upon motions and requests, which rulings may not be appealed from prior to the close of a hearing except at the discretion of the Administrative Law Judge, in extraordinary circumstances;

(3) Determine the time and place of hearing and regulate its course and conduct;

(4) Adopt rules of procedure and modify the same from time to time as occasion requires for the orderly disposition of proceedings;

(5) Rule upon offers of proof, receive relevant evidence, and examine witnesses;

(6) Take or authorize the taking of depositions;

(7) Receive and consider oral or written argument on facts or law;

(8) Hold or provide for the holding of conferences for the settlement or simplification of the issues by consent of the parties;

(9) Perform such acts and take such measures as are necessary or appropriate to the efficient conduct of any proceeding; and

(10) Make initial decisions.

### § 10.88 Hearings.

(a) *In general.* The Administrative Law Judge shall preside at the hearing on a complaint for the disqualification

of an appraiser. Hearings shall be stenographically recorded and transcribed and the testimony of witnesses shall be taken under oath or affirmation. Hearings will be conducted pursuant to 5 U.S.C. 556.

(b) *Failure to appear.* If either party to the proceeding fails to appear at the hearing after due notice thereof has been sent to him/her, the right to a hearing shall be deemed to have been waived and the Administrative Law Judge may make a decision by default against the absent party.

### § 10.89 Evidence.

(a) *In general.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings on complaints for the disqualification of appraisers. However, the Administrative Law Judge shall exclude evidence which is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* The deposition of any witness taken pursuant to §10.90 may be admitted.

(c) *Proof of Documents.* Official documents, records, and papers of the Internal Revenue Service or the Department of the Treasury shall be admissible in evidence without the production of an officer or employee to authenticate them. Any such documents, records, and papers may be evidenced by a copy attested or identified by an officer or employee of the Internal Revenue Service or the Department of the Treasury, as the case may be.

(d) *Exhibits.* If any document, record, or other paper is introduced in evidence as an exhibit, the Administrative Law Judge may authorize the withdrawal of the exhibit subject to any conditions which he/she deems proper.

(e) *Objections.* Objections to evidence shall be in short form, stating the grounds of objection relied upon, and

the record shall not include argument thereon, except as ordered by the Administrative Law Judge. Rulings on such objections shall be a part of the record. No exception to the ruling is necessary to preserve the rights of the parties.

#### **§ 10.90 Depositions.**

Depositions for use at a hearing may, with the written approval of the Administrative Law Judge, be taken either by the Director of Practice or the respondent or their duly authorized representatives. Depositions may be taken upon oral or written interrogatories, upon not less than 10 days' written notice to the other party before any officer duly authorized to administer an oath for general purposes or before an officer or employee of the Internal Revenue Service who is authorized to administer an oath in Internal Revenue matters. Such notice shall state the names of the witnesses and the time and place where the depositions are to be taken. The requirement of 10 days' notice may be waived by the parties in writing, and depositions may then be taken from the persons and at the times and places mutually agreed to by the parties. When a deposition is taken upon written interrogatories, any cross-examination shall be upon written interrogatories. Copies of such written interrogatories shall be served upon the other party with the notice, and copies of any written cross-interrogatories shall be mailed or delivered to the opposing party at least 5 days before the date of taking the depositions, unless the parties mutually agree otherwise. A party upon whose behalf a deposition is taken must file it with the Administrative Law Judge and serve one copy upon the opposing party. Expenses in the reporting of depositions shall be borne by the party at whose instance the deposition is taken.

#### **§ 10.91 Transcript.**

In cases where the hearing is stenographically reported by a Government contract reporter, copies of the transcript may be obtained from the reporter at rates not to exceed the maximum rates fixed by contract between the Government and the reporter. Where a hearing is stenographically reported by a regular employee of the Internal Revenue Service, a copy thereof will be supplied to the respondent either without charge or upon the payment of a reasonable fee. Copies of exhibits introduced at the hearing or at the taking of depositions will be supplied to the parties upon the payment of a reasonable fee (Sec. 501, Pub. L. 82-137, 65 Stat. 290 (31 U.S.C. 483a)).

#### **§ 10.92 Proposed findings and conclusions.**

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the Administrative Law Judge, prior to making a decision, shall afford the parties a reasonable opportunity to submit proposed findings and conclusions and supporting reasons therefor.

#### **§ 10.93 Decision of the Administrative Law Judge.**

As soon as practicable after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the Administrative Law Judge shall make the initial decision in the case. The decision shall include (a) a statement of findings and conclusions, as well as the reasons or bases therefor, upon all the material issues of fact, law, or discretion presented on the record, and (b) an order of disqualification or an order of dismissal of the complaint. The Administrative Law Judge shall file the decision with the Director of Practice and

shall transmit a copy thereof to the respondent or his attorney of record. In the absence of an appeal to the Secretary of the Treasury, or review of the decision upon motion of the Secretary, the decision of the Administrative Law Judge shall without further proceedings become the decision of the Secretary of the Treasury 30 days from the date of the Administrative Law Judge's decision.

#### **§ 10.94 Appeal to the Secretary.**

Within 30 days from the date of the Administrative Law Judge's decision, either party may appeal such decision to the Secretary of the Treasury. If an appeal is by the respondent, the appeal shall be filed with the Director of Practice in duplicate and shall include exceptions to the decision of the Administrative Law Judge and supporting reasons for such exceptions. If an appeal is filed by the Director of Practice, a copy thereof shall be transmitted to the respondent. Within 30 days after receipt of an appeal or copy thereof, the other party may file a reply brief in duplicate with the Director of Practice. If the reply brief is filed by the Director, a copy shall be transmitted to the respondent. Upon the filing of an appeal and a reply brief, if any, the Director of Practice shall transmit the entire record to the Secretary of the Treasury.

#### **§ 10.95 Decision of the Secretary.**

On appeal from or review of the initial decision of the Administrative Law Judge, the Secretary of the Treasury shall make the agency decision. In making such decision, the Secretary of the Treasury will review the record or such portions thereof as may be cited by the parties. A copy of the Secretary's decision shall be transmitted to the respondent by the Director of Practice.

#### **§ 10.96 Final Order.**

Upon the issuance of a final order disqualifying an appraiser, the Director of Practice shall give notice thereof to appropriate officers and employees of the Internal Revenue Service and to interested departments and agencies of the Federal Government.

#### **§ 10.97 Petition for reinstatement.**

The Director of Practice may entertain a petition for reinstatement from any disqualified appraiser after the expiration of 5 years following such disqualification. Reinstatement may not be granted unless the Director of Practice is satisfied that the petitioner, thereafter, is not likely to conduct himself/herself contrary to 26 U.S.C. 6701(a), and that granting such reinstatement would not be contrary to the public interest.

### **Subpart E—General Provisions**

#### **§ 10.98 Records.**

(a) *Availability.* There are made available to public inspection at the Office of Director of Practice the roster of all persons enrolled to practice, the roster of all persons disbarred or suspended from practice, and the roster of all disqualified appraisers. Other records may be disclosed upon specific request, in accordance with the disclosure regulations of the Internal Revenue Service and the Treasury Department.

(b) *Disciplinary procedures.* A request by a practitioner that a hearing in a disciplinary proceeding concerning him be public, and that the record thereof be made available for inspection by interested persons, may be granted if agreement is reached by stipulation in advance to protect from disclosure tax information which is confidential, in accordance with the applicable statutes and regulations.

**§ 10.99 Effective date of regulations.**

The regulations of this part shall become effective on January 22, 1986 and shall supersede all prior regulations related to this part.

**§ 10.100 Saving clause.**

Any proceeding for the disbarment or suspension of an attorney, certified public accountant, or enrolled agent, instituted but not closed prior to the effective date of these revised regulations, shall not be affected by such regulations. Any proceeding under this Part based on conduct engaged in prior to the effective date of these regulations

may be instituted subsequent to such effective date.

[50 F.R. 42014, Oct. 17, 1985]

**§ 10.101 Special orders.**

The Secretary of the Treasury reserves the power to issue such special orders as he may deem proper in any cases within the purview of this part.

[SEAL] Robert M. Kimmitt  
General Counsel, Department of the  
Treasury

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