Tax Rep & Prep Ethics:
Circular 230 Requirements & Preparation

THE OKLAHOMA SOCIETY OF ENROLLED AGENTS

OCTOBER 2018

By: LG Brooks, EA, CTRS

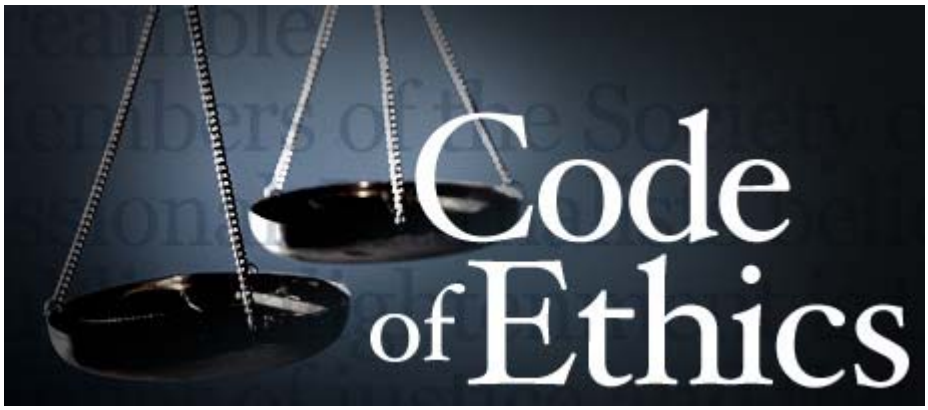

TABLE OF CONTENTS

Introduction: Tax Prep Ethics: Circular 230

Enrolled Agents (EAs), Certified Public Accountants (CPAs) and Attorneys provide uncompromising and valuable professional services to not only the public in general, but also to a multitude of private institutions and public entities on a continual basis. The above referenced professionals (and others) are mandated to follow a "Code of Ethics" or certain prescribed "Canon of Ethics" while providing their professional services. Although each governing body of the licensed professionals noted above maintain a separate "Codes of Ethics", the underlying emphasis is the same for each one. Each code of ethics mandates, professional responsibility, professional reliability, **trust**, integrity, and technical competence; and without a doubt the highest ethical standards, rules and guidelines.

An established and effective "code of ethics" should significantly affect and influence the conduct, judgment and professional behavior of all individuals, professionals and representatives related to professional "tax return preparation". To achieve this cohesiveness among the professionals, the United States Treasury Department (Treasury) created their own "code of ethics" and promulgated it as "Circular 230", which governs EAs, CPAs and Attorneys as one group of practitioners, and concerning other "unlicensed" individuals (practitioners) concerning practice before the Internal Revenue Service.

We will attempt to review, discuss and analyze "Tax Prep Ethics: Circular 230"" and determine ethical applications with regards to today's changing political and professional environment related to "Preparer Penalty" issues.

Regulatory Oversight

The Office of Professional Responsibility (OPR), formerly known as the "Office of the Director of Practice", has the responsibility of establishing and enforcing the rules, guidelines and regulations of Circular 230. These rules were constructed as standards of competence and integrity to govern the conduct of all practicing tax professionals.

In general, the OPR attempts to ensure the integrity and credibility of the American tax system by working through tax professionals and with IRS operating divisions and functions.

In an attempt to increase awareness of the rules and regulations regarding practice before the IRS, and to reduce or prevent non-compliance, the OPR provides enforcement of Circular 230 through various means which we will discuss. The OPR's position is "increased enforcement", along with additional legislation, should deter non-compliance.

The OPR periodically publishes and announces the disciplinary actions or sanctions involving Attorneys, CPAs, EAs, Enrolled Actuaries, Enrolled Retirement Plan Agents, and Appraisers. The disciplinary actions are usually published via the Internal Revenue Bulletin (IRB) entitled, "Announcement of Disciplinary Sanctions from the Office of Professional Responsibility". This publication and/or announcement includes the name, city & state, professional designation of the disciplined professional as well as the disciplinary sanction issued and the effective date or dates of the disciplinary sanction.

Caveat:
It should be noted that the majority of egregious non-compliance is performed by individuals that are not governed by Circular 230 and/or non-licensed practitioners.

OPR Business Objective

The business objective of the OPR is to "increase the percentage of tax professionals who do adhere to professional standards and follow the law by performing the following:

- Establishing procedures to identify and address the most egregious non-compliance cases
- Strengthening partnerships with tax professionals
- Establishing and communicating standards of conduct for tax practitioners
- Establishing and maintaining a system of tax practitioner oversight
- Rejuvenating the referral process
- Publicizing actions taken to promote the integrity of the system and deter further non-compliance
- Establishing and administering a system of sanctions for tax practitioners who fail to observe standards of conduct

The Small Business & Work Opportunity Act: OVERVIEW

The "Small Business & Work Opportunity Act of 2007"[1] (the 2007 Act) significantly changed and modified the rules & regulatory guidelines pursuant to which "tax return preparers" are required to abide by. Typically, the 2007 Act implemented and mandated four basic changes as follows:

1. The monetary penalty was increased to **the greater of** $1,000 or 50% of the income earned from preparing the return
2. The penalty is now applicable to tax **preparers of multiple type returns** (not just income tax returns) for example preparers of "Estate & Gift Tax Returns".
3. The preparer must now have a "*reasonable belief that the position taken of the return **would more likely than not** be sustained on it's merits*", and;
4. Regarding positions disclosed on the return, the preparer must now have a **reasonable basis regarding the tax treatment** in order to avoid the penalty.

[1] Small Business Act, P. L. 110-28

The 2007 Small Business & Work Opportunity Act: IRC §6694

A. **IRC §6694** was modified by the 2007 Small Business & Work Opportunity Act (SBWOA), P.L. #110-28, 121 Stat.

B. The new provisions were enacted into law **May 25, 2007**.

C. The SBWOA amended IRC §6694 to extend the application of income tax return preparer penalties to **all tax return preparers**.

D. The SBWOA also altered the **"standards of conduct"** that must be met to avoid imposition of penalties for preparing a return (which reflects an understatement of liability).

E. The SBWOA also increased the **1st tier** "preparer penalties" from **$250 to $1,000** regarding the understatement of a tax liability or 50% of the income derived (or expected to be derived) by the tax return preparer; and the SBWOA also increased the **2nd tier** "preparer penalties" from **$1,000 to $5,000** (or 50% of income) for willful neglect.

F. The above 1st tier penalties apply upon the following:

i) Preparer knew or reasonably should have known of the position
ii) There was not a reasonable belief that the position would "more likely than not" be sustained on its merits
iii) The position was not disclosed as provided via IRC §6662(d)(2)(B)(ii) or
iv) There was no reasonable basis for the position

G. The **"Standards of Conduct"** pertaining to Preparers was amended as follows:

i.) For undisclosed positions, the SBWOA replaces the "realistic possibly standard" with a requirement that there be a reasonable belief that the tax treatment of the position would **"more likely than not"** be sustained on its merits.

ii.) For disclosed positions the SBWOA replaces the not frivolous standard with the requirement that there be a **"reasonable basis for the tax treatment of the position".**

H. Disclosure is adequate if made on a **Form 8275** (Disclosure Statement) or **Form 8275-R** (Regulation Disclosure Statement). The disclosure statements must be attached to the returns. This issue is discussed in detail later in the text.

"Smoke & Mirrors"-Promulgation of the New Law

Why weren't more tax practitioners aware of the enactment of the changes of critical provisions of law via the "2007 Small Business & Work Opportunity Act" that modified **IRC §6694?**[2] Maybe because you weren't aware of the, "**U. S. Troop Readiness, Veteran's Care, Katrina Recovery, and Iraq Accountability Appropriations Act of 2007**" (the ACT). To be precise, the SBWOA is actually only "*Section 8246*" of "the Act". A vast majority of the tax practitioner community were unaware of the existence of the *then pending legislation* that increased the "preparer penalty" provisions under the law and significantly modified the "preparer penalty standards". For lack of a better phrase, in my opinion the tax practitioner community was "bush whacked" with the new preparer penalty provisions.

"More Likely Than Not" (MLTN) Standard

The phrase "More Likely Than Not" is delineated via **IRC §6694**[3], however some practitioners continue to wrestle with the exact meaning of this particular phrase or more appropriately , how it is to be employed with respect to tax preparer issues. In brief, MLTN may be described as:

> A preparer is considered to have a *reasonable basis or belief* that the tax treatment meets the MLTN standard if he or she actually **analyzes all relevant facts and authorities** related to the preparation issue, and based upon such analysis, the preparer concludes, in good faith, that there is a **51% or more (or greater than 50%) chance** that the treatment will be upheld if subsequently challenged.

Although the "relevant facts" are generally established via a "thorough & probing" interview of the taxpayer as well as securing adequate "documentation & substantiation" related to a matter, the next question the practitioner may encounter is what "authorities" are applicable and how do I apply them properly.

The appropriate "authorities" such as Treas. Regs., Rev. Rul., Rev. Procs., Treasury Decisions, Federal Court rulings and other authorities (such as actions taken by Congress) are actually described via the Treas. Regs.[4]

[2] IRC §6694(a)(2)(C)
[3] IRC §6694(a)(2)(C)
[4] Treas. Reg. §1.6662-4

"**Goose vs. Gander" Penalty Theory**

Most of us are familiar with the phrase, "what's good for the goose is good for the gander". However, this phrase doesn't always apply with respect to the application of the "Accuracy-Related" penalty concerning a taxpayer and the correlation with a potential "preparer penalty". *For example*:

The "accuracy-related" penalty is generally imposed on a taxpayer regarding certain underpayments of tax.[5] The types of "underpayments" typically associated with this penalty are:

- Negligence or disregard of rules & regulations
- Any substantial **understatement of income tax**
- Any substantial valuation misstatement for income tax purposes
- Any substantial overstatement of pension liabilities, and
- Any substantial estate or gift tax valuation understatement

The second type underpayment (as outlined above) is allowed to be mitigated or reduced if "substantial authority" exists for the treatment, **or** "*relevant facts*" affecting the item's tax treatment are adequately "disclosed" in the return or in a statement attached to the return **and** the taxpayer has a "*reasonable basis*" for the tax treatment. Now we review the "*goose v. gander*" issue.

As noted above, the taxpayer (*the Goose*) is allowed to avoid this penalty if there was a reasonable cause for the underpayment and the taxpayer acted in good faith.[6] However, the preparer (*the Gander*) continues to be subject to the **MLTN standard**. In short, this means that situations may develop where the preparer will be penalized *but the taxpayer will NOT*. Furthermore, even if the position taken on the return is *actually supported by "**substantial authority**"*, the practitioner will not have protection if the "substantial authority" *does not meet or rise to the level* of the MLTN standard.

[5] IRC §6662, "Imposition of Accuracy-Related Penalty on Underpayments"
[6] IRC §6664(c)(1), "Reasonable Cause Exception for Underpayments"

IRC §6695 - OTHER ASSESSABLE PENALTIES WITH RESPECT TO THE PREPARATION OF TAX RETURNS FOR OTHER PERSONS.

FAILURE TO FURNISH COPY TO TAXPAYER

Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with section 6107(a) with respect to such return or claim shall pay a penalty of $50 for such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to documents filed during any calendar year shall not exceed $25,000.[7]

FAILURE TO SIGN RETURN:

Any person who is a tax return preparer with respect to any return or claim for refund, who is required by regulations prescribed by the Secretary to sign such return or claim, and who fails to comply with such regulations with respect to such return or claim shall pay a penalty of $50 for such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to documents filed during any calendar year shall not exceed $25,000.[8]

FAILURE TO FURNISH IDENTIFYING NUMBER:

Any person who is a tax return preparer with respect to any return or claim for refund and who fails to comply with section 6109(a)(4) with respect to such return or claim shall pay a penalty of $50 for such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to documents filed during any calendar year shall not exceed $25,000.[9]

FAILURE TO RETAIN COPY OR LIST:

Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with section 6107(b} with respect to such return or claim shall pay a penalty of $50 for each such failure, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to any return period shall not exceed $25,000.[10]

[7] IRC 6695(a)
[8] IRC 6695(b)
[9] IRC 6695(c)
[10] IRC 6695(d)

FAILURE TO FILE CORRECT INFORMATION RETURNS:

Any person required to make a return under section 6060 who fails to comply with the requirements of such section shall pay a penalty of $50 for--

- ☞ each failure to file a return as required under such section, and
- ☞ each failure to set forth an item in the return as required under [such] section, unless it is shown that such failure is due to reasonable cause and not due to willful neglect. The maximum penalty imposed under this subsection on any person with respect to any return period shall not exceed $25,000.[11]

NEGOTIATION OF CHECK:

Any person who is a tax return preparer who endorses or otherwise negotiates (directly or through an agent) any check made in respect of the taxes imposed by this title which is issued to a taxpayer (other than the tax return preparer) shall pay a penalty of $500 with respect to each such check. The preceding sentence shall not apply with respect to the deposit by a bank (within the meaning of section 581) of the full amount of the check in the taxpayer's account in such bank for the benefit of the taxpayer.[12]

FAILURE TO BE DILIGENT IN DETERMINING ELIGIBILITY FOR EARNED INCOME CREDIT:

Any person who is a tax return preparer with respect to any return or claim for refund who fails to comply with due diligence requirements imposed by the Secretary by regulations with respect to determining eligibility for, or the amount of, the credit allowable by section 32 shall pay a penalty of $500 for each such failure.[13]

Practitioner Pointer:

Pursuant to "**Rev. Proc. 2018-18**", please note that in the case of any failure relating to a return or claim for refund that is **filed during 2019**, the penalty amounts under the provisions of "**IRC §6695**" as noted above are increased as follows:

- o Where the penalty amount is listed as **$ 500** the new penalty amount is **$520**, and;
- o Where the penalty amount is listed as **$25,000** the new penalty amount is **$26,000**

[11] IRC 6695(e)
[12] IRC 6695(f)
[13] IRC 6695(g)

"**IRS Interim Guidance"**

With respect to the "substantial authority" issue noted above, the IRS has periodically issued "interim guidance" via the promulgation of "Notices". These "notices" are developed to provide tax practitioners (and taxpayers as well) with specific guidance regarding the application of the law with respect to potential penalty issues and to provide a various detailed explanations and examples of certain definitions relative to these issues.

Pertinent "IRS Guidance":

- ❑ Notice 2007-54.. Transition relief under the SBWOA of 2007
- ❑ Notice 2008-11.. Clarification of transition relief under the 2007 Act
- ❑ Notice 2008-13..Guidance on the new standards under the 2007 Act
- ❑ Notice 2008-46..Further implementation guidance on returns subject to the 6694 penalty under the 2007 Act
- ❑ Notice 2009-5..Guidance under the preparer penalty amendments in the "Tax Extenders & Alternative Minimum Tax Relief Act of 2008"
- ❑ Rev. Proc. 2011-13..Guidance for adequate disclosure/penalty reduction for TY 2010
- ❑ Rev. Proc. 2010-15..Guidance for adequate disclosure/penalty reduction for TY 2009
- ❑ Rev. Proc. 2008-14..Guidance for adequate disclosure/penalty reduction for TY 2008
- ❑ Rev. Proc. 2008-7..Guidance for adequate disclosure/penalty reduction for TY 2007
- ❑ Treasury Decision (T.D.) 9436
  - a) Definition of "Return Preparer"
  - b) Disclosed positions on a tax return
  - c) Reasonable Basis

Additional Provisions of the Law Regarding "Tax Prep Ethics: Circular 230"

Tax Return Preparer

"Tax return preparer" means any person who is a tax return preparer within the meaning of IRC §7701(a)(36) and Treas. Reg. §301.7701-15. An individual is a tax return preparer subject to IRC §6694 if the individual is primarily responsible for the position(s) on the return or claim for refund giving rise to an understatement.[14]

Responsibility of Signing Tax Return Preparer:

If there is a signing tax return preparer within the meaning of Treas. Reg. §301.7701-15(b)(1) within a firm, the signing tax return preparer generally will be considered the person who is primarily responsible for all of the positions on the return or claim for refund giving rise to an understatement unless, based upon credible information from any source, it is concluded that the signing tax return preparer is not primarily responsible for the position(s) on the return or claim for refund giving rise to the understatement.[15]

Responsibility of Non-Signing Tax Return Preparer:

Generally, if there is no signing tax return preparer within the meaning of Treas. Reg. §301.7701-15(b)(1) within a firm, it is concluded that the non-signing tax return preparer within the firm with overall supervisory responsibility for the positions(s) giving rise to the understatement generally will be considered the tax return preparer who is primarily responsible for all of the positions for purposes of IRC §6694, unless, based upon credible information from any source, it is concluded that another non-signing tax return preparer within that firm is primarily responsible for the position(s) on the return or claim for refund giving rise to the understatement.[16]

[14] Treas. Reg. §1.6694-1(b)
[15] Treas. Reg. §1.6694-1(b)(2)
[16] Treas. Reg. §1.6694-1(b)(3)

Responsibility of Signing & Non-Signing Tax Return Preparer:

If the information presented would support a finding that, within a firm, either the signing tax return preparer or a non-signing tax return preparer is primarily responsible for the position(s) giving rise to the understatement, the penalty may be assessed against either one of the individuals, but not both, as the primary responsible tax return preparer.[17]

Verification of Information Furnished by Taxpayer or Other Party (in part):

Generally, the tax return preparer (TRP) ***is not required to audit, examine or review books & records, business operations, documents, or other evidence*** to verify independently, information provided by the taxpayer, advisor or other return preparer, or other party. However, the TRP may not ignore the implications if information furnished to the TRP or actually known by the TRP. The *TRP must make reasonable inquires* if the information as furnished appears to be incorrect or incomplete.[18]

Verification of Information on Previously Filed Returns (in part):

Generally, a TRP may rely in good faith *without verification* upon a tax return that has been previously prepared by a taxpayer or another tax return preparer and filed with the IRS. Therefore, a TRP who prepares an amended return need not verify the positions on the original return. However, the TRP may not ignore the implications if information furnished to the TRP or actually known by the TRP. The *TRP must make reasonable inquires* if the information as furnished appears to be incorrect or incomplete. The TRP must confirm that the position being relied upon has not been adjusted by examination or otherwise.[19]

Substantial Authority-Effect of Having Substantial Authority

If there is substantial authority for the tax treatment of an item, the item is treated as if it were shown properly on the return for the taxable year in computing the amount of the tax shown on the return. Thus, for purposes of IRC §6662(d), the tax attributable to the item is not included in the understatement for that year.[20]

[17] Treas. Reg. §1.6694-1(b)(4)
[18] Treas. Reg. §1.6694-1(e)(1)
[19] Treas. Reg. §1.6694-1(e)(2)
[20] Treas. Reg. §1.6662-4(d)(1)

Substantial Authority- Substantial Authority Standard

The substantial authority standard is an objective standard involving an analysis of the law and application of the law to relevant facts. The *substantial authority standard is less stringent* than the MLTN standard, but it is *more stringent than the "reasonable basis standard"* as defined via **Treas. Reg. §1.6662-3(b)(3)**. The possibility that a return will not be audited or, if audited, that an item will not be raised on audit, *is not relevant* in determining whether the substantial authority (or the reasonable basis standard) is satisfied.[21]

Method of Making DISCLOSURE:

Disclosure Statement:

Disclosure is adequate with respect to an item (or group of similar items, such as amounts paid or incurred for supplies by a taxpayer engaged in business) or a position on a return if the disclosure is made on a properly completed form attached to the return or to a qualified amended return (as defined in **Treas. Reg. §1.6664-2(c)(3)** for the taxable year. In the case of an item or position other than one that is contrary to a regulation, disclosure must be made on **Form 8275** (*Disclosure Statement*); in the case of a position contrary to a regulation, disclosure must be made on **Form 8275-R** (*Regulation Disclosure Statement*).[22]

Disclosure on Return:

The Commissioner may by annual revenue procedure (or otherwise) prescribe the circumstances under which disclosure of information on a return (or qualified amended return) in accordance with applicable forms and instructions is adequate. If the revenue procedure does not include an item., *disclosure is adequate with respect to that item only if* made on a properly completed **Form 8275 or Form 8275-R**, as appropriate, attached to the return for the year or to a qualified amended return.[23]

[21] Treas. Reg. §1.6662-4(d)(2)
[22] Treas. Reg. §1.6662-4(f)(1)
[23] Treas. Reg. §1.6662-4(f)(2)

Practitioner Ethics: Duties & Restrictions Relating to Practice before the Internal Revenue Service (Circular 230)

Key Circular 230 Provisions Relative to "Preparer Penalty" Issues

- Return Preparation & Application of Rules to Other Individuals (**§10.8**)
- Information to be Furnished (**§10.20**)
- Knowledge of Client's Omission (**§10.21**)
- Diligence as to Accuracy (**§10.22**)
- Assistance from or to Disbarred or Suspended Persons & former IRS Employees (**§10.24**)
- Fees (**§10.27**)
- Conflicting Interest (**§10.29**)
- Best Practices for Tax Advisors (**§10.33**)
- Standards with Respect to Tax Returns & Documents, Affidavits & Other Papers(**§10.34**)
- Procedures to Ensure Compliance (**§10.36**)
- Requirements for Written Advice (**§10.37**)

§10.8 Return Preparation & Application of Rules to Other Individuals.

(a) *Preparing all or substantially all of* a *tax return.*

Any individual who for compensation prepares or assists with the preparation of all or substantially all of a tax return or claim for refund must have a preparer tax identification number. Except as otherwise prescribed in forms, instructions, or other appropriate guidance, an individual must be an attorney, certified public accountant, enrolled agent, or registered tax return preparer to obtain a preparer tax identification number. Any individual who for compensation prepares or assists with the preparation of all or substantially all of a tax return or claim for refund is subject to the duties and restrictions relating to practice in subpart B, as well as subject to the sanctions for violation of the regulations in subpart C.

(b) *Preparing a tax return and furnishing information.*

Any individual may for compensation prepare or assist with the preparation of a tax return or claim for refund (provided the individual prepares less than substantially all of the tax return or claim for refund), appear as a witness for the taxpayer before the Internal Revenue Service, or furnish information at the request of the Internal Revenue Service or any of its officers or employees.

(c) *Application of rules to other individuals.*

Any individual who for compensation prepares, or assists in the preparation of, all or a substantial portion of a document pertaining to any taxpayer's tax liability for submission to the Internal Revenue Service is subject to the duties and restrictions relating to practice in subpart B, as well as subject to the sanctions for violation of the regulations in subpart C. Unless otherwise a practitioner, however an individual may not for compensation prepare, or assist in the preparation of, all or substantially all of a tax return or claim for refund, or sign tax returns and claims for refund. For purposes of this paragraph·, an individual described in 26 CFR 301.7701-15(f) is not treated as having prepared all or a substantial portion of the document by reason of such assistance.

(d) *Effective/applicability date.* This section is applicable beginning July 2, 2011.

§10.20 Information to be furnished.

(a) To the Internal Revenue Service.

(1) 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.

(2) Where the requested records or information are not in the possession of, or subject to the control of, the practitioner or the practitioner's client, the practitioner must promptly notify the requesting Internal Revenue Service officer or employee and the practitioner must provide any information that the practitioner has regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information. The practitioner must make reasonable inquiry of his or her client regarding the identity of any person who may have possession or control of the requested records or information, but the practitioner is not required to make inquiry of any other person or independently verify any information provided by the practitioner's client regarding the identity of such persons.

(3) When a proper and lawful request is made by a duly authorized officer or employee of the Internal Revenue Service, concerning an inquiry into an alleged violation of the regulations in this part, a practitioner must provide any information the practitioner has concerning the alleged violation, and 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.

(b) Interference with a proper and lawful request for records or information.
A practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the Internal Revenue Service, 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.
Effective/applicability date. This section is applicable beginning July 2, 2011

§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 practitioner must advise the client of the consequences as provided under the Code and regulations of such noncompliance, error, or omission.

§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 modified by*§§10.34 and 10.37*, a practitioner will be presumed to have exercised due diligence for purposes of this section if the practitioner relies on the work product of another person and the practitioner used reasonable care in engaging, supervising, training, and evaluating the person, taking proper account of the nature of the relationship between the practitioner and the person.

(c) *Effective/applicability date*. Paragraph (a) of this section is applicable on September 26, 2007. Paragraph (b) of this section is applicable beginning June 12, 2014.

§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 Internal Revenue Service.

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

§10.27 Fees.

In general. A practitioner may not charge an unconscionable fee in connection with any matter before the Internal Revenue Service.

(b) *Contingent fees —*

(1) Except as provided in paragraphs (b)(2), (3), and (4) of this section, a practitioner may not charge a contingent fee for services rendered in connection with any matter before the Internal Revenue Service.

(2) A practitioner may charge a contingent fee for services rendered in connection with the Service's examination of, or challenge to —

(i) An original tax return; or

(ii) An amended return or claim for refund or credit where the amended return or claim for refund or credit was filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to the original tax return.

(3) A practitioner may charge a contingent fee for services rendered in connection with a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the Internal Revenue Service.

(4) A practitioner may charge a contingent fee for services rendered in connection with any judicial proceeding arising under the Internal Revenue Code.

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

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 other filing avoids challenge by the Internal Revenue Service or is sustained either by the Internal Revenue Service or in litigation. A contingent fee includes a fee that is based on a percentage of the refund reported on a return, that is based on a percentage of the taxes saved, or that otherwise depends on the specific result attained. A contingent fee also includes any fee arrangement in which the practitioner will reimburse the client for all or a portion of the client's fee in the event that a position taken on a tax return or other filing is challenged by the Internal Revenue Service or is not sustained, whether pursuant to an indemnity agreement, a guarantee, rescission rights, or any other arrangement with a similar effect.

Treasury Department Circular No. 230

§10.29 Conflicting Interests

(a) Except as provided by paragraph (b) of this section, a practitioner shall not represent a client before the Internal Revenue Service if the representation involves a conflict of interest. A conflict of interest exists if:

(1) The representation of one client will be directly adverse to another client; or

(2) There is a significant risk that the representation of one or more clients will be materially limited by the practitioner's responsibilities to another client, a former client or a third person or by a personal interest of the practitioner.

(b) Notwithstanding the existence of a conflict of interest under paragraph (a) of this section, the practitioner may represent a client if:

(1) The practitioner reasonably believes that the practitioner will be able to provide competent and diligent representation to each affected client;

(2) The representation is not prohibited by law;

(3) Each affected client *waives the conflict of interest and gives informed consent, confirmed in writing by each affected client, at the time the existence of the conflict of interest is known by the practitioner. The confirmation may be made within a reasonable period of time after the informed consent, but in no event later than 30 days.*

(c) 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.

(d) Effective/applicability date. This section is applicable on **September 26, 2007**.

§10.33 Best Practices for Tax Advisors

(a) Best Practices. Tax advisors should provide clients with the highest quality representation concerning Federal tax issues by adhering to best practices in providing advice and in preparing or assisting in the preparation of a submission to the Internal Revenue Service. In addition to compliance with the standards of practice provided elsewhere in this part, best practices include the following:

(1) Communicating clearly with the client regarding the terms of the engagement. For example, the advisor should determine the client's expected purpose for and use of the advice and should have a clear understanding with the client regarding the form and scope of the advice or assistance to be rendered.

(2) Establishing the facts, determining which facts are relevant, evaluating the reasonableness of any assumptions or representations, relating the applicable law (including potentially applicable judicial doctrines) to the relevant facts, and arriving at a conclusion supported by the law and the facts.

(3) Advising the client regarding the import of the conclusions reached, including, for example, whether a taxpayer may avoid accuracy-related penalties under the Internal Revenue Code if a taxpayer acts in reliance on the advice.

(4) Acting fairly and with integrity in practice before the IRS.

(b) Procedures to ensure best practices for tax advisors. Tax advisors with responsibility for overseeing a firm's practice of providing advice concerning Federal tax issues or of preparing or assisting in the preparation of submissions to the Internal Revenue should take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with the best practices set forth in paragraph (a) of this section.

(c) Applicability date. This section is effective after **June 20, 2005**.

§10.34 Standards with respect to tax returns and documents, affidavits and other papers. *(in part)

(a) ***Tax returns***. (1) A practitioner may not willfully, recklessly, or through gross incompetence-

(i) Sign a tax return or claim for refund that the practitioner knows or reasonably should know contains a position that--

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Internal Revenue Code (Code) (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(ii) Advise a client to take a position on a tax return or claim for refund, or prepare a portion of a tax return or claim for refund containing a position, that--

(A) Lacks a reasonable basis;

(B) Is an unreasonable position as described in section 6694(a)(2) of the Code (including the related regulations and other published guidance); or

(C) Is a willful attempt by the practitioner to understate the liability for tax or a reckless or intentional disregard of rules or regulations by the practitioner as described in section 6694(b)(2) of the Code (including the related regulations and other published guidance).

(2) A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted willfully, recklessly, or through gross incompetence

(b) Documents, affidavits & other papers

(c) Advising clients on potential penalties

(d) Relying on information furnished by clients

(e) *Effective/applicability date.* Paragraph (a) of this section is applicable for returns or claims for refund, or advice provided, beginning July 2, 2011. Paragraphs (b) through (d) of this section are applicable to tax returns, documents, affidavits and other papers filed on or after September 26, 2007.

§10.36 Procedures to ensure compliance.

(a) Any individual subject to the provisions of this part who has (or practitioners who have or share) principal authority and responsibility for overseeing a firm's practice governed by this part, including the provision of advice concerning Federal tax matters and preparation of tax returns, claims for refunds, or other documents for submission to the Internal Revenue Service must take reasonable steps to ensure that the firm has adequate procedures in effect for all members, associates, and employees for purposes of complying with subparts A, B and C of this part, as applicable. In the absence of a person or persons identified by the firm as having the principal authority and responsibility described in the paragraph, the Internal Revenue Service may identify one or more individuals subject to the provisions of this part responsible for compliance with the requirements of this section.

(b) Any such individual who has (or such individuals who have or share) principal authority as described in paragraph (a) of this section will be subject to discipline for failing to comply with the requirements of this section if---

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

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

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

(c) *Effective/applicability date.* This section is applicable beginning June 12, 2014.

§ 10.37 Requirements for written advice.

(a) *Requirements.*

(1) A practitioner may give written advice (including by means of electronic communication) concerning one or more Federal tax matters subject to the requirements in paragraph (a)(2) of this section. Government submissions on matters of general policy are not considered written advice on a Federal tax matter for purposes of this section. Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on Federal tax matters are not considered written advice on a Federal tax matter for purposes of this section. The preceding sentence does not apply to presentations marketing or promoting transactions.

(2) The practitioner must--

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

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

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

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

(v) Relate applicable law and authorities to facts; an

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

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

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

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

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

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

(c) *Standard of review.*

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

(2) In the case of an opinion the practitioner knows or has reason to know will be used or referred to by a person other than the practitioner (or a person who is a member of, associated with, or employed by the practitioner's firm) in promoting, marketing, or recommending to one or more taxpayers a partnership or other entity, investment plan or arrangement a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code, the Commissioner, or delegate, will apply a reasonable practitioner standard, considering all facts and circumstances, with emphasis given to the additional risk caused by the practitioner's lack of knowledge of the taxpayer's particular circumstances, when determining whether a practitioner has failed to comply with this section.

(d) *Federal tax matter.* A Federal tax matter, as used in this section, is any matter concerning the application or interpretation of--

(1) A revenue provision as defined in section 6110(i)(l)(B) of the Internal Revenue Code;

(2) Any provision of law impacting a person's obligations under the internal revenue laws and regulations, including but not limited to the person's liability to pay tax or obligation to file returns; or

(3) Any other law or regulation administered by the Internal Revenue Service.

(e) *Effective/applicability date.* This section is applicable to written advice rendered after June 12, 2014.

Gerald Lee Ridgley, Jr. v. Jacob J. Lew, et al….2014-2 U.S.T.C

This case involves Plaintiff, Gerald Lee Ridgley, Jr. (a practicing CPA) who brought suit against the Secretary of the Treasury (Mr. Jacob J. Lew) and the Commissioner of the IRS in their official capacities, to challenge the scope of their statutory authority as defined and promulgated via "**§10.27 of Treasury Department Circular 230**" regarding the charging of a "*contingent fee*" related to the preparation of an "ordinary refund claim" prior to the beginning of any examination or adjudication.

Disposition:

The IRS was "**permanently enjoined**" from enforcing the provision of "§*10.27 of Treasury Department Circular 230*" related to the "contingent fee" restrictions concerning tax professionals who prepare "Ordinary Refund Claims" as defined via "§*10.27 of Treasury Department Circular 230*".

In essence, the Court ruled that the IRS **lacked the "statutory authority"** to regulate any individual, ***whether a "certified public accountant" (CPA) or not***, concerning the preparation and filing of an ordinary refund claim.

Discussion:

_____

_____

_____

_____

_____

_____

“Tax Prep Ethics: Circular 230” Punch List

- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____
- ❑ _____