June 6, 2006

Hon. Mark W. Everson
Commissioner
Internal Revenue Service
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Comments Regarding the Proposed Amendments to Circular 230

Dear Commissioner Everson:

Enclosed are comments addressing the proposed amendments to Circular 230. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Dennis B. Drapkin
Chair, Section of Taxation

Enclosure

cc: Donald L. Korb, Chief Counsel, Internal Revenue Service
    Eric Solomon, Acting Deputy Assistant Secretary (Tax Policy), Treasury Department
    Michael J. Desmond, Tax Legislative Counsel, Treasury Department
    Stephen Whitlock, Deputy Director Office of Professional Responsibility, Internal Revenue Service
    Deborah A. Butler, Associate Chief Counsel (Procedure & Administration), Internal Revenue Service
    Richard Goldstein, Special Counsel, Internal Revenue Service
These comments address the proposed amendments to Circular 230 that were issued on February 3, 2006. In addition, these comments address certain provisions of current Circular 230. These comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Ronald M. Wiener of the Standards of Tax Practice Committee (the “Committee”). Substantive contributions were made by Nancy Chassman, Karen L. Hawkins, Rochelle Hodes, Mona L. Hymel, Charles P. Rettig, Mary Elizabeth Rinaldi, Kevin E. Thorn and Peter S. Wilson. The Comments were reviewed by Kathryn Keneally, Chair of the Committee, George C. Howell III of the Section’s Committee on Government Submissions, and Charles A. Pulaski, Jr., Council Director for the Committee.

Although the members of the Section of Taxation who participated in preparing these Comments and/or other members of the Section of Taxation might be affected by the proposed amendments to Circular 230 addressed by these Comments, 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.

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Date: June 6, 2006
EXECUTIVE SUMMARY

Our recommendations are as follows:

A. Proposed § 10.2(a)(4) should be deleted or at least modified by removing the phrase “with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion” and substituting instead “to a client concerning whether a specific position may be taken on a tax return.”

B. Proposed § 10.27(b)(3) should be deleted. Consideration should be given to amending current § 10.27 to permit contingent fees in circumstances in which the taxpayer cannot exploit the audit process.

C. The expanded definition of “contingent fee” in the second sentence of proposed § 10.27(c)(1) should be modified to refer to “a fee … that depends exclusively on the specific tax result attained.”

D. Proposed § 10.27(c)(2) should be modified to remove the references to “tax planning and advice” and to “rendering written advice with respect to any entity, transaction, plan or arrangement” and to revise the definition of “matters before the Internal Revenue Service.”

E. Proposed § 10.29(b)(3) should be modified:

   (1) to omit any requirement that an affected client must give informed consent to a conflict of interest in writing;

   (2) to make clear that a practitioner may obtain a waiver of a future conflict upon informed consent; and

   (3) to clarify that the written consent to be produced upon demand to an employee of the Internal Revenue Service (“IRS”) may be redacted to exclude privileged material and is not required to detail the specific circumstances creating the conflict of interest or the basis on which the affected client has given informed consent to continued representation by the practitioner.

F. Proposed § 10.34(a)(2) should be clarified by the inclusion of a new subparagraph 10.34(a)(3) to provide as follows: “The practitioner complies with subparagraph (c) of this paragraph 10.34.”

G. Proposed § 10.50(d) should be redesignated as § 10.50(e) and a new § 10.50(d) should be inserted to provide as follows: “(d) Sanctions to be imposed. The sanctions imposed by this section shall in all cases bear a reasonable relationship to the conduct subject to sanction, taking into account all relevant facts and circumstances.”

H. Examples 4, 7, 12, and 13 in proposed § 10.51 should be modified.
I. Proposed § 10.60(a) should be modified to require the Director to make a factual showing before the Administrative Law Judge, upon due notice and an opportunity for the practitioner to be heard, establishing that probable cause exists to believe that the disreputable conduct charged in the complaint occurred before a formal complaint is filed. Moreover, the Administrative Law Judge who makes the determination of probable cause should thereafter be disqualified from subsequent proceedings concerning the practitioner, and the Director should be precluded from seeking a probable cause determination from more than two Administrative Law Judges with respect to formal charges arising out of the same factual circumstances.

J. Concerning proposed § 10.61:

(1) Subsection (a) should be modified to permit a conference, either in person or by telephone or video at the practitioner’s option, upon the request of the practitioner, except for unusual circumstances or in cases of expedited suspension under § 10.82.

(2) The title of subsection (b) should be modified by deleting the word “resignation” and the text should be modified to require the Director to inform a practitioner of any deficiencies in an offer to accept sanctions.

K. Proposed § 10.63(d) should be modified to require production of all evidence collected by the OPR in the course of investigating the respondent. This obligation should include any evidence OPR obtains after the proceeding has been instituted, within 10 days of receipt by OPR, unless the evidence is received from the respondent.

L. Proposed § 10.65(a) should be deleted or, at the very least, modified by omitting the phrase “for example.”

M. Proposed § 10.71 should be clarified to state clearly that nothing therein should be construed to limit OPR’s obligation to produce all evidence obtained in the course of investigating the respondent, including evidence obtained after the proceeding has been instituted. Proposed § 10.71(f) should be deleted, and replaced with a provision that authorizes the Administrative Law Judge to direct other forms of discovery upon a showing of the inadequacy of depositions, admissions, and document disclosure to meet the circumstances in a given matter.

N. Proposed § 10.72(d) should be modified:

(1) to postpone the public disclosure of the practitioner’s identity until after an Administrative Law Judge has made a determination, upon due notice and an opportunity for the practitioner to be heard, that the charges against the practitioner are supported by probable cause, or in the absence of a procedure for a probable cause determination, to postpone the public disclosure of the practitioner’s identity until after an Administrative Law Judge has made a determination that sanctions are warranted; and
to provide for a procedure by which third parties whose identifying information may be disclosed may review proposed redactions.

O. Proposed § 10.76(a)(3) should be modified to replace “should” with “must.”

P. In proposed § 10.76(b), OPR should be required to prove all allegations by clear and convincing evidence. At a minimum, if two separate standards are to remain, the standard to be applied should be based on the greatest sanction that OPR seeks in the complaint. The language that states that “the Administrative Law Judge, in rendering findings and conclusions, will consider an allegation of fact to be proven if it is established by the party who is alleging the fact by a preponderance of evidence in the record” should be deleted.

Q. Proposed § 10.82(b)(4) should be deleted.

R. Proposed § 10.82(b)(5) should be deleted.

INTRODUCTION

The proposed regulations are intended to impact practitioners before the IRS in multiple respects. The Section’s comments to these proposals are based upon the following principles:

First, although the Secretary and OPR may regulate practitioner conduct that constitutes “practice before the Internal Revenue Service,” this statutory authority does not extend to all activities carried out by individuals who are “practitioners.” In particular, this statutory authority does not extend to the conduct of practitioners before a court, even in matters involving the Internal Revenue Code.

Second, the Secretary and OPR may regulate practitioner conduct that is not “practice before the Internal Revenue Service” only if the conduct in question bears some demonstrable relationship to the practitioner’s activities as a practitioner before the IRS and the regulation intrudes only to the extent necessary into the practitioner-client relationship. Thus, for example, in connection with proposed § 10.27, relating to the use of contingent fees, we do not object to restrictions that reasonably serve to minimize any incentive to exploit the audit selection process. However, absent such a connection, we do not believe the regulation of contingent fees by OPR is appropriate.

Third, the disciplinary process contemplated by Subpart D of Circular 230 should provide practitioners with appropriate due process safeguards. We therefore oppose the public disclosure of a practitioner’s identity as contemplated by proposed § 10.72(d) in any matter in which OPR has filed a complaint pursuant to proposed § 10.60(a) until an Administrative Law Judge has concluded that the charges in the complaint are well-founded. In this respect, we note that the provisions of proposed § 10.72(d) are inconsistent with Rules 11 and 16 of the ABA Model Rules for Lawyer Disciplinary Enforcement.
§ 10.2(a)(4).

Proposed § 10.2(a)(4) includes within the definition of “practice before the Internal Revenue Service” the “rendering of written advice with respect to any entity, transaction, plan or arrangement having a potential for tax avoidance or evasion.” Unquestionably, the Secretary has the authority to impose standards applicable to the rendering of such written advice when it is provided by a practitioner. See 31 U.S.C. § 330(d), as enacted by § 822 of the American Jobs Creation Act of 2004 (“JOBS Act”). However, it does not follow from the language of the JOBS Act that the rendition of such written advice is properly classified as “practice before the Internal Revenue Service,” or that Congress intended to make the rendition of tax advice generically “practice before the Internal Revenue Service.”

There is an important distinction between conduct that the Secretary may regulate under Circular 230 because it constitutes “practice before the Internal Revenue Service” and other activities which are not themselves “practice before the Internal Revenue Service,” but which, when conducted by a practitioner, are also subject to regulation because they potentially relate to the practitioner’s fitness to practice before the Internal Revenue Service.\(^1\) While the Secretary may quite properly regulate all aspects of a practitioner’s “practice before the Internal Revenue Service,” the Secretary’s authority to regulate other professional activities by those who fall within the proposed § 10.2(a)(5) definition of “practitioners” should bear some demonstrable relationship to the practitioner’s activities as a practitioner before the Internal Revenue Service and should take into account other countervailing considerations.

These countervailing considerations include respect for the concurrent or primary authority of other institutions, including state legislatures and the judiciary, to regulate the conduct of practitioners and for the importance of intruding only to the extent necessary upon the practitioner-client relationship. An additional consideration is that, in contrast to courts or legislatures, in regulating the conduct of practitioners, the Treasury and the IRS are not wholly neutral. The relationship between representatives of the Treasury or the IRS and the practitioners whom the Secretary is authorized to regulate is sometimes adversarial; and the Secretary’s authority to dictate how practitioners must conduct themselves might potentially be used to disadvantage unfairly the taxpayers whom those practitioners represent. For this reason as well, regulations governing how practitioners must conduct themselves should be appropriately restrained. See also Comments regarding proposed § 10.27, discussed infra.

For these reasons, we recommend that proposed § 10.2(a)(4) should be deleted or at least modified by removing the reference to “with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion” and substituting instead “to a client concerning whether a specific position may be taken on a tax return.”

\(^1\) Thus, under appropriate circumstances, the Secretary’s authority may extend to imposing reasonable standards upon the practice of giving written tax advice by those who are otherwise authorized to practice before the Internal Revenue Service.
§ 10.27 Fees.

Existing § 10.27 satisfies the concerns expressed by the Preamble, while the proposed amendment is overly broad and includes unnecessary and confusing standards. It may also exceed statutory authority.

§ 10.27(b) currently meets the concern that practitioners not assist taxpayers in exploiting the audit selection process, is consistent with other applicable professional standards, and may indeed be too restrictive.

Current § 10.27(b) provides that contingent fees may only be charged in connection with an amended return or a claim for refund not made on an original return, and even then only if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended return or refund claim will receive substantive review by the Service. This rule resembles the professional standards set forth by the American Institute of Certified Public Accountants (“AICPA”) and most state boards of accountancy with respect to tax services. See, e.g., AICPA Professional Standards, Rule 302.

The proposed amendment would prohibit contingent fees except in defending a position already taken on a return in examination, at Appeals, or in litigation. In addition, the definition of “contingent fee” would be expanded to include a fee that is based on a percentage of a refund reported on a return or a percentage of taxes that would be saved as a result of the practitioner’s services, or “that otherwise depends on the specific result attained.” The Preamble to the proposed regulations states that the restriction of contingent fees supports voluntary compliance by discouraging return positions that exploit the audit selection process. Without any explanation, the Preamble further asserts that a broader prohibition against contingent fees “is appropriate in the light of concerns regarding attorney and auditor independence.”

The proposed amendment is overly broad and prohibits contingent fees in cases in which the taxpayer cannot exploit the audit process. To the contrary, the current regulation should be expanded to permit contingent fees in any situation in which IRS review of the taxpayer’s position is probable. For instance, prohibiting contingent fees for services provided to assist a taxpayer seeking a private letter ruling or recomputation of interest serves no purpose -- in both cases, the taxpayer fully expects that the IRS will closely examine the ruling request or claim. In the case of a private letter ruling, the taxpayer provides the IRS with a complete set of facts and law. The Office of Chief Counsel performs an in-depth review of the request and may even ask for additional information. The governing revenue procedure requires that an adverse ruling or withdrawal of a letter ruling be referred to the IRS office with examination jurisdiction.

Similarly, the IRS closely scrutinizes taxpayer challenges to the IRS’s computation of interest. For instance, Internal Revenue Manual (“IRM”) § 20.2.5.7 and § 20.2.14 provide formal review procedures for claims based on “use of money” principles and interest-netting, respectively. IRM § 20.2.1.4 provides that even informal inquiries regarding the accuracy of the IRS’s interest computations typically must be routed to an IRS interest specialist for review. In addition, various IRM provisions, such as IRM § 20.2.8.3(1)(a) and IRM § 20.2.8.3(1)(b), require IRS employees who compute or adjust any interest amounts to explain and document their actions.
By limiting contingent fees to situations in which the practitioner reasonably anticipates substantive review by the IRS, current § 10.27 appropriately prevents practitioners from assisting clients to exploit the audit selection process. Proposed § 10.27(b) expands the prohibition of contingent fees to include any services rendered in connection with any matter before the IRS. This broad-brush prohibition is, on the one hand, duplicative of the current rule (which effectively addresses “playing the audit lottery” concerns) and, on the other hand, over-inclusive insofar as it extends to tax services provided under circumstances that have no relationship to this perceived abuse.

Nor can such a broad-brush prohibition be justified as a means of ensuring “attorney or auditor independence.” Auditor independence is, of course, an important issue, but it is not an issue that directly concerns OPR. There are other governmental agencies charged with the responsibility of ensuring auditor independence, including the preservation of that independence within the context of tax advice and services. By contrast, we find the concept of “attorney independence” to be misapplied. The ABA Model Rules of Professional Conduct direct attorneys to “zealously” assert the client’s position under the rules of the adversary system and, in a proceeding before an administrative body, to present the client’s position “with persuasive force.” See Preamble and Comments to Model Rule 3.3, which applies to an attorney representing a client in a non-adjudicative proceeding pursuant to Model Rule 3.9.

Similarly, the ABA Standing Committee on Ethics and Professional Responsibility has addressed the role of attorneys as tax advisors and as representatives of clients before the IRS. See Formal Opinion 314 (April 27, 1965) and Formal Opinion 85-352 (July 7, 1985). These Formal Opinions confirm that attorneys providing tax advice or representing clients in matters involving the IRS are subject to a variety of ethical duties. However, neither Formal Opinion requires the attorney to be “independent” in the sense that an auditor scrutinizing the financial statements of a company is required to avoid potentially compromising entanglements in order to ensure objectivity and detachment in the performance of the auditor function. Consequently, we do not believe that ensuring “auditor or attorney independence” is an appropriate justification for prohibiting the use of contingent fees.

Finally, even if the proposed amendment to § 10.27 is adopted in its present form, the provision permitting contingent fees in connection with the Service’s examination of or challenge to an amended return or a claim for refund should not be limited to those cases in which the amended return or refund claim was filed prior to the taxpayer’s receipt of a written notice of the examination or written challenge to the return. Contingent fees should also be permitted in those cases in which the amended return or claim for refund was filed after the taxpayer’s receipt of written notice of examination or challenge to the original return. Why proposed § 10.27(b)(2)(ii) would permit contingent fees when the amended return or refund claim was filed before the taxpayer received written notice of an examination of or challenge to the original tax return, but not after the taxpayer received such notice, is unclear. If the concern is that some form of misconduct may occur in connection with the filing of amended returns or refund claims in the latter situation, the Service should address such misconduct directly pursuant to the substantive provisions of the Code or of Circular 230. Categorically prohibiting the use of contingent fees in all such cases unnecessarily intrudes into the private relationship between practitioners and their clients unless there is a justifiable basis for concern in a large majority of such cases.
(2) The expanded definition of contingent fee is overly broad and unnecessary.

Practitioners and their taxpayer-clients regularly establish the fees to be charged by the practitioners on the basis of multiple factors, including the time spent by the practitioner on the matter, the practitioner’s expertise and experience, the importance of the matter to the taxpayer (including the amount the taxpayer has at stake in the matter), and, in some cases, the result attained for the taxpayer by the practitioner’s services. See Rule 1.5 of the ABA Model Rules of Professional Conduct. By contrast, the expanded definition of “contingent fee” in proposed § 10.27(c)(1) includes “a fee…that otherwise depends on the specific result attained.” We do not believe that every fee arrangement that takes into account, among other factors, the result attained should be classified as a contingent fee. It is also important to note that, in many situations, tax-related services may only constitute a small portion of the total services that the practitioner provides to a client in connection with a particular matter. If, contrary to our strong recommendation below, the prohibition of contingent fees in proposed § 10.27 is extended to matters involving tax planning and advice, clarifying the reference to “specific results attained” may become especially critical. Consequently, we recommend that the quoted phrase in proposed § 10.27(c)(1) should be revised to read as follows: “a fee…that depends in material part upon the specific tax result attained.”

(3) The proposed amendments include an unnecessary, overly broad, and confusing definition of “matter before the Internal Revenue Service.”

Proposed § 10.27(c)(2)’s definition of a “matter before the Internal Revenue Service” is broader than and inconsistent with the definition of “practice before the Internal Revenue Service” in either current § 10.2(a)(4) or in the proposed amendment to that section. In addition to the confusion that may result from two definitions of similar phrases, OPR is arguably purporting to assert jurisdiction over contingent fees in connection with matters that do not constitute “practice before the Internal Revenue Service.”

As noted in the discussion of proposed § 10.2(a)(4), supra, there is an important distinction between conduct involving a “practitioner” that is subject to regulation under Circular 230 because he or she is a practitioner and conduct that constitutes “practice before the Internal Revenue Service.” However, the proposed amendments blur this distinction. In particular, proposed § 10.27(b)(1) purports to regulate practitioner conduct relating to contingent fees “in any matter before the Internal Revenue Service.” Such “matters” are defined to include “tax planning and advice.” In addition, this proposed amendment asserts that “presentations to the Internal Revenue Service” include “rendering written advice with respect to any entity, transaction, plan or arrangement….” Unlike § 330(d) of 31 U.S.C., the proposed amendment makes no reference to “having a potential for tax avoidance or evasion.” Indeed, such “written advice” is not even limited to “tax advice.” Compare proposed § 10.34 (imposing standards upon practitioners when they are advising a client to take positions on a tax return).

With respect to proposed § 10.27(c) (2), we recommend that the phrase “tax planning or advice” should be replaced by the phrase “advice concerning whether a specific position may be taken on a tax return” and the phrase “rendering written advice with respect to any entity, transaction, plan or arrangement” should be deleted. For the same reason, we also recommend that subsection (3) should be deleted from proposed § 10.27(b). The services rendered by a
practitioner in a judicial proceeding arising under the Internal Revenue Code do not constitute “practice before the Internal Revenue Service,” nor are the fees charged by such a practitioner for such services properly subject to regulation by the Secretary as “other conduct” of a practitioner. The regulation of contingent fees in a judicial proceeding falls properly within the supervisory authority of the applicable court. The Secretary does not independently need to regulate such fees. More importantly, we respectfully object to the implication of proposed § 10.27(b)(3) that the Secretary may properly regulate the conduct of practitioners when they are opposing IRS or Department of Justice attorneys in a court of law.

§ 10.29  Conflicting interests.

The proposed amendment to § 10.29(b) allows a practitioner to continue a representation in which a conflict may have arisen provided that a client affected by a conflict of interest “waives the conflict of interest and gives informed consent, confirmed in writing by the affected client, at the time the existence of the conflict of interest is known by the practitioner.” Proposed § 10.29(c) mandates presentation of such written consents to IRS employees on request.

Rule 1.7 of the ABA Model Rules of Professional Conduct provides that, under the circumstances described in proposed § 10.29(b)(3), a client may give “informed consent, confirmed in writing.” The comments to Model Rule 1.7 state that “[s]uch a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent.” There is no reason to impose upon tax practitioners under Circular 230 a higher standard than that set out in the ABA Model Rules. Accordingly, we recommend that proposed § 10.29(b)(3) should be modified by deleting the phrase “by the affected client.”

The proposed version of § 10.29 specifies that the client’s waiver of a conflict of interest and informed consent must occur “at the time the existence of the conflict of interest is known by the practitioner.” As drafted, this language might be interpreted to invalidate prospective waivers of anticipated conflicts of interest before they actually materialize. Such an interpretation would be at odds with the position of the ABA Standing Committee on Ethics and Professional Responsibility. See ABA Formal Opinion 05-436 (May 11, 2005). Formal Opinion 05-436 recognizes that, so long as a client reasonably understands the material risks that the waiver entails, it is permissible for an attorney to secure a written waiver, signed by the client, of a conflict of interest that may arise in the future. In this respect, Formal Opinion 05-436 reaffirms the American Bar Association’s interpretation of Rule 1.7 of the Model Rules of Professional Conduct. See ABA Model Rules of Professional Conduct, Rule 1.7 Comment [22].

We recommend that the same rule should apply with respect to future conflicts in connection with a practitioner’s practice before the Internal Revenue Service. In the first place, identifying the moment in time when “the existence of the conflict of interest is known by the practitioner” is problematic, particularly because, by definition, it requires a prospective determination whether a conflict of interest actually exists. More importantly, regardless of the timing of the waiver relative to the practitioner’s knowledge that, now, the conflict of interest has ceased to be a probability and has become an actuality, the important issue is whether the waiver is effective, i.e., whether the client has received a comprehensive explanation of the types of conflicts that might arise, the actual and reasonable foreseeable adverse consequences of the
practitioner’s continued representation under such circumstances and whether it is reasonably likely that the client actually understands the material risks that the conflict waiver would entail.

So long as these requirements are satisfied and consistent with Formal Opinion 04-436, we believe that a prospective waiver of a future conflict of interest should be permitted in the context of proposed § 10.29. Such prospective waivers eliminate the necessity for seeking out the client, explaining the circumstances and potential risks relating to a waiver, and securing the appropriate documentation under what may be inopportune or distracting conditions. By contrast, the use of prospective waivers of future conflicts of interest, subject always to the requirement of informed consent, may actually benefit the client. It permits the client to understand and evaluate the risks involved in the prospective waiver in a more deliberative manner. It may also sensitize the practitioner to potential conflicts of interest and better enable the practitioner to avoid them before they occur.

In some instances, in order to comply with the requirement of full disclosure, a practitioner may refer in writing to matters that are protected by the attorney-client or other privileges, including the attorney work product doctrine, or that are otherwise private or confidential. Under no circumstance should such a writing be producible under § 10.29. Section 10.29(c) should be amended to state that written consents may be redacted to avoid disclosure of privileged material or information to IRS employees. It should also provide that such written consents are not required to detail the specific circumstances creating the conflict of interest or the basis on which the affected client has given informed consent to continued representation by the practitioner.

§ 10.34(a)(2) Standards with respect to tax returns, affidavits and other papers.

As currently drafted, proposed § 10.34(a) lacks clarity regarding the requirements relating to adequate disclosure in connection with return positions that are permissible because they are not frivolous. The first sentence of proposed § 10.34(a), which deals with practitioners in the role of return preparers, specifically refers to the “adequate disclosure” requirement. By contrast, in the second sentence of proposed § 10.34(a), which deals with the role of the practitioner as an advisor, the current reference to advising concerning adequate disclosure has been deleted. Technically, the requirement that a practitioner may advise concerning a position that is not frivolous only if he or she also advises concerning adequate disclosure is addressed in new § 10.34(c)(2). However, on a stand-alone basis, proposed § 10.34(a)(2) includes no such requirement. To make proposed § 10.34(a) more understandable, we recommend including a new subparagraph 10.34(a)(3) that provides as follows: “The practitioner complies with paragraph (c) of this § 10.34.”

§ 10.50 Sanctions.

The proposed amendment would add a new § 10.50(c) to implement the JOBS Act provisions authorizing the imposition of monetary sanctions for violations of Circular 230. These monetary sanctions would apply to the practitioner and to the practitioner’s employer, firm, or other entity on behalf of whom the practitioner was acting in connection with the sanctionable conduct. As provided in the enabling legislation, a monetary sanction may not exceed the gross income derived by the practitioner, employer, firm, or other person. However,
proposed § 10.50(c) provides no guidance as to the relationship between the seriousness of the sanctionable conduct and the nature and extent of the sanctions to be imposed. As a matter of principle, the severity of the sanctions to be imposed should be reasonably related to the seriousness of the offense. However, in some cases, either (i) it will prove difficult to determine the amount of the income derived from the sanctionable conduct, and/or (ii) a transaction that involved a minor violation of Circular 230 may also yield a large amount of gross income to the practitioner, employer, firm, or other person. To ensure that any sanction, whether monetary or otherwise, imposed for a violation of Circular 230 bears a reasonable relationship to the seriousness of the practitioner’s misconduct, taking into account all relevant facts and circumstances, we recommend that proposed § 10.50(d) should be redesignated as § 10.50(e) and that a new § 10.50(d) should be inserted to provide as follows:

“(d) Sanctions to be imposed. The sanctions imposed by this section shall in all cases bear a reasonable relationship to the conduct subject to sanction, taking into account all relevant facts and circumstances.”

§ 10.51 Incompetence and disreputable conduct.

Proposed § 10.51 provides fifteen examples of incompetent and disreputable conduct for which a practitioner may be disciplined. Some of the examples are troubling in their breadth and impact outside tax practice. In addition, the introductory language to proposed § 10.51 suggests that a practitioner may be sanctioned for “incompetence.” However, incompetence is more appropriately considered in the context of malpractice, which is generally governed by the applicable standards in the area where the practitioner practices. Thus, we question whether OPR should engage in the analysis of a practitioner’s professional services to determine a practitioner’s “competence” for disciplinary purposes. By contrast, we note that several categories of disreputable conduct described in proposed § 10.51(a) refer to “gross incompetence.” This term is specifically defined in proposed § 10.51(a)(13). We recommend that the title of proposed § 10.51(a) and the introductory language should be modified by inserting the word “gross” before “incompetence.”

We offer the following comments about certain examples set forth in proposed § 10.51(a).

Proposed § 10.51(a)(4) states as follows:

Incompetence and disreputable conduct for which a practitioner may be sanctioned under § 10.50 includes . . .

(4) Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing such information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, or any other document or statement, written or oral, are included in the term information.
This example is potentially overbroad because the phrase “participating in any way” can extend to situations in which a client gives false information to the IRS without the practitioner’s knowledge, even though the practitioner knows the information in question is false.

Proposed § 10.51(a)(4) also overreaches by extending the scope of the example to include practitioner conduct in connection with judicial proceedings. Practitioner conduct in connection with a judicial proceeding is not “practice before the Internal Revenue Service.” It is practice before a court. Courts possess the inherent authority to discipline misconduct by those who appear before them. Unless, therefore, the presiding court refers the practitioner’s conduct to OPR for further consideration, we believe OPR should refrain from any effort to assert jurisdiction under Circular 230 over the conduct of practitioners in the course of judicial proceedings. Consequently, we recommend that proposed § 10.51(a)(4) should be revised as follows:

(4) Knowingly or willfully giving false or misleading information, or knowingly or willfully participating in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, in connection with a matter before the Internal Revenue Service. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, or any other document or statement, written or oral, are included in the term information.

Proposed § 10.51(a)(7) is awkward in construction and vague in meaning, in particular in its use of the terms “encouraging” and “suggesting.” Clearer language may be: “Willfully aiding or assisting in, procuring, counseling, or advising a client or prospective client in the violation of any Federal tax law.” This language tracks comparable language in the Code. See, e.g., 26 U.S.C. § 7206(2). The balance of the example should be deleted. The term “illegal plan” is vague and undefined. Counseling evasion of Federal taxes is covered by the example, and is itself criminal and accordingly sanctionable.

Proposed § 10.51(a)(12) should be edited for grammatical reasons to read: “…making false accusations or statements, knowing them to be false, or circulating or publishing malicious or libelous matter.”

Proposed § 10.51(a)(13) should be modified to omit references to incompetence and should be revised to read as follows:

(13) Knowingly or recklessly giving an opinion as to any Federal tax matter that is false or is intentionally or recklessly misleading or engaging in a pattern of providing inaccurate or misleading opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (13) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner
should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly or recklessly.

§ 10.60(a) Probable cause determination.

Proposed § 10.60(a) authorizes the Director to commence formal proceedings against a practitioner if a pending charge cannot be resolved voluntarily. The decision of the Director to commence formal proceedings is wholly discretionary. Moreover, under proposed § 10.72(d), the institution of formal proceedings is a public act: the identity of the practitioner and the proposed charges are subject to public disclosure, and proposed § 10.72(d) contemplates that the IRS will publish this information on its website.

Spokesmen for OPR have described the disciplinary hearing process contemplated by proposed §§ 10.60(a), et seq., as equivalent to the disciplinary procedures employed by many state courts to resolve charges against attorneys. Because of these statements, as well as the nature of the subject matter, our comments evaluate the proposed disciplinary hearing procedures contemplated under Subpart D of Circular 230 in light of the ABA Model Rules For Lawyer Disciplinary Enforcement. From this perspective, the process contemplated by proposed § 10.60(a) lacks an essential safeguard that is mandated by the Model Rules and by fundamental notions of procedural due process: there is no requirement that the Director must make a preliminary showing of probable cause to the satisfaction of a neutral arbiter before commencing formal (and public) proceedings against a practitioner.

Requiring a preliminary showing before a neutral arbiter that the proposed charges against a practitioner possess a demonstrable factual basis advances a number of important interests. First, it ensures that practitioners will not be forced to endure an extended period of uncertainty or incur potentially substantial expenses to defend themselves solely at the Director’s discretion. Second, because of the linkage between the commencement of formal proceedings and the widespread public disclosure of the practitioner’s identity contemplated by proposed § 10.72(d), requiring a preliminary showing of probable cause gives the practitioner some protection against the corrosive and largely irreversible effects of a public indictment for engaging in disreputable conduct. Third, a probable cause requirement will also serve the institutional interests of the IRS by ensuring that limited and valuable resources are not inappropriately allocated to the prosecution of charges that are not adequately factually founded. Finally, from the perspective of the practitioner community and of the public, the probable cause requirement reduces any basis for suspicion that the Director’s powers might be used inappropriately against practitioners who are particularly outspoken or critical in the context of adversary proceedings involving the IRS.

As a matter of procedure, therefore, we recommend that proposed § 10.60(a) should be modified to provide that, before a practitioner may be required to file an answer and thereafter to defend himself or herself against a formal complaint, the Director should be required to make a

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2 These Model Rules and the associated commentary are conveniently accessed at the website of the ABA Center for Professional Responsibility. See http://www.abanet.org/cpr/disenf.

3 These concerns are further discussed in our comments on proposed § 10.72(d), below.
factual showing that demonstrates to the satisfaction of an Administrative Law Judge that probable cause exists to believe that the disreputable conduct charged in the complaint actually occurred. This probable cause showing should not be an *ex parte* proceeding. See § 10.69 of current Circular 230. Rather, the practitioner should be given adequate prior notice and an opportunity to be heard.4

Moreover, consistent with Rule 11 of the Model Rules for Lawyer Disciplinary Enforcement, we also recommend that the Administrative Law Judge who makes the determination of probable cause should thereafter be disqualified from presiding over subsequent proceedings involving the practitioner and, in order to eliminate any opportunity for forum shopping, that the Director should be precluded from seeking a probable cause determination from more than two Administrative Law Judges with respect to formal charges arising out of the same factual circumstances.

§ 10.61 Conferences.

Proposed § 10.61(a) permits, but does not require, OPR to initiate a conference with a practitioner who is under investigation prior to the initiation of a formal proceeding. The better practice would be to confer at the practitioner’s request, either in person or by telephone or video at the practitioner’s option, except for unusual circumstances or in cases of expedited suspension under § 10.82.

Proposed § 10.61(b) bears the heading “Resignation or voluntary sanction” but then fails to address resignations. The title should conform to the content. Substantively, in any situation in which the Director declines an offer submitted pursuant to § 10.61(b), proposed § 10.61(b) should state explicitly that the Director may inform the practitioner of what specific terms the Director is willing to accept, and, at a minimum, should require the Director to identify with specificity the deficiencies in the declined offer.

§ 10.63 Service of complaint; service of other papers; service of evidence in support of complaint; filing of papers.

Proposed § 10.63(d) would require the disclosure of “evidence in support of the complaint.” This language should be changed to require production of all evidence collected by the OPR in the course of investigating the respondent. OPR should be required to provide incriminating as well as exculpatory evidence in its possession. Additionally, the obligation should be continuing: OPR should be required to serve the respondent with any evidence it obtains after the proceeding has been instituted, within 10 days of receipt by OPR, unless the evidence is received from the respondent.

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4 The requirement of prior notice and an opportunity to be heard is consistent with Rule 3 of the ABA Model Rules for Lawyer Disciplinary Enforcement. We anticipate that the nature and extent of the practitioner’s right to be heard will vary, depending upon the manner in which the attorney representing the Director of OPR undertakes to make the probable cause showing. Consistent with current §10.69, any written submissions would be served upon the practitioner, who would be permitted to respond in writing. By contrast, if any oral presentation occurs, the practitioner and the practitioner’s representative would be permitted to attend in person or by means of audio or video-conference. If the attorney representing the Director offers testimony, the practitioner would be permitted to cross-examine and to offer rebuttal testimony.
§ 10.65 Supplemental charges.

Proposed § 10.65(a) would provide the Director with unlimited authority to amend the complaint in an ongoing proceeding. Despite the examples, which relate to the ongoing proceeding, the language of proposed § 10.65(a) would permit the Director to bring supplemental charges for conduct unrelated to the proceeding. To the extent that the Director might seek to bring charges for unrelated conduct that was discovered after the initial complaint was filed, such allegations should be pursued separately and without regard to a pending proceeding. At a minimum, therefore, the phrase “for example” in proposed § 10.65(a) should be deleted. However, for the reasons stated below, we recommend that proposed § 10.65 should be deleted altogether.

The proposed amendment denies the respondent the procedural protections associated with the initial allegations. Regardless of whether the Director is seeking to bring supplemental charges relating to conduct outside of the proceeding or conduct arising as part of the proceeding, it is inherently unfair to force the respondent to defend against new charges announced after the proceeding has begun. If the Director decides to institute a proceeding against the practitioner for supplemental charges, the Director should institute such proceeding separately, then file a motion with the Administrative Law Judge (subject to § 10.68) to combine the supplemental charges with the original charges. The Administrative Law Judge should have the ultimate discretion in deciding whether it is appropriate to add supplemental charges against the respondent once the proceeding has begun.

Even in cases in which the Director believes the practitioner is responding to the complaint falsely and in bad faith or is introducing false testimony during the proceeding, it is unclear why giving the Director the authority to institute supplemental charges is appropriate. These are matters for the trier of fact -- the Administrative Law Judge -- to consider. The Director will have an opportunity to challenge the respondent’s veracity during the proceeding. If the Administrative Law Judge finds that the respondent’s responses or testimony are false, the Administrative Law Judge may take those findings into account when sanctioning the practitioner on the initial charges. If further sanctions seem appropriate, the Director is free to commence an additional proceeding pursuant to §§ 10.51(d) and (k).

§ 10.71 Discovery.

As stated in the comments to proposed § 10.63, supra, OPR should be required to produce all evidence obtained in the course of investigating the respondent, including evidence received subsequent to the commencement of proceedings. Proposed § 10.71 should clearly state that nothing herein should be construed to limit such an obligation. In addition, the Administrative Law Judge should not be restricted to specific forms of discovery. Proposed § 10.71(f) should be deleted, and replaced with a provision that allows for the Administrative Law Judge to direct other forms of discovery upon a showing of the inadequacy of depositions, admissions, and document disclosure to meet the circumstances in a given matter.
§ 10.72(d) Hearings. Publicity of proceedings.

Under current § 10.71(b), disciplinary proceedings pursuant to Circular 230 are not public unless the Administrative Law Judge grants a practitioner’s request for public proceedings. Proposed § 10.72(d) would change the current procedures and would make public and open to inspection all pleadings, hearings, evidence, reports, and decisions that are part of the proceedings before the Administrative Law Judge. Proposed § 10.72(d) provides for redaction of third party identifying information, and, under various circumstances, requires or permits the Administrative Law Judge to prevent or to limit disclosure of sensitive information, but the identity of the practitioner whose conduct is in question would not generally be kept confidential.

The proposed change puts the reputation of practitioners in jeopardy prematurely. Because proposed § 10.72(d) would permit the disclosure of the practitioner’s identity before any neutral party has found probable cause for further proceedings, it has created apprehension among practitioners. They fear that individual practitioners may feel pressured to accede to voluntary sanctions or other concessions as part of the disciplinary process that may not be factually justified simply in order to avoid the prospect of public identification. Moreover, it appears that the premature identification of a practitioner’s identity is not necessary in order to further the laudable goals that the proposal is intended to advance.

Consequently, we recommend that no public disclosure of a practitioner’s identity should be permitted until an Administrative Law Judge has made a determination that the charges against the practitioner are supported by probable cause. Consistent with Rule 11 of the Model Rules for Lawyer Disciplinary Enforcement, we also recommend that this probable cause determination should occur before a formal complaint may be filed. Thus, preparing for and participating in the probable cause determination might be designated as the initial responsibility of the IRS attorney from General Legal Services who assumes responsibility for representing the Director before the Administrative Law Judge.

(1) Public disclosure of disciplinary proceedings before the Administrative Law Judge is premature, and not consistent with analogous public disclosure of disciplinary proceedings.

The Preamble to the proposed amendments does not set out the rationale for proposed § 10.72(d). It has been suggested informally by OPR that the proposed change is based on and similar to the procedures followed by 41 state bar authorities in connection with disciplinary actions initiated against lawyers in those states. (See, e.g., Tax Analysts, “Tax Notes Today,” Feb. 6, 2006.) More recently, it was reported that the immediate past Director of OPR suggested that the proposed change is analogous to the disclosure made in a criminal indictment. (See, e.g., Tax Analysts, “Tax Notes Today,” April 14, 2006.) These analogies fail because of differences in the structure of disciplinary proceedings under Circular 230. Moreover, the proposed changes are not consistent with the ABA Model Rules for Lawyer Disciplinary Enforcement.

In particular, under the Model Rules and in the state disciplinary proceedings based on the Model Rules, disciplinary proceedings against a lawyer are not publicized unless and until there has been an independent determination by a neutral party that probable cause exists to
believe that the lawyer engaged in sanctionable conduct. Because a significant number of states have adopted disciplinary procedures that substantially follow the Model Rules, they offer a sound basis for determining the safeguards that should apply before a practitioner is publicly accused of violating Circular 230.

The Model Rules contain the following procedures, which combine to provide a significant degree of assurance that the identity of a lawyer accused of professional misconduct will be protected from premature adverse publicity:

(a) Under Model Rules 1 and 2, the entire disciplinary process is directly and exclusively controlled by the highest court in the state. This requirement establishes, in perception and in reality, that the disciplinary system is not biased against a lawyer whose conduct has been questioned by a client, an opposing party, or another person. Moreover, under Model Rule 2(B), two lawyers serve as members of the state disciplinary board for every non-lawyer member.  

(b) Under Model Rules 3, 4, and 11, a lawyer who serves as chair of one of a number of hearing committees established and appointed by the state’s disciplinary board must review a recommendation by disciplinary counsel (who is appointed either by the board or by the state’s highest court) to file a formal complaint against a lawyer for alleged misconduct. As noted in the official Commentary to Model Rule 11, “The approval of [disciplinary] counsel’s recommendation to file formal charges by the reviewing member [i.e., a hearing committee chair] amounts to a finding of probable cause to proceed.”

(c) Under Model Rule 16(C), disciplinary proceedings do not become public until “after a determination that probable cause exists to believe that misconduct occurred and after the filing of formal charges.”

By contrast, the safeguards against the public disclosure of unwarranted charges required by the Model Rules and in state bar disciplinary proceedings based on the Model Rules will not exist under the disciplinary hearing procedures contemplated by proposed § 10.72(d).

In the first place, OPR is a prosecutorial agency. Its Director has the authority under Circular 230 to discipline a practitioner who “is shown to be incompetent or disreputable, fails to comply with any regulation in this part, or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client.” § 10.50. Furthermore, the Director of OPR is a member of the IRS Enforcement Committee. (See IR-2003-148, December 29, 2003.)

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5 In Pennsylvania, for example, which generally follows the Model Rules, 14 of the 16 members of the Disciplinary Board are lawyers. See www.padisciplinaryboard.org.

6 In this respect, the ABA Model Rules for Lawyer Disciplinary Enforcement recognize that public hearings serve to protect the integrity of the disciplinary process. However, until a neutral determination of probable cause has occurred, this important objective is subordinated to the need to protect accused practitioners against publicity predicated on unfounded accusations. See ABA Model Rules for Lawyer Disciplinary Enforcement, Commentary to Rule 16.
In the second place, OPR is not administratively independent. It is part of the IRS. In the IRS organizational chart, the Director of OPR reports to the Deputy Commissioner for Services and Enforcement. This Deputy Commissioner is also responsible for supervising the IRS personnel who are the most likely source of complaints of practitioner conduct to OPR.

Circular 230 directs any officer or employee of the IRS who has reason to believe that a practitioner has violated any provision of Circular 230 to file a report with OPR. § 10.53(a). In many cases, there may be an adversarial relationship between the practitioner and the reporting officer or employee, who, under some circumstances, may also consider himself or herself to be the victim of practitioner conduct proscribed by Circular 230. Even if the complaint against the practitioner is initiated by a third party, the IRS officer or employee who prepares the report to OPR will have made a preliminary judgment that further proceedings are warranted. In other words, the IRS personnel who prepared written complaints against the practitioner for submission to OPR cannot be regarded as a “neutral” source.

Nevertheless, because both the IRS personnel who are the most likely source of complaints against practitioners and OPR, which is charged with prosecuting those complaints, are combined within a single administrative unit, there exists the potential for an institutional bias to develop to the disadvantage of the individual practitioner. The hearing procedures set forth in Subpart D of Circular 230 are intended to ensure that the ultimate disposition of complaints against individual practitioners comport with due process of law. However, at the point in time when proposed § 10.72(d) contemplates the publication of the practitioner’s identity as well as the details of the pending charges, these due process safeguards will not yet have come into play. The authority to discredit a practitioner’s reputation which proposed § 10.72(d) proposes to lodge in OPR, under circumstances in which OPR is functioning as a prosecutor, not as a detached “neutral” making an independent determination of probable cause, stands in sharp contrast to the position of charging bodies in state bar proceedings or in the procedures set out under the Model Rules.

As previously noted, the immediate past-Director of OPR has reportedly suggested that public disclosure of charges against a practitioner was similar to public disclosure of a criminal indictment. The differences in the two forms of proceedings are, however, stark. A criminal indictment charges a crime, alleged to have been committed with requisite criminal intent; disciplinary proceedings under Circular 230 may include charges ranging from negligence to disreputable conduct. A criminal indictment is sought by a prosecutor to vindicate the interests of a specific victim or the public; charges by OPR will more often be sought to vindicate the position of the IRS, and in essence will always be based on issues relating to practice before the IRS. Also, while the prosecutor in a criminal case, as distinct from OPR, will stand independent of the victim, the grand jury or the court will still serve as a safeguard to a prosecutor’s overzealousness. No such safeguard is provided in proposed § 10.72(d).

Moreover, the magnitude of the potential damage to the practitioner’s reputation and client relationships deserves emphasis. Under proposed § 10.72(d), public disclosure of the practitioner’s identity and of the charges against him will commence simultaneously with the filing of a formal complaint. Proposed § 10.72(d) would, therefore, permit public disclosure even before the practitioner had received an opportunity to prepare and file an answer to the complaint. Furthermore, under the proposed procedure, public charges of disreputable conduct
against a practitioner can remain unresolved for over a year after the filing of the Director’s complaint. Regardless of the outcome, the long-term detrimental effects of such a public accusation upon the practitioner’s relationship with existing clients and colleagues, upon the practitioner’s ability to attract new clients, and upon the practitioner’s own personal stability and morale may be irreversible.

Thus, under proposed § 10.72(d), there will be no determination by a neutral party as to whether the charges against the practitioner are factually justified until the Administrative Law Judge issues a decision on the merits. This decision may not occur for more than a year after the public disclosure on the IRS website of the practitioner’s identity and of the pending charges. While we recognize there are substantial benefits to be derived from the public disclosure of disciplinary processes, we submit that no practitioner should be subjected to the risk of potentially irreversible harm in such cases without a neutral determination that the charges against the practitioner are at least supported by probable cause. Moreover, if no such preliminary determination by an Administrative Law Judge of probable cause is afforded to the practitioner, the public disclosure of the practitioner’s identity prior to issuance of the Administrative Law Judge’s decision on the merits would be improper.\(^7\)

\(2\) Proposed § 10.72(d) has fostered the perception that the prospect of premature publicity may cause practitioners to make concessions in the disciplinary process that may not be factually supported or otherwise warranted.

Practitioners are seriously concerned by proposed § 10.72(d) because allegations of professional misconduct can inflict irreparable damage to the public reputation of accused practitioners, with concomitant financial hardship. Notably adding to this discomfort, proposed § 10.72(d) expressly contemplates making documents available through the IRS website. In the internet age, years of effort to establish one’s professional standing can be undermined in a matter of hours. The mere threat of such publicity without any neutral determination that the charges involved are well-founded would give the Director an excessive amount of leverage over an accused practitioner when negotiating the terms of a possible voluntary resolution of pending charges.

OPR itself should be concerned that its ability under proposed § 10.72(d) to make public allegations is seen as too strong a tool. It is essential to the integrity of OPR that disciplinary sanctions imposed upon practitioners are perceived to be factually based on provable charges. However, the risk that a practitioner may compromise a proceeding to avoid premature publicity, rather than because the facts are indisputable, is real and detrimental. Some may even elect to accept a public sanction for charges that may be disputable, rather than face the harm of long-

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\(^7\) In making this observation, we are aware that proposed § 10.72(d)(3)(ii) contemplates a process by which, upon a showing of good cause, an Administrative Law Judge may issue any order that “justice requires” to protect information that is privileged, confidential or sensitive in some other way. However, as proposed, this procedure does not constitute a determination of probable cause. Rather, it implements a process in which public disclosure of the practitioner’s identity is the norm and is only to be limited or deferred on the basis of a showing of extraordinary or compelling circumstances. It does not provide protection to the probable cause determination contemplated by the Model Rules for Lawyer Disciplinary Enforcement.
term publicity from lengthier proceedings. Publicizing a sanctioned practitioner’s identity only after a proceeding before an Administrative Law Judge mitigates this concern.

(3) The laudable goal of publicizing OPR efforts and results does not require pre-hearing publication of practitioner identities.

The Preamble does not describe the purpose of proposed § 10.72(d). However, government representatives have characterized the proposal as an effort to achieve “transparency.” (See, e.g., Tax Analysts, “Tax Notes Today,” April 14, 2006.) OPR can meet this laudable goal in many other ways. As examples, statistical data, or hypothetical fact patterns and sanctions, may be publicized. Indeed, in comments submitted to the IRS in late 2005, the Section of Taxation encouraged the publicity of sanctions and similar steps to educate practitioners concerning OPR enforcement actions. See Letter dated December 8, 2005 from Dennis B. Drapkin to the Honorable Mark W. Everson, 2005 TNT 236-18. Results of specific cases, including the identity of the sanctioned practitioner, can be publicly disclosed at the conclusion of disciplinary proceedings. While the practitioner community and the public will undoubtedly benefit from more information concerning the types of conduct that OPR has chosen to prosecute and the resulting sanctions, those benefits do not require the public disclosure of the identity of individual practitioners simply because they have been charged with Circular 230 violations by the Director of OPR.

(4) Third parties should be provided an opportunity to review proposed redactions.

If the proposed amendment is finalized, third parties whose identifying information may be disclosed should be provided with an opportunity to review proposed redactions. In the context of publication of private letter rulings under § 6110, procedures have been established to protect the identity of the taxpayer. A similar opportunity to review the proposed redaction should be provided to the third party for any portion of the disciplinary proceedings that are to be publicly disclosed.

§ 10.76 Decision of Administrative Law Judge.

The protection of third-party taxpayer information is of sufficient concern that the word “must” may be more emphatic than “should” in proposed § 10.76(a)(3).

In proposed § 10.76(b), there should be only one standard of proof for all cases: clear and convincing evidence. At a minimum, if two separate standards are to remain, the standard to be applied should be based on the greatest sanction that OPR seeks in the complaint. Further, the language that states that “the Administrative Law Judge, in rendering findings and conclusions, will consider an allegation of fact to be proven if it is established by the party who is alleging the fact by a preponderance of evidence in the record” (emphasis added) may have the improper effect of shifting the burden of proof. The burden of proof should remain solely with the Director. If OPR is unable to prove allegations against the respondent, then the Administrative Law Judge cannot sanction the respondent. There should be no burden, or suggestion of any burden, on the respondent to disprove the allegations.
§ 10.82 Expedited suspension.

Section 10.82 currently authorizes the Secretary to suspend on an expedited basis any practitioner who, within the previous five years, was convicted of certain specified crimes, whose license to practice was suspended or revoked for cause by a court or other authorized body, or who has violated a specific condition previously imposed by the Director of OPR in connection with a prior violation of Circular 230. See §§ 10.82(b)(1) through (3). The applicable procedure in such cases is brief. Sections 10.82(c) through (e) contemplate the service of a complaint; the filing of an answer within 30 days after service of the complaint, unless extended by the Director; and a conference between an OPR representative and the practitioner and his or her representative. Following the conference, upon a finding that the allegations of the complaint are correct, the Director is authorized immediately to suspend the practitioner from practice before the IRS.

Notably, proposed § 10.82 provides no due process rights to the practitioner in the context of the conference other than notice of the charges against him or her and the right to the assistance of counsel. It is our understanding that, in fact, conferences in cases of expedited suspension rarely occur. Of greater concern is the fact that an expedited suspension occurs entirely at the behest of the Director and OPR. No Administrative Law Judge or other neutral decision-maker is involved. As a consequence, a practitioner’s ability to earn his or her livelihood can be summarily interrupted solely at the discretion of OPR, a prosecutorial agency.

An expedited suspension can remain in effect for as many as five years. Although an order of expedited suspension can be lifted in connection with a proceeding instituted pursuant to § 10.60, there is no requirement in such cases that the Director must institute such a proceeding. Rather, during a two-year period following expedited suspension, the suspended practitioner must initiate such a proceeding by filing a request with the Director. After the two-year window has expired, therefore, the expedited suspension is incontestable. See § 10.82(g).

As a consequence of these provisions, expedited suspension is not just a temporary measure intended to protect the public and the IRS while the normal proceedings contemplated by Subpart D of Circular 230 are being completed. Rather, in many cases, the summary procedures contemplated by § 10.82(b) will serve as a substitute for the normal processes. They will provide the only due process protections that the suspended practitioner receives.

Nevertheless, despite its summary nature and despite the potentially severe consequences to a suspended practitioner, the current procedures relating to expedited suspension are appropriate. The very limited grounds that justify expedited suspension are most serious and, for the most part, entail a prior determination by a court or other authoritative body that misconduct has occurred. There can be little doubt, for example, whether a practitioner has, in fact, been convicted of a disqualifying crime or whether a court or other authorized body has suspended or revoked the practitioner’s license. Furthermore, permitting a practitioner whose license has been revoked or who has been convicted of a serious crime to continue thereafter to practice before the IRS would tend to discredit OPR in the eyes of the practitioner community and the public.

By contrast, the use of expedited suspension in cases in which the practitioner has violated a condition that was previously imposed potentially raises questions of due process.
Under both current § 10.82 and under the proposed version, questions of admissibility and the burden of proof concerning an alleged violation of a previously imposed condition in the context of the conference with OPR are not addressed. Furthermore, what is key from a due process perspective is the nature and specificity of the previously imposed condition. If the violation of a previously imposed condition is to constitute grounds for expedited suspension, then the Director should be obligated to articulate such conditions with such clarity and specificity that, if a violation occurs, it will be obvious and incontrovertible. Otherwise, the alleged violation of a previously imposed condition is not an appropriate basis for expedited suspension.

Proposed § 10.82(b) would enlarge the circumstances justifying expedited suspension in two respects. First, proposed § 10.82(b)(4) would authorize the expedited suspension of practitioners for multiple, uncorrected failures to file returns or to pay tax. Second, proposed § 10.82(b)(5) would authorize the expedited suspension of practitioners who have been sanctioned by a court of competent jurisdiction, in either civil or criminal tax-related matters, for instituting or maintaining proceedings “primarily for delay,” for advancing frivolous or groundless arguments, or for failure to pursue available administrative remedies.

We do not support this proposed expansion of the grounds justifying expedited suspension. In contrast to the grounds currently specified in §§ 10.82(b)(1) and (2), the proposed additions do not provide an adequate degree of certitude that misconduct justifying the imposition of an expedited sanction has, in fact, occurred. In the case of proposed § 10.82(b)(4), the factual predicate -- a repeated and uncorrected failure to file returns or to pay tax -- is relatively clear-cut; but whether, under the circumstances, such conduct warrants a summary order of suspension can be a much more complicated question. Experience has proven that, in many cases, a repeated failure to file returns or to pay taxes may be a consequence of compelling mitigating circumstances. Using an expedited suspension procedure in such cases, therefore, may prevent a full evaluation of such circumstances and become an instrument of injustice.

Furthermore, in light of published reports estimating that a substantial number of practitioners are not in compliance with their return filing obligations, adopting proposed § 10.82(b)(4) as currently drafted would create a significant risk of arbitrary or discriminatory enforcement. Consequently, despite our recognition of the serious problems associated with practitioner non-compliance, we oppose the adoption of proposed § 10.82(b)(4). We believe that suspending a practitioner who has already been convicted of failure to file returns or to pay tax on an expedited basis is very different from suspending under an expedited procedure a practitioner who may be charged with a similar failure, but whose case has not yet been adjudicated. The certitude associated with a prior conviction, which requires a showing of willfulness, eliminates any potential ambiguity about the blameworthiness of the practitioner’s non-compliance. Where such certitude is lacking, however, we believe the practitioner should not be suspended from practice without the benefit of a proceeding instituted under §§ 10.60, et seq.

We also oppose adoption of proposed § 10.82(b)(5). We recognize that the factual predicate for expedited suspension under proposed § 10.82(b)(5)—having been sanctioned by a court for instituting or prolonging proceedings primarily for delay, for advancing “frivolous or groundless arguments,” or for failing to pursue available administrative remedies—is easily established. But we question whether the imposition of a sanction for such conduct, even by a
court of competent jurisdiction, justifies depriving the practitioner of the due process protections which he or she would receive in a proceeding under proposed §§ 10.60, et seq. In contrast to the adjudicatory acts contemplated by current §§ 10.82(b)(1) through (3), the imposition of a “sanction” is substantially less determinative because sanctions can vary dramatically in their magnitude and nature.

Moreover, an expedited suspension pursuant to proposed § 10.82(b)(5) would entail a serious, additional penalty that the sanctioning court may not have contemplated and may, in fact, regard as excessive. By its terms, proposed § 10.82(b)(5) would only be invoked after a court had already evaluated the practitioner’s conduct and had already imposed what it considered to be a suitable punishment. Under such circumstances, both as a matter of statutory authority and as a matter of fairness, we question whether the Director should ever suspend a practitioner, especially on an expedited basis, simply on the grounds that a court had previously imposed some kind of sanction. Furthermore, as we have previously mentioned, we do not believe that the Director’s authority to regulate practitioners in connection with their “practice before the Internal Revenue Service” extends to the conduct of those practitioners in a court of law.