The following comments constitute the individual views of the members of the Section of Taxation who prepared them and do not represent the position of the American Bar Association or the Section of Taxation.

These comments were prepared by a Task Force consisting of individual members of the Committees on Standards of Tax Practice and Civil and Criminal Penalties of the Section of Taxation. Principal responsibility was exercised by George Connelly. Substantive contributions were made by Bryan Camp, Bryan Skarlatos, and Mona Hymel. The comments were reviewed by John P. Barrie of the Section’s Committee on Government Submissions and by Mark L. Yecies, Council Director for the Committee on Standards of Tax Practice.

Although the members of the Section of Taxation who participated in preparing these comments have clients who would be affected by the federal tax principles addressed by these comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these comments.

Please feel free to contact us to discuss any questions or concerns you may have. Members of the Task Force are available to meet, discuss our comments, and provide specific suggested language changes at your convenience.

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I. Background

On July 26, 2002, Circular No. 230 was amended to clarify the general standards of practice before the Service. The preamble to the amendments indicated that the Treasury and the Service would subsequently issue an ANPR relating to additional nonshelter matters. On December 18, 2002, the Treasury and the Service issued an ANPR by which comments were invited on matters relating to (a) the Director of Practice, (b) the definition of practice and who may practice, (c) enrolled agents and eligibility for enrollment, (d) sanctions and disciplinary proceedings, (e) contingent fees, and (f) confidentiality agreements. The comments set forth below address certain selected matters on which views were requested. The scope of these comments is limited solely to the questions addressed.

II. Comments

We offer the following comments with respect to the following specific questions raised in the ANPR:

Director of Practice¹

1. Whether the authority to appoint the Director of Practice should be delegated to the office or person who supervises the Director of Practice. If not, to whom should the Secretary delegate the authority to appoint the Director of Practice.

The “Background” section of the ANPR indicates that the authority to supervise the Office of the Director of Practice has been delegated to the Office of the Senior Counselor to the Commissioner. The question thus becomes whether the authority to appoint the Director of Practice should also be delegated to that same office. As a practical matter, it is appropriate that the Secretary of the Treasury delegate the authority to appoint the Director of Practice. We do not, however, see a compelling reason to delegate that authority to the Office of Senior Counselor to the Commissioner. Particularly, if, as described in paragraph 3 below, that office is also delegated the responsibility to review an Administrative Law

¹ We note that, on January 8, 2003, the Service announced the change in name from Director of Practice to Director of Office of Professional Responsibility. We believe that the change in title is appropriate. We also note, however, that the ANPR requested comments on this change, and it may have been appropriate to wait until the close of the comment period before the change was made. In these comments, we continue to refer to the Director of Practice.
Judge’s decision, we believe that it would be wiser to vest appointment authority in another person.

2. Whether the review of an Administrative Law Judge's decision under § 10.78 should be delegated to the office or person who supervises the Director of Practice. If not, to whom should the Secretary delegate the authority under § 10.78 to review the Administrative Law Judge's decision in disciplinary proceedings when these decisions are appealed.

The “Background” section of the ANPR also indicates that the authority to make the agency decision when decisions by an Administrative Law Judge (ALJ) are appealed has been delegated to the Senior Counselor to the Commissioner, which, as noted in paragraph 2 above, has also been delegated the authority to supervise the Office of the Director of Practice. Under prior rules, either party to a disciplinary action could appeal the decision of an ALJ to the Secretary of the Treasury. Again, we agree that the appellate review should be delegated. We question, however, whether the person who appoints the Director of Practice (see paragraph 2 above) should be the reviewer. We believe that it is critical that the reviewer be, in perception and in fact, independent of the Director of Practice, and question whether that independence will be present if the reviewing office appoints that official. As noted in paragraph 2 above, we question whether the Office of the Senior Counselor to the Commissioner should appoint the Director of Practice. If it does, providing another person in Treasury to review ALJ decisions may make for a fairer review of those decisions, both in perception and in fact. If the authority to appoint the Director of Practice were vested in another office, we would have no objection to having the office that supervises the Director of Practice review the ALJ decisions.

Definition of Practice and Who May Practice

1. Whether the definition of practice before the Service and the definition of practitioner in § 10.2 should be modified to specifically provide that return preparation by an individual not described in § 10.3(a) through (d) (“unenrolled return preparer”) is practice before the Service and that an unenrolled return preparer is a practitioner under Circular 230.

This proposal makes two significant changes to § 10.3(a). First, it significantly expands the category of “practitioner,” and in the process includes persons who may not be susceptible to effective regulation by the Director of Practice. Second, it changes the concept and definition of what it means to practice “before” the Service to include return preparation. We believe that these two changes create both legal authority and practical implementation issues.

The legal problem is that the Service may be acting beyond the scope of its authority in redefining practice before the Service to include return preparation. The practical problem is that the Service will have to secure additional resources to police professionals who cannot be effectively regulated, and in the process will reduce the resources available to police other practitioners who can be effectively regulated.

The statutory basis for the Service's ability to regulate practice before it is 31 USC. §330(a), which authorizes the Secretary of the Treasury to “regulate the practice of representatives of persons before the Department of the Treasury.” Historically, Circular

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2 Our comment in Footnote 1 applies here as well.
No. 230 (which contains the regulations promulgated under the authority of 31 USC § 330(a)), has defined "practice" in § 10.2(e). That section defines “practice” as comprehending “all matters connected with presentation to the Internal Revenue Service or any its officers or employees” including “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.”

Thus, practice before the Service within the meaning of 31 U.S.C. § 330(a) has traditionally meant presentations and representation before the Service. The part of the § 10.2(e) phrase “preparation and filing of necessary documents” has not, to our knowledge, been interpreted as applying to tax or information returns. We believe that preparing and filing a return is simply accounting for one’s financial transactions; it is not a presentation to, or representation before, the Service.

In this regard, we note that § 10.7 authorizes certain individuals (including unenrolled return preparers) to practice before the Service in very limited circumstances. The authorization in § 10.7 is essentially a list of circumstances where the Service allows individuals to represent others on a case-by-case basis; it is not an authorization to generally represent taxpayers before the Service. Under § 10.7, unenrolled return preparers only “practice” before the Service when one of their clients needs representation on a return prepared by that preparer.

As noted, we question the Service’s ability to make the proposed change of the definition of “practice” to include return preparation absent more specific statutory authority. The reasonable inference of the statutory framework, as well as prior rulings by the Service, appear to preclude such an interpretation. For example, Section 7407 of the Internal Revenue Code of 1986, as amended (the “Code”) authorizes a court to enjoin a person from acting as a tax return preparer. Section 7407(b)(1)(B) provides that one action supporting an injunction is misrepresenting the preparer’s eligibility to practice before the Service. The necessary implication of this language is that practice before the Service is something other than mere return preparation. A similar implication is found in § 4.01 in Rev. Proc. 81-38, 1981-2 C.B. 592, which provides that an “unenrolled individual who signs a return as its preparer may act as the taxpayer’s representative…. Such representation is limited to practice before examining officers of the Examination Division in the offices of District Directors and in the Office of International Operations, and may only encompass matters concerning the tax liability of the taxpayer for the taxable year covered by that return…."

Currently, the Service has a choice of several Code provisions under which it can obtain an injunction to prohibit certain behavior. For example, as noted, the Service can secure an injunction under Section 7407 by showing, among other things, conduct that violates Sections 6694 or 6695, or any other fraudulent or deceptive conduct that substantially interferes with the proper administration of the internal revenue laws. In addition, Section 7408 provides for injunctive relief for conduct subject to penalty under Sections 6700 or 7601. Finally, the Service can seek an injunction under Section 7402 if it shows that an individual interfered with the administration and enforcement of the internal revenue laws. See, e.g. United States v. Eddie L. Mims, et ux., No. 6:02 CV 00105 (S.D. Ga, November 14, 2002).

It thus appears that the Service is trying to “regulate” return preparation by defining return preparation as “practice” before the Service in order to transform unenrolled return
That change would allow the Service to forbid certain persons from preparing returns by using administrative sanctions and bypassing the above-described provisions that require an injunction. Currently, Congress allows the Service to deny an unenrolled return preparer’s livelihood only with court approval, where the return preparer has the opportunity to be heard by a neutral third party. If the Service can avoid court review, it should be Congress, through statutory amendment, that grants that power.

Moreover, as a practical matter, given the huge number of unenrolled return preparers, we cannot see how the Service can effectively police this category of “practitioners” without drawing resources from monitoring attorneys, CPAs, and others who now practice before the Service. Accordingly, additional funding will be necessary to accomplish this objective effectively.

Further, this change will increase the number of “federally authorized tax practitioners” eligible for the confidentiality privilege provided by Section 7525 of the Code. To the extent that Section 7525 creates uncertainties for those tax professionals now subject to its provisions, adding unenrolled return preparers will exacerbate those issues.

If the Service’s goal is to regulate return preparers administratively, we believe that the Service should require them to enroll or otherwise become licensed. We believe, however, that the better solution is to enforce existing statutory provisions (including Sections 6694 and 6695), or to obtain new legislation, linked to increased funding, that explicitly allows the Service to enjoin return preparation and otherwise regulate and sanction preparers.

2. Whether § 10.3(b) should be revised to permit licensed accountants, and certified internal auditors, who are not certified public accountants, to practice before the Service.

In light of our comments above, we recommend the proposed changes not take place in the absence of enabling legislation.

3. Whether § 10.7(c)(1)(viii) should be revised to authorize the Director of Practice to modify the scope of limited practice by unenrolled return preparers, without further amendment to the regulations.

In light of our comments above, we recommend the proposed changes not take place in the absence of enabling legislation. Preparers should not be made subject to Circular No. 230 to any greater degree than they are at present, and the Director of Practice should not independently be able to expand the scope of their practice. If, however, the proposal were modified to contract the scope of the limited “practice” permitted, we would support that proposal for the reasons described in paragraph 4 below.

Section 10.2(e) now defines “practitioner” as “any individual described in § 10.3(a), (b), (c), or (d).” Those sections currently describe, in order: attorneys, certified public accountants, enrolled agents, and enrolled actuaries. The Service’s proposal to include unenrolled return preparers in the definition of “practitioner” would give them a status like attorneys, accountants and enrolled agents and actuaries. As a result, unless otherwise limited, unenrolled return preparers would be fully subject to the powers, responsibilities, and sanctions that Circular No. 230 provides for these other groups.
4. Whether the regulations should specifically provide the Director of Practice with authority to determine eligibility for limited practice by unenrolled return preparers under § 10.7(c)(1)(viii).

The proposal gives the Director of Practice power to limit the eligibility for practice given to return preparers in § 10.7. Whether that “practice” is the current limited practice of representing taxpayers regarding returns prepared by that same preparer, or whether it is the expanded “practice” proposed by this ANPR (i.e., unless limited, the full range of Circular No. 230 practice), we support the proposal.

Currently, the regulations provide a blanket permission for any preparer to represent a taxpayer with respect to a return that preparer signed. In a letter dated September 15, 2000, members of the ABA Tax Section previously objected to this blanket permission because many unenrolled preparers are not qualified to deal with either the substance or procedure of tax law except on the most routine types of questions. See 2000 TNT 184-19. Despite those comments, the Service at that time modified § 10.7 to give unconditional permission for return preparers to perform the limited representation described. This current proposal retreats from that position and seems more in line with our prior comments.

Enrolled Agents and Eligibility for Enrollment

1. Whether Enrolled Agents should be allowed to refer to themselves as “Licensed Tax Professionals” or another specified designation determined by the Service, in addition to or instead of the Enrolled Agent designation, to more fully describe the nature of the professional services that they provide.

Webster’s defines “license” as “a permission granted by competent authority to engage in a business or occupation....” This definition describes the process one undertakes to become an enrolled agent. For example, those who wish to be enrolled agents must file an application, pay a fee, and ultimately, be granted permission to practice based on admission criteria. An individual must possess a valid enrollment card, which includes periodic renewals, subject to continuing education. As these procedures appear very much like licensing, we believe the designation “licensed” should be allowed.

Sanctions and Disciplinary Proceedings

1. Whether the regulations should be amended to authorize a practitioner and the Director of Practice to enter into settlement agreements, with such agreements enforceable through the expedited procedures of § 10.82.

This proposal in reality focuses on two separate sections of present regulations. The first, § 10.61, Conferences, authorizes the Director to confer with the professional concerning allegations of misconduct, regardless of whether a proceeding for a sanction has been instituted. It also permits the practitioner to offer a consent to a censure, suspension or disbarment, or an offer of resignation in the case of an enrolled agent. Thus, the rules already permit a “settlement” agreement.

The second part implicates the existing, expedited suspension proceedings of § 10.82. While we agree that, in some cases, it may be appropriate that access to the expedited procedures be a term of a negotiated settlement agreement, we do not believe that all
settlement agreements should be subject to those procedures. In this regard, we are concerned that the expedited procedures could be used to sanction professionals on the basis of mere allegations that they have violated the terms of their settlement agreement, as all elements of due process present in a normal sanction proceeding could be eliminated. Accordingly, we strongly believe that subjecting all settlement agreements to the expedited procedures should not become a general practice.

2. Whether the definition in the regulation of disreputable conduct should be amended to specifically include the willful failure of a practitioner who is a preparer to sign a return.

Disreputable conduct is defined in § 10.51. At a minimum, the amended definition should be limited to the class of individuals defined by Section 7701(a)(36) of the Code. It is also noted, however, that Section 6695 already provides a fine as a sanction for this conduct, and further discipline may be appropriate only for someone admitted to practice before the Service. Please reference our comments concerning whether the definition of “practice” should be expanded to include the preparation of returns.

3. Whether, in order to facilitate the timely adjudication of disciplinary proceedings instituted under § 10.60, the regulations should be amended to provide that the failure of a practitioner to answer a complaint constitutes an automatic default in the proceeding, subject to a showing of good cause.

We strongly disagree with the approach reflected in this proposal. Although the rules of practice are somewhat different, we can analogize the situation to a Notice of Deficiency petitioned to Tax Court. On most issues, the taxpayer bears the burden of proof, so that failure to proceed or come forward with evidence results in a default judgment. However, for the more serious sanctions of suspension of more than six months or disbarment, the recent amendments to § 10.76 modified the burden of proof to place it upon the Director of Practice by clear and convincing evidence. Just as in the civil tax fraud case, where something more than a default is necessary for the Service to prevail, the Director of Practice should be required to come forward with at least a prima facie case of the offense and its seriousness before such sanctions can be imposed.

4. Whether the regulations should be amended to provide the parties to a proceeding instituted under § 10.60 the opportunity to obtain discovery through means such as interrogatories, requests for production of documents, and requests for admissions, in addition to depositions. Whether the regulations should define what discovery should be permitted. Whether the regulations should place limits on discovery.

So long as the opportunities are reciprocal, we recommend that these proceedings become more like a court proceeding. In this regard, we further recommend that discovery procedures based upon those of the Federal Rules of Civil Procedure be implemented. In this regard, the Task Force also considered whether other discovery rules, such as those applicable in state courts or the Tax Court, would be suitable. The former (state court rules) were rejected because they were viewed as cumbersome, as well as nonuniform. The Tax Court rules were rejected because they were considered inefficient and incomplete. The Federal Rules, in contrast, were viewed as the most comprehensive, and the most familiar to practitioners.
5. Whether the protection afforded in the current regulation—that a party in a disciplinary proceeding is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross examination as may be required for a full and true disclosure of the facts—is sufficient, or whether changes should be made to afford greater protection in a disciplinary proceeding, including the opportunity to question, in the presence of the Administrative Law Judge, any person whose statement is offered by the opposing party.

We strongly support changes to afford greater protection in a disciplinary proceeding. Many practitioners have a perhaps erroneous view that the current rules foster an inquisition-like approach where hearsay could be relied upon, at least when presented by the Service. We believe that the rules of evidence should be followed, and the opportunity to challenge witnesses by cross-examination should be guaranteed.

Contingent Fees

1. Whether contingent fees should be permitted in conjunction with a request for a private letter ruling or other prefiling document.

We do not believe the Service should attempt to regulate this aspect of the relationship between the professional and the client. While contingent fees may not be appropriate in connection with the filing of an original return, the preparation of requests for private letter rulings (PLRs) and similar services are qualitatively different. Generally, in PLR requests that are the subject of contingent fee arrangements, there is little or no chance for a taxpayer (and a practitioner) to "play the audit lottery," as the submissions will receive significant Service review. Accordingly, the rationale that supports the prohibition of contingent fees for original returns does not apply to these services.

2. Whether the regulations should continue to permit a practitioner to charge a contingent fee for preparing, or for any advice rendered in connection with a position taken or to be taken on, an amended return or claim for refund.

We note that the current rule allows for contingent fee arrangements for amended returns and claims for refund only where the professional reasonably believes that the return or claim will receive substantive Service review. We believe this approach is appropriate for amended returns or claims. We do not perceive the existence of evidence of any widespread abuse from using contingent fees in these circumstances. We are of the view that, absent such evidence, a more restrictive rule does not appear warranted.

3. Whether the prohibition on contingent fees should be expanded to permit contingent fees only for amended returns or claims for refund when the client's taxable income on the amended return or claim for refund is less than $50,000 (or another amount determined with reference to financial need).

We strongly disapprove of this proposal. Beyond the reasons discussed above, the client's taxable income on the amended return or claim is simply the wrong place to start. Taxable income really is not a meaningful reflection of financial need, or ability to pay for service, as many items on a particular return could operate to make the $50,000 a meaningless amount. Further, we note that the attorneys' fees limitations of Section 7430 of the Code start at a $2 million net worth. This proposal would outlaw contingent fee
arrangements to the gross majority of people who might seek to file amended returns or claims for refund.

Confidentiality Agreements

1. Whether the regulations should prohibit practitioners from entering into agreements with clients that, in violation of applicable state professional rules or applicable state law, restrict a practitioner from providing relevant tax advice to other similarly situated taxpayers.

The regulation of this behavior is best left to the applicable state professional bodies. Further, we suggest that the recent promulgation of the tax shelter rules may significantly reduce the market pressure towards these types of agreements in any event. If, however, the Service believes that such confidentiality agreements will continue to present a significant problem of tax administration, we disagree with the approach proposed because it puts the Service in the position of interpreting state professional rules or applicable state law. That creates two problems. First, the Service’s interpretation of a state professional rule or state law may vary from the interpretation by the competent state authorities, thus creating uncertainty within the state regulatory schemes. Second, to the extent that state rules vary between states, the Service will have a difficult time creating uniform rules or standards to apply to tax practitioners. If the Service is determined to act in this area, we believe that, to achieve the important goals of uniformity and clarity, the better approach would be for the Service to amend § 10.51 of Circular No. 230 to expand the definition of “disreputable acts” to include clearly defined types of confidentiality agreements.

2. Whether the regulations should prohibit, irrespective of applicable state professional rules or applicable state law, the agreements identified above.

If there is no applicable state professional rule or state law restricting professionals from entering into such agreements with their clients, we agree it may be appropriate for the Service to create an additional act of “disreputable conduct” to include such agreements.