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Regulations Governing Practice Before the Internal Revenue Service; Proposed Rule

DEPARTMENT OF THE TREASURY

Office of the Secretary

31 CFR Part 10

[REG–111835–99]

RIN 1545–AY05

Regulations Governing Practice Before the Internal Revenue Service

AGENCY: Office of the Secretary, Treasury.

ACTION: Notice of proposed rulemaking and notice of public hearing.

SUMMARY: This notice proposes modifications of the regulations governing practice before the Internal Revenue Service (Circular 230). These regulations would affect individuals who are eligible to practice before the Internal Revenue Service. The proposed modifications would clarify the general standards of practice before the Internal Revenue Service and would modify the standards for providing advice regarding tax shelters. This document also provides notice of a public hearing on the proposed regulations.

DATES: Comments and requests to speak and outlines of topics to be discussed from persons wishing to speak at the public hearing scheduled for May 2, 2001, in the auditorium of the Internal Revenue Building at 1111 Constitution Avenue, NW., Washington, DC 20224, must be received by April 12, 2001.

ADDRESSES: Send submissions to: CC:M&SP:RU (REG–111835–99), room 5226, Internal Revenue Service, P.O. Box 7604, Ben Franklin Station, Washington, DC 20044. Submissions may be hand delivered Monday through Friday between the hours of 8 am and 5 pm to: CC:M&SP:RU (REG–111835–99), Courier's Desk, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC. Submit comments and data via electronic mail (email) to http://www.irs.gov/tax_regs/regslist.html.

FOR FURTHER INFORMATION CONTACT: Concerning issues for comment, Richard Goldstein at (202) 622–7820 or Brinton Warren at (202) 622–4940; concerning submissions of comments and delivering comments, Guy Traynor at (202) 622–7180; (not toll-free numbers).

SUPPLEMENTARY INFORMATION:

Paperwork Reduction Act

The collection of information contained in this notice of proposed rulemaking has been submitted to the Office of Management and Budget for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507). Comments on the collection of information should be sent to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, W:CAR:MP:FP:S:O, Washington, DC 20224. Comments on the collection of information should be received by March 13, 2001. Comments are specifically requested concerning:

Whether the proposed collection of information is necessary for the proper performance of the Office of the Director of Practice, including whether the information will have practical utility;

The accuracy of the estimated burden associated with the proper collection of information (see below);

How the quality, utility, and clarity of the information to be collected may be enhanced;

How the burden of complying with the proposed collection of information may be minimized, including through the application of automated collection techniques or other forms of information technology; and

Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

The collection of information in these proposed regulations is in §§ 10.6, 10.29, and 10.30. Section 10.6 requires an enrolled agent to maintain records and educational materials regarding his or her satisfaction of the qualifying continuing professional education credit. Section 10.6 also requires sponsors of qualifying continuing professional education programs to maintain records and educational material concerning these programs and those who attended them. The collection of this material helps to ensure that individuals enrolled to practice before the Internal Revenue Service are informed of the newest developments in Federal tax practice.

Section 10.29 requires a practitioner to obtain and retain for a reasonable period written consents to representation whenever such representation directly conflicts with the interests of the practitioner or the interests of another client of the practitioner. The consents are to be obtained after full disclosure of the conflict is provided to each party. Section 10.30 requires a practitioner to retain for a reasonable period any communication and the list of persons to whom that communication was provided with respect to public dissemination of fee information. The collection of consents to representation and communications concerning practitioner fees protects the practitioner against claims of impropriety and ensures the integrity of the tax administration system.

Estimated total annual recordkeeping burden is 50,000 hours.

Estimated annual burden per recordkeeper varies from 30 minutes to 1 hour, depending on individual circumstances, with an estimated average of 54 minutes.

Estimated number of recordkeepers is 56,000.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a valid control number assigned by the Office of Management and Budget.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by section 6103 of the Internal Revenue Code.

Background

Section 330 of title 31 of the United States Code authorizes the Secretary of the Treasury to regulate the practice of representatives before the Treasury Department. The Secretary of the Treasury is authorized, after notice and an opportunity for a proceeding, to suspend or disbar from practice before the Department those representatives who are incompetent, disreputable, or who violate regulations prescribed under section 330 of title 31. Pursuant to section 330 of title 31, the Secretary has published the regulations in Circular 230 (31 CFR part 10). These regulations authorize the Director of Practice to act upon applications for enrollment to practice before the Internal Revenue Service, to make inquiries with respect to matters under the Director's jurisdiction, to institute proceedings for suspension or disbarment from practice before the Internal Revenue Service, and to perform such other duties as are necessary to carry out these functions.

The regulations have been amended from time to time to address various specific issues in need of resolution. For example, on February 23, 1984, the regulations were amended to provide standards for providing opinions used in tax shelter offerings (49 FR 6719). On October 17, 1985, the regulations were amended to conform to legislative changes requiring the disqualification of an appraiser who is assessed a penalty

under section 6701 of the Internal Revenue Code for aiding and abetting the understatement of a tax liability (50 FR 42014). The regulations were most recently amended on June 20, 1994 (59 FR 31523), to provide standards for tax return preparation, to limit the use of contingent fees in tax return or refund claim preparation, to provide expedited rules for suspension, and to clarify or amend certain other items.

On June 15, 1999, an advance notice of proposed rulemaking was published (64 FR 31994) requesting comments on amendments to the regulations that would take into account legal developments, professional integrity and fairness to practitioners, taxpayer service, and sound tax administration. On May 5, 2000, an advance notice of proposed rulemaking was published (65 FR 30375) requesting comments on amendments to the regulations relating to standards of practice governing tax shelters and other general matters.

Summary of Comments

Twenty-seven written comments have been submitted concerning the revision of Circular 230. All comments received have been considered and are available for public inspection upon request. The following paragraphs provide a summary of significant comments.

A few commentators expressed concern that, under the current regulations, a practitioner may be in violation of the regulations if the practitioner fails to furnish information or documents subject to a lawful request for documents made by an officer or employee of the Internal Revenue Service where neither the practitioner nor the practitioner's client possesses or controls the documents. These commentators suggested that § 10.20 of the regulations be clarified to provide that there is no violation of the regulations if the information or documents are not in the possession or control of the practitioner or the practitioner's client.

Some commentators expressed concern about a practitioner's obligation when notifying a client of any noncompliance with the revenue laws. The commentators recommended that a practitioner be required to advise the client of the action necessary to correct the error or omission and the consequences of not taking such action when notifying a client of any noncompliance with the revenue laws. Some commentators expressed concern about the current practice used by some practitioners to obtain oral consents to represent parties where there is a direct conflict of interest. They recommended that a practitioner be required to obtain written consents to represent parties where there is a direct conflict of interest.

Some commentators suggested that § 10.22 be amended specifically to permit a practitioner to demonstrate due diligence for purposes of these regulations based on the practitioner's reliance on the work product of an associate or partner. It also was suggested that § 10.24 be amended to permit a practitioner to share fees with a suspended or disbarred person during the period of suspension or disbarment, respectively.

Several commentators noted that the regulations regarding solicitation are not consistent with recent court decisions concerning in-person contacts of potential clients by certified public accountants. They suggested that the restrictions on in-person contacts be liberalized for all practitioners. It also was suggested that the prohibition of deceptive public solicitations be extended to deceptive private solicitations and that practitioners be prohibited from associating with an individual who uses deceptive solicitation practices, regardless of whether the deceptive practices related to business connected with the practitioner.

One commentator suggested that the regulations be modified to require the Director of Practice to notify a practitioner whenever a complaint has been filed against the practitioner, whether or not any action is taken against the practitioner as a result of the complaint.

Several comments were received recommending changes to the regulation of opinion writing by practitioners. Commentators recommended that new opinion standards be promulgated with respect to tax shelter opinions that are rendered for the purpose of establishing a reasonable cause and good faith defense to the accuracy-related penalties under section 6662 of the Internal Revenue Code (''reasonable cause opinions''). These commentators suggested that standards for such opinions impose factual due diligence requirements that, in particular, restrict the reliance on hypothetical facts or factual assumptions as the basis for such opinions. Some commentators suggested that reliance on factual assumptions regarding the business purpose or noneconomic consequences of a transaction be treated as inherently unreasonable. Comments also were received on whether and to what extent reliance in an opinion on taxpayer representations or certifications should be permitted and the conditions under which a practitioner may rely on the opinions of other practitioners.

Several commentators recommended that the new standards impose requirements with respect to the legal analysis contained in reasonable cause opinions, particularly that such opinions contain no unreasonable legal assumptions, address all material tax issues, evaluate relevant legal authorities and consider applicable judicial doctrines and statutory and regulatory anti-abuse rules. One commentator, however, thought it was unnecessary to impose an explicit requirement in Circular 230 that reasonable cause opinions address the applicability of relevant judicial doctrines. Another commentator considered it sufficient for Circular 230 merely to require that reasonable cause opinions consider the substance and purpose of the transaction under scrutiny.

Comments also were received as to whether a reasonable cause opinion should unambiguously opine on a comfort level of ''more likely than not'' or higher, should state that it is issued to establish reasonable cause, and other matters. A few commentators expressed concern that the definition of a tax shelter utilized in any opinion standards not be overly broad and that opinion standards under Circular 230 be coordinated with opinion-related requirements under the accuracy-related penalties. One commentator suggested that the opinion standards provide that satisfaction of the standards would meet a practitioner's obligations under Circular 230, but would not determine the persuasiveness of, and the taxpayer's good faith reliance on, the opinion. Two commentators also suggested that standards be promulgated for written advice used for marketing purposes.

Commentators generally did not oppose the expansion of sanctions to encompass lesser sanctions such as censure. Commentators did not support attribution of practitioner misconduct to other members of the practitioner's firm. Several commentators, however, stated that in instances where there has been a knowing participation or acquiescence in such misconduct by other members of a firm or a pattern of abuse by members of a firm, sanctions extending beyond the individual practitioner may be appropriate.

The majority of commentators supported a contingent fee limitation with respect to original tax returns if the fee arrangement was contingent on the return position being sustained. Such fee arrangements may indicate an inappropriate reliance on the ''audit

lottery.'' The commentators believed that the same considerations were not as persuasive with respect to amended tax returns.

Commentators generally did not favor the imposition of restrictions in Circular 230 on confidentiality imposed on practitioners by clients or on clients by practitioners.

Explanation of Provisions

Who May Practice

Paragraph (d)(2) of § 10.3 of the regulations provides a list of issues with respect to which an enrolled actuary is authorized to represent a taxpayer in limited practice before the Internal Revenue Service. This list of issues would be expanded under the proposed regulations to include issues involving 26 U.S.C. 419 (treatment of funded welfare benefits), 419A (qualified asset accounts), 420 (transfers of excess pension assets to retiree health accounts), 4972 (tax on nondeductible contributions to qualified employer plans), 4976 (taxes with respect to funded welfare benefit plans), and 4980 (tax on reversion of qualified plan assets to employer).

Enrollment

Section 10.6 of the regulations sets forth the conditions for renewal of enrollment to practice before the Internal Revenue Service. One condition for renewal of enrollment is that the enrolled agent complete a minimum number of hours of continuing professional education. Paragraph (f) of § 10.6 of the regulations requires that there be a written outline and/or textbook for each course. Under the proposed regulations, a continuing education program may qualify for purposes of this part if the course requires suitable electronic educational materials, a written outline, or a textbook.

The regulations permit any individual who is enrolled as an actuary by the Joint Board for the Enrollment of Actuaries to enroll and qualify to practice before the Internal Revenue Service by filing with the Service a written declaration that such individual is currently qualified as an enrolled actuary. New paragraph 10.6(o) would be added to clarify that the renewal of enrollment of actuaries also is governed by the regulations concerning the Joint Board for the Enrollment of Actuaries at 20 CFR 901.1 *et seq.*

Information to be Furnished

Section 10.20 of the regulations requires a practitioner to submit documents or information whenever a lawful request for such documents or information is made by a duly authorized officer or employee of the Internal Revenue Service. The provision does not provide an exception if the practitioner or the practitioner's client does not possess or control the requested documents or information. Under the proposed regulations, paragraph (a) of § 10.20 would be modified to clarify that a practitioner is required to promptly respond to a lawful and proper request for documents by either submitting the requested information or advising the requesting officer or employee why the information cannot be provided (e.g., the documents requested are privileged, or the documents are not controlled by either the practitioner or the practitioner's client). If the documents are not controlled by either the practitioner or the practitioner's client, the provision would require the practitioner, to the extent possible, to identify any persons who may have the requested documents in their control.

Knowledge of Client's Omission

Section 10.21 of the regulations requires a practitioner to advise a client promptly of any noncompliance by the client with the revenue laws. Under the proposed regulations, a practitioner also would be required to advise the client of the manner in which the error or omission may be corrected and the possible consequences of not taking such corrective action.

Diligence as to Accuracy

Section 10.22 of the regulations requires a practitioner to exercise due diligence in preparing or assisting in the preparation, approving, and filing of documents relating to Internal Revenue Service matters. Section 10.22 also requires a practitioner to exercise due diligence in determining the correctness of oral or written representations made to the Department of Treasury or with reference to any matter administered by the Internal Revenue Service. The proposed regulations would clarify that a practitioner is presumed to have exercised due diligence if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training and evaluating such person.

Assistance from Disbarred or Suspended Persons

Section 10.24 of the regulations prohibits a practitioner, in practice before the Internal Revenue Service, from employing, accepting assistance from, accepting employment from, or becoming a subagent for, a disbarred or suspended person. Section 10.24 also precludes a practitioner from accepting assistance from any former government employee where the provisions of § 10.26 of the current regulations (§ 10.25 of the proposed regulations) or any Federal law would be violated. Section 10.24 of the proposed regulations clarifies that a practitioner is prohibited from accepting assistance from or assisting a disbarred or suspended practitioner if the assistance relates to matters constituting practice before the Internal Revenue Service. The proposed regulations, however, would not require practitioners to disassociate themselves from a suspended or disbarred person as long as the other proscriptions regarding disbarred or suspended persons are observed. Practitioners who are partners of a law or accountancy partnership, for example, would not be required to expel another partner who was subject to discipline simply because the disciplined partner might otherwise share in fees derived from services rendered by others before the Internal Revenue Service.

Practice by Partners of Government Employees

Section 10.25 of the regulations precludes partners of former Government employees from practice with respect to matters in which the employee personally and substantially participated. This provision would be removed under the proposed regulations because the statutory prohibition implemented by this provision (18 U.S.C. 207(c)) has been repealed.

Practice by Former Government Employees, Their Partners and Their Associates

Section 10.26 of the current regulations places restrictions on the practice of former Government employees, their partners, and their associates with respect to certain matters that the former Government employees participated in during the course of their Government employment. This section would be renumbered as § 10.25 under the proposed regulations and would be amended to reflect changes to the Federal statutes governing post-employment restrictions applicable to former Government employees.

Fees and Confidentiality

Paragraph (b) of § 10.28 of the current regulations precludes a practitioner from charging his or her client a contingent fee for the preparation of an original tax return, but permits the

practitioner to charge a contingent fee for the preparation of an amended tax return or a claim for refund (other than a claim for refund made on an original tax return). Section 10.28 would be renumbered as § 10.27 and paragraph (b) would be clarified to provide that a practitioner is prohibited from charging a contingent fee not only for preparation of an original tax return, but also for advice rendered in connection with a position taken or to be taken on an original tax return. A practitioner would be permitted, however, to charge a contingent fee both for the preparation of, and for advice rendered in connection with a position taken, or to be taken on, an amended tax return or a claim for refund if the practitioner reasonably anticipates that the amended tax return or refund claim will receive substantive review by the Internal Revenue Service. In addition, a contingent fee would be defined to include any fee that is based, in whole or in part, on whether or not a position taken on a tax return or in a refund claim is sustained, an indemnity agreement, a guarantee, recission rights, insurance or any other arrangement by which the practitioner will compensate or reimburse the taxpayer or another person if a position taken on a tax return or in a refund claim is not sustained.

The proposed regulations would not prohibit confidentiality agreements. Confidentiality restrictions imposed by clients may raise an ethical inquiry as to the effects of such arrangements on a practitioner's ability to represent his or her clients. See Illinois State Bar Association Advisory Opinion on Professional Conduct 00–01 (October 2000)(a conflict of interest arises with respect to other similar clients when a lawyer agrees not to disclose ideas of a third party to reduce a client's tax obligations). Commentators asserted that such confidentiality restrictions were not an issue appropriate for regulation under Circular 230. Commentators also asserted that confidentiality restrictions imposed by practitioners on clients were an appropriate contractual arrangement for the benefit of practitioners. The Treasury Department remains concerned, however, about confidentiality restrictions and specifically invites comments on whether the final regulations should address such restrictions, and, if so, in what manner.

Return of Client's Records

Section 10.28 of the proposed regulations would specifically require a practitioner to return a client's records when the client makes a request for such records, whether or not a dispute regarding fees exists. The practitioner may retain a copy of those records.

Conflicting Interests

Section 10.29 of the regulations prohibits a practitioner from representing conflicting interests before the Internal Revenue Service, except with the express consent of all directly interested parties after full disclosure. Under the proposed regulations, a practitioner would be required to obtain the written consents of the clients before representing clients with conflicting interests. The practitioner would be required to retain the written consents for at least 36 months after the conclusion of the representation of the clients and to present copies of such consents to the Internal Revenue Service, if requested to do so.

In addition, the proposed regulations would provide that a practitioner may not represent a party in his or her practice before the Internal Revenue Service if that representation may be materially limited by the practitioner's own interests, unless practitioner reasonably believes the representation will not be adversely affected and the client consents after full disclosure, including disclosure of the implications of the potential conflict and the risks involved.

Solicitation

Section 10.30 of the regulations governs the manner in which practitioners may contact potential business clients. The proposed regulations would update the solicitation rules to reflect recent court decisions and to respond to comments received in connection with this rulemaking. Under the proposed regulations, a practitioner would be permitted to contact potential business clients using any medium that is not prohibited by Federal or state statutes or other rules applicable to the practitioner regarding the uninvited solicitation of prospective clients. The proposed regulations also would expand the prohibition of deceptive solicitation practices to cover private, as well as public, solicitations, expand the prohibition against providing assistance to or accepting assistance from an individual who uses deceptive solicitation practices, whether or not such practices are in connection with the relationship the individual has with the practitioner, and include electronic mail, facsimile, and hand-delivered flyers in the definition of communication.

Negotiation of Taxpayer Checks

Section 10.31 of the regulations prohibits a practitioner who prepares income tax returns from negotiating a check with respect to income tax issued to a taxpayer other than the practitioner. The proposed regulations would clarify that this prohibition is not limited to checks issued for income taxes, but applies to all checks issued to the practitioner's clients by the Government with respect to matters before the Internal Revenue Service. The proposed regulations also would clarify that practitioners are not prohibited from negotiating checks issued to their own partnerships, corporations, etc.

Tax Shelter Opinions

Two sections of the proposed regulations would provide standards governing tax shelter opinions. New § 10.35 would apply to all tax shelter opinions that conclude that the Federal tax treatment of a tax shelter item or items is more likely than not (or at a higher level of confidence) the proper treatment. Section 10.33 would be revised in scope to apply to all tax shelter opinions not governed by § 10.35 that a practitioner knows or has reason to believe will be used or referred to by persons other than the practitioner to promote, market or recommend a tax shelter. For purposes of §§ 10.33 and 10.35 of the proposed regulations, the definition of a tax shelter would conform to the definition found in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

The Treasury Department and the Internal Revenue Service recognize that the proposed rules in §§ 10.33 and 10.35 of the proposed regulations may regulate opinion standards with respect to transactions that had not previously been subject to the rules governing tax shelter opinions. The proposed regulations would exclude opinions relating to municipal bonds and qualified retirement plans. The Treasury Department and the Internal Revenue Service specifically request comment on whether the regulations should exempt other transactions from the requirements for tax shelter opinions and, if so, the types of other transactions that should be exempted.

Tax Shelter Opinions Used by Third Parties to Market Tax Shelters

Section 10.33 currently governs advice by a practitioner concerning the Federal tax aspects of a tax shelter either appearing or referred to in offering materials, or used or referred to in connection with sales promotion efforts, and directed to persons other than the

client who engaged the practitioner to give the advice. The proposed regulations would revise the scope of § 10.33 to govern a tax shelter opinion that does not conclude that the Federal tax treatment of an item or items is more likely than not the proper treatment and that a practitioner knows or has reason to believe will be used or referred to by persons other than the practitioner to promote, market or recommend the tax shelter to one or more taxpayers. The proposed regulations would clarify that § 10.33 governs tax shelter opinions prepared for use by third parties that are promoting the tax shelter, irrespective of whether such promotional efforts are conducted publicly or privately. The proposed regulations also would modify the definition of a material Federal tax issue and define a tax shelter item as an item of income, gain, loss, deduction or credit if the item is directly or indirectly attributable to a tax shelter.

Section 10.33 would require a practitioner who provides a written opinion with respect to a tax shelter item or items to comply with a series of requirements with respect to each such item. A practitioner would be required to make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and that the material facts are accurately and completely described in the opinion. Furthermore, the opinion could not be based, directly or indirectly, on any unreasonable factual assumptions. An unreasonable factual assumption would include a factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent or implausible. An unreasonable factual assumption also would include a factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented.

The proposed regulations would permit a practitioner, where it would be reasonable based on all the facts and circumstances, to rely upon factual representations, statements, findings or agreements. The proposed regulations would further provide that a practitioner need not conduct an audit or independent verification of a factual representation, but that reliance would not be permitted on factual representations that the practitioner knows or has reason to believe are unreasonable, incorrect, incomplete, inconsistent or implausible (*e.g.,* a representation that there are business reasons for a transaction without describing those reasons, a representation that a transaction is potentially profitable apart from tax benefits without providing adequate factual support, or a valuation that is inconsistent with the facts of the transaction).

The proposed regulations would provide that the opinion must clearly identify the facts upon which the opinion's conclusions are based, contain a reasoned analysis of the pertinent facts and legal authorities and not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on unreasonable legal assumptions. The proposed regulations also would require that the opinion not contain legal analyses or conclusions that are inconsistent with each other.

The practitioner would be required to ascertain that all material Federal tax issues with respect to the tax shelter item or items have been considered and that all of those material Federal tax issues involving the reasonable possibility of a challenge by the Internal Revenue Service are fully and fairly addressed. The opinion would be required to state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item or items is (are) vulnerable to challenge under all such potentially relevant doctrines and anti-abuse rules.

The proposed regulations would require that the opinion clearly provide the practitioner's conclusion as to the likelihood that a typical investor of the type to whom the tax shelter is or will be marketed will prevail with respect to the merits of each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service or clearly state that the practitioner is unable to reach a conclusion with respect to one or more issues. Further, the opinion would be required to fully describe the reasons for the practitioner's conclusions or fully describe the reasons for the inability to reach a conclusion.

The practitioner would be required to reach an overall conclusion as to the likelihood that the Federal tax treatment of the tax shelter item or items is the proper treatment or, where the practitioner is unable to reach such a conclusion, clearly state that the practitioner is unable to reach such an overall conclusion. Where an overall conclusion cannot be reached, the opinion would be required to fully describe the reasons for the practitioner's inability to reach an overall conclusion. Moreover, the fact that the practitioner's opinion does not reach a conclusion that the Federal tax treatment of a tax shelter item or items is more likely than not the proper treatment, or that the practitioner is unable to reach an overall conclusion, would be required to be clearly and prominently disclosed on the first page of the opinion. The opinion also would be required to clearly and prominently disclose that it was not written for the purpose of establishing reasonable belief or reasonable cause and good faith under sections 6662 and 6664, respectively, of the Internal Revenue Code. The proposed regulations also would clarify that in ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper treatment, the possibility that a return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

The proposed regulations would require the practitioner to take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion correctly and fairly represent the nature and extent of the opinion.

The proposed regulations also would address reliance on the opinions of others. The proposed regulations would require that the practitioner be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered. A practitioner would not be permitted to provide a tax shelter opinion that does not reach a conclusion on all the material Federal tax issues that involve a reasonable possibility of challenge by the Internal Revenue Service or does not reach an overall conclusion (or, alternatively, fails to clearly state that such conclusions cannot be reached), unless at least one other competent practitioner provides an opinion with respect to all of the other material Federal tax issues which involve a reasonable possibility of challenge by the Internal Revenue Service, and with respect to the tax shelter item or items. The practitioner also would be required, upon reviewing such other opinion and any written materials that distribute, reflect or refer to such opinion, to have no reason to believe that the other practitioner has not complied with § 10.33 or that the overall conclusion reached by such practitioner is incorrect on its face.

''More Likely Than Not'' Tax Shelter Opinions

Under the proposed regulations, new standards would be applicable to practitioners who provide tax shelter opinions that conclude that the Federal tax treatment of a tax shelter item or items is more likely than not (or at a higher level of confidence) the proper treatment. Such opinions potentially provide a basis for establishing reasonable belief and reasonable cause and good faith under the provisions of sections 6662 and 6664 of the Internal Revenue Code, respectively. These proposed rules would apply to all tax shelter opinions that reach a more likely or not, or higher, overall conclusion, regardless of whether they were rendered in connection with promotional efforts conducted by a third party or directly to a potential tax shelter investor. The proposed regulations also would define a material Federal tax issue. A tax shelter item would be defined in the same manner as in § 10.33.

Section 10.35 would require a practitioner who provides a written opinion with respect to a tax shelter item or items to comply with a series of requirements with respect to each such item. A practitioner would be required to make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and be satisfied that the material facts are accurately and completely described in the opinion. Furthermore, the opinion could not be based, directly or indirectly, on any unreasonable factual assumptions. An unreasonable factual assumption would include a factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent or implausible. An unreasonable factual assumption also would include a factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented. Furthermore, an unreasonable factual assumption would include a factual assumption that the transaction has a business reason, an assumption with respect to the potential profitability of the transaction apart from tax benefits, or an assumption with respect to a material valuation issue.

The proposed regulations would permit a practitioner, where it would be reasonable based on all the facts and circumstances, to rely on factual representations, statements, findings, or agreements of the taxpayer or other persons. The proposed regulations would further provide that a practitioner need not conduct an audit or independent verification of a factual representation, but that reliance would not be permitted on factual representations that the practitioner knows or has reason to believe are unreasonable, incorrect, incomplete, inconsistent or implausible (e.g., a representation that there are business reasons for a transaction without describing those reasons, a representation that a transaction is potentially profitable apart from tax benefits without providing adequate factual support, or a valuation that is inconsistent with the facts of the transaction).

The proposed regulations would provide that the opinion must clearly identify the facts upon which the opinion's conclusions are based, contain a reasoned analysis of the pertinent facts and legal authorities and not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on unreasonable factual assumptions. The proposed regulations also would require that the opinion not contain legal analysis or conclusions that are inconsistent with each other.

The practitioner would be required to ascertain that all material Federal tax issues with respect to the tax shelter item or items have been considered and that all of those material Federal tax issues involving the reasonable possibility of a challenge by the Internal Revenue Service are fully and fairly addressed. The opinion would be required to state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item or items is (are) vulnerable to challenge under all such potentially relevant doctrines and anti-abuse rules.

The proposed regulations would require that the opinion clearly provide the practitioner's conclusion as to the likelihood that the taxpayer will prevail with respect to the merits of each material Federal tax issue that involves a reasonable possibility of challenge by the Internal Revenue Service and must unambiguously conclude that the Federal tax treatment of the tax shelter item or items more likely than not (or at a higher level of confidence) is the proper treatment. The proposed regulations also would clarify that in ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper treatment, the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

The proposed regulations would require the practitioner to take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion correctly and fairly represent the nature and extent of the opinion. The proposed regulations also would require that the practitioner be knowledgeable in all of the relevant aspects of Federal tax law at the time the opinion is rendered. The practitioner who is providing an overall conclusion that the Federal tax treatment of a tax shelter item or items more likely than not (or at a higher level of confidence) is the proper treatment may rely on the opinion of another practitioner with respect to certain issues only if the practitioner is satisfied that the other practitioner is sufficiently knowledgeable regarding such issues and the practitioner has no reason to believe that such opinion should not be relied upon. To the extent the practitioner relies on such opinion, the opinion rendered by the practitioner must identify the other practitioner, state the date on which the opinion was rendered, and set forth the conclusions reached in such opinion. Furthermore, the practitioner must be satisfied that the combined analysis, taken as a whole, satisfies the requirements of this § 10.35.

The Treasury Department and the Internal Revenue Service intend to modify the advice standards in the regulations under section 6662 of the Internal Revenue Code (pertaining to whether a taxpayer other than a corporation reasonably believed at the time a tax return was filed that the tax treatment of a tax shelter item was more likely than not the proper treatment of that item) and under section 6664 of the Internal Revenue Code (pertaining to whether a taxpayer acted with reasonable cause and in good faith with respect to a tax shelter item) to provide that opinions can satisfy those standards only if such opinions satisfy the standards of Circular 230.

Procedures to Ensure Compliance

Section 10.36 of the proposed regulations provides that a practitioner who is a member of, associated with, or employed by a firm must take reasonable steps, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters arising under the

Federal tax laws, to make certain that the firm has adequate procedures in effect for purposes of ensuring compliance with §§ 10.33, 10.34 and 10.35. The Director of Practice would be authorized to take disciplinary action against any practitioner for failing to comply with this requirement if the practitioner through willfulness, recklessness, or gross incompetence does not take such reasonable steps and one or more persons who are members of, associated with, or employed by the firm have, while they were members of, associated with, or employed by the firm, engaged in a pattern or practice of failing to comply with §§ 10.33, 10.34 or 10.35. The Director of Practice also would be authorized to take disciplinary action against any practitioner who takes such steps but has actual knowledge that one or more persons who are members of, associated with, or employed by the firm have, while they were members of, associated with, or employed by the firm, engaged in a pattern or practice of failing to comply with §§ 10.33, 10.34 or 10.35 and the practitioner through willfulness, recklessness, or gross incompetence fails to take prompt action, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters under the Federal tax law, to correct such pattern or practice.

Sanctions

Section 10.50 of the regulations authorizes the Secretary of the Treasury to disbar or suspend any practitioner from practice before the Internal Revenue Service after notice and an opportunity for a proceeding. Under the proposed regulations, the Secretary also would be permitted to censure the practitioner after notice and an opportunity for a proceeding. Censure is a public reprimand. Additionally, the authority to disqualify an appraiser would be relocated to paragraph (b) of § 10.50 of the regulations.

Disreputable Conduct

Section 10.51 of the regulations defines disreputable conduct for which a practitioner may be disbarred or suspended. The proposed regulations would provide that a practitioner who engages in disreputable conduct also may be censured. The definition of disreputable conduct also would be modified to include conviction of any felony involving conduct that renders the practitioner unfit to practice before the Internal Revenue Service.

Institution of Proceeding

Section 10.54 authorizes the Director of Practice to institute a proceeding to suspend or disbar a practitioner if the Director believes the practitioner has violated any provisions of the laws or regulations governing practice before the Internal Revenue Service. The section would be renumbered as § 10.60 under the proposed regulations and would specify that the Director of Practice also may institute a proceeding to censure the practitioner if the Director believes the practitioner has violated any provisions of the laws or regulations governing practice before the Internal Revenue Service. Under the proposed regulations, the procedures set forth in § 10.60 would apply to proceedings to disqualify an appraiser.

Conferences

Section 10.55 authorizes the Director of Practice to confer with a practitioner regarding allegations of misconduct. The provision permits a practitioner to offer his or her consent to voluntary suspension to prevent the institution or conclusion of a disbarment proceeding. The provision would be renumbered as § 10.61 and would be changed to permit a practitioner to also offer his or her consent to censure to prevent the institution or conclusion of a disbarment proceeding. The provision also would apply to conferences with an appraiser regarding allegations of misconduct and would permit the appraiser to offer his or her voluntary consent to disqualification.

Service of Complaint and Other Papers

Sections 10.57 and 10.80 of the regulations permit the Director of Practice to serve a complaint or any other paper upon a practitioner or appraiser by certified mail. If the certified mail is not claimed, the Director of Practice may serve the complaint by first class mail. The proposed regulations would consolidate these provisions under § 10.63 and would specify that service by first class mail is complete if the complaint is mailed to the practitioner or appraiser at his or her last known address as determined under section 6212 of the Internal Revenue Code.

Answer

Sections 10.58 and 10.81 of the regulations require a practitioner or an appraiser to file an Answer whenever the Director of Practice files a complaint against him or her under the regulations. These provisions also establish the time for filing an Answer and prescribe certain requirements as to the content of an Answer. The proposed regulations would consolidate these provisions under § 10.64, which section would require that the Answer to the complaint be signed by the respondent or the respondent's authorized representative and include an acknowledgment that knowing and willful false statements may be punishable under 18 U.S.C. 1001.

Reply to Answer

Sections 10.60 and 10.83 permit the Director of Practice to file a reply to the respondent's answer at the Director's discretion or at the request of the Administrative Law Judge. Under the proposed regulations, these provisions would be consolidated under § 10.66 and that section would require the Director of Practice to file a reply to the respondent's answer if the Administrative Law Judge orders that a reply be filed.

Motions and Requests

Sections 10.62 and 10.85 of the regulations permit the Director of Practice and the respondent to file motions and requests in hearings before an Administrative Law Judge with the Director or the Administrative Law Judge. Under the proposed regulations, these provisions would be consolidated under § 10.68 and would clarify that the Administrative Law Judge may direct that motions or requests be filed at a place specified by the Administrative Law Judge.

Effect of Disbarment, Suspension, or Censure

Section 10.73 of the regulations prohibits a disbarred practitioner from practicing before the Internal Revenue Service unless and until authorized to do so by the Director of Practice. The regulations also prohibit a suspended practitioner from practicing before the Internal Revenue Service during the period of suspension. Under the proposed regulations, this section would be renumbered as § 10.79 and would also provide that the Director of Practice may make a practitioner's future right to practice before the Internal Revenue Service subject to his or her meeting certain conditions designed to promote high standards of conduct.

Expedited Suspension Upon Criminal Conviction or Loss of License for Cause

Paragraph (b)(2) of § 10.76 of the regulations permits the Director of Practice to institute a proceeding to suspend any practitioner who has, within 5 years of the date on which the complaint instituting the proceeding is served, been convicted of any crime

under title 26 of the United States Code or a felony under title 18 of the United States Code involving dishonesty or breach of trust. Under the proposed regulations this provision would be renumbered as § 10.82 and would permit the Director of Practice to institute a proceeding to suspend any practitioner who has been convicted of any crime under the Internal Revenue Code, any crime involving dishonesty or breach of trust (regardless of whether such crime constituted a felony under title 18 of the United States Code), or any felony that involved conduct that renders the practitioner unfit to practice before the Internal Revenue Service (regardless of whether such felony was pursuant to title 18 of the United States Code or involved dishonesty or breach of trust).

Consolidation of Appraiser Disqualification Rules

The current regulations contain, in separate provisions, virtually identical rules applicable to disciplinary proceedings against practitioners and appraisers. The proposed rules would consolidate the rules regarding sanctions of practitioners and appraisers under subpart C and the rules regarding the conduct of disciplinary proceedings under subpart D.

Proposed Effective Date

These regulations are proposed to apply on the date that final regulations are published in the **Federal Register**.

Special Analyses

It has been determined that these regulations are not a significant regulatory action as defined in Executive Order 12866. Therefore, a regulatory assessment is not required. It is hereby certified that these regulations will not have a significant economic impact on a substantial number of small entities because the general requirements, including the collection of information requirements, of these regulations are substantially the same as the requirements of the regulations that these regulations will replace. Persons authorized to practice have long been required to comply with certain standards of conduct when practicing before the Internal Revenue Service. These regulations do not alter the basic nature of the obligations and responsibilities of these practitioners. These regulations clarify those obligations in response to public comments and judicial decisions, and make other modifications to reflect the development of electronic media. In addition, the added requirements for tax shelter opinions imposed by these regulations will have no impact on the substantial number of small entities who have been satisfying these requirements when they provide such opinions. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required. Pursuant to section 7805(f) of the Internal Revenue Code, this notice of proposed rulemaking will be submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on its impact on small businesses.

Comments and Public Hearing

Before the regulations are adopted as final regulations, consideration will be given to any written comments and electronic comments that are submitted timely to the Internal Revenue Service. The Internal Revenue Service and Treasury Department specifically request comments on the clarity of the proposed regulations and how they can be made easier to understand. All comments will be available for public inspection and copying.

The public hearing is scheduled for May 2, 2001, from 8 am. to 11 am., and will be held in the auditorium, Internal Revenue Building, 1111 Constitution Avenue, NW., Washington, DC. Due to building security procedures, visitors must enter at the 10th Street entrance, located between Constitution and Pennsylvania Avenues, NW. All visitors must present photo identification to enter the building. Visitors will not be admitted beyond the immediate entrance area more than 15 minutes before the hearing starts. For information about having your name placed on the building access list to attend the hearing, see the **FOR FURTHER INFORMATION CONTACT** section of this preamble.

The rules of 26 CFR 601.601(a)(3) apply to the hearing. Persons who wish to present oral comments at the hearing must submit written or electronic comments and an outline of the topics to be discussed and the time to be devoted to each topic by April 12, 2001. A period of 10 minutes will be allocated to each person for making comments.

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

Drafting information

The principal authors of these regulations are Richard S. Goldstein and Brinton Warren, Office of Associate Chief Counsel (Procedure & Administration), Administrative Provisions and Judicial Practice Division, but other personnel from the Internal Revenue Service and Treasury Department participated in their development.

List of Subjects in 31 CFR Part 10

Accountants, Administrative practice and procedure, Lawyers.

Proposed Amendments to the Regulations

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

PART 10—PRACTICE BEFORE THE INTERNAL REVENUE SERVICE

Sec.

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

§ 10.0 Scope of part.

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

Subpart A—Rules Governing Authority to Practice

§ 10.1 Director of practice.

(a) *Establishment of office.* The office of the Director of Practice is established in the Office of the Secretary of the Treasury. The Director of Practice is appointed by the Secretary of the Treasury, or his or her designate.

(b) *Duties.* The Director of Practice acts on applications for enrollment to practice before the Internal Revenue Service; makes inquires with respect to matters under his or her jurisdiction; institutes and provides for the conduct of disciplinary proceedings relating to attorneys, certified public accountants, enrolled agents, enrolled actuaries and appraisers; and performs other duties as are necessary or appropriate to carry out his or her functions under this part or as are prescribed by the Secretary of the Treasury, or his or her designate.

(c) *Acting Director of Practice.* The Secretary of the Treasury, or his or her designate, will designate an officer or employee of the Treasury Department to act as Director of Practice in the absence of the Director or a vacancy in that office.

§ 10.2 Definitions.

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

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

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

(c) *Commissioner* refers to the Commissioner of Internal Revenue.

(d) *Director* refers to the Director of Practice.

(e) *Practice before the Internal Revenue Service* comprehends all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service. Such presentations include, but are not limited to, preparing and filing documents, corresponding and communicating with the Internal Revenue Service, and representing a client at conferences, hearings, and meetings.

(f) *Practitioner* means any individual described in paragraphs (a), (b), (c), or (d) of § 10.3 of this part.

(g) A *tax return* includes an amended tax return and a claim for refund.

(h) *Service* means the Internal Revenue Service.

§ 10.3 Who may practice.

(a) *Attorneys.* Any attorney who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service by filing with the Service a written declaration that he or she is currently qualified as an attorney and is authorized to represent the party(ies) on whose behalf he or she acts.

(b) *Certified public accountants.* Any certified public accountant who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service by filing with the Service a written declaration that he or she is currently qualified as a certified public accountant and is authorized to represent the party(ies) on whose behalf he or she acts.

(c) *Enrolled agents.* Any individual enrolled as an agent pursuant to this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service.

(d) *Enrolled actuaries.* (1) Any individual who is enrolled as an actuary by the Joint Board for the Enrollment of Actuaries pursuant to 29 U.S.C. 1242 who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Service by filing with the Service a written declaration stating that he or she is currently qualified as an enrolled actuary and is authorized to represent the party(ies) on whose behalf he or she acts.

(2) Practice as an enrolled actuary is limited to representation with respect to issues involving the following statutory provisions in title 26 of the United States Code: sections 401 (relating to qualification of employee plans), 403(a) (relating to whether an annuity plan meets the requirements of section 404(a)(2)), 404 (relating to deductibility of employer contributions), 405 (relating to qualification of bond purchase plans), 412 (relating to funding requirements for certain employee plans), 413 (relating to application of qualification requirements to collectively bargained plans and to plans maintained by more than one employer), 414 (relating to definitions and special rules with respect to the employee plan area), 419 (relating to treatment of funded welfare benefits), 419A (relating to qualified asset accounts), 420 (relating to transfers of excess pension assets to retiree health accounts), 4971 (relating to excise taxes payable as a result of an accumulated funding deficiency under section 412), 4972 (relating to tax on nondeductible contributions to qualified employer plans), 4976 (relating to taxes with respect to funded welfare benefit plans), 4980 (relating to tax on reversion of qualified plan assets to employer), 6057 (relating to annual registration of plans), 6058 (relating to information required in connection with certain plans of deferred compensation), 6059 (relating to periodic report of actuary), 6652(e) (relating to the failure to file annual registration and other notifications by

pension plan), 6652(f) (relating to the failure to file information required in connection with certain plans of deferred compensation), 6692 (relating to the failure to file actuarial report), and 7805(b) (relating to the extent to which a Internal Revenue Service ruling or determination letter coming under the statutory provisions listed here will be applied without retroactive effect); and 29 U.S.C. 1083 (relating to the waiver of funding for nonqualified plans).

(3) An individual who practices before the Internal Revenue Service pursuant to paragraph (d)(1) of this section is subject to the provisions of this part in the same manner as attorneys, certified public accountants and enrolled agents.

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

(f) *Government officers and employees, and others.* An individual, who is an officer or employee of the executive, legislative, or judicial branch of the United States Government; an officer or employee of the District of Columbia; a Member of Congress; or a Resident Commissioner may not practice before the Internal Revenue Service if such practice violates 18 U.S.C. 203 or 205.

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

§ 10.4 Eligibility for enrollment.

(a) *Enrollment upon examination.* The Director of Practice may grant enrollment to an applicant who demonstrates special competence in tax matters by written examination administered by, or administered under the oversight of, the Director and who has not engaged in any conduct that would justify the censure, suspension, or disbarment of any practitioner under the provisions of this part.

(b) *Enrollment of former Internal Revenue Service employees.* The Director of Practice may grant enrollment to an applicant who, by virtue of his or her past service and technical experience in the Internal Revenue Service, has qualified for such enrollment and who has not engaged in any conduct that would justify the censure, suspension, or disbarment of any practitioner under the provisions of this part, under the following circumstances—

(1) The former employee applies for enrollment to the Director of Practice on a form supplied by the Director and supplies the information requested on the form and such other information regarding the experience and training of the applicant as may be relevant.

(2) An appropriate office of the Internal Revenue Service, at the request of the Director of Practice, will provide the Director with a detailed report of the nature and rating of the applicant's work while employed by the Service and a recommendation whether such employment qualifies the applicant technically or otherwise for the desired authorization.

(3) Enrollment based on an applicant's former employment with the Internal Revenue Service may be of unlimited scope or it may be limited to permit the presentation of matters only of the particular class or only before the particular unit or division of the Service for which the applicant's former employment has qualified the applicant.

(4) Application for enrollment based on an applicant's former employment with the Internal Revenue Service must be made within 3 years from the date of separation from such employment.

(5) An applicant for enrollment who is requesting such enrollment based on his or her former employment with the Internal Revenue Service must have had a minimum of 5 years continuous employment with the Service during which he or she must have been regularly engaged in applying and interpreting the provisions of the Internal Revenue Code and the regulations thereunder relating to income, estate, gift, employment, or excise taxes.

(6) For the purposes of paragraph (b)(5) of this section, an aggregate of 10 or more years of employment in positions involving the application and interpretation of the provisions of the Internal Revenue Code, at least 3 of which occurred within the 5 years preceding the date of application, is the equivalent of 5 years continuous employment.

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

§ 10.5 Application for enrollment.

(a) *Form; address.* An applicant for enrollment must file an application on Form 23, ''Application for Enrollment to Practice Before the Internal Revenue Service'', properly executed under oath or affirmation, with the Director of Practice. The address of the applicant entered on Form 23 will be the address under which a successful applicant is enrolled and is the address to which the Director will send correspondence concerning enrollment. An enrolled agent must send notification of any change to his or her enrollment address to the Director of Practice, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224, or at such other address specified by the Director. This notification must include the enrolled agent's name, old address, new address, social security number, signature, and the date.

(b) *Fee.* The application for enrollment must be accompanied by a check or money order in the amount set forth on Form 23, payable to the Internal Revenue Service, which amount constitutes a fee charged to each applicant for enrollment. This fee will be retained by the United States whether or not the applicant is granted enrollment.

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

(d) *Temporary recognition.* On receipt of a properly executed application, the Director of Practice may grant the applicant temporary recognition to practice pending a determination as to whether enrollment to practice should be granted. Temporary recognition will be granted only in unusual circumstances and it will not be granted, in any circumstance, if the application is not regular on its face, if the information stated in the application, if true, is not sufficient to warrant enrollment to practice, or if there is any information before the Director indicating that the statements in the application are untrue or that the applicant would not otherwise qualify for enrollment. Issuance of temporary recognition does not constitute enrollment to practice or a finding of eligibility for enrollment, and the temporary recognition may be withdrawn at any time by the Director.

(e) *Appeal from denial of application.* The Director of Practice must inform the applicant as to the reason(s) for any denial of an application for enrollment. The applicant may, within 30 days after receipt of the notice of denial of enrollment, file a written appeal of the denial of enrollment with the Secretary

of the Treasury. A decision on the appeal will be rendered by the Secretary of the Treasury, or his or her designate, as soon as practicable.

§ 10.6 Enrollment.

(a) *Roster.* The Director of Practice will maintain rosters of all individuals—

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

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

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

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

(5) Whose offer of consent to resign from enrollment to practice before the Internal Revenue Service has been accepted by the Director of Practice under § 10.61 of this part; and

(6) Whose application for enrollment has been denied.

(b) *Enrollment card.* The Director of Practice will issue an enrollment card to each individual whose application for enrollment to practice before the Internal Revenue Service is approved after the effective date of this regulation. Each enrollment card will be valid for the period stated on the enrollment card. Enrollment cards issued to individuals before February 1, 1999, are invalid. An individual is not eligible to practice before the Service if his or her enrollment card is not valid.

(c) *Term of enrollment.* Each individual enrolled to practice before the Internal Revenue Service will be accorded active enrollment status subject to his or her renewal of enrollment as provided in this part.

(d) *Renewal of enrollment.* To maintain active enrollment to practice before the Internal Revenue Service, each individual enrolled is required to have his or her enrollment renewed. Failure by an individual to receive notification from the Director of Practice of the renewal requirement will not be justification for the failure to satisfy this requirement.

(1) All individuals enrolled to practice before the Internal Revenue Service must apply for renewal of enrollment between November 1, 2001, and January 31, 2002. Those who receive initial enrollment between November 1, 2001, and January 31, 2002, must apply for renewal of enrollment by March 1, 2002. The renewal will be effective April 1, 2002.

(2) Thereafter, applications for renewal will be required between November 1, 2004, and January 31, 2005, and between November 1 and January 31 of every subsequent third year. Those who receive initial enrollment during the renewal application period must apply for renewal of enrollment by March 1 of the renewal year. Renewed enrollment will be effective April 1, 2005, and April 1 of every subsequent third year.

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

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

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

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

(1) *For renewed enrollment effective April 1, 2002.* (i) A minimum of 24 hours of continuing education credit must be completed between January 1, 2001, and January 31, 2002.

(ii) An individual who receives initial enrollment between January 1, 2001, and January 31, 2002, is exempt from the continuing education requirement for the renewal of enrollment effective April 1, 2002, but is required to file a timely application for renewal of enrollment.

(2) *For renewed enrollment effective April 1, 2005, and every third year thereafter.* (i) A minimum of 72 hours of continuing education credit must be completed between February 1, 2002, and January 31, 2005, and during each subsequent three year period. Each such three year period is known as an enrollment cycle.

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

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

(f) *Qualifying continuing education*—(1) *General.* To qualify for continuing education credit, a course of learning must—

(i) Be a qualifying program designed to enhance professional knowledge in Federal taxation or Federal tax related matters, *i.e.,* programs comprised of current subject matter in Federal taxation or Federal tax related matters, including accounting, tax preparation software and taxation; and

(ii) Be conducted by a qualifying sponsor.

(2) *Qualifying programs*—(i) *Formal programs.* A formal program qualifies as continuing education programs if it—

(A) Requires attendance. Additionally, the program sponsor must provide each attendee with a certificate of attendance; and

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

(C) Provides or requires a written outline, textbook, or suitable electronic educational materials.

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

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

(B) Provide a means for measuring completion by the participants (*e.g.,* a written examination), including the issuance of a certificate of completion by the sponsor; and

(C) Provide a written outline, textbook, or suitable electronic educational materials.

(iii) *Serving as an instructor, discussion leader or speaker.* (A) One hour of continuing education credit will be awarded for each contact hour completed as an instructor, discussion leader, or speaker at an educational program that meets the continuing education requirements of paragraph (f) of this section.

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

maintain records to verify preparation time.

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

(D) An instructor, discussion leader, or speaker who makes more than one presentation on the same subject matter during an enrollment cycle, will receive continuing education credit for only one such presentation for the enrollment cycle.

(iv) *Credit for published articles, books, etc.* (A) Continuing education credit will be awarded for publications on Federal taxation or Federal tax related matters, including accounting, financial management, tax preparation software, and taxation, provided the content of such publications is current and designed for the enhancement of the professional knowledge of an individual enrolled to practice before the Internal Revenue Service.

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

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

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

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

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

(ii) Courses designed to help an applicant prepare for the examination specified in paragraph (a) of § 10.4 are considered basic in nature and are not qualifying continuing education.

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

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

(i) Be an accredited educational institution;

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

(iii) Be recognized by the Director of Practice as a professional organization or society whose programs include offering continuing professional education opportunities in subject matters within the scope of paragraph (f)(1)(i) of this section; or

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

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

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

(ii) Program subject matter must be current;

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

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

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

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

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

(5) A professional organization or society recognized as a qualified sponsor by the Director of Practice will retain its status for one enrollment cycle. The Director will publish the names of such sponsors on a periodic basis.

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

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

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

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

(i) *Recordkeeping requirements.* (1) Each individual applying for renewal must retain for a period of three years following the date of renewal of enrollment the information required with regard to qualifying continuing professional education credit hours. Such information includes—

(i) The name of the sponsoring organization;

(ii) The location of the program;

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

(iv) Written outlines, course syllibi, textbook, and/or electronic materials provided or required for the course;

(v) The dates attended;

(vi) The credit hours claimed;

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

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

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

(i) The name of the sponsoring organization;

(ii) The location of the program;

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

(iv) The dates of the program; and

(v) The credit hours claimed.

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

(i) The publisher;

(ii) The title of the publication;

(iii) A copy of the publication;

(iv) The date of publication; and

(v) Records that substantiate the hours worked on the publication.

(j) *Waivers.* (1) Waiver from the continuing education requirements for a given period may be granted by the Director of Practice for the following reasons—

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

(ii) Extended active military duty;

(iii) Absence from the United States for an extended period of time due to employment or other reasons, provided the individual does not practice before

the Internal Revenue Service during such absence; and

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

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

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

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

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

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

(k) *Failure to comply.* (1) Compliance by an individual with the requirements of this part is determined by the Director of Practice. An individual who fails to meet the requirements of eligibility for renewal of enrollment will be notified by the Director at his or her enrollment address by first class mail. The notice will state the basis for the determination of noncompliance and will provide the individual an opportunity to furnish information in writing relating to the matter within 60 days of the date of the notice. Such information will be considered by the Director in making a final determination as to eligibility for renewal of enrollment.

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

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

(4) Individuals placed in inactive enrollment status and individuals ineligible to practice before the Internal Revenue Service may not, directly or indirectly, indicate that they are enrolled to practice before the Service, or use the term ''enrolled agent,'' the designation ''E. A.,'' or other form of reference to eligibility to practice before the Service.

(5) An individual placed in an inactive status may be reinstated to an active enrollment status by filing an application for renewal of enrollment and providing evidence of the completion of all required continuing professional education hours for the enrollment cycle. Continuing education credit under this subsection may not be used to satisfy the requirements of the enrollment cycle in which the individual has been placed back on the active roster.

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

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

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

(m) *Renewal while under suspension or disbarment.* An individual who is ineligible to practice before the Internal Revenue Service by virtue of disciplinary action is required to be in conformance with the requirements for renewal of enrollment before his or her eligibility is restored.

(n) *Verification.* The Director of Practice may review the continuing education records of an enrolled individual and/or qualified sponsor in a manner deemed appropriate to determine compliance with the requirements and standards for renewal of enrollment as provided in paragraph (f) of this section.

(o) *Enrolled Actuaries.* The enrollment and the renewal of enrollment of actuaries authorized to practice under paragraph (d) of § 10.3 are governed by the regulations of the Joint Board for the Enrollment of Actuaries at 20 CFR 901.1 *et seq.*

§ 10.7 Representing oneself; participating in rulemaking; limited practice; special appearances; and return preparation.

(a) *Representing oneself.* Individuals may appear on their own behalf before the Internal Revenue Service provided they present satisfactory identification.

(b) *Participating in rulemaking.* Individuals may participate in rulemaking as provided by the Administrative Procedure Act. See 5 U.S.C. 553.

(c) *Limited practice*—(1) *In general.* Subject to the limitations in paragraph (c)(2) of this section, an individual who is not a practitioner may represent a taxpayer before the Internal Revenue Service in the circumstances described in this paragraph (c)(1), even if the taxpayer is not present, provided the individual presents satisfactory identification and proof of his or her authority to represent the taxpayer. The circumstances described in this paragraph (c)(1) are as follows:

(i) An individual may represent a member of his or her immediate family.

(ii) A regular full-time employee of an individual employer may represent the employer.

(iii) A general partner or a regular full-time employee of a partnership may represent the partnership.

(iv) A bona fide officer or a regular full-time employee of a corporation (including a parent, subsidiary, or other affiliated corporation), association, or organized group may represent the corporation, association, or organized group.

(v) A regular full-time employee of a trust, receivership, guardianship, or estate may represent the trust, receivership, guardianship, or estate.

(vi) An officer or a regular employee of a governmental unit, agency, or authority may represent the governmental unit, agency, or authority in the course of his or her official duties.

(vii) An individual may represent any individual or entity, who is outside the United States, before personnel of the Internal Revenue Service when such representation takes place outside the United States.

(viii) An individual who prepares and signs a taxpayer's tax return as the preparer, or who prepares a tax return but is not required (by the instructions to the tax return or regulations) to sign the tax return, may represent the taxpayer before revenue agents, customer service representatives or similar officers and employees of the Internal Revenue Service during an examination of the taxable year or period covered by that tax return, but this right does not permit such individual to represent the taxpayer, regardless of the circumstances requiring representation, before appeals officers, revenue officers, Counsel or similar officers or employees of the Service or the Department of Treasury.

(2) *Limitations.* (i) An individual who is under suspension or disbarment from practice before the Internal Revenue Service may not engage in limited practice before the Service under paragraph (c)(1) of this section.

(ii) The Director, after notice and opportunity for a conference, may deny eligibility to engage in limited practice before the Internal Revenue Service under paragraph (c)(1) of this section to any individual who has engaged in conduct that would justify censuring, suspending, or disbarring a practitioner from practice before the Service.

(iii) An individual who represents a taxpayer under the authority of paragraph (c)(1) of this section is subject, to the extent of his or her authority, to such rules of general applicability regarding standards of conduct and other matters as the Director of Practice prescribes.

(d) *Special appearances.* The Director of Practice may, subject to such conditions as he or she deems appropriate, authorize an individual who is not otherwise eligible to practice before the Service to represent another person in a particular matter.

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

(f) *Fiduciaries.* For purposes of this part, a fiduciary (i.e., a trustee, receiver, guardian, personal representative, administrator, or executor) is considered to be the taxpayer and not a representative of the taxpayer.

§ 10.8 Customhouse brokers.

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

Subpart B—Duties and Restrictions Relating to Practice Before the Internal Revenue Service

§ 10.20 Information to be furnished.

(a) *To the Internal Revenue Service.* A practitioner must, on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged. Where the requested records or information are not in the possession or control of the practitioner or the practitioner's client, the practitioner must promptly notify the requesting officer or employee, and must provide any information that either the practitioner or the practitioner's client has regarding the identity of any person who may have possession or control of the requested records or information. A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Service or its officers or employees to obtain any record or information unless the practitioner believes in good faith and on reasonable grounds that the record or information is privileged.

(b) *To the Director of Practice.* When a proper and lawful request is made by the Director of Practice, a practitioner must provide the Director with any information the practitioner has concerning a violation or possible violation of the regulations in this part by any person, and to testify regarding this information in any proceeding instituted under this part, unless the practitioner believes in good faith and on reasonable grounds that the information is privileged.

§ 10.21 Knowledge of client's omission.

A practitioner who, having been retained by a client with respect to a matter administered by the Internal Revenue Service, knows that the client has not complied with the revenue laws of the United States or has made an error in or omission from any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States, must advise the client promptly of the fact of such noncompliance, error, or omission, the manner in which corrective action may be taken, and the possible consequences of not taking corrective action.

§ 10.22 Diligence as to accuracy.

(a) *In general.* A practitioner must exercise due diligence—

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

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

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

(b) *Reliance on others.* Except as provided in §§ 10.33, 10.34, and 10.35, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

§ 10.23 Prompt disposition of pending matters.

A practitioner may not unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.

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

A practitioner may not, knowingly and directly or indirectly:

(a) Accept assistance from or assist any person who is under disbarment or suspension from practice before the Internal Revenue Service if the assistance relates to a matter or matters constituting practice before the Service.

(b) Accept assistance from any former government employee where the provisions of § 10.25 of this part or any Federal law would be violated.

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

(a) *Definitions.* For purposes of this section—

(1) *Assist* means to act in such a way as to advise, furnish information to, or

otherwise aid another person, directly or indirectly.

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

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

(4) *Practitioner* includes any individual described in paragraph (f) of § 10.2.

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

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

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

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

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

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

(3) A former Government employee who within a period of one year prior to the termination of Government employment had official responsibility for a transaction may not, within two years after his or her Government employment is ended, represent or knowingly assist in that transaction any person who is or was a specific party to that transaction.

(4) No former Government employee may, within one year after his or her Government employment is ended, appear before any employee of the Treasury Department in connection with the publication, withdrawal, amendment, modification, or interpretation of a rule in the development of which the former Government employee participated or for which, within a period of one year prior to the termination of his or her Government employment, he or she had official responsibility. This paragraph (b)(4) does not, however, preclude such former employee from appearing on his or her own behalf or from representing a taxpayer before the Internal Revenue Service in connection with a transaction involving the application or interpretation of such a rule with respect to that transaction, provided that such former employee does not utilize or disclose any confidential information acquired by the former employee in the development of the rule.

(c) *Firm representation.* (1) No member of a firm of which a former Government employee is a member may represent or knowingly assist a person who was or is a specific party in any transaction with respect to which the restrictions of paragraph (b)(2) or (3) of this section apply to the former Government employee, in that transaction, unless the firm isolates the former Government employee in such a way to ensure that the former Government employee cannot assist in the representation.

(2) When isolation of a former Government employee is required under paragraph (c)(1) of this section, a statement affirming the fact of such isolation must be executed under oath by the former Government employee and by another member of the firm acting on behalf of the firm. The statement must clearly identify the firm, the former Government employee, and the transaction(s) requiring isolation and it must be filed with the Director of Practice and in such other place and in the manner prescribed by rule or regulation.

(d) *Pending representation.* Practice by former Government employees, their partners and associates with respect to representation in specific matters where actual representation commenced before adoption of this regulation is governed by the regulations set forth at 31 CFR part 10 immediately preceding the adoption of these regulations. The burden of showing that representation commenced before adoption of the revised regulations lies with the former Government employees, and their partners and associates.

§ 10.26 Notaries.

A practitioner may not take acknowledgments, administer oaths, certify papers, or perform any official act as a notary public with respect to any matter administered by the Internal Revenue Service and for which he or she is employed as counsel, attorney, or agent, or in which he or she may be in any way interested. (26 Op. Atty. Gen. 236).

§ 10.27 Fees.

(a) *Generally.* A practitioner may not charge an unconscionable fee for representing a client in a matter before the Internal Revenue Service.

(b) *Contingent fees.* A practitioner may not charge a contingent fee for preparing an original tax return or for any advice rendered in connection with a position taken or to be taken on an original tax return. A practitioner may charge a contingent fee for preparing, or for any advice rendered in connection with a position taken or to be taken on, an amended tax return or a claim for refund (other than a claim for refund made on an original tax return) if the practitioner reasonably anticipates at the time the fee arrangement is entered into that the amended tax return or refund claim will receive substantive review by the Internal Revenue Service. For purposes of this section, a contingent fee is any fee that is based, in whole or in part, on whether or not a position taken on a tax return or in a refund claim is sustained by the Service or in litigation. A contingent fee includes an indemnity agreement, a guarantee, rescission rights, insurance, or any other arrangement under which the taxpayer or other person would be entitled to be compensated or reimbursed by the practitioner in the event a position taken on a tax return or

in a refund claim is not sustained, or any other arrangement that has a similar effect.

§ 10.28 Return of client's records.

On the request of a client, a practitioner must promptly return any and all records of the client. The existence of a dispute over fees does not relieve the practitioner of his or her responsibility under this section. The practitioner may retain copies of the records returned to a client.

§ 10.29 Conflicting interests.

(a) A practitioner may not represent potential conflicting interests in his or her practice before the Internal Revenue Service, unless—

(1) The practitioner reasonably believes that the representation of any party before the Service will not be adversely affected; and

(2) All parties represented by the practitioner who have an interest in the matter before the Service expressly consent in writing to the representation after the practitioner has fully disclosed the potential conflict.

(b) Copies of the written consents must be retained by the practitioner for at least 36 months from the date of the conclusion of the representation of the affected clients and the written consents must be provided to any officer or employee of the Internal Revenue Service on request.

(c) A practitioner may not represent a party in his or her practice before the Internal Revenue Service if the representation of the party may be materially limited by the practitioner's own interests, unless the practitioner reasonably believes the representation will not be adversely affected and the client consents after the practitioner has fully disclosed the potential conflict, including disclosure of the implications of the potential conflict and the risks involved.

§ 10.30 Solicitation.

(a) *Advertising and solicitation restrictions.* (1) A practitioner may not, with respect to any Internal Revenue Service matter, in any way use or participate in the use of any form of public communication or private solicitation containing a false, fraudulent, or coercive statement or claim; or a misleading or deceptive statement or claim. Enrolled agents, in describing their professional designation, may not utilize the term of art ''certified'' or ''licensed'' or indicate an employer/employee relationship with the Service. Examples of acceptable descriptions are ''enrolled to represent taxpayers before the Internal Revenue Service,'' ''enrolled to practice before the Internal Revenue Service,'' and ''admitted to practice before the Internal Revenue Service.'' Enrolled agents and enrolled actuaries may abbreviate such designation as either EA or E.A. Examples of unacceptable descriptions are ''Internal Revenue Service (or IRS) Enrolled Agent,'' ''Enrolled Agent of the Internal Revenue Service (or IRS),'' ''Certified Enrolled Agent,'' or ''Licensed to practice before the Internal Revenue Service (or IRS).''

(2) A practitioner may not make, directly or indirectly, an uninvited written or oral solicitation of employment in matters related to the Internal Revenue Service if the solicitation violates Federal or State law or other applicable rule, *e.g.,* attorneys are precluded from making a solicitation that is prohibited by the rules of the State bar to which they are members. Any lawful solicitation made by or on behalf of a practitioner eligible to practice before the Service must, nevertheless, clearly identify the solicitation as such and, if applicable, identify the source of the information used in choosing the recipient.

(b) *Fee information.* (1)(i) A practitioner may publish the availability of a written schedule of fees and disseminate the following fee information—

(A) Fixed fees for specific routine services.

(B) Hourly rates.

(C) Range of fees for particular services.

(D) Fee charged for an initial consultation.

(ii) Any statement of fee information concerning matters in which costs may be incurred must include a statement disclosing whether clients will be responsible for such costs.

(2) A practitioner may charge no more than the rate(s) published under paragraph (b)(1) of this section for a reasonable period of time after the last date on which the schedule of fees was published (which, in no event, may be shorter than 30 days).

(c) *Communication of fee information.* Fee information may be communicated in professional lists, telephone directories, print media, mailings, electronic mail, facsimile, hand delivered flyers, radio, television, and any other method. The method chosen, however, must not cause the communication to become untruthful, deceptive, or otherwise in violation of these regulations. A practitioner may not persist in attempting to contact a prospective client if the prospective client has made it known to the practitioner that he or she does not desire to be solicited. In the case of radio and television broadcasting, the broadcast must be recorded and the practitioner must retain a recording of the actual transmission. In the case of direct mail and e-commerce communications, the practitioner must retain a copy of the actual communication, along with a list or other description of persons to whom the communication was mailed or otherwise distributed. The copy must be retained by the practitioner for a period of at least 36 months from the date of the last transmission or use.

(d) *Improper associations.* A practitioner may not, in matters related to the Internal Revenue Service, assist, or accept assistance from, any person or entity who, to the knowledge of the practitioner, obtains clients or otherwise practices in a manner forbidden under this section.

§ 10.31 Negotiation of taxpayer checks.

A practitioner who prepares tax returns may not endorse or otherwise negotiate any check issued to a client by the government in respect of a Federal tax liability.

§ 10.32 Practice of law.

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

§ 10.33 Tax shelter opinions used by third parties to market tax shelters.

(a) *In general.* A practitioner who provides a tax shelter opinion that does not conclude that the Federal tax treatment of a tax shelter item or items is more likely than not the proper treatment must comply with each of the following requirements with respect to each such item.

(1) *Factual matters.* (i) The practitioner must make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and be satisfied that the material facts (including factual assumptions and representations) are accurately and completely described in the opinion and in any related offering materials or sales promotion materials.

(ii) The opinion must not be based, directly or indirectly, on any unreasonable factual assumptions (including assumptions as to future events). Unreasonable factual assumptions include—

(A) A factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent with an important fact or another factual assumption, or implausible in any material respect; or

(B) A factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented.

(iii) A practitioner may, where it would be reasonable based on all the facts and circumstances, rely upon factual representations, statements, findings, or agreements (factual representations) (including representations describing the specific business reasons for the transaction, the potential profitability of the transaction apart from tax benefits, or a valuation prepared by an independent party). Factors relevant to whether such factual representations are reasonable include, but are not limited to, whether the person making the factual representations is knowledgeable as to the facts being represented and is the appropriate person to make such factual representations. A practitioner does not need to conduct an audit or independent verification of a factual representation, but the practitioner may not rely on factual representations if the practitioner knows or has reason to believe, based on his or her background and knowledge, that the relevant information is, or otherwise appears to be, unreasonable, incorrect, incomplete, inconsistent with an important fact or another factual representation, or implausible in any material respect. For example, a representation is incomplete if it states that there are business reasons for the transaction without describing those reasons, or if it states that a transaction is potentially profitable apart from tax benefits without providing adequate factual support. In addition, a valuation is inconsistent with an important fact or factual assumption or is implausible if it appears to be based on facts that are inconsistent with the facts of the transaction.

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

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

(B) The practitioner reasonably believes that the person making the appraisal or financial projection is reputable and competent to perform the appraisal or projection; and

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

(v) If the fair market value of purchased property is to be established by reference to its stated purchase price, the practitioner must examine the terms and conditions on which the property was (or is to be) purchased to determine whether the stated purchase price reasonably may be considered to be its fair market value.

(2) *Relate law to facts.* (i) The opinion must relate the applicable law to the relevant facts.

(ii) The opinion must clearly identify the facts upon which the opinion's conclusions are based.

(iii) The opinion must contain a reasoned analysis of the pertinent facts and legal authorities and must not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on any unreasonable legal assumptions.

(iv) The opinion must not contain legal analyses or conclusions with respect to Federal tax issues that are inconsistent with each other.

(3) *Analysis of material Federal tax issues.* The practitioner must ascertain that all material Federal tax issues have been considered, and that all of those issues that involve the reasonable possibility of a challenge by the Internal Revenue Service have been fully and fairly addressed. The opinion must state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item is vulnerable to challenge under all potentially relevant doctrines and anti-abuse rules. In analyzing such judicial doctrines and statutory and regulatory anti-abuse rules, the opinion must take into account the typical investor's non-tax and tax purposes (and the relative weight of such purposes) for entering into a transaction and for structuring a transaction in a particular manner.

(4) *Evaluation of material Federal tax issues.* The practitioner must, where possible, clearly provide his or her conclusion as to the likelihood that a typical investor of the type to whom the tax shelter is or will be marketed will prevail on the merits with respect to each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service. If the practitioner is unable to reach such a conclusion with respect to one or more Federal tax issues, he or she must clearly state that he or she is unable to reach such a conclusion with respect to those issues. The practitioner's opinion must fully describe the reasons for the practitioner's conclusions or fully describe the reasons for his or her inability to reach a conclusion as to one or more issues.

(5) *Overall conclusion.* (i) The practitioner must, where possible, clearly provide an overall conclusion as to the likelihood that the Federal tax treatment of the tax shelter item or items is the proper treatment. If the practitioner is unable to reach such an overall conclusion, he or she must clearly state that he or she is unable to reach such an overall conclusion and the opinion must fully describe the reasons for the practitioner's inability to reach a conclusion.

(ii) The fact that the practitioner's opinion does not reach an overall conclusion that the Federal tax treatment of the tax shelter item or items is more likely than not the proper treatment, or the fact that the practitioner is unable to reach an overall conclusion, must be clearly and prominently disclosed on the first page of the opinion.

(iii) The opinion must clearly and prominently disclose on the first page of the opinion that the opinion was not written for the purpose of establishing—

(A) Under section 6662(d)(2)(C)(i)(II) of the Internal Revenue Code and 26 CFR 1.6662–4(g)(4), that a taxpayer other than a corporation reasonably believed at the time a tax return was filed that the tax treatment of a tax shelter item was more likely than not the proper treatment of that item; or

(B) Under section 6664(c)(1) of the Internal Revenue Code and 26 CFR 1.6664–4(e), that a corporate taxpayer acted with reasonable cause and in good faith with respect to a tax shelter item.

(iv) In ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper treatment, the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

(6) *Description of opinion.* The practitioner must take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion, correctly and fairly represent the nature and extent of the opinion.

(b) *Competence to provide opinion; reliance on opinions of others.* (1) The practitioner must be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered.

(i) A practitioner may not provide a tax shelter opinion that does not clearly provide his or her conclusion as to the

likelihood that a typical investor of the type to whom the tax shelter is or will be marketed will prevail on the merits with respect to each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service (or, alternatively, if the practitioner is unable to reach a conclusion with respect to one or more material Federal tax issues, an opinion that does not clearly state that he or she is unable to reach a conclusion with respect to those issues), or does not provide an overall conclusion as to the likelihood that the Federal tax treatment of the tax shelter item or items is the proper treatment (or, alternatively, if the practitioner is unable to reach an overall conclusion, an opinion that does not clearly state that he or she is unable to reach such an overall conclusion), unless—

(A) At least one other competent practitioner provides an opinion on the likely outcome with respect to all of the other material Federal tax issues which involve a reasonable possibility of challenge by the Internal Revenue Service, and with respect to the tax shelter item or items; and

(B) The practitioner, on reviewing such other opinions and any written materials that distribute, reflect or refer to such other opinions, has no reason to believe that the other practitioner did not comply with the standards of paragraph (a) of this section.

(ii) Notwithstanding the foregoing, a practitioner who has not been retained to provide an overall evaluation may issue an opinion on less than all the material tax issues only if he or she has no reason to believe, based on his or her knowledge and experience, that an overall conclusion given by the practitioner who reaches an overall conclusion is incorrect on its face. Such practitioner also must ensure that the limited opinion satisfies the requirements of this section that are otherwise applicable.

(2) *Financial forecasts and projections.* A practitioner who makes financial forecasts or projections relating to or based on the tax consequences of the tax shelter item that are included in written materials disseminated to any or all of the same persons as the opinion may rely on the opinion of another practitioner as to any or all material Federal tax issues, provided that the practitioner who desires to rely on the other opinion has no reason to believe the practitioner rendering such other opinion has not complied with the standards of paragraph (a) of this § 10.33, and the requirements of paragraphs (b)(1)(i)(A) and (B) and the first sentence of paragraph (b)(1)(ii) of this section are satisfied. The practitioner's report must disclose any material Federal tax issue not covered by, or incorrectly opined on, by the other opinion, and shall set forth his or her opinion with respect to each such issue in a manner that satisfies the requirements of paragraph (a) of this section.

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

(1) *Practitioner* includes any individual described in paragraph (f) of § 10.2.

(2) The definition of *tax shelter* is set forth in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

(3) A *tax shelter item* is an item of income, gain, loss, deduction or credit if the item is directly or indirectly attributable to a tax shelter as defined in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

(4) A *tax shelter opinion,* as the term is used in this section, is written advice by a practitioner concerning the Federal tax aspects of a tax shelter item or items that a practitioner knows or has reason to believe will be used or referred to by a person other than the practitioner (or person who is a member of, associated with, or employed by the practitioner's firm or company) in promoting, marketing or recommending the tax shelter to one or more taxpayers, irrespective of whether such promotional, marketing, or similar activities are conducted privately or publicly. The term tax shelter opinion includes the Federal tax aspects or tax risks portion of offering materials prepared for the person who is promoting, marketing or recommending the tax shelter by or at the direction of a practitioner, whether or not a separate opinion letter is issued or whether or not the practitioner's name is referred to in offering materials or in connection with sales promotion efforts. Similarly, a financial forecast or projection prepared by a practitioner is a tax shelter opinion if it is predicated on assumptions regarding Federal tax aspects of the investment and that meets the other requirements of the first sentence of this paragraph. The term tax shelter opinion does not include advice provided in connection with the review of portions of offering or sales promotion materials, provided neither the name of the practitioner or the practitioner's firm, nor the fact that a practitioner has rendered advice concerning the Federal tax aspects, is referred to in the offering materials or related sales promotion efforts.

(5) A *material Federal tax issue,* as the term is used in this section, is any Federal tax issue the resolution of which could have a significant impact (whether beneficial or adverse) on a taxpayer under any reasonably foreseeable circumstance. A material Federal tax issue includes the potential applicability of penalties, additions to tax, or interest charges that reasonably could be asserted by the Internal Revenue Service with respect to the tax shelter item.

(6) The following examples illustrate this section—

Example 1. A practitioner is requested by a third party to prepare a memorandum evaluating whether the purported Federal tax treatment of a tax shelter item arising from a series of transactions will be sustained if challenged by the Internal Revenue Service. The practitioner concludes that there is a realistic possibility that the purported treatment of the tax shelter item is the proper treatment and has reason to believe that the third party will use or refer to the memorandum he prepares in promoting, marketing or recommending the transaction to one or more taxpayers. The memorandum is a tax shelter opinion for purposes of this section.

Example 2. A practitioner writes a memorandum that evaluates whether a hypothetical taxpayer which enters into a series of transactions can offset a preexisting capital gain against certain losses arising from the series of transactions. The practitioner concludes that, while a significant purpose for entering into the series of transactions is the avoidance or evasion of Federal income tax within the meaning of section 6662(d)(2)(C)(iii) of the Internal Revenue Code, there is a realistic possibility that the tax loss arising from this series of transactions is the proper treatment. The practitioner plans to provide this memorandum directly to clients who have capital gains. The memorandum is not a tax shelter opinion for purposes of this section because the promoting, marketing or recommending of the tax shelter is not being done by a person other than the practitioner.

§ 10.34 Standards for advising with respect to tax return positions and for preparing or signing returns.

(a) *Realistic possibility standard.* A practitioner may not sign a tax return as a preparer if the practitioner determines that the tax return contains a position that does not have a realistic possibility of being sustained on its merits (the realistic possibility standard) unless the position is not frivolous and is adequately disclosed to the Internal Revenue Service. A practitioner may not advise a client to take a position on a tax return, or prepare the portion of a tax return on which a position is taken, unless—

(1) The practitioner determines that the position satisfies the realistic possibility standard; or

(2) The position is not frivolous and the practitioner advises the client of any

opportunity to avoid the accuracy-related penalty in section 6662 of the Internal Revenue Code by adequately disclosing the position and of the requirements for adequate disclosure.

(b) *Advising clients on potential penalties.* A practitioner advising a client to take a position on a tax return, or preparing or signing a tax return as a preparer, must inform the client of the penalties reasonably likely to apply to the client with respect to the position advised, prepared, or reported. The practitioner also must inform the client of any opportunity to avoid any such penalty by disclosure, if relevant, and of the requirements for adequate disclosure. This paragraph (b) applies even if the practitioner is not subject to a penalty with respect to the position.

(c) *Relying on information furnished by clients.* A practitioner advising a client to take a position on a tax return, or preparing or signing a tax return as a preparer, generally may rely in good faith without verification upon information furnished by the client. The practitioner may not, however, ignore the implications of information furnished to, or actually known by, the practitioner, and must make reasonable inquiries if the information as furnished appears to be incorrect, inconsistent with an important fact or another factual assumption, or incomplete.

(d) *Definitions.* For purposes of this section—

(1) *Realistic possibility.* A position is considered to have a realistic possibility of being sustained on its merits if a reasonable and well informed analysis by a person knowledgeable in the tax law would lead such a person to conclude that the position has approximately a one in three, or greater, likelihood of being sustained on its merits. The authorities described in 26 CFR 1.6662–4(d)(3)(iii), or any successor provision, of the substantial understatement penalty regulations may be taken into account for purposes of this analysis. The possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

(2) *Frivolous.* A position is frivolous if it is patently improper.

§ 10.35 More likely than not tax shelter opinions.

(a) *In general.* A practitioner who provides a tax shelter opinion that concludes that the Federal tax treatment of a tax shelter item or items is more likely than not (or at a higher level of confidence) the proper treatment must comply with each of the following requirements with respect to each such item.

(1) *Factual matters.* (i) The practitioner must make inquiry as to all relevant facts, be satisfied that the opinion takes account of all relevant facts, and be satisfied that the material facts (including factual assumptions and representations) are accurately and completely described in the opinion, and, where appropriate, in any related offering materials or sales promotion materials.

(ii) The opinion must not be based, directly or indirectly, on any unreasonable factual assumptions (including assumptions as to future events). Unreasonable factual assumptions include—

(A) A factual assumption that the practitioner knows or has reason to believe is incorrect, incomplete, inconsistent with an important fact or another factual assumption, or implausible in any material respect; or

(B) A factual assumption regarding a fact or facts that the practitioner could reasonably request to be provided or to be represented.

(C) A factual assumption that the transaction has a business reason, an assumption that the transaction is potentially profitable apart from tax benefits, or an assumption with respect to a material valuation issue.

(iii) A practitioner may, where it would be reasonable based on all the facts and circumstances, rely on factual representations, statements, findings, or agreements of the taxpayer or other persons ((factual representations) (including representations describing the specific business reasons for the transaction, the potential profitability of the transaction apart from tax benefits, or a valuation prepared by an independent party). Factors relevant to whether such factual representations are reasonable include, but are not limited to, whether the person making the factual representations is knowledgeable as to the facts being represented and is the appropriate person to make such factual representations. A practitioner does not need to conduct an audit or independent verification of a factual representation, but the practitioner may not rely on factual representations if the practitioner knows or has reason to believe, based on his or her background and knowledge, that the relevant information is, or otherwise appears to be, unreasonable, incorrect, incomplete, inconsistent with an important fact or another factual representation, or implausible in any material respect. For example, a representation is incomplete if it states that there are business reasons for the transaction without describing those reasons, or if it states that a transaction is potentially profitable apart from tax benefits without providing adequate factual support. In addition, a valuation is inconsistent with an important fact or factual assumption or is implausible if it appears to be based on facts that are inconsistent with the facts of the transaction.

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

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

(B) The practitioner reasonably believes that the person making the appraisal or financial projection is reputable and competent to perform the appraisal or projection; and

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

(v) If the fair market value of purchased property is to be established by reference to its stated purchase price, the practitioner must examine the terms and conditions on which the property was (or is to be) purchased to determine whether the stated purchase price reasonably may be considered to be its fair market value.

(2) *Relate law to facts.* (i) The opinion must relate the applicable law to the relevant facts.

(ii) The opinion must clearly identify the facts upon which the opinion's conclusions are based.

(iii) The opinion must contain a reasoned analysis of the pertinent facts and legal authorities and must not assume the favorable resolution of any Federal tax issue material to the analysis or otherwise rely on any unreasonable legal assumptions.

(iv) The opinion must not contain legal analyses or conclusions with respect to Federal tax issues that are inconsistent with each other.

(3) *Analysis of material Federal tax issues.* The practitioner must ascertain that all material Federal tax issues have been considered, and that all of those issues which involve the reasonable possibility of a challenge by the Internal Revenue Service have been fully and fairly addressed. The opinion must state that the practitioner has considered the possible application to the facts of all potentially relevant judicial doctrines, including the step transaction, business purpose, economic substance, substance over form, and sham transaction doctrines, as well as potentially relevant

statutory and regulatory anti-abuse rules, and the opinion must analyze whether the tax shelter item is vulnerable to challenge under all potentially relevant doctrines and anti-abuse rules. In analyzing such judicial doctrines and statutory and regulatory anti-abuse rules, the opinion must take into account the taxpayer's non-tax and tax purposes (and the relative weight of such purposes) for entering into a transaction and for structuring a transaction in a particular manner.

(4) *Evaluation of material Federal tax issues and overall conclusion.* (i) The practitioner must clearly provide his or her conclusion as to the likelihood that an investor (or, where the practitioner is relying on a representation as to the characteristics of potential investors, a typical investor of the type to whom the tax shelter is or will be marketed) will prevail on the merits with respect to each material Federal tax issue that involves the reasonable possibility of a challenge by the Internal Revenue Service. This requirement is not satisfied by including a statement in the opinion that the practitioner was unable to opine with respect to certain material Federal tax issues, including but not limited to whether the transaction has a business purpose or economic substance.

(ii) The opinion must unambiguously conclude that the Federal tax treatment of the tax shelter item or items is more likely than not (or at a higher level of confidence) the proper tax treatment. A favorable overall conclusion may not be based solely on the conclusion that the taxpayer more likely than not will prevail on the merits of each material Federal tax issue.

(iii) In ascertaining that all material Federal tax issues have been considered, evaluating the merits of those issues and evaluating whether the Federal tax treatment of the tax shelter item or items is the proper tax treatment, the possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.

(5) *Description of opinion.* The practitioner must take reasonable steps to assure that any written materials or promotional efforts that distribute, reflect or refer to the tax shelter opinion, correctly and fairly represent the nature and extent of the opinion.

(b) *Competence to provide opinion; reliance on opinions of others.* (1) The practitioner must be knowledgeable in all of the aspects of Federal tax law relevant to the opinion being rendered. If the practitioner is not sufficiently knowledgeable to render an informed opinion with respect to particular material Federal tax issues, then the practitioner may rely on the opinion of another practitioner with respect to such issues, provided the practitioner is satisfied that the other practitioner is sufficiently knowledgeable regarding such issues and the practitioner does not know and has no reason to believe that such opinion should not be relied on.

(2) To the extent the practitioner relies on an opinion of another practitioner, the opinion rendered by the practitioner must identify the other practitioner, state the date on which the opinion was rendered, and set forth the conclusions reached in such opinion.

(3) The practitioner also must be satisfied that the combined analysis, taken as a whole, satisfies the requirements of this § 10.35.

(4) *Financial forecasts and projections.* A practitioner who makes financial forecasts or projections relating to or based on the tax consequences of the tax shelter item that are included in written materials disseminated to any or all of the same persons as the opinion may rely on the opinion of another practitioner as to any or all material Federal tax issues, provided that the practitioner who desires to rely on the other opinion has no reason to believe the practitioner rendering such other opinion has not complied with the standards of paragraph (a) of this § 10.35, is satisfied that the other practitioner is sufficiently knowledgeable and does not know and has no reason to believe that the opinion of the other practitioner should not be relied on. The practitioner's report must disclose any material Federal tax issue not covered by, or incorrectly opined on, by the other opinion, and shall set forth his or her opinion with respect to each such issue in a manner that satisfies the requirements of paragraph (a) of this section.

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

(1) *Practitioner* includes any individual described in paragraph (f) of § 10.2.

(2) The definition of *tax shelter* is set forth in section 6662(d)(2)(C)(iii) of the Internal Revenue Code. Excluded from the term are municipal bonds and qualified retirement plans.

(3) A *tax shelter item* is an item of income, gain, loss, deduction or credit if the item is directly or indirectly attributable to a tax shelter as defined in section 6662(d)(2)(C)(iii) of the Internal Revenue Code.

(4) A *tax shelter opinion,* as the term is used in this section, is written advice by a practitioner concerning the Federal tax aspects of a tax shelter item or items. The term tax shelter opinion includes the Federal tax aspects or tax risks portion of offering materials prepared by or at the direction of a practitioner, whether or not a separate opinion letter is issued and whether or not the practitioner's name is referred to in offering materials or in connection with sales promotion efforts. Similarly, a financial forecast or projection prepared by a practitioner is a tax shelter opinion if it is predicated on assumptions regarding Federal tax aspects of the investment and that meets the other requirements of the first sentence of this paragraph. The term tax shelter opinion does not include advice provided in connection with the review of portions of offering materials or sales promotion materials, provided neither the name of the practitioner or the practitioner's firm nor the fact that a practitioner has rendered advice concerning the Federal tax aspects, is referred to in the offering materials or related sales promotion materials.

(5) A *material Federal tax issue,* as the term is used in this section, is any Federal tax issue the resolution of which could have a significant impact (whether beneficial or adverse) on a taxpayer under any reasonably foreseeable circumstance.

(d) *Effect of opinion that meets these standards.* An opinion of a practitioner that meets these requirements will satisfy the practitioner's responsibilities under this section, but the persuasiveness of the opinion with regard to the tax issues in question and the taxpayer's good faith reliance on the opinion will be separately determined under applicable provisions of the law and regulations.

(e) For purposes of advising the Director of Practice whether an individual may have violated § 10.33 or § 10.35, the Director is authorized to establish an Advisory Committee composed of at least five individuals authorized to practice before the Internal Revenue Service. Under procedures established by the Director, such Advisory Committee will, at the request of the Director, review and make recommendations with regard to the alleged violations of § 10.33 or § 10.35.

§ 10.36 Procedures to ensure compliance.

A practitioner who is a member of, associated with, or employed by a firm must take reasonable steps, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters arising under the Federal tax laws, to make certain that the firm has adequate procedures in effect for purposes of ensuring compliance with §§ 10.33,

10.34, and 10.35. The Director of Practice may take disciplinary action against any practitioner for failing to comply with the requirements of the preceding sentence if, and only if—

(a) The practitioner through willfulness, recklessness, or gross incompetence does not take such reasonable steps and the practitioner and one or more persons who are members of, associated with, or employed by the firm have, in connection with their practice with the firm, engaged in a pattern or practice of failing to comply with § 10.33, § 10.34 or § 10.35; or

(b) The practitioner takes such reasonable steps but has actual knowledge that one or more persons who are members of, associated with, or employed by the firm have, in connection with their practice with the firm, engaged in a pattern or practice of failing to comply with § 10.33, § 10.34 or § 10.35 and the practitioner, through willfulness, recklessness, or gross incompetence, fails to take prompt action, consistent with his or her authority and responsibility for the firm's practice advising clients regarding matters under the Federal tax laws, to correct such pattern or practice.

Subpart C—Sanctions for Violation of the Regulations

§ 10.50 Sanctions.

(a) *Authority to censure, suspend, or disbar.* The Secretary of the Treasury, or his or her designate, after notice and an opportunity for a proceeding, may censure, suspend or disbar any practitioner from practice before the Internal Revenue Service if the practitioner 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. Censure is a public reprimand.

(b) *Authority to disqualify.* The Secretary of the Treasury, or his or her designate, after due notice and opportunity for hearing, may disqualify any appraiser with respect to whom a penalty has been assessed under section 6701(a) of the Internal Revenue Code.

(1) If any appraiser is disqualified pursuant to this subpart C, such appraiser is barred from presenting evidence or testimony in any administrative proceeding before the Department of Treasury or the Internal Revenue Service, regardless of whether such evidence or testimony would pertain to an appraisal made prior to or after such date.

(2) Any appraisal made by a disqualified appraiser after the effective date of disqualification will not have any probative effect in any administrative proceeding before the Department of the Treasury or the Internal Revenue Service. However, an appraisal otherwise barred from admission into evidence pursuant to this section may be admitted into evidence solely for the purpose of determining the taxpayer's reliance in good faith on such appraisal.

§ 10.51 Incompetence and disreputable conduct.

Incompetence and disreputable conduct for which a practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service includes, but is not limited to—

(a) Conviction of any criminal offense under the revenue laws of the United States;

(b) Conviction of any criminal offense involving dishonesty, or breach of trust;

(c) Conviction of any felony under Federal or State law for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service;

(d) 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.*

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

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

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

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

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

(j) Knowingly aiding and abetting another person to practice before the Internal Revenue Service during a period of suspension, disbarment, or ineligibility of such other person.

(k) Contemptuous conduct in connection with practice before the Internal Revenue Service, including the use of abusive language, making false accusations and statements, knowing them to be false, or circulating or publishing malicious or libelous matter.

(l) Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion which is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the Federal tax laws. False opinions described in this paragraph (l) 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 tax opinion or offering material are false or misleading. For purposes of this paragraph, 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, recklessly, or through gross incompetence. Gross incompetence includes conduct that reflects gross indifference, preparation which is grossly inadequate under the

circumstances, and a consistent failure to perform obligations to the client.

§ 10.52 Violation of regulations.

A practitioner may be censured, suspended or disbarred from practice before the Internal Revenue Service for any of the following—

(a) Willfully violating any of the regulations contained in this part.

(b) Recklessly or through gross incompetence (within the meaning of § 10.51(l)) violating § 10.33, § 10.34, or § 10.35.

§ 10.53 Receipt of information concerning practitioner.

(a) *Officer or employee of the Internal Revenue Service.* If an officer or employee of the Internal Revenue Service has reason to believe that a practitioner has violated any provision of this part, the officer or employee will promptly make a written report to the Director of Practice of the alleged violation.

(b) *Other persons.* Any person other than an officer or employee of the Internal Revenue Service having information of a violation of any provision of this part may make an oral or written report of the alleged violation to the Director of Practice or any officer or employee of the Service. If the report is made to an officer or employee of the Service, the officer or employee will make a written report of the alleged violation to the Director.

Subpart D—Rules Applicable to Disciplinary Proceedings

§ 10.60 Institution of proceeding.

(a) Whenever the Director of Practice determines that a practitioner violated any provision of the laws or regulations governing practice before the Internal Revenue Service, the Director may reprimand the practitioner or, in accordance with § 10.62, institute a proceeding for censure, suspension, or disbarment of the practitioner.

(b) Whenever the Director of Practice is advised or becomes aware that a penalty has been assessed against an appraiser under section 6701(a) of the Internal Revenue Code, the Director may reprimand the appraiser or, in accordance with § 10.62, institute a proceeding for disqualification of the appraiser.

(c) A proceeding for censure, suspension, or disbarment of a practitioner or disqualification of an appraiser is instituted by the filing of a complaint, the contents of which are more fully described in § 10.62. Except as provided in § 10.82, a proceeding will not be instituted under this section unless the proposed respondent previously has been advised in writing of the facts or conduct warranting such action and has been accorded an opportunity to provide an explanation or description of mitigating circumstances.

§ 10.61 Conferences.

(a) *In general.* The Director of Practice may confer with a practitioner or an appraiser concerning allegations of misconduct irrespective of whether a proceeding for censure, suspension, disbarment, or disqualification has been instituted against the practitioner or appraiser. If the conference results in a stipulation in connection with a proceeding in which the practitioner or appraiser is the respondent, the stipulation may be entered in the record by either party to the proceeding.

(b) *Resignation or voluntary suspension or censure.* To avoid the institution or conclusion of a proceeding under paragraph (a) of § 10.60, a practitioner may offer his or her consent to the issuance of a censure, suspension or disbarment, or may resign, as the case may be, from practice before the Internal Revenue Service. It is within the discretion of the Director of Practice to accept the offered censure, suspension, disbarment, or resignation, in accordance with the consent offered.

(c) *Voluntary disqualification.* To avoid the institution or conclusion of a proceeding under paragraph (b) of § 10.60, an appraiser may offer his or her consent to disqualification. It is within the discretion of the Director of Practice to accept the offered disqualification in accordance with the consent offered.

§ 10.62 Contents of complaint.

(a) *Charges.* A complaint must name the respondent, give a plain and concise description of the allegations that constitute the basis for the proceeding, and be signed by the Director of Practice. A complaint is sufficient if it fairly informs the respondent of the charges brought so that he or she is able to prepare a defense. In the case of a complaint filed against an appraiser, the complaint is sufficient if it refers to a penalty imposed previously on the respondent under section 6701(a) of the Internal Revenue Code.

(b) *Demand for answer.* The Director of Practice must notify the respondent of the place and time for answering the complaint, the time for which may not be less than 15 days from the date of service of the complaint, and notice must be given that a decision by default may be rendered against the respondent in the event an answer is not filed as required.

§ 10.63 Service of complaint and other papers.

(a) *Complaint.* The complaint or a copy of the complaint must be served on the respondent by certified mail or first class mail, as provided below; by delivering it to the respondent or the respondent's authorized representative in person; by leaving it at the office or place of business of the respondent or the respondent's authorized representative; or in any other manner that has been agreed to by the respondent. Where service is by certified mail, the returned post office receipt duly signed by or on behalf of the respondent will be proof of service. If the certified mail is not claimed or accepted by the respondent and is returned undelivered, complete service may be made on the respondent by mailing the complaint to the respondent by first class mail, provided the complaint is addressed to the respondent at the respondent's last known address as determined under section 6212 of the Internal Revenue Code and the regulations thereunder. If service is made on the respondent or the respondent's authorized representative in person, by leaving the complaint at the office or place of business of the respondent or the respondent's authorized representative, or by other means agreed to by the respondent, the sworn or affirmed written statement of service by the person making service, setting forth the manner of service, including the place, recipient, date and time of service, will be proof of service.

(b) *Service of papers other than complaint.* Any paper other than the complaint may be served on the respondent as provided in paragraph (a) of this section or by mailing the paper by first class mail to the respondent at his or her last known address as determined under section 6212 of the Internal Revenue Code and the regulations thereunder, or by mailing the paper by first class mail to the respondent's authorized representative. This mailing constitutes complete service.

(c) *Filing of papers.* Whenever the filing of a paper is required or permitted in connection with a proceeding under this part, and the place of filing is not specified by these regulations, rule, or order of the Administrative Law Judge, the paper must be filed with the Director of Practice, Internal Revenue Service, 1111 Constitution Avenue, NW., Washington, DC 20224. All papers must be filed in duplicate.

§ 10.64 Answer.

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

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

(b) *Contents.* The answer must contain a statement of facts that constitute the respondent's grounds of defense. The respondent must specifically admit or deny each allegation set forth in the complaint, except that the respondent may state that the respondent is without sufficient information to admit or deny a specific allegation. The respondent, nevertheless, may not deny a material allegation in the complaint which the respondent knows to be true, or state that the respondent is without sufficient information to form a belief, when the respondent possesses the required information. The respondent also must state affirmatively any special matters of defense on which he or she relies.

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

(d) *Signature.* The answer must be signed by the respondent or the respondent's authorized representative and must include a statement directly above the signature acknowledging that the statements made in the answer are true and correct and that knowing and willful false statements may be punishable under 18 U.S.C. 1001.

§ 10.65 Supplemental charges.

If it appears that the respondent, in his or her answer, falsely and in bad faith, denies a material allegation of fact in the complaint or states that the respondent has insufficient knowledge to form a belief, when the respondent in fact possesses such information, or if it appears that the respondent has knowingly introduced false testimony during proceedings for his or her censure, suspension, disbarment, or disqualification, the Director of Practice may file supplemental charges against the respondent. The supplemental charges may be tried with other charges in the case, provided the respondent is given due notice of the charges and is afforded an opportunity to prepare a defense to such charges.

§ 10.66 Reply to answer.

The Director of Practice may file a reply to the respondent's answer, but unless otherwise ordered by the Administrative Law Judge, no reply to the respondent's answer is required. If a reply is not filed, new matter in the answer is deemed denied.

§ 10.67 Proof; variance; amendment of pleadings.

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

§ 10.68 Motions and requests.

Unless the Administrative Law Judge directs otherwise, motions and requests may be filed with the Director of Practice or with the Administrative Law Judge.

§ 10.69 Representation.

A respondent or proposed respondent may appear in person or he or she may be represented by a practitioner. The Director of Practice may be represented by an attorney or other employee of the Internal Revenue Service.

§ 10.70 Administrative Law Judge.

(a) *Appointment.* Proceedings on complaints for the censure, suspension or disbarment of a practitioner or the disqualification of an appraiser will be conducted by an Administrative Law Judge appointed as provided by 5 U.S.C. 3105.

(b) *Powers of the Administrative Law Judge.* The Administrative Law Judge, among other powers, has the authority, in connection with any proceeding under § 10.60 assigned or referred to him or her, to do the following—

(1) Administer oaths and affirmations;

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

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

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

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

(6) Take or authorize the taking of depositions;

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

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

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

(10) Make decisions.

§ 10.71 Hearings.

(a) *In general.* An Administrative Law Judge will preside at the hearing on a complaint filed under paragraph (c) of § 10.60 for the censure, suspension, or disbarment of a practitioner or disqualification of an appraiser. Hearings will be stenographically recorded and transcribed and the testimony of witnesses will be taken under oath or affirmation. Hearings will be conducted pursuant to 5 U.S.C. 556. A hearing in a proceeding requested under paragraph (g) of § 10.82 will be conducted *de novo.*

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

§ 10.72 Evidence.

(a) *In general.* The rules of evidence prevailing in courts of law and equity are not controlling in hearings on complaints filed under paragraph (c) of § 10.60. However, the Administrative Law Judge may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(b) *Depositions.* The deposition of any witness taken pursuant to § 10.73 may be admitted into evidence in any proceeding instituted under § 10.60.

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

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

(e) *Objections.* Objections to evidence are to be made in short form, stating the grounds for the objection. Except as ordered by the Administrative Law Judge, argument on objections will not be recorded or transcribed. Rulings on objections are to be a part of the record, but no exception to a ruling is necessary to preserve the rights of the parties.

§ 10.73 Depositions.

(a) Depositions for use at a hearing may be taken, with the written approval of the Administrative Law Judge, by either the Director of Practice or the respondent or their duly authorized representatives. Depositions may be taken before any officer duly authorized to administer an oath for general purposes or before an officer or employee of the Internal Revenue Service who is authorized to administer an oath in internal revenue matters.

(b) The party taking the deposition must provide the deponent and the other party with 10 days written notice of the deposition, unless the deponent and the parties agree otherwise. The notice must specify the name of the deponent, the time and place where the deposition is to be taken, and whether the deposition will be taken by oral or written interrogatories. When a deposition is taken by written interrogatories, any cross-examination also will be by written interrogatories. Copies of the written interrogatories must be served on the other party with the notice of deposition, and copies of any written cross-interrogation must be mailed or delivered to the opposing party at least 5 days before the date that the deposition will be taken, unless the parties mutually agree otherwise. A party on whose behalf a deposition is taken must file the responses to the written interrogatories or a transcript of the oral deposition with the Administrative Law Judge and serve copies on the opposing party and the deponent. Expenses in the reporting of depositions will be borne by the party that requested the deposition.

§ 10.74 Transcript.

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

§ 10.75 Proposed findings and conclusions.

Except in cases where the respondent has failed to answer the complaint or where a party has failed to appear at the hearing, the parties must be afforded a reasonable opportunity to submit proposed findings and conclusions and their supporting reasons to the Administrative Law Judge.

§ 10.76 Decision of the Administrative Law Judge.

As soon as practicable after the conclusion of a hearing and the receipt of any proposed findings and conclusions timely submitted by the parties, the Administrative Law Judge will make the decision in the case. The decision must include a statement of findings and conclusions, as well as the reasons or basis for making such findings and conclusions, and an order of censure, suspension, disbarment, disqualification, or dismissal of the complaint. The Administrative Law Judge will file the decision with the Director of Practice, who will transmit a copy of the decision to the respondent or the respondent's authorized representative. In the absence of an appeal to the Secretary of the Treasury, or review of the decision on motion of the Secretary, the decision of the Administrative Law Judge will without further proceedings become the decision of the Secretary of the Treasury 30 days after the date of the Administrative Law Judge's decision.

§ 10.77 Appeal to the Secretary.

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

§ 10.78 Decision of the Secretary.

On appeal from or review of the decision of the Administrative Law Judge, the Secretary of the Treasury, or his or her designate, will make the agency decision. A copy of the agency's decision will be transmitted to the respondent by the Director of Practice.

§ 10.79 Effect of disbarment, suspension, or censure.

(a) *Disbarment.* Where the final order in a case is against the respondent and is for disbarment, the respondent will not be permitted to practice before the Internal Revenue Service unless and until authorized to do so by the Director of Practice pursuant to § 10.81.

(b) *Suspension.* Where the final order in a case is against the respondent and is for suspension, the respondent will not be permitted to practice before the Internal Revenue Service during the period of suspension.

(c) *Censure.* Where the final order in the case is against the respondent and is for censure, the respondent may be permitted to practice before the Internal Revenue Service, but the respondent's future representations may be subject to conditions prescribed by the Director of Practice designed to promote high standards of conduct. For example, where a practitioner is censured because he or she failed to advise his or her clients about a potential conflict of interest and obtain the clients' written consents, the Director of Practice may require the practitioner to provide the Director or another Internal Revenue Service official with a copy of all future consents obtained by the practitioner, whether or not such consents are specifically requested.

§ 10.80 Notice of disbarment, suspension, censure, or disqualification.

On the issuance of a final order censuring, suspending, or disbarring a practitioner or a final order disqualifying an appraiser, the Director of Practice may give notice of the censure, suspension, disbarment, or disqualification to appropriate officers and employees of the Internal Revenue Service and to interested departments and agencies of the Federal government. The Director may determine the manner of giving notice to the proper authorities of the State by which the censured, suspended, or disbarred person was licensed to practice.

§ 10.81 Petition for reinstatement.

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

§ 10.82 Expedited suspension upon criminal conviction or loss of license for cause.

(a) *When applicable.* Whenever the Director of Practice determines that a practitioner is described in paragraph (b) of this section, the Director may institute a proceeding under this section to suspend the practitioner from practice before the Internal Revenue Service.

(b) *To whom applicable.* This section applies to any practitioner who, within 5 years of the date a complaint instituting a proceeding under this section is served—

(1) Has had his or her license to practice as an attorney, certified public accountant, or actuary suspended or revoked for cause (not including a failure to pay a professional licensing fee) by any authority or court, agency, body, or board described in § 10.51(i); or

(2) Has been convicted of any crime under title 26 of the United States Code, any crime involving dishonesty or breach of trust, or any felony for which the conduct involved renders the practitioner unfit to practice before the Internal Revenue Service.

(c) *Instituting a proceeding.* A proceeding under this section will be instituted by a complaint that names the respondent, is signed by the Director of Practice, is filed in the Director's office, and is served according to the rules set forth in paragraph (a) of § 10.63. The complaint must give a plain and concise description of the allegations that constitute the basis for the proceeding. The complaint must notify the respondent—

(1) Of the place and due date for filing an answer;

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

(3) That the respondent may request a conference with the Director of Practice to address the merits of the complaint and that any such request must be made in the answer; and

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

(d) *Answer.* The answer to a complaint described in this section must be filed no later than 30 calendar days following the date the complaint is served, unless the Director of Practice extends the time for filing. The answer must be filed in accordance with the rules set forth in § 10.64, except as otherwise provided in this section. A respondent is entitled to a conference with the Director only if the conference is requested in a timely filed answer. If a request for a conference is not made in the answer or the answer is not timely filed, the respondent will be deemed to have waived his or her right to a conference and the Director may suspend such respondent at any time following the date on which the answer was due.

(e) *Conference.* The Director of Practice or his or her designee will preside at a conference described in this section. The conference will be held at a place and time selected by the Director, but no sooner than 14 calendar days after the date by which the answer must be filed with the Director, unless the respondent agrees to an earlier date. An authorized representative may represent the respondent at the conference. Following the conference, upon a finding that the respondent is described in paragraph (b) of this section, or upon the respondent's failure to appear at the conference either personally or through an authorized representative, the Director may immediately suspend the respondent from practice before the Internal Revenue Service.

(f) *Duration of suspension.* A suspension under this section will commence on the date that written notice of the suspension is issued. A practitioner's suspension will remain effective until the earlier of the following—

(1) The Director of Practice lifts the suspension after determining that the practitioner is no longer described in paragraph (b) of this section or for any other reason; or

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

(g) *Proceeding instituted under § 10.60.* If the Director of Practice suspends a practitioner under this section, the practitioner may ask the Director to issue a complaint under § 10.60. The request must be made in writing within 2 years from the date on which the practitioner's suspension commences. The Director must issue a complaint requested under this paragraph within 30 calendar days of receiving the request.

Subpart E—General Provisions

§ 10.90 Records.

(a) *Availability.* The Director of Practice will make available for public inspection at the Office of Director of Practice the roster of all persons enrolled to practice, the roster of all persons censured, suspended, or disbarred from practice before the Internal Revenue Service, and the roster of all disqualified appraisers. Other records of the Director may be disclosed upon specific request, in accordance with the applicable disclosure rules of the Internal Revenue Service and the Treasury Department.

(b) *Disciplinary procedures.* A request by a practitioner or appraiser that a hearing in a disciplinary proceeding concerning him or her be public, and that the record of such disciplinary proceeding be made available for inspection by interested persons may be granted by the Director of Practice where the parties stipulate in advance to protect from disclosure confidential tax information in accordance with all applicable statutes and regulations.

§ 10.91 Saving clause.

Any proceeding instituted under this part, but not closed prior to the effective date of these revised regulations, will not be affected by the revisions. Any proceeding under this part based on conduct engaged in prior to the effective date of these regulations may be instituted subsequent to the effective date of these revisions. Conduct engaged in prior to the effective date of these regulations is subject to the regulations in effect at the time the conduct occurred.

§ 10.92 Special orders.

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

§ 10.93 Effective date.

Subject to § 10.91, Part 10 is applicable on the date final regulations are published in the **Federal Register**.

Robert E. Wenzel,

Deputy Commissioner of Internal Revenue.

Approved: January 3, 2001.

Jonathan Talisman,

Assistant Secretary (Tax Policy).

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