[4830-01-p]

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 10

[REG-138367-06]

RIN 1545-BF96

Regulations Governing Practice Before the Internal Revenue Service

AGENCY: Office of the Secretary, Treasury.

ACTION: Withdrawal of notice of proposed rulemaking; notice of proposed rulemaking and notice of public hearing.

SUMMARY: This document proposes modifications of the regulations governing practice before the Internal Revenue Service (IRS). These proposed regulations affect individuals who practice before the IRS. These proposed regulations modify the standards governing written advice and update certain provisions as appropriate. This document also provides notice of a public hearing on the proposed regulations and withdraws the notice of proposed rulemaking published on December 20, 2004, setting forth standards for State or local bond opinions.

DATES: Comments must be received by **[INSERT DATE 60 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. Outlines of topics to be discussed at the public hearing scheduled for December 7, 2012 at 10 a.m., in the Auditorium of the Internal Revenue Service building at 1111 Constitution Avenue, NW, Washington, DC 20224, must be received by **[INSERT DATE 60 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**.

ADDRESSES: Send submissions to: CC:PA:LPD:PR (REG-138367-06), room 5205, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 a.m. and 4 p.m. to: CC:PA:LPD:PR (REG-138367-06), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW, Washington, DC, or sent electronically via the Federal eRulemaking Portal at www.regulations.gov (indicate IRS and REG-138367-06). The public hearing will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Concerning issues for comment, Matthew D. Lucey at (202) 622-4940; concerning submissions of comments the public hearing, or to be placed on the building access list to attend the hearing, Oluwafunmilayo Taylor at (202) 622-7180; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Background

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

Treasury and the IRS have consistently maintained that tax practitioners must meet minimum standards of conduct with respect to written tax advice, and those who do not should be subject to disciplinary action, including suspension or disbarment. In

accordance with these principles, the regulations have been amended from time to time to address issues relating to tax opinions and written tax advice.

In February 1984, the regulations were amended to provide standards for providing opinions used in tax shelter offerings in accordance with American Bar Association Formal Opinion 346 (49 FR 6719). The 1984 amendments required a practitioner who renders a tax shelter opinion to exercise responsibility with respect to the accuracy of the relevant facts; apply the law to the particular facts of the tax shelter offering; ascertain that all material Federal tax issues have been considered; when possible, provide an opinion as to the likely outcome on the merits of each material tax issue; provide an evaluation of the extent to which the material tax benefits in the aggregate will be realized; and assure that the nature and extent of the tax shelter opinion is described correctly in the offering materials.

In January 2001, Treasury and the IRS proposed additional amendments regarding tax shelter opinions. See 66 FR 3276. The 2001 notice of proposed rulemaking addressed both general matters pertaining to practice before the IRS and matters pertaining specifically to tax shelter opinions, but the portion of these regulations regarding tax shelter opinions was not finalized. Rather, on December 30, 2003, Treasury and the IRS published in the **Federal Register** (68 FR 75186) (the 2003 proposed regulations) a second notice of proposed rulemaking to set forth best practices for tax advisors and to modify the standards for certain tax shelter opinions. Subsequently, Congress amended section 330 of title 31 to clarify that the Secretary may impose standards for written advice relating to a matter that is identified as having

a potential for tax avoidance or evasion (American Jobs Creation Act of 2004, Public Law 108-357, 118 Stat. 1418).

In December 2004, Treasury and the IRS finalized the 2003 proposed regulations by publishing final regulations (TD 9165) in the **Federal Register** (69 FR 75839) setting forth best practices for tax advisors and providing standards for covered opinions and other written advice. Treasury and the IRS simultaneously issued a notice of proposed rulemaking (REG-159824-04) in the **Federal Register** (69 FR 75887) proposing standards for practice before the IRS relating to State or local bond opinions. In May 2005, Treasury and the IRS published revisions to the final regulations (TD 9201) in the **Federal Register** (70 FR 28824) to clarify the standards for covered opinions. In June 2005, Treasury and the IRS published Notice 2005-47 (2005-1 CB 1373), providing interim guidance and information concerning State or local bond opinions. While not a complete list of revisions to Circular 230, the preceding history demonstrates Treasury and the IRS' commitment to maintaining minimum standards for written advice that foster an ethical environment for practitioners and taxpayers.

As explained later in the Explanation of Provisions section of this preamble, these proposed regulations amend Circular 230 by eliminating the complex rules governing covered opinions in current §10.35. In addition, these proposed regulations expand the requirements for written advice under §10.37 and withdraw the proposed amendments to §10.39 of the regulations governing requirements for State or local bond opinions. These proposed regulations also broaden the scope of the procedures to ensure compliance under §10.36 by requiring that a practitioner with principal

authority for overseeing a firm's Federal tax practice take reasonable steps to ensure the firm has adequate procedures in place for purposes of complying with Circular 230. These proposed regulations clarify that practitioners must exercise competence when engaged in practice before the IRS and that the prohibition on a practitioner endorsing or otherwise negotiating any check issued to a taxpayer in respect of a Federal tax liability applies to government payments made by any means, electronic or otherwise. These proposed regulations expand the categories of violations subject to the expedited proceedings in §10.82 to include failures to comply with a practitioner's personal tax filing obligations that demonstrate a pattern of willful disreputable conduct. The proposed regulations also clarify the Office of Professional Responsibility's scope of responsibility.

Explanation of Provisions

Public awareness of the standards for written tax advice and the accountability of practitioners offering tax advice have increased since Treasury and the IRS published final regulations on covered opinions. This increased awareness and accountability is having a positive effect on our Federal tax system. Years of practical experience, however, have shown that the covered opinion rules in current §10.35 have produced some unintended consequences and should be reconsidered.

Reconsideration of the covered opinion rules is appropriate in light of continued practitioner dissatisfaction due to the difficulty and cost of compliance with the rules. Practitioners have consistently voiced their concern over the current rules since their promulgation in 2004. See the docket for IRS REG-138367-06 at www.regulations.gov.

Practitioners overwhelmingly conclude that the rules are overbroad, difficult to apply, and do not necessarily produce higher quality tax advice. Many practitioners have stated that the rules unduly interfere with their client relationships and are not an ethical standard that everyone, including clients, can comprehend easily. Some practitioners have also opined that these rules may reduce, rather than enhance, tax compliance due to the perception that a covered opinion takes more time to produce and is more expensive for the client than other tax advice. In this same regard, it has been suggested that the rules increase the likelihood that practitioners will provide oral advice to their clients when written advice is more appropriate because current §10.35 does not govern oral advice.

Another concern that the government has heard from practitioners relates to the unrestrained use of disclaimers on nearly every practitioner communication regardless of whether the communication contains tax advice. Practitioners have stated that this practice discourages compliance with the ethical requirements because some practitioners have concluded that, if they include a disclaimer, they are free to disregard the standards in current §10.35 regarding written tax advice. The disclaimers also lead to confusion for clients because clients often do not understand why the disclaimer is present and its consequences. In addition, practitioners have complained that the disclaimer's widespread overuse causes clients to ignore the disclaimers altogether, and may render their use in some circumstances irrelevant.

Although practitioners have informed us that they support sensible regulation of written tax advice, they have expressed little support for the rules in their current form

and we have received numerous requests to revise the rules. After years of experience with these rules, the government and practitioners agree that the covered opinion rules are often burdensome and provide only minimal taxpayer protection. Overall, the benefit is insufficient to justify the additional costs associated with practitioner compliance with the covered opinion rules. After careful consideration, including consideration of the public's experience with and comments on these rules, Treasury and the IRS have concluded that the written advice standards should be revised.

The proposed regulations will streamline the existing rules for written tax advice by removing current §10.35 and applying one standard for all written tax advice under proposed §10.37. Proposed §10.37 provides that the practitioner must base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or should know. The proposed removal of §10.35 will eliminate the requirement that practitioners fully describe the relevant facts (including the factual and legal assumptions relied upon) and the application of the law to the facts in the written advice itself, and the use of Circular 230 disclaimers in documents and transmissions, including e-mails.

Other provisions, §§10.31, 10.36, and 10.82, are also being updated at this time to reflect the current practice environment. In addition, a general competence standard is being proposed in new §10.35. The proposed regulations also clarify that the Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions.

The scope of these regulations is limited to practice before the IRS. These

regulations do not alter or supplant other ethical standards applicable to practitioners.

1. Amendments Regarding Rules Governing Written Advice

A. Elimination of Covered Opinion Rules in §10.35

Current §§10.35 and 10.37 provide comprehensive rules with respect to written tax advice. Specifically, current §10.35 provides detailed rules for tax opinions that constitute "covered opinions" under Circular 230. Covered opinions include written advice concerning: (1) a listed transaction; (2) a transaction with the principal purpose of tax avoidance or evasion; or (3) a transaction with a significant purpose of tax avoidance or evasion, if the advice is a reliance opinion, marketed opinion, subject to conditions of confidentiality, or subject to a contractual protection.

The definitions of the various types of covered opinions under Circular 230 require considerable effort on behalf of practitioners to determine whether the advice rendered in a particular circumstance is subject to the covered opinion rules in current §10.35. Because of the effort involved, many practitioners attempt to exempt the advice from the covered opinion rules by making a prominent disclosure or disclaimer stating that the opinion cannot be relied upon for penalty protection, as permitted by Circular 230.

Circular 230 also requires that practitioners comply with the extensive requirements set forth in §10.35 when providing written advice that constitutes a covered opinion. Many of the standards in current §10.35 track principles a competent practitioner uses when considering and rendering any advice, although these standards may be more rigid and cumbersome in application than generally applicable ethical

standards. For example, current §10.35 requires the practitioner to include in the written advice the relevant facts (including assumptions and representations), the application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts. This mechanical requirement of automatic inclusion of information will sometimes lead to awkward or unnecessary, highly technical discussions in the opinion that may hinder the practitioner's ability to provide quality tax advice. Further, the inclusion of this particular detail almost always burdens the practitioner and the client with significant increased costs, without necessarily increasing the quality of the tax advice that the client receives.

Significant progress has been made in combating abusive tax shelters and schemes, and preventing unscrupulous individuals from promoting those arrangements. In recent years, heightened awareness of the ethical standards governing tax advice contributed to this improved state and has benefited practitioners, taxpayers, and the government. At the same time, there is no direct evidence to suggest that the overly-technical and detailed requirements of current §10.35 were responsible for, or particularly effective at, curtailing the behavior of individuals attempting to profit from promoting frivolous transactions or transactions without a reasonable basis.

For these reasons, the proposed regulations eliminate the covered opinion rules in §10.35 and instead subject all written tax advice to streamlined standards under proposed §10.37, as described later in this preamble. The proposed regulations also remove references to current §10.35 in §§10.3, 10.22, and 10.52. The burden reduction that should result from the proposed regulations is consistent with the President's

directive in Executive Order 13563 to remove or modify regulations that are outmoded, ineffective, insufficient, or too burdensome.

The elimination of the covered opinion rules in this notice of proposed rulemaking would, at a minimum, save tax practitioners $5,333,200. This burden reduction comes from the elimination of the provisions requiring practitioners to make certain disclosures in the covered opinion.

This number does not include a number of other significant savings to both tax practitioners and taxpayers relating to the cost of obtaining a covered opinion under the current rules that would occur as a result of the proposed regulations. Practitioners spend many hours each year determining whether they need to prepare a covered opinion for a client or if the advice falls into one of the exceptions. This requires significant time to, among other things, research and review the complicated covered opinion rules and discuss the issue with other practitioners in the firm to determine the right course of action. If the practitioner decides, after undertaking these activities, that a covered opinion is necessary, the practitioner must discuss the covered opinion rules with the client, including how the rules affect the scope of the work that the client has asked the practitioner to perform, because the client will incur significant extra costs to obtain the written advice the client requested. These significant extra costs can, in some cases, tip the scales against obtaining written advice.

B. Revision of Requirements for Written Advice

Treasury and the IRS continue to be aware of the risk associated with practitioners providing and marketing written tax opinions. Proposed §10.37, therefore,

replaces the covered opinion rules with basic principles to which all practitioners must adhere when rendering written advice. The proposed provisions also complement the best practices of §10.33 and the due diligence requirements in §10.22. Specifically, the proposed regulations revise §10.37 to state affirmatively the standards to which a practitioner must adhere when providing written advice on a Federal tax matter. Proposed §10.37 requires, among other things, that the practitioner base all written advice on reasonable factual and legal assumptions, exercise reasonable reliance, and consider all relevant facts that the practitioner knows or should know. A practitioner must also use reasonable efforts to identify and ascertain the facts relevant to written advice on a Federal tax matter under the proposed regulations.

Consistent with current §10.37, the proposed regulations provide that a practitioner must not, in evaluating a Federal tax matter, take into account the possibility that a tax return will not be audited or that an issue will not be raised on audit. Proposed §10.37 eliminates the provision in the current regulations that prohibits a practitioner from taking into account the possibility that an issue will be resolved through settlement if raised when giving written advice evaluating a Federal tax matter. Treasury and IRS conclude that the current rule may unduly restrict the ability of a practitioner to provide comprehensive written advice because the existence or nonexistence of legitimate hazards that may make settlement more or less likely may be a material issue for which the practitioner has an obligation to inform the client.

Under proposed §10.37(c)(2), the IRS will continue to apply a heightened standard of review to determine whether a practitioner has satisfied the written advice

standards when the practitioner knows or has reason to know that the written advice will be used in promoting, marketing, or recommending an investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code.

Proposed §10.37(b) also provides that a practitioner may rely on the advice of another practitioner only if the reliance on that advice is reasonable and in good faith considering the facts and circumstances. Specifically, proposed §10.37(b) provides that reliance is not reasonable when the practitioner knows or should know that the opinion of the other practitioner should not be relied on, the other practitioner is not competent to provide the advice, or the other practitioner has a conflict of interest. These proposed reliance provisions incorporate reliance concepts from current §§10.22 and 10.35(d).

Proposed §10.37, unlike current §10.35, does not require that the practitioner describe in the written advice the relevant facts (including assumptions and representations), the application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts. Rather, the scope of the engagement and the type and specificity of the advice sought by the client, in addition to all other appropriate facts and circumstances, are factors in determining the extent that the relevant facts, application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts must be set forth in the written advice. Also, under proposed §10.37, unlike current §10.35, the practitioner may consider these factors in determining the scope of the written advice. Further, the determination of whether a practitioner has failed to comply with the requirements of proposed §10.37 will be based

on all facts and circumstances, not on whether each requirement is addressed in the written advice.

As discussed earlier in this preamble, many practitioners currently use a Circular 230 disclaimer at the conclusion of every e-mail or other writing as a measure to remove the advice from the covered opinion rules in §10.35. In many instances, these disclaimers are frequently inserted without regard to whether the disclaimer is necessary or appropriate. These types of disclaimers are routinely inserted in any written transmission, including writings that do not contain any tax advice. The proposed removal of current §10.35 eliminates the detailed provisions concerning covered opinions and disclosures in written opinions. Because proposed §10.37 does not include the disclosure provisions in the current covered opinion rules, Treasury and the IRS expect that these amendments, if adopted, will eliminate the use of a Circular 230 disclaimer in e-mail and other writings.

Overall, Treasury and the IRS have determined that the proposed regulations regarding written advice strike an appropriate balance between allowing practitioners flexibility in providing written advice and at the same time maintaining standards that require the practitioner to act ethically and competently. Treasury and the IRS are particularly interested in comments responding to whether the proposed rules achieve that appropriate balance.

C. Municipal Bond Opinions

The proposed regulations withdraw the proposed amendments to §10.39 governing requirements for State or local bond opinions, and remove the definition of,

and exclusion for, State or local bond opinions from the definition of covered opinions in §10.35. The previously proposed amendments to §10.39 are no longer necessary because these proposed regulations remove entirely the concept of covered opinions from Circular 230. Under these proposed regulations, practitioners rendering opinions concerning the tax treatment of municipal bonds are subject to the standards in §10.37, the same professional standards that apply to all written tax advice.

2. Procedures to Ensure Compliance

Current §10.36(a) provides requirements for procedures to ensure compliance with §10.35. Because these proposed regulations remove current §10.35, these regulations also remove current §10.36(a). Treasury and the IRS, however, are proposing a new §10.36 to ensure compliance with Circular 230 generally.

The procedures to ensure compliance have produced great successes in encouraging firms to self-regulate, without the excessive burden often associated with a rigid one-size-fits-all approach. Treasury and the IRS expanded §10.36 in June 2011 to require firms to have procedures in place to ensure Circular 230 compliance with respect to a firm's tax return preparation practice. Under §10.36 of these proposed regulations, the requirement for procedures to ensure compliance are expanded to include all provisions of Circular 230.

Firm responsibility is a critical factor in ensuring high quality advice and representation for taxpayers. Accordingly, Treasury and the IRS conclude that firm management with principal authority and responsibility for overseeing a firm's practice governed by Circular 230 should be responsible for establishing procedures to ensure

compliance with all provisions of Circular 230, and not merely the provisions regarding tax advice and tax return preparation. For purposes of §10.36, "principal" management will be interpreted in a manner consistent with its use in §1.6694-2(a)(2) and Notice 2007-39.

3. General Standard of Competence

Proposed §10.35 provides that a practitioner must exercise competence when engaged in practice before the IRS. Although a practitioner can be sanctioned for incompetent conduct under §10.51, no provision of Circular 230 specifically requires a practitioner to exercise competence when engaged in practice before the IRS. Section 10.35 is revised, therefore, to clarify that a practitioner must possess the necessary competence when engaged in practice before the IRS. Proposed §10.35 specifies that competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

4. Electronic Negotiation of Taxpayer Refunds

Proposed §10.31 provides that a practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

Treasury and the IRS are proposing to revise §10.31 to clarify that the prohibition on practitioner negotiation of taxpayer refunds applies in the modern-day electronic environment in which the IRS and practitioners operate today. The proposed

regulations also expand §10.31 to apply to all individuals who practice before the IRS, not just those practitioners who are tax return preparers. Treasury and the IRS continue to encounter a small number of unscrupulous preparers and practitioners who attempt to manipulate the electronic refund process with the intent to defraud their clients and the IRS. The proposed regulations clarify that it constitutes disreputable conduct for a practitioner to direct the payment (or accept payment) of any monies issued to a client by the government in respect of a Federal tax liability to the practitioner or any firm or entity with which the practitioner is associated and that such conduct is subject to sanction.

5. Expedited Suspension Procedures

Section 10.82 of the current regulations authorizes the immediate suspension of a practitioner who has engaged in certain conduct. The proposed regulations extend the expedited disciplinary procedures to disciplinary proceedings against practitioners who have willfully failed to comply with their Federal tax filing obligations. Treasury and the IRS issued a notice of proposed rulemaking in 2006, which included provisions that proposed extension of the availability of the expedited suspension procedures to practitioners not compliant with tax filing and payment obligations. See 71 FR 6421. These provisions were not finalized in the attendant 2007 final regulations due to practitioners' concerns that the proposed rule would erode due process rights. See 72 FR 54540. Treasury and the IRS continue, however, to encounter practitioners who demonstrate they are unfit to practice by repeatedly failing to comply with their own tax obligations.

Accordingly, these proposed regulations permit prompt action against practitioners who have engaged in a pattern of willful disreputable conduct as demonstrated by non-compliance with their Federal tax obligations, but in a manner more narrowly tailored than the 2006 proposal. These proposed regulations only permit the use of expedited procedures in the limited circumstances when a noncompliant practitioner demonstrates a pattern of willful disreputable conduct by (1) failing to make an annual Federal tax return during four of five tax years immediately before the institution of an expedited suspension proceeding; or (2) failing to make a return required more frequently than annually during five of seven tax periods immediately before the institution of an expedited suspension proceeding. For purposes of proposed §10.82, the phrase "make a return" has the same meaning as used in sections 6011 and 6012 of the Internal Revenue Code and §10.51(a)(6) of this part. Additionally, the practitioner must be noncompliant with a tax filing obligation at the time the notice of suspension is served on the practitioner for the expedited procedures to apply.

Unlike the previously proposed regulations, these proposed regulations do not permit the use of expedited suspension proceedings against practitioners who have not paid their Federal tax obligations. This modification responds to commentators' concern that a practitioner's failure to pay can be precipitated by circumstances outside of the practitioner's control and that it may be inequitable to suspend a practitioner expeditiously in these situations. Treasury and the IRS conclude, however, that expedited suspension is appropriate for practitioners who have not complied with basic tax filing obligations for the immediately preceding four of five years for annual returns

(or five of seven tax periods). Practitioners engaging in this repeated pattern of non-filing demonstrate a high level of disregard for the Federal tax system and a level of willfulness sufficient for practitioner sanction under Circular 230. Treasury and the IRS have determined that the proposed rule is appropriate because practitioners demonstrating this high level of disregard for the Federal tax system are unfit to represent others who are making a good faith attempt to comply with their own Federal tax obligations. Expedited action in these cases will likely prevent harm to these taxpayers and the Federal tax system.

Current §10.82(f)(2) provides that a suspension under the expedited procedures is effective until the suspension is lifted by the IRS, an Administrative Law Judge, or the Secretary of the Treasury. Circular 230 does not otherwise provide guidance with respect to the length of suspension or the time period in which the practitioner is permitted to apply for reinstatement. Section 10.81, however, currently provides that a disbarred practitioner (or disqualified appraiser) may apply for reinstatement after five years following the practitioner's disbarment or disqualification. Proposed §10.81 makes these rules consistent and applies the same five-year time period for both disbarred and suspended practitioners.

Treasury and IRS are also proposing several non-substantive changes to the terms of §10.82 that will help practitioners distinguish between the expedited suspension procedures of §10.82 and otherwise generally applicable procedures for sanctions instituted under §10.60. For example, to begin an expedited suspension under the proposed regulations, the IRS would issue a "show cause order" instead of a

"complaint" and the practitioner would submit a "response" instead of an "answer." The terms "complaint" and "answer" are currently used to describe the documents used in both expedited suspensions under §10.82 and regular proceedings under §10.60. These revisions do not generally change current expedited suspension procedures, or the contents of what must be included in the underlying documents, but are proposed to make §10.82 easier to understand.

Proposed §10.82(g) clarifies that practitioners subject to an expedited proceeding may demand a complaint under §10.60, and that the demand must specifically reference the suspension action under §10.82. Current §10.82(g) provides that the IRS has 30 days to issue a complaint after receiving the practitioner's demand for a complaint. In some cases, extra time may be necessary to provide the practitioner and Administrative Law Judge with the most current information regarding the practitioner's fitness to practice before the IRS. Treasury and the IRS have determined that 45 days will provide the IRS with sufficient time to ensure the complaint complies with the requirements in §10.62. Accordingly, proposed §10.82(g) provides that the IRS has 45 days to issue a complaint after receiving a demand for a complaint from a practitioner suspended under the expedited procedures.

6. Scope of the Office of Professional Responsibility

IRS and Treasury propose revising current §10.1 to clarify that the Office of Professional Responsibility has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions.

Effect on Other Documents

Notice 2005-47 (2005-1 CB 1373) will be obsolete beginning on the date that final regulations are published in the **Federal Register**.

Availability of IRS Documents

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

Special Analyses

It has been determined that this proposed rule is not a significant regulatory action as defined in Executive Order 12866, as supplemented by Executive Order 13563. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities. The proposed rule affects practitioners who practice before the IRS. Persons authorized to practice before the IRS have long been required to comply with certain standards of conduct, and those who provide written tax advice currently must comply with specific rules for this advice. Because these proposed rules replace the rigid rules for written tax advice with more flexible rules and eliminate the necessity to provide disclaimers in certain written tax advice, these rules will reduce the burden imposed on small entities that issue written tax advice. Therefore, the updating amendments and requirements for written advice imposed by these regulations will not have a significant economic impact on a substantial number of small entities. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking has been submitted to the Chief Counsel for

Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Public Hearing

Before these proposed regulations are adopted as final regulations, consideration will be given to any comments that are timely submitted to the IRS as prescribed in this preamble under the "Addresses" heading. Treasury and the IRS request comments on all aspects of the proposed rules. All comments will be available at www.regulations.gov or upon request.

The public hearing is scheduled for December 7, 2012, from 10 a.m., and will be held in the Auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW, Washington, DC. Due to building security procedures, visitors must enter at the Constitution Avenue entrance. All visitors must present photo identification to enter the building. Because of access restrictions, visitors will not be admitted beyond the immediate entrance area more than 30 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the FOR FURTHER INFORMATION CONTACT section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit comments by **[INSERT DATE 60 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]** and an outline of the topics to be discussed and the time to be devoted to each topic by **[INSERT DATE 60 DAYS AFTER PUBLICATION OF THIS DOCUMENT IN THE FEDERAL REGISTER]**. A period of 10 minutes will be allocated to each person for

making comments. An agenda showing the scheduling of the speakers will be prepared after the deadline for receiving outlines has passed. Copies of the agenda will be available free of charge at the hearing.

Drafting Information

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

List of Subjects in 31 CFR Part 10

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

Withdrawal of Notice of Proposed Rulemaking

Accordingly, under the authority of 31 CFR part 330, the notice of proposed rulemaking (REG-159824-04) that was published in the **Federal Register** on December 20, 2004 (69 FR 75887) is withdrawn.

Proposed Amendments to the Regulations

Accordingly, 31 CFR part 10 is proposed to be amended as follows:

PART 10—PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

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

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

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

§10.1 Offices.

(a) * * *

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

* * * * *

(d) Effective/applicability date. This section is applicable beginning after the date that final regulations are published in the **Federal Register.**

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

§10.3 Who may practice.

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

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

* * * * *

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

* * * * *

(j) Effective/applicability date. This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

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

§10.22 Diligence as to accuracy.

* * * * *

(b) Reliance on others. Except as provided in §§10.34 and 10.37, a practitioner will be presumed to have exercised due diligence for purposes of this section if the

practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

(c) Effective/applicability date. This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

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

§10.31 Negotiation of taxpayer checks.

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

(b) Effective/applicability date. This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

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

§10.35 Competence.

(a) A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

(b) Effective/applicability date. This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

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

§10.36 Procedures to ensure compliance.

(a) Any practitioner who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refund, or other documents for submission to the Internal Revenue Service, must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with this part, as applicable. Any practitioner who has (or practitioners who have or share) this principal authority will be subject to discipline for failing to comply with the requirements of this paragraph (a) if--

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

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

(b) Effective/applicability date. This section is applicable beginning after the date that final regulations are published in the **Federal Register**.

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

§10.37 Requirements for written advice.

(a) Requirements. (1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section.

(2) The practitioner must--

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

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

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

(iv) Not rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person if reliance on them would be unreasonable; and

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

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

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

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

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

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

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

(2) In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the determination of whether a practitioner has failed to comply with this section will be made on the basis of a heightened standard of review because of the greater risk caused by the practitioner's lack of knowledge of the

taxpayer's particular circumstances.

(d) Effective/applicability date. The rules of this section will apply to written advice that is rendered after the date of publication of the Treasury decision adopting these rules as final regulations in the **Federal Register.**

Par. 9. Section 10.52 is revised to read as follows:

§10.52 Violations subject to sanction.

(a) A practitioner may be sanctioned under §10.50 if the practitioner—

(1) Willfully violates any of the regulations (other than §10.33) contained in this part; or

(2) Recklessly or through gross incompetence (within the meaning of §10.51(a)(13)) violates §§10.34, 10.36, or 10.37.

(b) Effective/applicability date. This section is applicable to conduct occurring on or after the date final regulations are published in the **Federal Register**.

Par. 10. Section 10.81 is revised to read as follows:

§10.81 Petition for reinstatement.

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

(b) Effective/applicability date. This section is applicable beginning on the date final regulations are published in the **Federal Register**.

Par 11. Section 10.82 is amended by:

1. Revising paragraph (a) and the introductory text of paragraph (b).

2. Adding paragraph (b)(5).

3. Revising paragraphs (c), (d), (e), (f), (g), and (h).

The revisions and additions read as follows:

§10.82 Expedited suspension.

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

(b) To whom applicable. This section applies to any practitioner who, within 5 years prior to the date that a show cause order under this section's expedited suspension procedures is served:

* * * * *

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

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

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

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

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

(2) That an expedited suspension decision by default may be rendered if the respondent fails to file a response as required;

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

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

(d) Response. The response to the show cause order described in this section must be filed no later than 30 calendar days following the date the show cause order is served, unless the time for filing is extended. The response must be filed in accordance

with the rules set forth for answers to a complaint in §10.64, except as otherwise provided in this section. The response must include a request for a conference, if a conference is desired. The respondent is entitled to the conference only if the request is made in a timely filed response.

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

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

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

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

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

(2) Duration of suspension. A suspension under this section will commence on

the date that the written notice of expedited suspension is served on the practitioner, either personally or through an authorized representative. The suspension will remain effective until the earlier of:

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

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

(g) Practitioner request for §10.60 proceeding. If the Internal Revenue Service suspends a practitioner under the expedited suspension procedures described in this section, the practitioner may demand that the Internal Revenue Service institute a proceeding under §10.60 and issue the complaint described in §10.62. The request must be in writing, specifically reference the suspension action under §10.82, and be made within 2 years from the date on which the practitioner's suspension commenced. The Internal Revenue Service must issue a complaint demanded under this paragraph (g) within 45 calendar days of receiving the demand.

(h) Effective/applicability date. This section is applicable beginning on the date that final regulations are published in the **Federal Register.**

Par. 12. Section 10.91 is revised to read as follows:

§10.91 Saving provision.

Any proceeding instituted under this part prior to the date that final regulations

are published in the **Federal Register**, for which a final decision has not been reached or for which judicial review is still available is not affected by these revisions. Any proceeding under this part based on conduct engaged in prior to the date that final regulations are published in the **Federal Register**, which is instituted after that date, will apply subpart D and E of this part as revised, but the conduct engaged in prior to the effective date of these revisions will be judged by the regulations in effect at the time the conduct occurred.

Par. 13. Section 10.93 is revised to read as follows:

§10.93 Effective date.

Except as otherwise provided in each section and subject to §10.91, Part 10 is applicable on the date that final regulations are published in the **Federal Register**.

Steven T. Miller

Deputy Commissioner for Services and Enforcement

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