



March 4, 2021

Ms. Sharyn M. Fisk, Director
Office of Professional Responsibility
Internal Revenue Service
SE:OPR, Room 7238/IR
1111 Constitution Avenue NW
Washington, DC 20224

Re: Request for Guidance on Changes to Treasury Department Circular No. 230, Regulations Governing Practice Before the Internal Revenue Service (31 C.F.R. Part 10)

Dear Director Fisk:

In response to your request, the American Institute of CPAs (AICPA) recommends revisions to Treasury Department Circular 230¹ for consideration by the Office of Chief Counsel of the Internal Revenue Service (IRS).

BACKGROUND

Circular No. 230 contains the rules governing the practice of attorneys, certified public accountants, enrolled agents, enrolled retirement plan agents, registered tax return preparers, and other persons representing taxpayers before the IRS.

The IRS issued final regulations under Circular 230 in June 2014, adopting the proposed regulations (REG-138367-06) issued in September 2012 with some modifications. Since these regulations were issued, several judicial decisions have restricted the scope of these regulations and limited the applicability of these rules to only those tax practitioners representing clients before the IRS.

In November 2020, Treasury noted its intention to update Circular 230 in its 2020–2021 Priority Guidance Plan.

The comments that follow reflect suggested changes to the regulations as a consequence of the judicial decisions under *Loving v. Internal Revenue Service*, 742 F.3d 1013 (D.C. Cir. 2014), *Ridgely v. Lew*, 55 F.Supp. 3d (D.D.C. 2014) and related cases. Other recommended revisions clarify certain sections and allow a better understanding of the rules to which tax practitioners must adhere when representing taxpayers before the IRS.

¹ References to Treasury Department Circular No. 230 (Circular 230 or the Circular) are to Title 31 Code of Federal Regulations, Subtitle A, Part 10, published (June 12, 2014).

RECOMMENDATIONS

Our recommendations are broken down by each existing subpart of Circular 230 and are cross-referenced to a specific section of the current version of the Circular. In addition, we have provided recommendations for your consideration on new subjects to be incorporated into an updated version of the regulations when they are issued that are not currently covered in the Circular.

Reference to 31 U.S.C. §330. *Practice before the Department* was added to the Circular in the update to these regulations, effective August 2011. The revision to the regulations were in conjunction with the introduction of the IRS's Registered Tax Return Preparer Program. This reference was carried over to the current version of the regulations, effective June 2014. This reference should be reviewed and revised to reflect the subsequent changes to be incorporated in the upcoming version of the Circular.

Prior to each subpart, we recommend adding a preamble to explain in non-binding terms, what is covered in each section to assist Federally Authorized Tax Practitioners (FATPs) to understand the concepts and principles underlying the respective requirements and rules set forth in the applicable subpart of the Circular.

Subpart A

We recommend revising Subpart A to reflect the elimination of the Registered Tax Return Preparer Program and removal of all references to such program. In addition, proper delineation of the Office of Professional Responsibility's (OPR) perceived current jurisdiction is necessary in light of the *Loving* and *Ridgely* cases.

We recommend defining applicable jurisdiction in the context of whether OPR has authority to regulate the tax preparation and tax planning practices of FATPs.

Subparts B and C

The *Loving* and *Ridgely* cases held that Treasury exceeded its authority in applying Circular 230 to return preparation. We believe the IRS may take into consideration the tax preparation and tax planning conduct of FATPs in the evaluation of their suitability to practice, i.e., to represent a client with regard to a matter before the IRS. For example, this would include examinations, collection proceedings, and appeals.

Our specific suggestions regarding Subpart B and C are:

Section 10.20

While Circular 230 includes the privilege exception applicable to the production of taxpayer records to the IRS, this privilege does not cover records that a FATP may possess that (i) the client does not want to provide to the IRS or (ii) the FATP cannot release to the IRS for other legally acceptable reasons. This section does not currently consider the breadth of records a practitioner may now receive from a client due to the implementation of digital delivery of scanned records. These records are the property of the client, and while no privilege may exist, the practitioner does not have the authority to share such records unless the practitioner receives authorization from the client or is legally compelled to do so.

Section 10.21

We suggest adding a provision to clarify that a practitioner has no duty to notify a former client of an omission arising from subsequent events or laws occurring after the termination of the engagement with the client.

Section 10.22

We recommend revising Section 10.22(b) to align with section 10.34(d) and, where applicable, section 10.37(b) regarding reliance on third parties, including those engaged directly by the client. For example, we recommend clarification in those situations in which third parties may be independent and therefore, outside the reach of a practitioner's ability to supervise and train. Specifically, an independent non-signing preparer of a tax credit study engaged directly by the client is outside the reach of the signing preparer to supervise and train.

Section 10.25

Section 10.25(b) appropriately restricts former Government employees from working on certain matters in which he or she personally and substantially participated while a government employee. Section 10.25(c) also bars the firm from working on these matters unless the individual is isolated from such representation and an isolation statement is signed. This is difficult to implement in large firms, where Internal Revenue Code section 7216 prevents the former government employee from providing a list for a central team to cross-reference. Client confidentiality may prevent the firm from disclosing information about the engagement to the former government employee. We recommend clarification to section 10.25(c) to provide that an isolation statement is required only if the former government employee informs the firm of his or her involvement.

Section 10.27

Depending on the final effect of any subsequent legislative or regulatory interpretations related to the *Loving* or *Ridgely* decisions, this section needs revision. One possibility is to coordinate the definition of “contingent fee” found in section 10.27(c)(1) with that found in the AICPA’s “Contingent Fees Rule” (ET sec. 1.510.001 et seq.).²

Section 10.28

We recommend revising Section 10.28 to consider the current filing dynamics, i.e., electronic filing as opposed to paper filing. For example, we suggest updating the reference to attaching records to a return needs to comply with modern e-filing policies and regulations.

The definition of “client’s records” as found in section 10.28(b) should delineate between client records and practitioner work papers. Helpful concepts include those found in the AICPA’s “Acts Discreditable Rule” (ET sec. 1.400.001)³ and related interpretations, specifically “Records Requests” (ET sec. 1.400.200).⁴ Clarification of the phrase “necessary for the taxpayer to comply with his or her current Federal tax obligations” is also recommended.

Additionally, the section should specifically allow for a practitioner’s ability to charge reasonable fees and applicable costs incurred for returning client records. Requests for records should be honored within a reasonable period of time, not to exceed forty-five days.⁵

Section 10.29

Section 10.29(b) should provide a *de minimis* exception from the definition of “affected client” for minority owners of passthrough entities. For example, owners of less than 5 or 10 percent of an entity should not be considered an affected or adverse party.

Similarly, section 10.29(b) should provide a *de minimis* exception for minority owners of passthrough entities for purposes of the written consent requirements.

We also recommend providing a concise definition of the term “affected client.” While the practitioner has a responsibility to a former client under section 10.29(a)(2), some reasonable limitation on the look back period necessary to identify a former client is appropriate – for example, a 36-month period of prior engagement with the client. As an alternative to a specified look back period, include a concept of “reasonable effort” to define the practitioner’s responsibility to identify former clients.

² [AICPA Code of Professional Conduct](#)

³ Ibid.

⁴ Ibid.

⁵ Ibid.

The requirement for written waivers should apply only to actual conflicts of interest with regards to practice. The governing rules of state bar associations, boards of accountancy and those of enrolled agents do and should continue to govern conflicts of interest in tax return preparation and tax planning activities of an FATP.

Section 10.33

This section needs revision to reflect the *Loving* and *Ridgely* decisions.

Section 10.34

We request clarification of section 10.34(d) to confirm the historical understanding that a practitioner may reasonably rely on information from *third parties* in a manner similar to section 10.37(d).

Section 10.36

This section needs revision to reflect the *Loving* and *Ridgely* decisions.

Section 10.37

This section should specifically detail if and how it interacts with preparation advice, e.g., written advice on prospective transactions and similar advice for completed transactions.

Sections 10.50 and 10.51

Circular 230 should clarify the terms and conditions under which a monetary penalty will be imposed.

We recommend evaluating Sections 10.50 and 10.51 for consistency of terminology and application.

Section 10.51(a)(18)

We recommend clarifying Section 10.51(a)(18) to describe how a person who is not authorized to practice under this part can be subject to sanctions under this part in light of the decision under *Sexton v. Hawkins* (2:13-cv-00893-RFB-VCF (D. Nev. 3/17/17)).

Section 10.64

We recommend updating Section 10.64(e) to address electronic signatures. We encourage their use as widely as possible and practicable.

New Provisions for Circular 230 and Other Considerations

Circular 230 currently has no provisions regarding confidentiality, privacy, data protection or record retention. Each of these should be appropriately addressed. We suggest that rather than a detailed requirement, the Circular should set forth broad general requirements and refer the FATP to available resources of acceptable authority.

Frequently Asked Questions (“FAQs”) on common questions about provisions would be beneficial to practitioners subject to Circular 230. The provisions of Circular 230 should set forth required ethical and conduct requirements as broadly as possible with the objective of assuring a practitioner’s “suitability” to practice. FAQs are the appropriate avenue to describe particular conduct regarding identified topics subject to the broad general requirements. FAQs also provide an opportunity to address specific emerging issues in tax practice, provide meaningful examples of conduct and describe how the broader ethical and conduct requirements apply.

We are aware of and commend OPR’s recent efforts to provide online access to agency decisions to make them available to the greater public and to the practitioner community. We encourage OPR to continue publication as permitted by privacy rules and, where appropriate, to seek legislative permission to release information regarding OPR disciplinary actions and authority while recognizing the need to protect sensitive taxpayer and practitioner information.

We would be pleased to discuss these recommendations and any other related issues at your convenience.

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The AICPA is the world’s largest member association representing the CPA profession, with more than 431,000 members in the United States and worldwide, and a history of serving the public interest since 1887. Our members advise clients on federal, state and international tax matters and prepare income and other tax returns for millions of Americans. Our members provide services to individuals, not-for-profit organizations, small and medium-sized businesses, as well as America’s largest businesses.

We appreciate your consideration of these comments and welcome the opportunity to discuss these issues further. If you have any questions, please feel free to contact Henry Grzes, Lead Manager – AICPA Tax Practice & Ethics, at (919) 402-4889 or Henry.Grzes@aicpa-cima.com; Kip Dellinger, Chair – AICPA Circular 230 Revision Task Force at (310) 993-2291 or Kip@kloepas.com or me at (612) 397-3071 or Chris.Hesse@CLAconnect.com.

Ms. Sharyn M. Fisk, Director

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Sincerely,

A handwritten signature in blue ink that reads "Christopher W. Hesse". The signature is written in a cursive style with a large initial "C" and a stylized "H".

Christopher W. Hesse, CPA
Chair, AICPA Tax Executive Committee

cc: The Honorable Charles P. Rettig, Commissioner, Internal Revenue Service
Mr. William M. Paul, Acting Chief Counsel, Internal Revenue Service
Mr. Mark J. Mazur, Acting Assistant Secretary for Tax Policy, Department of the Treasury