Chapter 5: Ethics in Tax Practice

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Please note. Corrections were made to this workbook through January of 2020. No subsequent modifications were made. For clarification about acronyms used throughout this chapter, see the Acronym Glossary at the end of the Index.

For your convenience, in-text website links are also provided as short URLs. Anywhere you see **uofi.tax/xxx**, the link points to the address immediately following in brackets.

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CHAPTER SUMMARY

Ethical considerations for tax practitioners are not simply limited to the preparation of tax returns and the provision of tax advice. The tax practitioner must act ethically during all interactions with clients or potential clients. The goal of this chapter is to review a tax practitioner's ethical responsibilities from the time a practitioner advertises for work to the conclusion of the engagement.

Even before engaging with a client, it is necessary for the tax practitioner to act ethically when soliciting new work. This chapter reviews the ethical rules that tax practitioners should abide by in this regard.

The tax practitioner must clearly communicate the scope of a client engagement. The practitioner must also take steps to keep client communications confidential, particularly if they include sensitive client information. Tips are provided on how to achieve this.

Tax practitioners can provide tax compliance, consulting, and other advisory services to their clients. This chapter discusses the standards that practitioners must adhere to when providing these services. There are also services that tax practitioners may **not** provide to their clients. These excluded services are mentioned, as well as situations that could give rise to conflicts of interest between the tax practitioner and their clients.

Staff members assist many tax practitioners. The circumstances when a tax practitioner can rely on work done by others are discussed along with the tax practitioner's role in supervising work done by others. An office procedures manual is a helpful resource for practitioners and staff, and material to consider including in such a manual is provided.

Client records are a necessity in any tax practice. The records that tax practitioners are required to retain are described. These records can take both paper and electronic form but, in either case, the tax practitioner is required to safeguard this information. The IRS may request records from a tax practitioner. This chapter reviews the client records that a practitioner is required to turn over and the time allowed to do this upon receipt of such a request. On occasion, a client may request their records from their tax practitioner. Generally, practitioners should comply with such requests. However, there are situations when a tax practitioner can refuse such a request, and these circumstances are discussed.

Tax practitioners are required to both safeguard and keep their clients' data private. To achieve this, tax practitioners must develop, implement, and maintain a comprehensive written information security program. This chapter considers various suggestions on keeping client data secure (e.g., data storage, communication, and encryption requirements). Additionally, tax practitioners must develop a client data privacy policy and periodically communicate this policy to their clients.

Occasionally, tax practitioners receive requests for client information from third parties. The rules that tax practitioners must observe in disclosing such information are discussed, including when client consent is required. Generally, tax practitioners are also prohibited from using client information for anything other than tax return preparation without client consent.

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Tax practitioner fees are also subject to ethical considerations (e.g., unconscionable fees and contingency fees). However, the IRS's authority to regulate tax practitioner fees has been challenged in recent court decisions. This chapter considers a related tax practitioner constraint regarding the prohibition on negotiation of taxpayer refund checks.

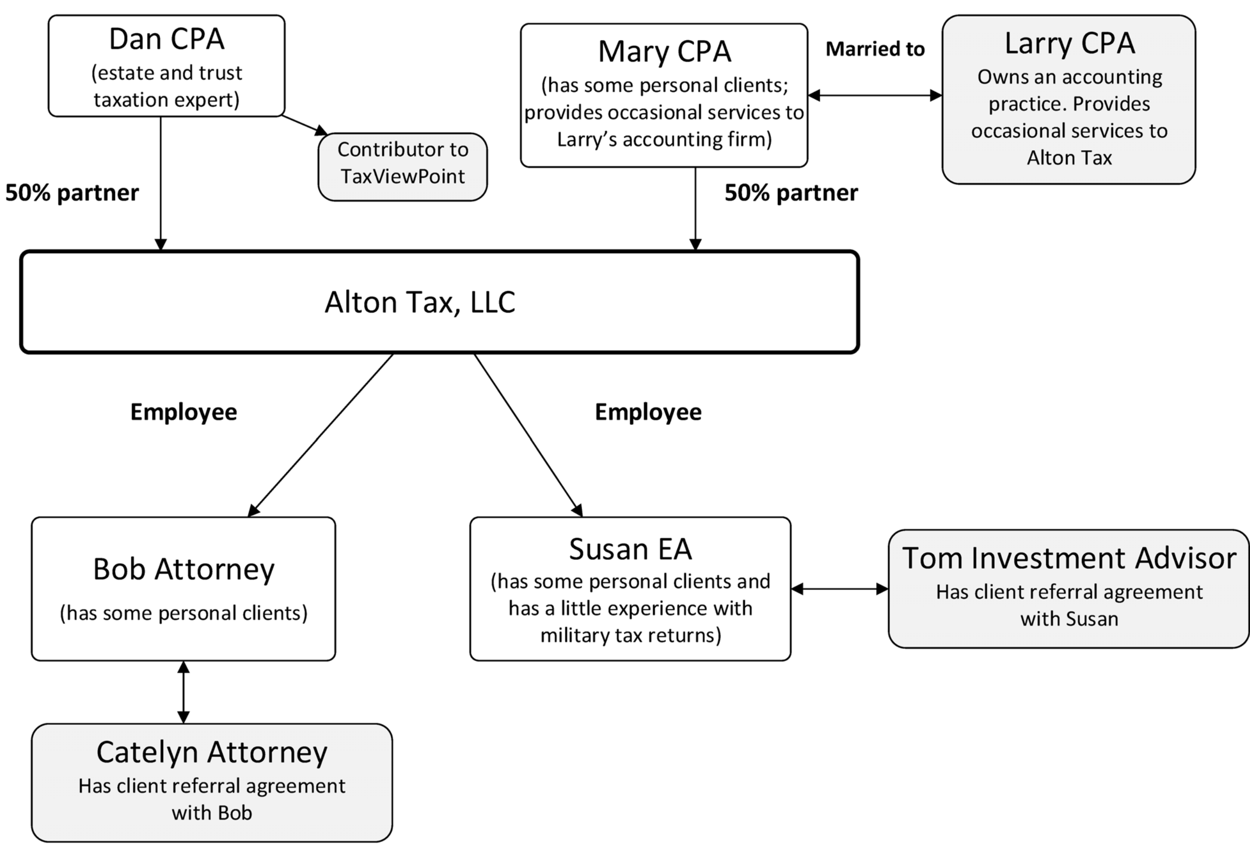
Most of the ethics material covered in this chapter comes from Treasury Department Circular No. 230, which was last revised in June 2014 (hereinafter referred to as Circular 230). However, there are other sources of rules and regulations governing ethical behavior that are discussed (e.g., the Gramm-Leach-Bliley Act (GLBA),[1] various Code sections, court cases, professional associations' codes of conduct, etc.).

While this chapter covers many sources of ethical rules, regulations, and guidance, it is not exhaustive. Therefore, tax practitioners are encouraged to consult all sources of ethical regulation and guidance and stay abreast of developments in this area.

ILLUSTRATIVE EXAMPLES

The examples throughout this chapter center around a single tax preparation firm and the people associated with it. The common facts for these examples, along with a visual representation of the professional relationships of the firm's personnel are as follows.

Alton Tax LLC is an Illinois tax preparation firm. Two partners, Dan and Mary, each own 50% of the firm, and both are CPAs with principal authority for oversight of the firm's tax work. They have two employees: Bob is an attorney and Susan is an EA. The firm does a mixture of tax preparation, consulting, and representation work. For some projects, Bob and Susan work independently and for other projects they are supervised by Dan or Mary. In addition, Bob, Susan, and Mary have some personal clients that they handle when not working for Alton Tax. Mary is married to Larry who is also a CPA and owner of his own accounting practice. Larry occasionally provides services to Alton Tax. This fact pattern applies to all the examples in this chapter.



[1] The Gramm-Leach-Bliley Act is also known as the Financial Services Modernization Act of 1999, PL 106-102 (Nov. 12, 1999).

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ADVERTISING AND SOLICITING

Circular 230 contains provisions that restrict advertising and solicitation of work. These restrictions apply to **all** tax practitioners covered by Circular 230 (including attorneys, certified public accountants (CPAs), enrolled agents (EAs), and enrolled retirement plan agents (ERPAs)). In addition, attorneys, CPAs, and EAs who are members of professional associations are subject to their association's rules governing ethical conduct. These rules are covered later in this section.

CIRCULAR 230

Under Circular 230, §10.30, practitioners are prohibited from making a false, fraudulent, or coercive statement or claim, or a misleading or deceptive statement or claim with respect to any IRS matter. This prohibition applies to all forms of public communication and private solicitation.

Lawful solicitations made by or on behalf of Circular 230 practitioners must clearly identify the solicitation as such and, if applicable, identify the source of the information used in choosing the recipient.

A practitioner may not make, directly or indirectly, an uninvited written or oral solicitation of employment in matters related to the IRS 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 conduct rules applicable to all attorneys in their state(s) of licensure). Any lawful solicitation made by or on behalf of a practitioner eligible to practice before the IRS must, nevertheless, clearly identify the solicitation as such and, if applicable, identify the source of the information used in choosing the recipient.

Note. In a recent case before the Office of Professional Responsibility (OPR),[2] an EA created false advertising designed to mislead potential clients to believe the firm successfully helped thousands of taxpayers and employed multiple qualified tax professionals. In reality, the practitioner was the only Circular 230 practitioner at the firm.

Moreover, the advertising coerced potential clients into believing that hiring a private firm was virtually their only hope of resolving their tax issues due to alleged widespread misconduct by IRS employees. The advertising also contained fraudulent offer-in-compromise data.

After investigation, the OPR reached a settlement agreement with the tax practitioner for violating conduct set forth in Circular 230. This included a monetary penalty based on a percentage of the gross income from the misconduct. His firm also accepted responsibility for knowing the practitioner engaged in misconduct in attracting clients with outstanding collection issues. Additionally, the practitioner agreed to five years of probation and a 12-month suspension of practice before the IRS if the probation is violated.

Stephen Whitlock, Director of OPR, stated "Monetary penalties are generally not part of Circular 230 cases but in this situation, we concluded it provided a way to limit the practitioner's ability to profit from his misconduct."

2. IRS News Rel. IR-2018-155 (Jul. 25, 2018).

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Acceptable Professional Designations for EAs and ERPAs

EAs and ERPAs may **not** use the term **certified** or imply an employer/employee relationship with the IRS when describing their professional designation. Examples of **acceptable** professional descriptions for EAs include the following.

- Enrolled to represent taxpayers before the IRS
- Enrolled to practice before the IRS
- Admitted to practice before the IRS

Examples of **acceptable** professional descriptions for ERPAs include the following.

- Enrolled to represent taxpayers before the IRS as a retirement plan agent
- Enrolled to practice before the IRS as a retirement plan agent

Fee Information

Practitioners may publish a fee schedule and the following fee information.

- Fixed fees for specific routine services
- Hourly fee rates
- A fee range for specific services
- The fee for an initial consultation

If the fee schedule or information concerns work where out-of-pocket costs could arise, it should clarify whether clients will be responsible for such costs. Once the fee schedule is published, a practitioner can charge **no more than** the published fee rates for at least **30 calendar days** from the date of publication.

Communication of Fee Information. Fee information can be communicated via professional lists, telephone directories, print media, mailings, electronic mail, facsimile, hand-delivered flyers, radio, television, and any other method as long as it does not result in untruthful or deceptive communication of the information.

When a practitioner uses radio or television broadcasting, they must retain a recording of the actual transmission. For direct mail and e-commerce communications, the practitioner must retain a copy of the actual communication, along with a list or other description of the persons to whom the communication was distributed. The practitioner must keep the copy for at least 36 months from the date of the last transmission or use.

A practitioner must cease contacting prospective clients who have made it known that they do not wish to be solicited.

Improper Associations

With regard to matters before the IRS, a practitioner may not 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 Circular 230, §10.30.

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ABA[3]

Section 7.3 of the American Bar Association's (ABA) model rules of professional conduct (MRPC) addresses the solicitation of clients. Under these rules, a lawyer must not solicit paid professional employment, except when the contact is with:

1. A lawyer;
2. A person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
3. A person who routinely uses for business purposes the type of legal services offered by the lawyer.

Regardless of these exceptions, a lawyer must desist soliciting professional employment in the following situations.

- The person being solicited has informed the lawyer that they do not wish to be solicited.
- The solicitation involves coercion, duress, or harassment.

However, these solicitation rules do not apply to communications authorized by law or ordered by a court or other tribunal. Another exception to the application of these rules concerns participation in a prepaid or group legal service plan operated by an organization not owned or directed by the lawyer. Such plans can solicit customers.

Communications Promoting a Lawyer's Services[4]

Generally, lawyers can utilize any media outlet to promote their services but they cannot compensate, give, or promise anything of value to a person for recommending their services. Nevertheless, a lawyer may:

1. Pay reasonable advertising/communication costs;
2. Pay the usual charges of a legal service plan or a nonprofit or qualified lawyer referral service;
3. Purchase a law practice;
4. Make nominal gifts as an expression of appreciation that are neither intended nor reasonably expected to be a form of compensation for recommending a lawyer's services;
5. Utilize a recognized agreement to refer clients to another lawyer or a nonlawyer professional under a reciprocal arrangement, if:
   a. The reciprocal client referral agreement is **not exclusive;** and
   b. The client is informed of the existence and nature of the agreement.

Lawyers cannot hold themselves out as being a specialist in a particular field of law, unless a U.S. authority accredited by the ABA certifies them. The name of the certifying organization must be clearly identified in the communication.

Communications regarding a lawyer's services must include the name and contact information of at least one lawyer or law firm responsible for its content.

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3. *Model Rules of Professional Conduct*. Feb. 13, 2019. ABA. [www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/] Accessed on Feb. 26, 2019. Hereafter referred to as MRPC.

4. MRPC, rule 7.2.

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Example 1. Bob, Alton Tax's tax attorney, and Catelyn, an immigration attorney, have an exclusive agreement. Under this agreement, Bob refers his personal clients seeking legal advice on immigration to Catelyn and Catelyn reciprocates by referring her clients needing tax services to Bob. Both attorneys inform their clients of the nature of the agreement. When a referral results in a fee-paying engagement, the referring lawyer receives a $100 fee from the other lawyer.

Bob and Catelyn's client referral agreement may **violate** ABA rules because it is an exclusive arrangement and lawyers cannot give anything of value for recommending their services. It may also violate Circular 230, §10.30, because attorneys cannot make solicitations that are prohibited by conduct rules applicable to all attorneys in their licensing state.

AICPA[5]

Rules concerning advertising and other forms of solicitation are contained in the American Institute of CPAs (AICPA) Code of Professional Conduct (CPC).[6]

Similar to ABA rules, CPAs must not seek to obtain clients by advertising or other forms of solicitation that are false, misleading, or deceptive. Solicitation by the use of coercion or harassment is also prohibited.

False, misleading, or deceptive promotional efforts are those that:

1. Create false or unjustified expectations of favorable results;
2. Imply the ability to influence any court, tribunal, regulatory agency, or similar body or official;
3. Indicate the performance of specific professional services for a stated fee, estimated fee, or fee range when it was likely at the time of the representation that such fees would be substantially increased and the member failed to advise the prospective client of that likelihood; and
4. Contain any other representations that would likely deceive or cause misunderstanding.

Use of Professional Designations[7]

Individuals holding an AICPA-awarded designation, such as Personal Financial Specialist (PFS), may use the designation after the member's name. However, a member's firm may only use an AICPA-awarded designation, such as PFS, on firm letterhead and in marketing materials if all the firm's partners hold that designation.

CPA practitioners should refer to applicable state accountancy laws and board of accountancy rules and regulations for guidance regarding the use of the CPA credential. Practitioners misusing the CPA credential in a manner that is false, misleading, or deceptive violates the rules governing advertising and other forms of solicitation.

Commissions and Referral Fees[8]

CPAs in public practice **cannot** receive commissions for recommending products or services to a client or supplied by a client when the CPA or their firm also performs **any** of the following **covered** services for that client.

1. An audit or review of a financial statement
2. Compilation of a financial statement when the CPA expects, or reasonably might expect, that a third party will use the financial statement and the member's compilation report does not disclose a lack of independence
3. An examination of prospective financial information

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5. *AICPA Code of Professional Conduct*. Sep. 1, 2018. AICPA. [pub.aicpa.org/codeofconduct/ethicsresources/et-cod.pdf] Accessed on Oct. 16, 2018. Hereafter referred to as CPC.

6. CPC, rule 1.600.

7. Ibid.

8. CPC, rule 1.520.

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Disclosure Rules. CPAs who receive **permitted** commissions must disclose that to any person or entity to whom the CPA recommends or refers a product or service to which the commission relates. Likewise, CPAs who receive referral fees for recommending or referring CPA services to any person or entity to obtain a client must disclose such acceptance or payment to the client.

Commissions Paid to Spouse. A CPA's spouse may receive a permitted commission for referring products or services to or from a client for whom the member performs **covered** service(s) provided that:

1. The activities of the spouse are separate from the CPA's practice, **and**
2. The CPA is not significantly involved in their spouse's activities.

Example 2. From time to time, Mary refers a private client to her husband Larry, a CPA and owner of an accounting practice, for which Larry pays Mary a referral fee. In addition, sometimes Larry refers a client to Mary, for which Mary pays a referral fee to Larry. Neither Larry nor Mary are significantly involved in their spouse's activities.

Mary's receipt of referral fees from Larry should not represent an ethical violation for Mary because her business is separate from Larry's and Mary is not significantly involved in Larry's business.

Larry's receipt of client referral fees from Mary for recommending clients to her should not represent an ethical violation for Larry because his business is separate from Mary's and he is not significantly involved in Mary's business. This does not change even if Larry provides a covered service to the client that he recommends to Mary because of the exception provided in the AICPA code of conduct.

Third Party Commissions. CPAs are held responsible for the actions of third parties, such as distributors or agents, who act on the member's behalf. For example, if the CPA or their firm performs a covered service for a client, the CPA may not recommend or refer any product or services for a commission that will be paid through a distributor or an agent or receive a commission for the recommendation or referral pertaining to that client.

A CPA may receive a commission from a third party for referring that party's product or service to a client for whom the CPA does not perform a covered service as long as receipt of the commission is disclosed to the client.

Excluded Commissions. Any profit a CPA receives on selling a product to a client is not considered a commission if the CPA owns the product.

If a CPA, in providing professional services to a client, subcontracts the services of another person or entity, any mark-up of the cost of the subcontracted services does not constitute a commission.

PROFESSIONAL ASSOCIATIONS

There are many professional associations, such as the National Association of Enrolled Agents' (NAEA), and National Association of Tax Professionals (NATP). Each has their own codes of conduct. NAEA rules of professional conduct (RPC) include rules that govern professional independence, advertising, and soliciting.[9]

Independence

NAEA members (generally EAs) must **not** allow their related business interests to affect representation of a client and must immediately disclose their interests when referring a client to another firm.[10]

Members are required to refuse any gift, favor, or hospitality that would influence or appear to influence their actions.[11]

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9. *Code of Ethics and Rules of Professional Conduct*. Aug. 2014. NAEA. [www.naea.org/sites/default/files/Code%20of%20Conduct%20Approved%20August%202014.pdf] Accessed on Oct. 16, 2018. Hereafter referred to as RPC.

10. RPC, rule 6.

11. RPC, rule 7.

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Example 3. Tom is an investment advisor in the same office building as Alton Tax. Susan is an EA and also a member of the NAEA. Susan and Tom have a reciprocal client referral agreement under which Tom receives commissions for clients Tom refers to Susan. In addition, Tom offers to pay for a vacation for Susan and her family after receiving 250 client referrals from her.

To comply with NAEA rules of professional conduct and avoid any appearance of impropriety, Susan should verify that Tom is licensed to provide investment advice and disclose in writing to her clients her business relationship with Tom. In order to maintain her professional independence, Susan must refuse the free vacation offered to her by Tom.

BEST PRACTICES WITH EMPHASIS ON COMMUNICATION

COMMUNICATING WITH CLIENTS

There is sparse information in Circular 230 concerning practitioner/client communications. In §10.37, it states practitioners may give written advice (including by means of electronic communication) concerning federal tax matters. Such advice must adhere to the facts and relate applicable law to these facts.[12] Circular 230 contains no requirements pertaining to the confidentiality and security of communications between practitioners and their clients. For statutory requirements in this regard, practitioners should look to IRC §7216 and the GLBA. The former contains rules regarding disclosure and use of clients' tax return data and the latter contains safeguards and privacy rules that concern storage and communication of client data. Both of these sources are explored in more detail in a later section. To summarize, for purposes of communicating with clients, a tax practitioner must take the necessary steps to prevent client data from falling into the hands of an unauthorized party. These steps include encrypting electronic documents containing confidential client information, as discussed further in the section titled "Securing Client Data."

Besides Circular 230, IRC §7216, and the GLBA, there are other considerations that tax practitioners should take into account when communicating with their clients. For example, practitioners should recognize the extent that practitioner/client communications are privileged by law. They should also consider legal disclaimers and record retention policies.

Confidentiality Privileges Relating to Taxpayer Communications[13]

Under the Code, communications between any **federally authorized practitioner** and a taxpayer have the same common law protection of confidentiality that applies between an attorney and a taxpayer. However, this protection is limited to **tax advice** and only to the extent that the communication would be a privileged communication if it took place between a taxpayer and an attorney. Furthermore, this privileged communication protection can only be asserted for:

1. Any noncriminal tax matter before the IRS, and
2. Any noncriminal tax proceeding in federal court brought by or against the United States.

A **federally authorized practitioner,** for this purpose, is any individual who is authorized under federal law to practice before the IRS if such practice is subject to federal regulation under 31 USC §330. This includes attorneys, CPAs, and EAs.[14]

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12. Circular 230, §10.37.

13. IRC §7525.

14. Circular 230, §10.3.

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Tax advice refers to any advice given by a practitioner concerning a matter that is within the scope of the practitioner's authority to practice except for advice that concerns tax shelter promotion. A key point here is that **tax advice does not include tax return information.** Because tax return information is intended to be disclosed to the IRS, related client/practitioner communications are **not privileged communications** subject to protection. This is the case even when the communication serves a dual purpose (e.g., tax return preparation and litigation).[15] Therefore, in practice, many client/practitioner communications are **not** privileged communications subject to protection.

Discovery[16]

Discovery is the term used to describe the procedure that litigating parties employ to acquire pertinent records. It is available in federal courts that hear tax litigation. An important aspect of discovery concerns requests for documents. **Discoverable documents can include emails, text messages, chat messages, and social media posts.** With discovery in mind, tax practitioners should consider the following tips when preparing **any** documents.

1. Recognize that the document could be available to a court or opposing party.
2. Send the document only to necessary recipients.
3. Use only appropriate language (i.e., no offensive, sarcastic, or otherwise inappropriate remarks).
4. Ensure that potentially excludable privileged messages are clearly identified by stating the communication is "privileged and confidential."
5. When possible, consider oral communication as an alternative to written communication.

Disclaimers[17]

In 2014, Circular 230 revisions included the elimination of the detailed §10.35 provisions concerning covered opinions and disclosures. The IRS expected that these revisions would eliminate the use of a Circular 230 disclaimer in email and other writings. Nevertheless, Circular 230, as revised in 2014, does not prohibit the use of an appropriate statement describing any reasonable and accurate limitations of advice rendered to a client.

When deciding on a suitable Circular 230 disclaimer for written communications, the practitioner should contemplate how the communication may be used and structure the disclaimer to avoid repercussions that could occur if the client overly relies on the written communication. However, this should be worded in a way that does not suggest that the client is forbidden from relying on the practitioner's advice.[18]

Universal disclaimers stating, "The Internal Revenue Service says" or "I am required under Circular 230" could result in the tax practitioner receiving a letter from the OPR asking them to cease and desist using such language.[19] Consequently, use of universal disclaimers that include such language should be avoided.

An example of a confidentiality notice and legal disclaimer is provided in the next section.

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15. *U.S. v. Frederick*, 182 F.3d 496 (7th Cir. 1999) and *U.S. v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003).

16. *What discovery methods apply in Federal Tax Litigation?* Klasing, David W. Mar. 25, 2014. [klasing-associates.com/question/what-discovery-methods-apply-in-federal-tax-litigation]; *INSIGHT: Practical Tips For "Anticipation of Litigation" Discovery*. Collyard, Michael A. and Walcker, Chelsea A. Jun. 22, 2018. Bloomberg BNA. [www.bloomberglaw.com/document/X46UQBJ8000000] Accessed on Aug. 6, 2019.

17. Preamble to TD 9668, 2014-27 IRB 1.

18. *New Rules on Written Tax Advice and Other Revisions to Circular 230 and Their Effect on CPAs*. Blatch, Mary L.; Bresnahan II, James F.; Schreiber Jr., Gerard H.; Schrock, Norma J.; and Purcell III, Thomas J. Nov. 30, 2014. The Tax Adviser. [www.thetaxadviser.com/issues/2014/dec/purcell-dec14.html#fnref_11] Accessed on Oct. 22, 2018.

19. *OPR Will Tell Practitioners to Remove Circular 230 Disclaimers*. Davis, William. Jun. 18, 2014. Tax Notes Today. [www.irs.gov/pub/irs-utl/OPR_Will_Tell_Practitioners_to_Remove_Circular_230_Disclaimers.pdf] Accessed on Oct. 22, 2018.

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Communication Records[20]

Circular 230 does not contain specific requirements relating to retention of copies of communications between practitioners and their clients. However, in referring to **client records,** Circular 230 defines them as including all documents or written or electronic materials **provided to the practitioner** in the course of the practitioner's representation of the client before the IRS. They also include those records that preexisted the retention of the practitioner by the client.

Generally, **client records** for this purpose are those that are necessary for the client to comply with their federal tax obligations. Therefore, when determining how long to keep copies of client/practitioner communications, practitioners need to distinguish between communications containing client records necessary for the client to comply with their federal tax obligations from **other** communications. The length of time that client records should be maintained is discussed later in the "Client Records" section.

Practitioners should also be aware of any relevant requirements mandated by their professional association. For example, the AICPA defines **client-provided records** as "accounting or other records, including hardcopy and electronic reproductions of such records, belonging to the client that were provided to the member by, or on behalf of, the client."[21] Thus, the definition of client records for CPAs may be broader than the Circular 230 definition because it includes accounting and other records and not just records in connection with the representation of the client before the IRS.

Besides traditional written correspondence between tax practitioners and their clients, tax practitioners can communicate with their clients in many other ways. These alternative communication methods, along with associated recordkeeping requirements, are discussed next.

Telephone. Federal law requires that at least one party taking part in the call must be notified if the call is recorded.[22] However, state laws vary, with 38 states and the District of Columbia requiring only one of the parties to consent (similar to federal law) and 11 states requiring the consent of all parties.[23]

Practitioner Planning Tip

Practitioners should obtain professional advice regarding the possible legal ramifications of recording client phone calls and retaining voicemail messages from clients.

20. Circular 230, §10.28.

21. CPC, rule 1.400.200.

22. 18 USC §2511(2)(d); *Laws on Recording Conversations in All 50 States*. Feb. 26, 2019. Matthiesen, Wickert & Lehrer, S.C. [www.mwl-law.com/wp-content/uploads/2013/03/LAWS-ON-RECORDING-CONVERSATIONS-CHART.pdf] Accessed on Aug. 6, 2019.

23. Ibid.

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Fax.[24] Some firms still communicate by fax, although this communication is becoming less prevalent. Fax machines or substitutive computer software typically maintain records of what documents were sent and by whom, as well as when and where the documents were sent.

Practitioner Planning Tip

A tax practitioner firm's record retention policy should include guidelines on how long fax records should be retained.

Tax practitioner firms should consider adding a confidentiality notice and legal disclaimer at the bottom of the fax cover sheet, similar to the email disclaimer discussed next.

Email. Email is a frequently used written communication medium between tax practitioners and their clients. However, like any other documentary data, emails are subject to discovery in a lawsuit.[25] Therefore, it is recommended that tax practitioner firms have a record retention policy including guidelines on how long emails should be retained.

Tax practitioner firms should consider adding a disclaimer to emails. The following is an example of a confidentiality notice and legal disclaimer.

CONFIDENTIALITY NOTICE AND LEGAL DISCLAIMER. The information contained in this email message, including any attachments, is legally privileged and confidential and intended only for the addressee(s). If you are not the intended recipient, you are hereby notified that any reading, use, or dissemination of this message is strictly prohibited. If you have received this message in error, please notify us immediately and delete this message from your system.

Although this email and any attachments are believed to be free of any virus or other defect which may affect any computer system into which it is received and opened, it is the responsibility of the recipient to ensure it is virus free. [Tax Practitioner Firm] accepts no responsibility for any loss or damage arising from receipt and use of this email.

Note that the only professional services provided by [Tax Practitioner Firm] are those specified in a written communication from our office detailing the scope of services to be rendered and the terms and conditions applicable to the engagement.

24. *Why Business Are Still Sending Faxes in 2018*. Young, Naomi. Jul. 16, 2018. Business.com. [www.business.com/articles/business-faxing] Accessed on Mar. 6, 2019.

25. *What discovery methods apply in Federal Tax Litigation?* Klasing, David W. Mar. 25, 2014. [klasing-associates.com/question/what-discovery-methods-apply-in-federal-tax-litigation]; *INSIGHT: Practical Tips For "Anticipation of Litigation" Discovery*. Collyard, Michael A. and Walcker, Chelsea A. Jun. 22, 2018. Bloomberg BNA. [www.bloomberglaw.com/document/X46UQBJ8000000] Accessed on Dec. 12, 2018.

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Practitioner Planning Tip

Tax practitioner firms should consider obtaining legal advice in developing a disclaimer and should avoid the use of Circular 230 disclaimers (discussed earlier).

Social Media. Practitioners with social media accounts need to carefully consider the information that they post there. They should particularly take note of the provisions of IRC §7216 concerning client information disclosure (discussed in detail in a later section). Use of social media is not specifically addressed in Circular 230 or in the ABA or AICPA rules.

When using social media, Circular 230 practitioners must be aware of the potential for damage to their reputations through their own behavior or that of a third party. In this regard, practitioners should be mindful of provisions in Circular 230 concerning disreputable conduct. Disreputable conduct includes the following behavior.[26]

- Use of false or misleading representations with intent to deceive a **client** or **prospective client** in order to procure employment
- Willfully assisting, counseling, encouraging a **client** or **prospective client** in violating, or suggesting to a client or prospective client to violate, any federal tax law
- Giving a false opinion, knowingly, recklessly, or through gross incompetence, including an opinion that is intentionally or recklessly misleading, or engaging in a pattern of providing incompetent opinions on questions arising under the federal tax laws

Under Circular 230,[27] the Treasury has the authority to censure, suspend, or disbar practitioners who engage in incompetent or disreputable conduct. Such practitioners may also be subject to monetary penalties.

In discussing social media policies, an article from the Tax Adviser makes various recommendations.[28] Besides offering guiding principles to protect the tax firm's reputation, external social media policy should address the following issues.

1. Employees' expected behavior on social media, including using appropriate language
2. A prohibition on providing guidance beyond one's level of expertise
3. Permitted and prohibited websites
4. Addition of disclaimers to social media postings
5. Privacy (as regards the user, their firm, and their clients)
6. Legal liability
7. Other considerations regarding financial counseling

Similarly, the tax firm's policies should address social media etiquette and recordkeeping.

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26. Circular 230, §10.51.
27. Circular 230, §10.50.
28. *Social Media: Opportunities and Risks for Tax Practices*. Schamberger, Steven G. May 1, 2013. The Tax Adviser. [www.thetaxadviser.com/issues/2013/may/tpr-may2013.html] Accessed on Dec. 11, 2018.

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Example 4. Dan, a CPA partner in Alton Tax, is an expert in estate and trust taxation and contributes to TaxViewPoint, an online social media forum open to partners, employees, clients, and prospective clients of the firm. The firm's social media policy includes a prohibition on advice or knowledge beyond one's capabilities or on behalf of the firm.

Dan responds to two postings on TaxViewPoint. The first posting is from Linda Haven, a prospective U.S. individual client who has a 10% holding in a Dutch company. Linda wants to know if she is affected by the recently enacted IRC §951A rules concerning global intangible low-taxed income (GILTI). Dan responds that she only needs to be concerned in the event that she receives a **distribution** of GILTI. Dan then adds that Linda is fortunate that Alton Tax has an international corporate tax expert in the firm and that he would be glad to refer Linda to that person if she is interested.

Dan's response to Linda was incorrect and may have **misled** Linda into believing that there were no GILTI reporting requirements **unless** she received a distribution of GILTI from the Dutch company. In fact, under IRC §951A, GILTI is taxed **currently** regardless of whether any amount is distributed to the shareholder. Although Dan misled Linda on when GILTI is taxed, it may not be conduct that is sanctionable under Circular 230 unless he did so knowingly.[29] However, Dan may have violated Alton Tax's prohibition on providing advice beyond his capabilities.

Harry Hazy, one of Dan's clients, asks a question on TaxViewPoint regarding the taxability of a complex trust transaction. Dan responds that there is no clear authoritative answer for the transaction concerned but informs Harry of Alton Tax's position on other clients in a similar position.

Harry's question was within Dan's area of expertise. In responding to Harry, Dan expressed his opinion that there was no authoritative answer to the question.

Texting and Instant Messages. These communication applications are gaining in popularity. Because information transmitted through these applications are considered "documents" for purposes of discovery, tax practitioner firms should ensure that their record retention policy covers them.

COMMUNICATING WITH THE IRS[30]

Several Circular 230 provisions concern communications with the IRS. These provisions also apply to communications with the OPR.

Responding to IRS/OPR Requests for Information[31]

Tax practitioners who receive a proper and lawful request for records or information from the IRS/OPR must promptly submit the requested information unless they believe in good faith and on reasonable grounds that it is privileged. If the requested information is not in the tax practitioner's or their client's possession, the tax practitioner must promptly inform the requesting IRS personnel of that fact. Additionally, the tax practitioner must provide any information that they have regarding who is in possession of the requested information. However, the tax practitioner is **not** required to:

1. Make inquiries of anyone other than their client, or
2. Independently verify information provided by their client regarding the person(s) in possession of the requested information.

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29. Circular 230, §10.51.

30. *Guidance to Practitioners Regarding Professional Obligations under Treasury Circular No. 230*. Aug. 2015. IRS. [www.irs.gov/pub/irs-utl/guidance_regarding_professional_obligations_under_circular_230.pdf] Accessed on Dec. 13, 2018.

31. Circular 230, §10.20.

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Tax practitioners must not interfere with any lawful attempt by the IRS to obtain information unless they reasonably believe, in good faith and on reasonable grounds, that the information is privileged.

Tax practitioners cannot advise a client to submit any document to the IRS that is frivolous or that contains or omits information in a manner demonstrating an intentional disregard of a rule or regulation **unless** they also advise the client to submit a document that evidences a good faith challenge to the rule or regulation.[32]

Prompt Disposition.[33] Tax practitioners cannot unreasonably delay the prompt disposition of any matter before the IRS. This rule applies with respect to responding to their clients as well as to IRS personnel. Furthermore, tax practitioners cannot advise a client to submit any document to the IRS for the purpose of delaying or impeding the administration of federal tax laws.

Professional Associations' Rules

Generally, professional associations of attorneys, CPAs, and EAs do not have specific rules governing communicating with the IRS that go beyond Circular 230. However, there are other rules that are relevant. For example, when representing a client, an attorney must not knowingly:[34]

1. Make a false statement of material fact or law to a third person, or
2. Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client (except when disclosure is prohibited by confidentiality rules).

TAX SERVICES AND STANDARDS

REGULATED TAX SERVICES[35]

Tax practitioner services that are subject to Circular 230 regulation are those that constitute **practice before the IRS,** which comprises all matters connected with a presentation to the IRS or any of its officers or employees relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the IRS. These services include, but are not limited to:

- Preparing documents;
- Filing documents;
- Corresponding and communicating with the IRS;
- Rendering written advice with respect to any entity, transaction, plan, or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and
- Representing a client at conferences, hearings, and meetings.

EXCLUDED SERVICES[36]

Circular 230 does **not** authorize the practice of law by tax practitioners who are **not** members of the bar.

32. Circular 230, §10.34(b).
33. Circular 230, §10.23.
34. MRPC, rule 4.1.
35. Circular 230, §10.2(a)(4).
36. Circular 230, §10.32.

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APPROPRIATE STANDARDS OF PRACTICE

Best Practices[37]

Generally, tax practitioners are expected to provide the highest quality of representation when providing federal tax advice and services to their clients. These services should adhere to best practices, which include the following.

- Clearly communicating the terms of the engagement to the client (See the sample client engagement and IRS tax examination representation letters in the appendix.)
- 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
- Advising the client regarding the practitioner's conclusions and whether the taxpayer may avoid statutory accuracy-related penalties when relying upon the practitioner's advice
- Acting fairly and with integrity in practice before the IRS

Diligence as to Accuracy[38]

Tax practitioners must exercise **due diligence** when performing the following activities.

- Preparing, approving, and filing tax returns, documents, affidavits, and other papers relating to IRS matters
- Assisting with the above services
- Ensuring oral and written communications to the Treasury are correct
- Ensuring oral and written communications to clients regarding IRS matters are correct

Written Advice[39]

Tax practitioners may give written advice (including through the use of electronic communications) on federal tax matters when **all** the following requirements are met.

1. The written advice is based on reasonable factual and legal assumptions (including assumptions as to future events).
2. The practitioner makes reasonable efforts to identify and ascertain relevant facts.
3. The practitioner reasonably considers **all** relevant facts and circumstances that the practitioner knows or reasonably should know.
4. The practitioner does **not** unreasonably rely upon representations, statements, findings, or agreements (including projections, financial forecasts, or appraisals) of the taxpayer or any other person.

Besides specific advice to clients, written advice also includes presentations that market or promote transactions.

Exceptions. Written advice does **not** include:

- Government submissions on matters of general policy, **or**
- Continuing education presentations provided to an audience solely for the purpose of enhancing practitioners' professional knowledge on federal tax matters.

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37. Circular 230, §10.33.

38. Circular 230, §10.22.

39. Circular 230, §10.37.

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Reliance on the Work of Others[40]

A tax practitioner is presumed to have exercised due diligence if the practitioner relies on the work product of another person **provided** that the practitioner used reasonable care in engaging, supervising, training, and evaluating that person (see the detailed discussion in the "Staff Supervision" section). However, this presumption only applies to work that otherwise meets Circular 230 standards.[41]

Reliance on Client Information[42]

Tax practitioners may generally rely in good faith upon information furnished by the client without verification. Practitioner reliance upon client information applies both to tax preparation as well as advising a client to take a position on a tax return, document, affidavit, or other paper submitted to the IRS. However, practitioners may not 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, incomplete, or inconsistent with an important fact or another factual assumption.

PROHIBITED PRACTITIONER CONDUCT

Preparation of Tax Returns[43]

Tax practitioners may not willfully, recklessly, or through gross incompetence sign a tax return or claim for refund that they know or ought to know contains a position that:

1. Lacks a reasonable basis,
2. Is an unreasonable position lacking substantial authority,[44] or
3. Is a willful attempt by the practitioner to understate a client's tax liability or a reckless or intentional disregard of rules or regulations by the practitioner.[45]

Likewise, a practitioner may **not** 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 for which any of the three preceding conditions apply.

Finally, it should be noted that a pattern of conduct by the practitioner is a factor that the OPR considers in determining whether the practitioner acted willfully, recklessly, or through gross incompetence.

Preparation of Documents, Affidavits, and Other Papers[46]

Tax practitioners may not advise a client to take a position on a document, affidavit, or other paper submitted to the IRS that is **frivolous.** Likewise, practitioners cannot advise a client to submit a document, affidavit, or other paper to the IRS that is **frivolous**, or:

- The purpose of which is to delay or impede the administration of the federal tax laws, or
- That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation **unless** the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

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40. Circular 230, §10.22.
41. Circular 230, §10.36.
42. Circular 230, §10.34(d).
43. Circular 230, §10.34(a).
44. See IRC §6694(a)(2), associated regulations, and other published guidance.
45. See IRC §6694(b)(2), associated regulations, and other published guidance.
46. Circular 230, §10.34(b).

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ADVICE ON POTENTIAL PENALTIES[47]

Tax practitioners must inform a client of their potential exposure to penalties regarding a position taken on a tax return if:

- The practitioner advised the client with respect to the position, or
- The practitioner prepared or signed the tax return.

Likewise, tax practitioners must similarly inform their clients of exposure to penalties for any document, affidavit, or other paper submitted to the IRS. Additionally, tax practitioners must inform their clients of opportunities and requirements to avoid any such penalties (e.g., by disclosure). A practitioner's responsibility to inform their clients of penalty exposure applies regardless of whether the practitioner has any personal exposure to penalties under the Code with respect to the position or with respect to the document, affidavit, or other paper submitted to the IRS.

Example 5. Randy Chester has always prepared his own individual tax returns and is the sole owner of Chester Real Estate Enterprises (CREE), organized as an S corporation. In February 2019, Randy contacted Susan of Alton Tax explaining that he recently read about the IRS's rental real estate enterprise (RREE) safe harbor for the qualified business income deduction (QBID).[48] Because of the QBID's apparent complexity, Randy informed Susan that he needs professional help this year and asked Susan for assistance in preparing his 2018 individual tax returns. Susan accepted the engagement on behalf of Alton Tax and provided Randy with a letter detailing the terms of the engagement.

Subsequently, Susan obtained copies of Randy's prior year individual tax returns along with his 2018 tax information. While perusing Randy's tax information, Susan saw that Randy owned an office building which was rented to CREE (i.e., a self-rental). When questioning Randy further, Susan determined that the self-rental was effectively a triple net lease where Randy's S corporation pays all the building's overhead costs and maintains the property. CREE then sublets the office space. Susan remembers that triple net leases are excluded from the RREE safe harbor[49] but a self-rental can nevertheless be treated as a qualified trade or business for purposes of the QBID.[50] Randy is delighted to receive this good news.

After verifying that Randy's self-rental meets the requirements of the Treasury Regulations, Susan completes and e-files Randy's 2018 individual tax returns treating the income from the self-rental as qualified business income (QBI).

A few days later, while idly browsing the Internet, Susan notices that Randy has a website on which units in the building he owns are being advertised for rent using triple net leases. Potentially this information conflicts with her understanding that all the units in the building are rented to CREE. Susan is concerned as to whether she prepared Randy's 2018 tax returns correctly.

Ethical questions posed by this situation include the following.

1. As an employee, should Susan have discussed the situation with Dan and Mary (the firm's partners) before accepting an engagement on behalf of Alton Tax?

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47. Circular 230, §10.34(c).

48. IRS Notice 2019-07, 2019-09 IRB 740.

49. Ibid.

50. TD 9847, 2019-09 IRB 670, 674; Treas. Reg. §1.199A-4(b)(1)(i).

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2. Should Susan have relied exclusively on the verbal information provided to her by Randy regarding the self-rental and not requested copies of CREE's tax returns, for example, before proceeding?

3. When Susan discovered the possible inconsistency between Randy's information and the website advertising, what should she do?

4. Does Susan have any obligation to inform Randy of his exposure to IRS penalties if the IRS determines that any of the income from CREE does not qualify for the QBID?

Discussion. As a staff member, Susan is subject to supervision (see the later section entitled "Staff Supervision"). Therefore, unless Susan informs her supervisors of the engagement, they are unable to perform their supervisory responsibilities. A section in Alton Tax's office procedures manual would be useful in guiding staff regarding new client engagements.

Susan must make reasonable efforts to identify and ascertain relevant facts and consider all relevant facts and circumstances that she knows or reasonably should know. Reviewing copies of CREE's tax returns might have helped her verify whether the rental income received by Randy from the rental of his office building to CREE was reported there as an expense.

A practitioner who becomes aware that a taxpayer has made a tax return error or omission must advise the client promptly of the issue and its consequences.[51] Therefore, Susan should inform Randy that she noticed that units in his office building are being advertised as available for rent on his website and ask for clarification. If it turns out that not all the units were rented to CREE in 2018, then Susan should inform Randy that she needs to review the situation further to determine if this impacts his 2018 tax returns and whether amended tax returns may be required to remedy the situation. For example, income from units rented to other parties under triple net lease agreements may not rise to the trade or business standard necessary to be treated as QBI.

Susan should also inform Randy of his potential exposure to penalties if the IRS determines that any of the income from CREE does not qualify for the QBID and this results in additional tax.

CONFLICTS OF INTEREST

Tax practitioners are subject to the conflict of interest rules in Circular 230, §10.29, which are addressed in this section. The solicitation of clients, particularly the payment of referral fees, can also give rise to conflicts between practitioners' interests and their clients' interests. The solicitation of clients was covered in the earlier section entitled "Advertising and Soliciting."

Besides these Circular 230 rules, there are professional association rules concerning conflicts of interest (discussed later), as well as state rules and court rulings that tax practitioners should consider.

51. Circular 230, §10.21.

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Circular 230[52]

Generally, tax practitioners cannot represent a client before the IRS if the representation involves a conflict of interest. A conflict of interest exists if:

- The representation of one client will be directly adverse to another client; or
- 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.

Exception to Conflict of Interest Rule. Under a representation exception rule, when a conflict of interest exists, a tax practitioner may nevertheless represent a client if:

1. The practitioner reasonably believes that they will be able to provide competent and diligent representation to each affected client;
2. The representation is not prohibited by law; and
3. Each affected client waives the conflict of interest and provides written informed consent of the conflict of interest within 30 days from the time the practitioner learns about the conflict of interest.

Copies of the written consents must be retained by the practitioner for **at least 36 months** from the date of the conclusion of the affected clients' representation. In addition, the written consents must be provided to any officer or employee of the IRS upon request.

ABA[53]

Circular 230 conflict of interest rules are based on ABA rule 1.7.[54] However, the representation exception rule differs from Circular 230. This rule is as follows (with the key difference bolded).

When a conflict of interest exists, a lawyer may nevertheless represent a client if:

1. The lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
2. The representation is not prohibited by law;
3. **The representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal**; and
4. Each affected client gives informed consent, which is confirmed in writing.

AICPA[55]

Besides complying with Circular 230 conflict of interest rules, CPAs are also required to adhere to the AICPA's **integrity and objectivity** rule in the performance of any professional service. To do so, the CPA must:

- Maintain objectivity and integrity,
- Be free of conflicts of interest, and
- Not knowingly misrepresent facts or subordinate their judgment to others.

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52. Circular 230, §10.29.

53. MRPC, rule 1.7.

54. *Conflicts of Interest: IRS Rules Differ from AICPA Professional Standards*. Horwitz, Kenneth M. Nov. 1, 2011. The Tax Adviser. [www.thetaxadviser.com/issues/2011/nov/tpr-nov11.html] Accessed on Jan. 3, 2019.

55. CPC, rules 1.100 and 1.110.

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In this regard, a conflict of interest may arise in the following situations.

- The CPA or their firm provides a professional service related to a particular matter involving two or more clients whose interests with respect to that matter are in conflict.
- The CPA or their firm's interest with respect to a particular matter conflict with their client's interests.

The following are examples of situations with tax consequences that could give rise to conflicts of interest.

- Assisting both a vendor and a purchaser in a transaction when they are both clients of the firm
- Representing two clients at the same time regarding the same matter when the clients are in a legal dispute with each other (e.g., divorce or the dissolution of a partnership)
- Providing tax services to several members of a family who have opposing interests
- Providing tax services to the executives of a client when the client requests such services and the services could be contrary to the best interests of the client company

Example 6. Bob is an attorney and employee of Alton Tax. His personal client, Anne, is a successful businesswoman. Bob completes Anne's 2018 tax return in February 2019. Anne is married to Earle, a stockbroker. Anne and Earle file separate tax returns. At the beginning of the tax season, Bob receives the list of Alton Tax client returns that he is responsible for preparing. Earle, Anne's husband, is included on this list. As an Alton Tax employee, before he completes Earle's 2018 tax return in September 2019, he contacts Anne to obtain a signed conflict of interest waiver.

1. Does the preparation of Anne's and Earle's tax returns pose a conflict of interest for Bob and/or Alton Tax? If so, what should Bob and/or Alton Tax do?

   ____

   ____

2. Would the conflict of interest waivers be necessary if someone else in the firm prepared Earle's return?

   ____

   ____

Discussion. Although Bob may prefer that Alton Tax not have information regarding his personal clients, Bob should consider alerting his supervisor of the potential conflict of interest when he sees Earle's name on the client list. That way, Alton Tax can evaluate reassigning Earle's tax preparation to another preparer and take steps to impede Bob's access to Earle's client files.

If Earle remains on Bob's client list, then when Alton Tax receive Earle's 2018 tax data, Bob must carefully evaluate the situation to see if there are any issues that could put Earle's interests in conflict with Anne's (for example, one spouse may prefer to itemize and the other spouse prefer to claim the standard deduction). When there is potential for a conflict of interest, both spouses should be informed, and conflict of interest waivers should be obtained from them.

Anne and Earle's subsequent divorce does not necessarily change the situation except that it may be prudent to obtain conflict of interest waivers even if no potential for conflict of interest is identified.

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STAFF SUPERVISION

Generally, a tax practitioner is presumed to have exercised due diligence when relying on the work product of another person if the practitioner used reasonable care in engaging, supervising, training, and evaluating the person.[56] However, this presumption only applies if the work product in question meets appropriate standards of care (see the "Tax Services and Standards" section and in particular the "Prohibited Practitioner Conduct" and "Written Advice" subsections).[57]

SUPERVISORY STAFF[58]

A tax firm may designate one or more supervisory staff with principal authority for oversight of the firm's tax work (i.e., tax preparation and advice) to ensure that it meets Circular 230 requirements.

If a tax firm fails to designate supervisory staff with principal authority for oversight of the firm's tax work, then the IRS may identify one or more members of the firm to take on this responsibility. This authority of the IRS is exemplified by the following frequently asked question contained in IRS guidance.[59]

Question. "I think my business partner is advising his clients to take credits for which they do not qualify. We have never had policies involving supervision or training since we are both licensed and neither of us "manages" the other. Can I be sanctioned for his negligent or reckless actions?"

Answer. "Yes. The IRS may designate one or more individuals to be responsible for the firm's compliance with Circular 230. If you know or should have known of others within your firm who are engaged in a pattern or practice in violation of Circular 230, you could be held accountable for failure to correct the noncompliance, even if it involves individuals who you do not supervise. *Treasury Circular No. 230 §10.36.*"

Note. It is not specified who in the IRS has the authority to designate a tax preparation firm's supervisory staff. However, it is reasonable to assume that this responsibility would fall on the OPR.

Consequences for Failure to Perform Supervisory Duties

Designated supervisory staff are subject to disciplinary proceedings under Circular 230 subparts C and D (which concern sanctions for violation of Circular 230 regulations) if any of the following occur.

1. Through willfulness, recklessness, or gross incompetence, they do not take reasonable steps to ensure that the firm has adequate Circular 230 compliance procedures, and one or more members/associates of the firm have engaged in a pattern or practice of failure to comply with Circular 230 requirements.
2. Through willfulness, recklessness, or gross incompetence, they do not take reasonable steps to ensure that the firm's Circular 230 procedures are properly followed, and one or more members/associates of the firm have engaged in a pattern or practice of failure to comply with those procedures.
3. They know or should know that one or more members/associates of the firm have engaged in a pattern or practice of Circular 230 noncompliance, and through willfulness, recklessness, or gross incompetence, they failed to promptly correct the noncompliance.

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56. Circular 230, §10.22.

57. Circular 230, §§10.34 and 10.37.

58. Circular 230, §10.36.

59. *Guidance to Practitioners Regarding Professional Obligations under Treasury Circular No. 230*. Aug. 2015. IRS. [www.irs.gov/pub/irs-utl/guidance_regarding_professional_obligations_under_circular_230.pdf] Accessed on Mar. 7, 2019.

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Example 7. In March 2019, Ted Watkins, an Illinois resident for many years and employee of Alpha Corporation, called Alton Tax from Rome, Italy, to ask for their assistance in dealing with his 2018 tax obligations. Ted explained that his U.S. employer sent him on a 3-year assignment to Rome in August 2018. While on assignment, Ted remained on the U.S. company's payroll, and the U.S. company takes a corporate tax deduction for these costs.

Because neither Dan nor Mary have international tax expertise, they decided to assign preparation of Ted's 2018 tax return to Susan, who had prepared a couple of tax returns for military personnel stationed overseas. Susan contacted Ted to gather his tax information. Ted's documents included paystubs from the Italian subsidiary in Rome that showed Italian tax withholding for the months of August through December 2018. When Susan asked Ted about these paystubs, Ted explained that, although he was paid by the U.S. parent company, his compensation was subject to Italian income taxes.

Susan prepared and Dan reviewed Ted's 2018 tax returns. A foreign tax credit for the Italian taxes withheld was claimed. Two years later, the IRS issued an assessment to Ted disallowing the foreign taxes claimed on the 2018 tax return on the basis that they were refundable under a provision of the U.S./Italy double tax treaty. This situation occurred because the Italian company incorrectly withheld income tax from Ted's pay. The assessment included accuracy-related and late payment penalties.

Ethical questions posed by this example include the following.

1. As a member of Alton Tax's supervisory staff, did Dan adequately supervise Susan regarding the preparation of Ted's 2018 tax returns?

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____

2. What procedures should Alton Tax have had in place to ensure that Ted's tax return was accurately prepared?

____

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3. Did Alton Tax have the necessary technical expertise to handle Ted's 2018 tax returns?

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Discussion. A key requirement of Circular 230, §10.36, is that supervisors must ensure that work is done in compliance with appropriate standards. Dan did not have international tax expertise, so he assigned Ted's tax returns to Susan because she had done two tax returns for military personnel stationed overseas. However, Ted's fact pattern was significantly different because there were foreign tax credit and tax treaty issues, which do not typically affect overseas military personnel. Moreover, Dan's inexperience with international tax matters made him unsuitable to review Susan's work.

Alton Tax could have adopted a pre-screening procedure under which proposed client work was first evaluated to determine if the firm possessed the necessary competence to perform the work. If Dan had comprehensively pre-screened Ted's situation and further investigated Susan's international tax experience, it is likely that he would have concluded that Alton Tax did not have the necessary competence to handle the engagement.

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OFFICE PROCEDURES MANUAL

A tax practitioner with oversight responsibility of a tax practice that provides tax preparation services or advice is required to take reasonable steps to ensure that the firm's procedures for all members, associates, and employees are consistent with "Best Practices" as described under "Tax Services and Standards" in this chapter."[60] This is also required for sole practitioners.

Practitioner Planning Tip

Contents of the procedures manual must include adequate procedures that comply with subparts A, B, and C of Circular 230. An office procedures manual, whether digital or printed, is an appropriate tool for documenting a firm's procedures. The content of the manual should include sections on the topics covered in this chapter, such as the following.[61]

- Advertising and soliciting (acceptable advertising, marketing, and referral fees)
- Communicating with clients and the IRS (e.g., records, potential for discovery, and use of disclaimers)
- Tax services and standards (e.g., regulated services, required standards, prohibited conduct, conflicts of interest, etc.)
- Staff supervision (e.g., procedures for reviewing staff work)
- Record retention policy (e.g., what records to retain, in what format, and for how long)
- Client data privacy policy (e.g., when client data can be disclosed to third parties and opt-out procedures)
- Written security plan (to maintain the security and confidentiality of client information)
- Response to a security breach
- Use of client information (consent procedures for nontax preparation uses)
- Fees (acceptable pricing options)

60. Circular 230, §10.33(b).

61. Circular 230, §10.36(a); 16 CFR §313 [www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/financial-privacy-rule] and 16 CFR §314 [www.ftc.gov/policy/federal-register-notices/16-cfr-part-314-standards-safeguarding-customer-information] Accessed on Jan. 9, 2019; IRC §7216.

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DUE DILIGENCE PENALTIES

IRC §6695(g) imposes a $520[62] penalty on tax return preparers for each failure to apply due diligence in claiming any of the following.

- Head of household (HoH) status
- Child tax credit (CTC)
- American opportunity credit (AOC)
- Earned income credit (EIC)

The penalty amount is adjusted annually for inflation.[63]

Tax Firm Penalty

A firm employing a tax return preparer who is subject to a penalty under IRC §6695(g) for failure to exercise due diligence is also subject to a similar penalty if:[64]

1. One or more principal members or officers of the firm or a branch office participated in or, prior to the time the return was filed, knew of the failure to comply with the HoH, CTC, AOC, or EIC due diligence requirements;
2. The firm failed to establish reasonable and appropriate procedures to ensure compliance with the HoH, CTC, AOC, or EIC due diligence requirements; or
3. The firm disregarded its reasonable and appropriate compliance procedures through willfulness, recklessness, or gross indifference (including ignoring facts that would lead a person of reasonable prudence and competence to investigate) in the preparation of the tax return or claim for refund related to the penalty imposed.

CLIENT RECORDS

DEFINITION OF CLIENT RECORDS[65]

The only definition of client records in Circular 230 is provided in the context of "Return of Client's Records" (discussed later). **Client records** are defined as including "all documents or written or electronic materials provided to the practitioner, or obtained by the practitioner in the course of the practitioner's representation of the client, that preexisted the retention of the practitioner by the client." This term includes the following.

- Materials provided to the practitioner that are relevant to the engagement and that were prepared by the client or a third party (excluding an employee or agent of the practitioner)
- Any client return, claim for refund, schedule, affidavit, appraisal, or other document prepared by the practitioner, or their employee/agent, for a prior representation if such document is necessary for the taxpayer to comply with their current federal tax obligations

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62. *Summary of Preparer Penalties under Title 26*. Nov. 5, 2018. IRS. [www.irs.gov/tax-professionals/summary-of-preparer-penalties-under-title-26] Accessed on Mar. 7, 2019.

63. IRC §6695(h).

64. Treas. Reg. §1.6695-2(c).

65. Circular 230, §10.28(b).

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RECORD RETENTION POLICY[66]

Neither Circular 230 nor the Code contain a general mandate specifying how long a tax practitioner should retain records of a client. However, there are statutory requirements in several specific situations. First, regarding HoH, CTC, AOC, or EIC due diligence requirements, the tax preparer must retain a copy of Form 8867, *Paid Preparer's Due Diligence Checklist*, worksheets, and other information for at least three years.[67] Second, tax preparers must retain either a copy of a tax return/claim for refund or pertinent records relating to the tax return for at least three years.[68] Pertinent records include a list of taxpayer names and identification numbers. Besides these statutory requirements, a tax practitioner firm should also consider the questions of **what records to retain** and **for how long** when developing a record retention policy. There are several factors to consider in responding to these questions, including the following.

- Client contractual requirements
- Discovery rules
- Practice protection insurance requirements
- Professional association rules
- Registration and filing requirements
- State board of accountancy rules
- Statutes of limitation

Because of the number of factors to consider, along with their legal ramifications, tax practitioner firms should consider obtaining legal advice in developing a record retention policy.

Tax firms should also develop procedures regarding dissemination of the tax firm's record retention policy to clients (i.e., determining when clients should be informed of the firm's record retention policy).

Finally, the firm needs to determine what constitutes client records other than copies of tax forms, worksheets, paper documents, and other workpapers. For example, when do voicemail messages, faxes, emails, social media messages, text messages, instant messages, and document images constitute client records?

Record Formats

Tax practitioners may have paper copies and/or electronic client records. Some tax practitioners are transitioning entirely to electronic media. Software applications are available to scan, organize, and store records of tax returns, depreciation schedules, bookkeeping data, workpapers, and other documents. These records can easily be converted to PDF format and stored in a virtual filing cabinet.

Some of the advantages of electronic client records are the ease with which copies can be made, seemingly unlimited storage, and the convenience of accessing records at both onsite and offsite locations.

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66. *Record Retention*. Parker, Kenneth M. Nov. 30, 2008. The Tax Adviser. [www.thetaxadviser.com/issues/2008/dec/recordretention.html] Accessed on Jan. 8, 2019.

67. Treas. Reg. §1.6695-2(b)(4).

68. IRC §6107(b).

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Practitioner Planning Tip

Considerations for a paperless office include:

- Selecting a program that converts paper documents to electronic records
- Determining what type of scanning equipment is best
- Choosing a document management system
- How digital files are organized, e.g., file-naming conventions of folders and individual files
- Ease of accessing files
- Implementing safeguards for protecting client information (discussed later)

Security and Privacy[69]

Tax practitioners are subject to the **financial privacy** and **safeguards** rules contained in the Gramm-Leach-Bliley Act (GLBA). These rules require tax firms to inform their clients of the firm's data privacy policies and to develop, implement, and maintain a comprehensive written information security program.[70] The privacy and safeguards rules apply to client records regardless of the medium used to store them. These rules are explained in further detail in the section entitled "Securing Client Data." Additionally, tax preparers must keep their client's tax return information confidential, as explained in detail in the later section entitled "Disclosure and Use of Tax Return Information."[71]

Recommended Record Retention Periods[72]

Generally, the IRS can audit tax returns within three years after filing, but this period is extended to six years for substantial underreporting of income.[73] The NAEA recommends retaining tax records for at least seven years after a return is filed. **The following tables summarize client record retention periods recommended by the NAEA.**[74] These recommendations apply equally to hard copy and electronic records.

69. The Gramm-Leach-Bliley Act is also known as the Financial Services Modernization Act of 1999, PL 106-102 (Nov. 12, 1999).

70. 16 CFR §§313 and 314.

71. IRC §§7216 and 6713.

72. *Record Retention Requirements*, by the National Association of Enrolled Agents (NAEA). All rights reserved. [www.naea.org/sites/default/files/pdf/1639_NAEA_RecordRetention.pdf] Accessed on Mar. 14, 2019.

73. IRC §§6501(a) and (e).

74. *Record Retention Requirements*, by the National Association of Enrolled Agents (NAEA). All rights reserved. [www.naea.org/sites/default/files/pdf/1639_NAEA_RecordRetention.pdf] Accessed on Mar. 14, 2019.

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Recommended by NAEA

Business Accounting Records	Retention Period
Accounts payable	7 years
Accounts receivable	7 years
Audit reports	Permanent
Chart of accounts	Permanent
Depreciation schedules	Permanent
Expense records	7 years
Financial statements (annual)	Permanent
Fixed asset purchases	Permanent
General ledger	Permanent
Inventory records	7 years [a]
Loan payment schedules	7 years
Purchase orders (1 copy)	7 years
Sales records	7 years
Tax returns	Permanent

[a] Permanent for last-in-first-out system

Bank Records	Retention Period
Bank reconciliations	2 years
Bank statements	7 years
Cancelled checks	7 years [a]
Electronic payment records	7 years

[a] Permanent for real estate purchases

Corporate Records	Retention Period
Board minutes	Permanent
Bylaws	Permanent
Business licenses	Permanent
Contracts — major	Permanent
Contracts — minor	Life + 4 years
Insurance policies	Life + 3 years [a]
Leases/mortgages	Permanent
Patents/trademarks	Permanent
Shareholder records	Permanent
Stock registers	Permanent
Stock transactions	Permanent

[a] Check with the insurance agent. Liability for prior years can vary.

Real Property Records	Retention Period
Construction records	Permanent
Leasehold improvements	Permanent
Lease payment records	Life + 4 years
Real estate purchases	Permanent

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Recommended by NAEA

Employee Records	Retention Period
Benefits plans	Permanent
Employee files (ex-employees)	7 years [a]
Employee applications	3 years
Employment taxes	7 years
Payroll records	7 years
Pension/profit sharing plans	Permanent

[a] Or statute of limitations for employee lawsuits

Individual Records	Retention Period
Tax returns (uncomplicated)	7 years
Tax returns (all others)	Permanent
W-2s	7 years
1099s	7 years
Cancelled checks supporting tax deductions	7 years
Bank deposit slips	7 years
Bank statements	7 years
Charitable contribution documentation	7 years
Credit card statements	7 years
Receipts & logs pertaining to tax returns	7 years
Investment purchase and sales slip	Ownership period + 7 years
Dividend reinvestment records	Ownership period + 7 years
Year-end brokerage statements	Ownership period + 7 years
Mutual fund annual statements	Ownership period + 7 years
Investment property purchase documents	Ownership period + 7 years
Home purchase documents	Ownership period + 7 years
Home improvement receipts and cancelled checks	Ownership period + 7 years
Home repair receipts and cancelled checks	Warranty period for item
Retirement plan annual reports	Permanent
IRA annual reports	Permanent
IRA nondeductible contributions	Form 8606 Permanent
Insurance policies	Life of policy + 3 years [a]
Divorce documents	Permanent
Loans	Term of loan + 7 years
Estate planning documents	Permanent

[a] Check with the insurance agent. Liability for prior years can vary.

Note. The AICPA professional liability insurance program has a 50-page guide with useful information on the development and implementation of a record retention policy. It is available at **uofi.tax/19eth1** [forms.cpai.com/pdfs/records.pdf]. It provides answers to questions such as "Why a written record retention policy?" and "Why retain workpapers and records?" as well as advice on preparing, implementing, and using a record retention policy.[75]

[75] *Retaining Engagement Records and Responding to Requests for Records – A Guide for CPA Firms*. AICPA Professional Liability Insurance Program. Jul. 2006. CNA. [forms.cpai.com/pdfs/records.pdf] Accessed on Jan. 9, 2019.

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Example 8. Alton Tax's standard practice is to maintain client records (paper and electronic) for three years. In 2017, Alton Tax suffered a computer systems failure and lost all electronic client data due to the absence of backup files. In February 2019, the firm made a policy decision to maintain only electronic client records and destroyed their paper client records.

Ethical questions posed by this example include the following.

1. Has Alton Tax's policy of retaining client records for three years been violated with the loss of data?

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2. Could the destruction of client paper records without scanning and storing them as PDFs create ethical issues for Alton Tax?

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3. What else should Alton Tax consider when migrating to electronic records only?

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Discussion. IRC §6107 includes specific record retention requirements. Circular 230 does not contain specific requirements regarding how long client records should be maintained. From an ethical standpoint, client records should be maintained for as long as is necessary for the tax practitioner to fulfill their client obligations. Alton Tax's standard practice of keeping client records for only three years may not be adequate for certain client records (e.g., depreciation schedules).

Convenience and cost savings are factors that may have influenced Alton Tax's decision to migrate towards a policy of only keeping electronic records. However, before destroying paper records, Alton Tax should have made electronic copies where appropriate, particularly for 2015 and prior years for which electronic records were lost.

While an electronic-record-only policy may be convenient for Alton Tax, when implementing this policy, Alton Tax needs to ensure that adequate data backup and safeguard procedures are in place (see "Securing Client Data" later in this chapter).

RESPONDING TO IRS REQUESTS FOR CLIENT RECORDS[76]

Upon receiving a proper **and** lawful request by a duly authorized officer or employee of the IRS, a tax practitioner must promptly submit records or information in any matter before the IRS **unless** the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.

Records Not Held by Practitioner

If the client records/information requested by the IRS 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 IRS officer or employee. Furthermore, the practitioner must provide any information that they have regarding the identity of any person who the practitioner believes may have possession or control of the requested records or information. In so doing, the practitioner must make reasonable inquiry of their client regarding the identity of any person who may have possession or control of the requested records or information. However, 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.

[76] Circular 230, §10.20.

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Prompt Response. Circular 230, §10.23, further emphasizes the need for the practitioner to respond promptly to IRS requests for information unless the practitioner has reasonable cause for not doing so.

Privileged Information. A tax practitioner may not interfere, or attempt to interfere, with any proper and lawful effort by the IRS, its officers, or its 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.

RETURN OF CLIENT'S RECORDS[77]

When requested by a client, a tax practitioner generally must promptly return **any and all** client records that are necessary for the client to comply with their federal tax obligations. However, the practitioner may retain copies of the records returned to a client.

Records of a client were previously defined in the section "Definition of Client Records."

Fee Dispute

Generally, the existence of a fee dispute does not relieve the tax practitioner of the requirement to return a client's records upon their request. Nevertheless, if because of a fee dispute, state law permits a tax practitioner to retain a client's records, then the practitioner need only:

1. Return those records that must be attached to the taxpayer's return, and
2. Provide the client with reasonable access to review and copy any other records of the client retained by the practitioner under state law that are necessary for the client to comply with their federal tax obligations.

A tax practitioner can withhold any return, claim for refund, schedule, affidavit, appraisal, or any other document **prepared** by the tax practitioner firm pending the client's payment of fees contractually required.

SECURING CLIENT DATA

Circular 230 does not contain any requirements for tax practitioners to safeguard or keep their clients' personal and financial data private. Nevertheless, there are **two** statutory requirements[78] under which tax practitioners must secure client data. First, tax preparers must keep their client's tax return information confidential, as explained in detail in the later section entitled "Disclosure and Use of Tax Return Information." Second, the GLBA contains **safeguards** and **privacy** rules that apply to nonpublic personal information (NPI).[79] The Federal Trade Commission (FTC) has jurisdiction over financial institutions that handle such information, and tax preparation firms are considered financial institutions whose handling of NPI is subject to FTC oversight.[80]

NPI DEFINED[81]

In the context of a relationship between a tax preparer and a client, NPI is personally identifiable financial information whether in paper, electronic, or other form, that is:

1. Provided by the client to the tax preparer,
2. The result of any transaction with the client or any service performed for the client, or
3. Otherwise obtained by the tax preparer.

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77. Circular 230, §10.28.
78. IRC §7216.
79. 16 CFR §§313 and 314.
80. GLBA §505(a)(7); 16 CFR §313.1(b).
81. 15 USC §6809(4)(A); 16 CFR §313.3(n); and 16 CFR §314.2(b).

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NPI includes any list, description, or other grouping of clients (and publicly available information pertaining to them) **but** only if derived from NPI.

SAFEGUARDS RULE

As custodians of NPI, tax preparers **must** develop, implement, and maintain a comprehensive written information security program pursuant to the GLBA.[82] The objectives of this program are to:[83]

1. Ensure the security and confidentiality of NPI,
2. Protect against any anticipated threats or hazards to the security or integrity of such information, and
3. Protect against unauthorized access to or use of such information that could result in substantial harm or inconvenience to any client.

This information security program must contain the following elements.[84]

- Designated staff to coordinate the program
- A risk assessment analysis
- Development of safeguards to control the risks identified
- Regular testing and monitoring of safeguards
- Training and management of employees handling client information
- Adequate oversight of external service providers handling client information
- Procedures for modification of the program in response to observed deficiencies, changes to business operations, or any other factors affecting information security

GLBA guidance is limited to general requirements. Consequently, the GLBA does not contain specific de minimis technical requirements. However, the IRS provides specific guidance to tax preparers in safeguarding electronic taxpayer data (e.g., IRS Pub. 4557, *Safeguarding Taxpayer Data*).

Observation. According to a recent ComputerWeekly online article,[85] businesses are failing to apply encryption technology effectively. Although encryption is well recognized as an effective safeguard, a recent survey found that only **4%** of data breaches are "secure breaches," meaning that the files stolen were encrypted rendering them "useless" without the access password.

The survey data also revealed that "61% of respondents believe **compliance** drives the need for encryption, not **users' data protection,** heightening the disconnect between encryption and security."

Only 35% of respondents used encryption. Other respondents mentioned technical difficulties in implementing the technology as the reason it was not a priority.

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82. 16 CFR §314.1.

83. 16 CFR §314.3.

84. 16 CFR §314.4.

85. *Businesses fail to apply encryption technology effectively*. Ashford, Warwick. Jan. 15, 2019. ComputerWeekly.com. [www.computerweekly.com/news/252455881/Businesses-fail-to-apply-encryption-technology-effectively] Accessed on Jan. 17, 2019.

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Example 9. When Alton Tax destroyed their clients' paper records, they used the firm's strip cut shredder and disposed of the shredded documents with their recycled trash.

1. What, if any, ethical considerations are raised by Alton Tax's disposal of their clients' paper records?

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2. Are there better paper records disposal methods?

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Discussion. Under the GLBA safeguards rule, tax practitioners are required to maintain the security and confidentiality of NPI. This requirement applies to NPI kept in paper, electronic, or other form. Therefore, Alton Tax must ensure that use of a strip cut shredder effectively destroys all NPI.

Alton Tax could have employed a more effective NPI disposal method by, for example, using a cross cut rather than strip cut paper shredder and using a trash disposal service that specializes in handling confidential documents.

Components of an NPI Data Security Plan[86]

The following are recommended components of a data security plan (part of a broader information security program). They were developed with material from IRS Pub. 4557 as well as other publicly available information. It is recommended that tax practitioners obtain legal advice when developing a data security plan and a broader information security program to ensure that they conform to all legal requirements.

Wireless Network Security. Wireless networks are vulnerable to access by cybercriminals. The IRS recommends taking the following precautions to protect a wireless network router from unauthorized access.

- Replace the wireless router's default administrative password with a strong, unique password.
- Log into the router's WLAN advanced settings and reduce transmit (TX) power to broadcast no further than needed.
- Change the name of the router (service set identifier (SSID)) to something that is not personally identifying (e.g., TomsTaxService), and disable the SSID broadcast so that it cannot be seen by those who do not use the network.
- Use Wi-Fi protected access 2 (WPA-2), with the advanced encryption standard (AES) for encryption.
- Do not use wired-equivalent privacy (WEP) to connect computers to the router because WEP is considered insecure.

Computer Security. To thwart illegitimate intrusion of computer devices (e.g., laptops, desktops, routers, tablets, and phones), tax practitioners should install the following security software.

- Anti-virus
- Anti-malware and anti-spyware
- Firewall (to block unwanted connections)
- Virtual private network (VPN)

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86. IRS Pub. 4557, *Safeguarding Taxpayer Data*.

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Tax practitioners should ensure that this software is kept up to date (by enabling automatic updates). Following receipt, all electronic documents should be scanned by an anti-virus application before they are opened.

Practitioners and their employees/associates should not use a public Wi-Fi (for example, at a café or airport) to access business email or NPI without using a VPN. A VPN provides data security by encrypting communications between computing devices and the Internet. Besides ensuring that NPI is safely transmitted, VPNs also prevent eavesdropping and illegal interception of data.[87]

USB storage devices and external drives that contain NPI should not be attached to public computers.

Internet Safety. The IRS recommends that tax practitioners take appropriate precautions when browsing the Internet. Such precautions include the following.

- Keeping web browser software up to date to ensure it has the latest security features
- Scanning files for viruses/malware before downloading them
- Regularly deleting the web browser cache, temporary Internet files, cookies, and browsing history
- Securely exchanging data with websites (e.g., those with a web address that is prefaced by "https")
- Using a VPN with public Wi-Fi connections
- Disabling the stored password feature offered by some operating systems
- Enabling the browser's pop-up blocker
- Not calling any number from pop-ups claiming the computer has a virus or clicking tools claiming to delete viruses

Software Applications. Download software or applications **only from official sites.** Avoid installing superfluous software or applications to the business network. Do not download "free" software, especially security software, which can be a criminal scam.

Passwords. Use strong passwords of eight or more characters (including special and alphanumeric characters) to protect computer devices and accounts. Each device or account should have its own password. Consider utilizing a password management program.

Encryption. Encrypting files should make them unreadable by those who do not have permission to access them. Encrypt files and electronic communications containing NPI. Neither the GLBA nor the IRS recommend minimum encryption standards for NPI but the IRS does require authorized IRS e-file providers to use a minimum encryption standard.[88] Encrypted files should be further protected with strong passwords. Encrypting the entire content of a computer hard drive is an alternative to encrypting individual files or folders.

87. *What Is a VPN? – Virtual Private Network*. Cisco. [www.cisco.com/c/en/us/products/security/vpn-endpoint-security-clients/what-is-vpn.html] Accessed on Jan. 14, 2019.

88. IRS Pub. 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*.

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Practitioner Planning Tip

Encryption renders the contents of a file unreadable. It does this by encoding and transforming the contents of a file into an unreadable cipher text.[89] Consequently, trusted parties require a key to decrypt the file and read its contents. In practice, the key is often in the form of a password. Generally, the higher the level of encryption used, the safer the file is from attacks from unauthorized parties. Long alphanumeric passwords can be used to increase file security.

Because file encryption is a complex subject, it is recommended that tax practitioners seek advice from technical experts regarding the use of encryption in their tax practices.

Data Backup. Copies of NPI should be maintained on secure external repositories not connected fulltime to a network. Back-up copies of NPI should be made frequently.

Inventory. Maintain an inventory of devices storing NPI. This includes laptops, smart phones, tablets, and external hard drives. In addition, maintain an inventory of software used to process or send tax data, which includes operating systems, browsers, applications, tax software, and websites.

Obsolete Hardware. Obsolete computer hard drives, printers, and other devices containing NPI should be wiped clean or destroyed.

Access to NPI. Limit access to NPI to personnel who need to have access to that information.

Monitor Returns Filed. Check the IRS e-Services account weekly for the number of returns filed using the firm's electronic filing identification number (EFIN).

Phishing.[90] Phishing is a scam perpetrated by apparently legitimate parties that lure unsuspecting victims into providing personal and financial information. Usually, this is done through unsolicited email, although it can also be found on seemingly legitimate websites. The IRS offers the following advice to recipients of an email purporting to be from the IRS (and other agencies) requesting personal information, or concerning taxes associated with a large investment, inheritance, or lottery.

1. Do not reply.
2. Do not open any attachments. They could contain malicious code that may infect the receiving computer or mobile phone.
3. Do not click on any links.
4. Visit the IRS's identity protection page at **uofi.tax/19eth2** [www.irs.gov/identity-theft-fraud-scams] if links were inadvertently clicked and confidential information entered.
5. Forward the email as-is (including headers) to phishing@irs.gov.
6. Delete the original email.

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89. *Encryption.* Techopedia. [www.techopedia.com/definition/5507/encryption] Accessed on May 14, 2019.

90. *Report Phishing and Online Scams*. Feb. 19, 2019. IRS. [www.irs.gov/privacy-disclosure/report-phishing] Accessed on Mar. 1, 2019.

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Example 10. Ellen, a long-standing high-net-worth client of Alton Tax, makes significant charitable donations and has numerous receipts for tax deductions. Customarily, Ellen mails in original receipts to Alton Tax for preparation of her tax returns. Before destroying Ellen's paper files in February 2019, Alton Tax scanned the content of those files.

In June 2019, Ellen informs Alton Tax that she is changing tax preparers and would like her client records returned to her.

Ethical questions posed by this example include the following.

1. What client records must Alton Tax return to Ellen?

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2. Does the destruction of Ellen's tax deduction receipts cause ethical or other concerns for Alton Tax?

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3. If Ellen wants her records returned in hard copy, what measures should Alton Tax take when complying?

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4. If Ellen wants her records returned electronically, what measures should Alton Tax take when complying?

____

____

Discussion. A tax practitioner must, in general, promptly return **any** and **all** records of the client that are necessary for the client to comply with their federal tax obligations.[91] Therefore, Alton Tax should return to Ellen documents that she provided as well as documents that Alton Tax prepared for Ellen in the course of their work (except for any tax returns and other documents prepared by the firm for which Ellen has not yet paid).

The destruction of Ellen's original tax deduction receipts could create a liability for Alton Tax if the absence of those original receipts causes Ellen to suffer financial loss (e.g., a tax auditor requires them). Furthermore, the original receipts are Ellen's property and Alton Tax should have obtained her permission before destroying them.

In returning paper records to Ellen, Alton Tax should ensure that they are adequately safeguarded until they are in Ellen's possession. If Ellen requests delivery of the records, then safeguards must be in place during the delivery process.

Similarly, for records returned electronically, Alton Tax must ensure adequate safeguards are in place (by, for example, encrypting the records and transmitting them over a VPN).

Caution. Given the almost unlimited Internet access available from remote locations, it is extremely important to be vigilant concerning the safety and security of client data, being sure to always use encryption and VPN access.

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91. Circular 230, §10.28.

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Spot Signs of Data Theft[92]

Tax practitioner firms need to be constantly on the lookout for signs of data theft. The following are some common clues to possible current or past data theft.

- The IRS rejects client e-filed tax returns because returns with their social security numbers were already filed.
- Clients who have not filed tax returns begin to receive IRS authentication letters 5071C, 4883C, or 5747C.
- Clients receive refunds when they have not filed tax returns.
- Clients receive tax transcripts they did not request.
- Clients who created an IRS online services account receive an IRS notice that their account was accessed or IRS emails stating their account has been disabled. Alternatively, clients receive an IRS notice that an IRS online account was created in their names.
- The number of returns filed with a tax practitioner's EFIN exceeds the number of their clients.
- Tax professionals or clients respond to emails that the practitioner did not send.
- Network computers are running slower than normal.
- Computer cursors are moving, or numbers or text are changing without physical operator input.
- Network computers lock out tax practitioners.
- There is an unauthorized change in the browser homepage.

RESPONSE TO A SECURITY BREACH[93]

Besides taking the necessary steps to safeguard NPI, tax practitioners must develop a response plan in the event that they suffer a data breach. Components of this plan should include procedures for informing clients and other interested parties and for recovering from the data loss. Tax practitioners may prefer to work with legal counsel in developing an appropriate response plan.

Reporting a Security Breach

The data breach should be reported to the IRS and law enforcement, relevant states, clients, and other interested parties. However, tax practitioners may prefer to seek legal counsel before taking any action.

IRS and Law Enforcement Reporting. It is important that the tax practitioner firm inform their local IRS stakeholder liaison so that the IRS can act to protect the firm's clients from fraudulent returns being filed in their names.[94] The tax practitioner firm should also report the data breach to local police and, if directed by the IRS, to the local office of the following law enforcement agencies.

- Federal Bureau of Investigation: **uofi.tax/19eth3** [www.fbi.gov/contact-us/field-offices]
- Secret Service: **uofi.tax/19eth4** [www.secretservice.gov/contact/field-offices]

92. IRS Pub. 4557, *Safeguarding Taxpayer Data*.

93. IRS Pub. 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*; *Data Theft Information for Tax Professionals*. Jan. 30, 2019. IRS. [www.irs.gov/individuals/data-theft-information-for-tax-professionals] Accessed on Mar. 1, 2019; *Data Breach Response – A Guide for Business*. May 2019. FTC. [www.ftc.gov/system/files/documents/plain-language/pdf-0154_data-breach-response-guide-for-business-042519-508.pdf] Accessed on Aug. 6, 2019.

94. *Stakeholder Liaison Local Contacts*. Feb. 15, 2019. IRS. [www.irs.gov/businesses/small-businesses-self-employed/stakeholder-liaison-local-contacts] Accessed on Mar. 1, 2019.

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State Tax Jurisdictions. The tax practitioner should determine relevant state and local jurisdictions for which client tax returns were filed and email the Federation of Tax Administrators at StateAlert@taxadmin.org for information on how to report victim information to those states. Most states also require that the state attorney general be notified of data breaches. Certain states may also require tax practitioners to offer credit monitoring and/or identity theft protection to victims of identity theft.

Clients. Tax practitioners should work with law enforcement (and their insurance company, if applicable) to determine the optimum time to communicate the data breach to their clients. Additionally, clients should file Form 14039, *Identity Theft Affidavit*, if they receive a notice or letter from the IRS or have their e-filed return rejected because of a duplicate social security number.

Other Parties. The IRS recommends that tax practitioners consult with a security expert to:

- Determine the cause and scope of the breach,
- Stop the breach, and
- Prevent further breaches from occurring.

Tax practitioners should also notify credit bureaus of the data breach and inform them that affected clients may require their services. The three principal credit bureaus can be contacted as follows.

Equifax Credit Information Services — Consumer Fraud Division
P.O. Box 105496
Atlanta, Georgia 30348-5496
Tel: 800-997-2493
www.equifax.com

Experian
P.O. Box 2104
Allen, Texas 75013-2104
Tel: 888-EXPERIAN (397-3742)
www.experian.com

Trans Union Fraud Victim Assistance Dept.
P.O. Box 390
Springfield, PA 19064-0390
Tel: 800-680-7289
www.transunion.com

Recovery from a Security Breach[95]

The FTC offers assistance to businesses who are victims of data theft and can be contacted as follows.

Email: idt-brt@ftc.gov
Telephone: 1-877-ID-THEFT (877-438-4338)

The FTC has a letter template that can be used to notify clients of the data breach, inform them of actions being taken in response, and advise them of actions they can take to protect themselves. This letter template is reproduced in the appendix to this chapter.

95. IRS Pub. 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns*; *Data Breach Response — A Guide for Business*. May 2019. FTC. [www.ftc.gov/system/files/documents/plain-language/pdf-0154_data-breach-response-guide-for-business-042519-508.pdf] Accessed on Jan. 16, 2019; *Data Theft Information for Tax Professionals*. Jan. 30, 2019. IRS. [www.irs.gov/individuals/data-theft-information-for-tax-professionals] Accessed on Mar. 11, 2019.

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The following are actions that tax practitioners should consider in their recovery from a data breach.[96]

- Determine how the data breach occurred, make any required fixes before resuming tax preparation activities, and request a new EFIN.
- Develop a continuity plan.
- Keep the firm's local IRS stakeholder liaison apprised of developments.
- Once systems are clean, make encrypted backups of all business data and keep the files in a secure location.
- Develop an ongoing schedule for data backups.
- Ensure that the practice is adequately insured against a data breach.

Observation. In a recent survey, the National Society of Accountants found that only 48% of respondents had cyber liability insurance policies, 64% use secure file transfer portals, and 69% backup their data to online or remote sites.[97]

PRIVACY RULE[98]

As stated earlier, tax preparation firms are subject to the GLBA's privacy rule.[99] This limits the circumstances under which tax preparation firms can disclose their clients' NPI to nonaffiliated third parties. The privacy rule requires tax preparers to notify their clients about their information-sharing practices and inform them of their right to "opt-out" if they do not want their information shared with certain nonaffiliated third parties. In this regard, tax preparers must provide their clients with the following NPI privacy notices.

- An initial privacy notice at the outset of the practitioner/client relationship that is clear, conspicuous, and accurately reflects the tax preparer's data privacy policies and practices[100]
- Annual data privacy notices

All NPI privacy notices must include the following information.

1. Categories of the client's NPI collected
2. Categories of the client's NPI disclosed
3. Categories of parties to whom NPI is disclosed
4. Similar NPI collection and disclosure policies for former clients
5. Procedures for clients to opt out of NPI disclosure
6. Policies and practices for protecting the confidentiality and security of clients' NPI

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96. IRS Pub. 4557, *Safeguarding Taxpayer Data*.

97. *2018-2019 Income and Fees of Accountants and Tax Preparers in Public Practice Survey Report*. Dec. 2018. NSA. [mainstreetpractitioner.org/wp-content/uploads/2018/11/MSP-December-2018.pdf] Accessed on Mar. 1, 2019.

98. 16 CFR §313. [www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/financial-privacy-rule] Accessed on Jan. 16, 2019; *How To Comply with the Privacy of Consumer Financial Information Rule of the Gramm-Leach-Bliley Act*. Jul. 2002. FTC. [www.ftc.gov/tips-advice/business-center/guidance/how-comply-privacy-consumer-financial-information-rule-gramm] Accessed on Jan. 16, 2019.

99. GLBA §505(a)(7); 16 CFR §313.1(b).

100. 16 CFR §313.4(a).

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Model Privacy Form and Safe Harbor[101]

Due to the diverse requirements of the GLBA privacy rule, the FTC has developed a model privacy form. Tax preparers wishing to use the model privacy form must adhere to the instructions provided so that it can be relied upon as a safe harbor. A copy of this 2-page form is included in the appendix to this chapter.

Example 11. Alton Tax does not share their clients' NPI with nonaffiliated third parties. To minimize time spent complying with the GLBA's privacy rule, Alton Tax developed a streamlined office policy. Under this policy, the initial notice is included as a paragraph in the client engagement letter and the annual notice is included as a paragraph in the annual tax organizer cover letter. Both notices state simply that Alton Tax does not share their clients' NPI with nonaffiliated third parties. In addition, a copy of Alton Tax's NPI data security plan is attached to the notice.

Ethical questions posed by this example include the following.

1. Is Alton Tax's policy enough to comply with the GLBA privacy rule? If not, what else is needed?

   ____

   ____

2. Is Alton Tax's policy to include privacy notices with other client correspondence appropriate?

   ____

   ____

Discussion. Although Alton Tax's office policy does include providing clients with initial and annual privacy notices, the content of these notices may be insufficient to comply with the privacy rule. For example, the privacy rule requires businesses to provide their clients with the opportunity to opt out of NPI disclosure. Therefore, Alton Tax should consider obtaining legal advice to ensure that their policy complies with the privacy rule.

Alton Tax's NPI privacy notices to their clients must be clear, conspicuous, and accurately reflect the firm's data privacy policies and practices. Including such notices with other client correspondence is appropriate if this requirement is met.

DISCLOSURE AND USE OF TAX RETURN INFORMATION[102]

Tax return preparers who make unauthorized **disclosure** or **use** of their clients' tax return information are subject to civil or criminal sanctions.

CIVIL SANCTIONS[103]

Tax return preparers are subject to a penalty of $250 **each time** they:

1. **Disclose** any information furnished to them for, or in connection with, the preparation of a return; or
2. **Use** any such information for any purpose other than to prepare, or assist in preparing, a return.

The maximum aggregate civil penalty assessable on a tax preparer for **unauthorized disclosure** or **use** of tax return information is $10,000 in a calendar year.

101. *Final Model Privacy Form Under the Gramm-Leach-Bliley Act*. FTC. [www.ftc.gov/sites/default/files/documents/rules/privacy-consumer-financial-information-financial-privacy-rule/model_form_rule_a_small_entity_compliance_guide.pdf] Accessed on Jan. 17, 2019.

102. *Section 7216 Frequently Asked Questions*. Dec. 6, 2018. IRS. [www.irs.gov/tax-professionals/section-7216-frequently-asked-questions] Accessed on Jan. 17, 2019.

103. IRC §6713.

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IRC §6713 relies on IRC §7216(b) when providing the rules regarding exceptions from this civil penalty for **authorized disclosure** or **use** of tax return information.

CRIMINAL SANCTIONS

In 1971, Congress enacted IRC §7216, a criminal provision prohibiting tax return preparers from knowingly or recklessly **disclosing** or **using** tax return information. Tax preparers convicted of violating this provision face up to one year in prison and/or a fine of up to $1,000 for each violation.

Due to the introduction of electronic filing and the cross-marketing of financial and commercial products and services, Treas. Regs. §§301.7216-1, 301.7216-2, and 301.7216-3 were updated and apply to **disclosures** and **uses** beginning on January 1, 2009.

DEFINITIONS

Tax Return Preparer[104]

For the purposes of IRC §6713 (civil sanctions) and IRC §7216 (criminal sanctions), **tax return preparers** are defined as those participating in the preparation of tax returns for taxpayers, including but not limited to:

- Return preparers that are in business or hold themselves out as preparers,
- Casual preparers that are compensated,
- Electronic return originators,
- Electronic return transmitters,
- Intermediate service providers,
- Tax return preparation software/equipment contractors, and
- Reporting agents.

Those who assist in preparing returns or performing auxiliary services in connection with preparing returns are also considered tax return preparers for this purpose. Similarly, volunteer preparers participating in programs like Volunteer Income Tax Assistance (VITA) and Tax Counseling for the Elderly (TCE) are considered tax return preparers.

Tax Return and Tax Return Information

Tax Return.[105] The term **tax return** refers to any income tax return (or amended return) imposed by chapter 1 of the Code (i.e., normal taxes and surtaxes).

Tax Return Information.[106] All information collected by tax return preparers from taxpayers or other sources used for tax return preparation is tax return information. This includes but is not limited to:

- A taxpayer's name, address, and identifying number;
- Tax preparer computations, worksheets, and printouts;
- Correspondence from the IRS during preparation;
- Information connected with the filing and correction of returns;
- Statistical compilations of tax return information; and
- Tax return preparation software registration information.

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104. IRC §6713(b); Treas. Reg. §301.7216-1(b)(2).

105. Treas. Reg. §301.7216-1(b)(1).

106. Treas. Reg. §301.7216-1(b)(3).

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PERMITTED DISCLOSURES[107]

Sanctions (civil or criminal) do **not** apply to **permitted** disclosure or use of tax return information. For this purpose, the following **disclosures** and **uses** of tax return information are permitted.

- **Disclosure** pursuant to any other Code section or Treasury regulation
- **Disclosure** to the IRS
- **Disclosure** pursuant to a court order
- **Use** of a client's tax return information when updating tax preparation/filing software provided to that client
- **Use** of and **disclosure** to tax return preparers located within the same firm **inside** the United States for tax preparation or auxiliary services for that client
- **Use** of and **disclosure** to tax return preparers located within the same firm **outside** the United States for tax preparation or auxiliary services for that client (with the client's consent)
- **Use** of and **disclosure** between tax return preparers located within the same firm **outside** the United States if the information was originally provided to the firm by the taxpayer
- **Disclosure** to tax return preparation software/equipment contractors **only to the extent necessary** to provide contracted services
- **Disclosure** and **use** for certain related taxpayers[108]
- **Disclosure** when securing legal advice, or during Treasury investigations or court proceedings concerning the preparer
- **Use** and **disclosure** to other members of the preparer firm for other tax, legal, or accounting services to the client
- **Use** and **disclosure** to other members of the preparer firm for other tax, legal, or accounting services for work on **another** client to the extent relevant to that work
- Certain **disclosure** and **use** by a preparer who also serves as a corporate fiduciary to the same client[109]
- **Disclosure** to the taxpayer's fiduciary when the taxpayer dies or becomes incompetent, insolvent, or bankrupt
- **Disclosure** or **use** in preparation or audit of state or local tax returns or assisting a taxpayer with foreign country tax obligations
- **Disclose** or **use** to the extent necessary to process or collect payment for tax preparation services
- **Use** in preparation of other tax returns of the taxpayer or in connection with an IRS examination of any tax return or subsequent tax litigation relating to the tax return
- **Use** of certain tax return information in compiling client lists for solicitation of tax return preparation business[110]
- **Use** and **disclosure** of certain tax return information in producing statistical information in connection with tax return preparation business[111]

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107. IRC §7216(b); Treas. Regs. §§301.7216-2 and 301.7216-3.

108. Treas. Reg. §301.7216-2(e).

109. Treas. Reg. §301.7216-2(i).

110. Treas. Reg. §301.7216-2(n).

111. Treas. Reg. §301.7216-2(o).

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- **Disclosure** or **use** of information for quality, peer, or conflict reviews to a reviewer who is eligible to practice before the IRS
- **Disclosure** to a federal, state, or local official when reporting the commission of a crime or suspected crime
- **Disclosure** to the legal representative of an incapacitated or deceased tax return preparer for the purpose of assisting the representative in operating the business

Preparers may also use tax return information for preparation of the client's state and local tax returns and declarations of estimated tax.

Unless **disclosure** or **use** of tax return information is specifically authorized, as previously described, a tax return preparer may not disclose or use a client's tax return information prior to obtaining a written consent from the client.[112]

CONSENT TO DISCLOSURE OR USE OF TAX RETURN INFORMATION[113]

A tax return preparer may **disclose** or **use** tax return information as the taxpayer directs if the preparer obtains a written consent from the taxpayer that is knowing and voluntary.

Client consent to **disclose** or to **use** tax return information obtained on or after January 1, 2014, must contain mandatory language, depending on which of the following three contexts apply.[114]

1. A request for consent to **disclose** tax return information for purposes other than return preparation or auxiliary services
2. A request for consent to **disclose** tax information for purposes of tax preparation or auxiliary services
3. A request for consent to **use** tax return information for purposes other than the preparation and filing of a tax return

112. Treas. Reg. §301.7216-3(a)(1).

113. Treas. Reg. §301.7216-3.

114. Rev. Proc. 2013-19, 2013-11 IRB 648; Rev. Proc. 2013-14, 2013-3 IRB 283.

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The following table summarizes the mandatory language for **all** consent requests and for each of the three specific contexts.[115]

Context	Mandatory Language to Include
All consent requests	If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaintstigta.treas.gov.
Disclosure for purposes **other than** tax return preparation or auxiliary services	Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose your tax return information to third parties for purposes other than the preparation and filing of your tax return without your consent. If you consent to the disclosure of your tax return information, federal law may not protect your tax return information from further use or distribution. You are not required to complete this form to engage our tax return preparation services. If we obtain your signature on this form by conditioning our tax return preparation services on your consent, your consent will not be valid. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year from the date of signature.
Disclosure for **tax return preparation** or provision of **auxiliary services**	Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose your tax return information to third parties for purposes other than those related to the preparation and filing of your tax return without your consent. If you consent to the disclosure of your tax return information, federal law may not protect your tax return information from further use or distribution. You are not required to complete this form. Because our ability to disclose your tax return information to another tax return preparer affects the tax return preparation service(s) that we provide to you and its (their) cost, we may decline to provide you with tax return preparation services or change the terms (including the cost) of the tax return preparation services that we provide to you if you do not sign this form. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year from the date of signature.
Use of information	Federal law requires this consent form be provided to you. Unless authorized by law, we cannot use your tax return information for purposes other than the preparation and filing of your tax return without your consent. You are not required to complete this form to engage our tax return preparation services. If we obtain your signature on this form by conditioning our tax return preparation services on your consent, your consent will not be valid. Your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year from the date of signature.

115. Ibid.

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DISCLOSURE EXAMPLE

Included in the appendix are model disclosure forms for consent to disclose tax return information to another tax practitioner firm and to another party for non-tax preparation purposes.

Example 12. Use the same facts as **Example 10,** except Ellen also requests in writing that Alton Tax provide her electronic client records to her new tax preparer. To comply with Ellen's request, Alton Tax prepares a zip file containing all of Ellen's client records.

1. Can Alton Tax immediately act on Ellen's written request or must Alton Tax have Ellen sign a disclosure consent form first?

   ____

   ____

2. Would the preceding answer change if Ellen's new tax preparer was employed in another office of Alton Tax?

   ____

   ____

3. Can Alton Tax comply with Ellen's request by simply emailing Ellen's client records to the new preparer or are there other ethical considerations?

   ____

   ____

Discussion. If Ellen's tax returns continue to be handled by Alton Tax in the United States (i.e., her new tax preparer works for Alton Tax in the United States), then Ellen's consent to disclose her tax return information to the new tax preparer is not required.[116] Otherwise, Alton Tax must obtain Ellen's consent before releasing her tax return information to her new tax preparer. Ellen's consent must be in the required format (see the model disclosure form in the appendix).

Alton Tax is also subject to the GLBA's safeguards rule. Accordingly, Alton Tax must ensure that Ellen's records (including her tax return information) are safely delivered to her new tax preparer. Attaching the zip file to an email to Ellen's new tax return preparer leaves open the possibility of the email being intercepted and its content potentially disclosed to a third party. Therefore, Alton Tax should take steps to safely transmit this data. For example, Alton Tax could encrypt the zip file and apply a password known only by Alton Tax and the new tax preparer. Additionally, Alton Tax could use a VPN when transmitting the email with the encrypted zip file to Ellen's new tax preparer.

116. Treas. Reg. §301.7216-2(c)(2).

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FEES

Circular 230 contains rules prohibiting negotiation of taxpayer checks and regulating tax practitioner fees for client services performed. In recent years, the courts have called into question the IRS's authority to regulate tax preparation, including related practitioner fees, and a recent legislative proposal would definitively eliminate the IRS's authority in this regard. These issues are explored next, followed by a discussion of tax service pricing.

NEGOTIATING TAXPAYER CHECKS[117]

Tax practitioners are prohibited from endorsing or otherwise negotiating any federal tax refund check (paper or electronic) issued to clients into an account owned by themselves or by their firm. During the 2013 IRS Nationwide Tax Forum, the IRS clarified that this general prohibition means that tax practitioners may not do any of the following regarding their clients' federal tax refunds.

- Cash checks
- Endorse checks
- Deposit checks to trust accounts
- Arrange split electronic transfers

Furthermore, the IRS clarified that these prohibitions apply **even if the client agrees** to let the tax practitioner cash or otherwise negotiate their tax refund check.

Tax return preparers who violate these prohibitions are subject to a $530 penalty (for returns filed in 2020) for each violation.[118]

UNCONSCIONABLE FEES[119]

Taxpayers are proscribed by Circular 230 from charging unconscionable fees in connection with any matter before the IRS. The term unconscionable is not defined in Circular 230 but Dictionary.com[120] defines it as:

- Not guided by conscience, unscrupulous;
- Not in accordance with what is just or reasonable; or
- Excessive, extortionate.

In a recent case, the court entered a permanent injunction against the defendants who had subjected their clients to unconscionable tax preparation fees. Such fees were described by the court as being "exorbitant" (a synonym for excessive or extortionate).[121]

117. Circular 230, §10.31; *What Every Tax Return Preparer Needs to Know*. Hawkins, Karen L. 2013. IRS Office of Professional Responsibility. [www.irs.gov/pub/irs-utl/2013_NTF_Key_Circular_230_Provisions.pdf] Accessed on Feb. 4, 2019.

118. IRC §6695(f); Rev. Proc. 2018-57, 2018-49 IRB 827.

119. Circular 230, §10.27(a).

120. Dictionary.com, LLC [www.dictionary.com/browse/unconscionable] Accessed on Aug. 6, 2019.

121. *U.S. v. Franklin, Wiggins, Brown, and Instant Tax Refund Service (d/b/a Instant Tax Service)*, No. 1:12-cv-00394-SEB-DKL (S.D. Ind. Mar. 28, 2011).

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CONTINGENT FEES[122]

Under Circular 230, tax practitioners may charge contingent fees for representations on matters **before the IRS** only in the following circumstances.

- For services rendered in connection with the IRS's examination of, or challenge to, one of the following
  - An original tax return
  - An amended return or claim for refund or credit filed within 120 days of the taxpayer receiving an IRS written notice challenging or examining the **original** tax return
- For services rendered regarding a claim for credit or refund of IRS-assessed penalties and/or statutory interest
- Any judicial proceeding arising under the Code

A contingent fee is any fee that depends, wholly or partly, on whether or not a position taken on a tax return or other filing avoids challenge by the IRS or is sustained either by the IRS or in litigation. Such fees include those based on any of the following.

1. A percentage of the refund reported on a return
2. A percentage of the taxes saved, or that otherwise depends on a specific result
3. An arrangement to waive fees if a position taken on a tax return or other filing is challenged by the IRS or is not sustained

For this purpose, a matter **before the IRS** includes the following.

- Tax planning and advice
- Preparing or filing, or assisting in preparing or filing, returns or claims for refund or credit
- All matters connected with a presentation to the IRS relating to a taxpayer's rights, privileges, or liabilities under laws or regulations administered by the IRS

Practitioner presentations on matters before the IRS include the following.

- Preparing and filing documents
- Corresponding and communicating with the IRS
- Rendering written advice with respect to any entity, transaction, plan, or arrangement
- Representing a client at conferences, hearings, and meetings

While Circular 230 represents the official position of the IRS, the authority of the IRS to regulate tax practitioner fees has been successfully challenged in the courts, as discussed next.

IRS Authority to Regulate Tax Preparers

In the 2014 case of *Ridgely v. Lew et al*., the U.S. District Court for the District of Columbia ruled that the IRS did not have the authority to regulate Gerald Ridgely in his role as a tax preparer for the contingent fee arrangement used in preparation of an ordinary refund claim.[123] The court's reasoning was that the Horse Act of 1884, which the IRS cited as its source of regulatory authority, only provided the IRS with authority to regulate "representatives," **not** tax return preparers. This reasoning was consistent with that used by the court in *Loving v. IRS*, when the court concluded that the IRS lacked statutory authority to enforce its 2011 regulatory program for registered tax return preparers.[124]

> **Note.** For more information about the *Ridgely* case, see the 2014 *University of Illinois Federal Tax Workbook,* Volume A, Chapter 5: Ethical Considerations. This can be found at **uofi.tax/arc** [taxschool.illinois.edu/taxbookarchive].

[122] Circular 230, §10.27(b).

[123] *Ridgely v. Lew*, No. 1:12-cv-00565 (D.D.C. Jul. 16, 2014).

[124] *Loving v. IRS*, 742 F.3d 1013 (D.C. Cir. 2014), *aff'g* 917 F. Supp.2d 67 (D.D.C. Jan. 18, 2013).

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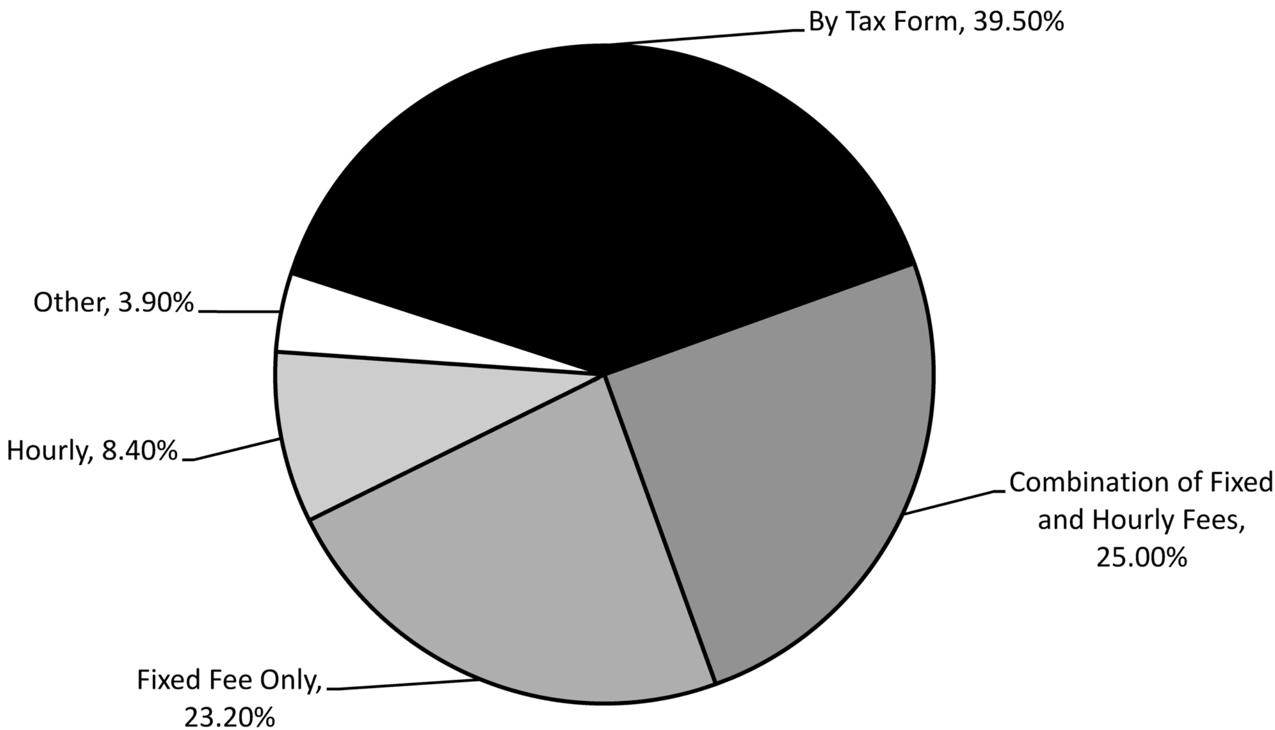
Legislative Reform Initiative

In December 2018, Chairman of the House Ways and Means Committee Kevin Brady (R-TX) unveiled a proposal under which the IRS would not be able to regulate contingent fees charged by tax preparers for tax returns or claims for refund.[125] This proposal was included as part of the Retirement, Savings, and Other Tax Relief Act of 2018, which along with the proposed Taxpayer First Act of 2018, was part of a broad IRS reform initiative.[126] While there is bipartisan support for reform of the IRS,[127] it is unclear how Congress intends to proceed in this regard.

TAX PRACTITIONER SERVICE PRICING

Billing Methods

In their 2016–2017 survey of tax accounting firms, the National Society of Accountants (NSA) asked tax practitioners to provide information regarding the billing methods they used.[128] The results of this survey are shown in the following chart.



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125. *Kevin Brady and Other GOP Leaders Big Push to Expand Tax Reform and Oversight*. Dec. 2018. The Daily Blaze. [www.thedailyblaze.com/kevin-brady-and-other-gop-leaders-big-push-to-expand-tax-reform-and-oversight] Accessed on Mar. 14, 2019; Proposed *Retirement, Savings, and Other Tax Relief Act of 2018*, §409. [docs.house.gov/billsthisweek/20181210/BILLS-115HASAHR88-RCP115-86.pdf] Accessed on Feb. 5, 2019.

126. Ibid.

127. *Coalition Urges Passage of Major Bipartisan Reforms to the IRS*. Aiello, Thomas. Apr. 17, 2018. National Taxpayers Union. [www.ntu.org/publications/detail/coalition-urges-passage-of-major-bipartisan-reforms-to-the-irs] Accessed on Mar. 11, 2019.

128. *NSA Survey Reveals Fee and Expense Data For Tax Accounting Firms in 2016 and 2017 Projections*. Jan. 27, 2017. NSA [connect.nsacct.org/blogs/nsa-blogger/2017/01/27/nsa-survey-reveals-fee-and-expense-data-for-tax-accounting-firms-in-2016-and-2017-projections] Accessed on Feb. 5, 2019.

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Average Fees for Federal Tax Returns

Recently, the NSA released the results of their 2018–2019 survey on the income and fees of accountants and tax preparers in public practice.[129] The following table summarizes the **average tax return preparation fees** charged by survey respondents in the 2018–2019 survey period and compares these to the **average fees** recorded in the 2016–2017 survey. The range of fees charged for tax returns was not available.

Tax Return Type	2018	2016	Percent Change
Form 1040 (itemized: Schedule A and state return)	294	273	8.0%
Form 1040 (standard deduction and state return)	188	176	7.0%
Form 1041 (fiduciary)	508	482	5.0%
Form 1065 (partnership)	670	656	2.0%
Form 1120 (corporation)	851	826	3.0%
Form 1120S (S corporation)	807	809	0.0%
Form 706 (estates)	1,784	1,563	14.0%
Form 709 (gift tax)	389	413	−6.0%

5

Observation. Obviously, tax return complexity is a significant factor in determining the appropriate fee to charge. Nevertheless, these average fee amounts may be helpful to tax practitioners in determining whether their fees are appropriate (i.e., not **unconscionable or excessive**) for the services they render.

Example 13. Karen Hutchins is the sole owner of an S corporation. In 2019, Alton Tax prepares Karen's 2018 federal and state corporate and individual tax returns. Subsequently, Alton Tax invoices Karen for preparation of these tax returns. Its fee for the corporate tax returns (federal and state) is $5,000. For the individual tax returns, Alton Tax charges $2,500, consisting of a flat fee of $1,000 and a $1,500 contingent fee based on a percentage of the tax refunds due. Upon receipt of the invoice, Karen calls Dan, a partner in Alton Tax, demanding a significant reduction in the fees charged. If she does not receive a significant discount, Karen threatens to report Alton Tax to the OPR for charging her an unconscionable fee for her corporate tax returns and an illegal contingent fee for her individual tax returns.

Note. The OPR can be reached at:[130]

Internal Revenue Service
Office of Professional Responsibility
SE:OPR, Room 7238/IR
1111 Constitution Avenue NW
Washington, DC 20224

EEFax: 855-814-1722

[129] *2018-2019 Income & Fees of Accountants and Tax Preparers in Public Practice Survey Report*. Dec. 2018. NSA. [mainstreetpractitioner.org/wp-content/uploads/2018/11/MSP-December-2018.pdf] Accessed on Mar. 5, 2019.

[130] *The Office of Professional Responsibility (OPR) At-A-Glance*. Feb. 4, 2019. IRS. [www.irs.gov/tax-professionals/the-office-of-professional-responsibility-opr-at-a-glance] Accessed on Feb. 20, 2019.

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1. What arguments can Dan use to defend the firm from Karen's accusation that the $5,000 fee for the corporate tax returns was unconscionable?

____

____

2. What arguments can Dan use to defend the firm from Karen's accusation that they charged an illegal contingent fee for her individual tax returns?

____

____

3. What could Alton Tax have done to avoid the fee dispute with Karen?

____

____

Discussion. According to the preceding NSA table, the average fee for a 2018 Form 1120S, *U.S. Income Tax Return for an S Corporation,* was $807. Therefore, at $5,000, Alton Tax's fee for Karen's S corporation tax returns is significantly higher than the average fee for a 2018 Form 1120S. To counter Karen's accusation that the fee was unconscionably high, a possible argument Dan could use is that the complexity of the tax returns justified the fee. Timesheets showing the hours charged by the staff involved and details of the work performed could help bolster such an argument.

While Circular 230, §10.27(b), prohibits Alton Tax from charging a contingent fee based on a percentage of the refund due on a tax return, Dan could refer to the *Ridgely* case,[131] for which the court found that the IRS does not have the authority to regulate contingent fee arrangements used by tax preparers.

Alton Tax had not previously agreed to a fee arrangement with Karen. If, instead, Alton Tax had provided Karen with an upfront fee quote for the work and obtained Karen's agreement thereto, then the fee dispute could have been avoided if Alton Tax's invoice reflected the fee agreement.

131. *Ridgely v. Lew*, No. 1:12-cv-00565 (D.D.C. Jul. 16, 2014).

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APPENDIX

TAX PRACTITIONER DUE DILIGENCE TOOLKIT

The following due diligence practice aids are included in this tax practitioner toolkit.

Item	Topic	Description of Practice Aid	Client Type
1	Engagement letter	New individual client engagement letter	Individual
2	IRS representation letter	New IRS tax examination representation letter	Individual
3	Conflict of interest waiver	Customizable document	Business/Individual
4	Conflict of interest waiver	Preparation of joint tax return of divorced spouses	Individual
5	Data breach	Letter for notifying clients of data breach based on FTC template	Business/Individual
6	Model privacy form	Safe harbor form for compliance with GLBA disclosure requirements of client's NPI	Business/Individual
7	Model consent to disclosure form	Client consent to disclosure of tax return information to another U.S.-based practitioner firm for tax preparation purposes	Business/Individual
8	Model consent to disclosure form	Client consent to disclosure of tax return information to another party for other (non-tax preparation) purposes	Business/Individual

Note. In the letters that follow, mandatory language (discussed earlier) is shown in italics so that it may be easily identified. **These letters are provided as reference samples only and are not intended for client use without appropriate modification.**

Under Rev. Proc. 2013-14, the text on all consent/use forms provided to taxpayers must be in a 12-point or larger font.

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1. New individual client engagement letter

Dear <Client name> ,

Preparation of Your <Current Tax Year> Tax Returns.

Thank you for choosing us to assist you with your tax affairs. This letter specifies the terms of our engagement with you and details the services that we will be providing to you.

We will prepare your <Current Tax Year> federal and state income tax returns. In order for us to prepare complete and accurate tax returns, we will be relying on you to provide us with the necessary information. When information you provide is incomplete or unclear, we may ask you for clarification. However, we will not audit or otherwise verify the data you submit. An Organizer is enclosed with this letter to assist you in gathering the data required for your tax returns.

We will perform accounting tasks required to prepare your tax returns. Our engagement should not be relied upon to disclose errors, fraud, or other illegal acts. However, we will, of course, inform you of any material errors, fraud, or other illegal acts we discover during the course of our engagement.

If we encounter instances of unclear tax law or of potential conflicts in the interpretation of the law, we will outline the reasonable courses of action and the risks and consequences of each. We will ultimately adopt, on your behalf, the alternative you select.

The law imposes penalties when taxpayers underestimate their tax liability. Please contact us if you require further information in this regard.

Your original records will be returned to you with your completed tax returns. Please ensure that you securely store your records, along with all supporting documents, canceled checks, etc., as these items may be needed to respond to an audit or inquiry from the tax authorities. We will retain copies of your records and our work papers for your engagement for seven years, after which these documents will be destroyed.

Our engagement to prepare your <Current Tax Year> tax returns will conclude with the delivery of the completed returns to you (if paper-filing), or your signature and our subsequent submittal of your tax return (if e-filing). If you have not elected to e-file your returns with our office, you will be solely responsible to file the returns with the appropriate taxing authorities. Review all tax-return documents carefully before signing them. We recommend that tax returns be sent to tax authorities by certified or registered mail. Please keep your mailing receipts.

Our fees for this engagement are as follows <Provide Fee Schedule>.

To confirm that this letter correctly summarizes your understanding of the arrangements for this work, please sign the enclosed copy of this letter in the space indicated and return it to us in the envelope provided.

We appreciate your business. Please contact <Provide contact name and telephone> if you have questions.

Sincerely,

<Paid Preparer Name>

<Firm Name>

Enclosures

<Current Tax Year> Tax Organizer

(Both spouses must sign for preparation of joint returns.)

Accepted By:

____

Taxpayer

____

Spouse

____

Date

SAMPLE

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2. New IRS tax examination representation letter

Dear <Client name> ,

Representation of you before the IRS.

This letter specifies the terms of our engagement with you regarding the IRS examination of your <Tax Years> income tax return(s). Before we begin this engagement, please sign the attached Form 2848, *Power of Attorney and Declaration of Representative*, so that we can notify the IRS that we are your authorized representative. Additionally, please sign, date, and return a copy of this letter to confirm your understanding of the terms of our engagement.

We will represent you before the IRS during this examination, unless either party terminates the arrangement in writing. If we cannot resolve all issues at the examination level, we will discuss the options available with you so that you can decide how you wish to proceed.

When information you provide to us is incomplete or unclear, we may ask you for clarification. Generally, we will not audit or otherwise verify the data you provide to us during the course of this IRS examination except when we notice inconsistencies with any other information we may possess. In this case, our professional standards require us to make the necessary efforts to resolve those differences.

With respect to tax advice we provide to you, the same common law protections of confidentiality that apply to a communication between a taxpayer and an attorney will also apply to a communication between a taxpayer and any federally authorized tax practitioner to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney. We are federally authorized tax practitioners for this purpose. However, there is no tax practitioner-client privilege in criminal matters. Accordingly, if we are served a properly issued administrative summons to testify before the IRS or a court in a criminal proceeding, then even our confidential communications may be subject to disclosure.

If an IRS examining agent asks to interview you directly, please be aware that you have a statutory right to be represented and **not** to meet with the examining agent (unless you are served with an enforceable administrative summons). We request that you refer any questions or other contact from a revenue agent or other tax official to us without any discussion with the tax official. If you choose to appear before, or discuss this case with, a tax official against our advice, you do so at your own risk.

Our fees for this engagement are as follows <Provide Fee Schedule>. If we have not received payment in accordance with the stated terms, we reserve the right to terminate this engagement without notice.

To confirm that this letter correctly summarizes your understanding of the terms of our engagement, please sign the enclosed copy of this letter in the space indicated and return it to us in the envelope provided.

We appreciate your confidence in us. Please contact <Provide contact name and telephone> if you have questions.

Sincerely,

<Paid Preparer Name>

<Firm Name>

Enclosures

Form 2848

(Both spouses must sign for preparation of joint returns.)

Accepted By:

____

Taxpayer

____

Spouse

____

Date

SAMPLE

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3. Conflict of interest waiver

Tax practitioner/firm ____

We the undersigned taxpayers express our desire to retain the above stated tax practitioner/firm to represent us regarding [description of matter].

We hereby confirm that no disagreement or dispute currently exists with regard to the previously stated matter and understand that all information needed to handle representation of us in this matter will be available to both of us at all times. Furthermore, we agree to preparation of the following forms/documents in connection with the matter [description of forms/documents and year/period they relate to].

We understand that because of differing or conflicting interests inherent in our personal or business affairs, your advice and any agreements reached by us may benefit one of us over the other or, where applicable, benefit the business entity over us and that at such times, advice and agreements between us may be necessary. Both of us wish to enter into this agreement, even though our interests are or may become adverse, including in situations not presently known or anticipated.

We have determined that the benefits of entering into this agreement to retain your professional services outweigh any adverse implications or consequences of doing so. Both of us expressly and forever waive the conflict of interest on your part that may arise during the performance of tax preparation, tax advising, and related or ancillary services.

We understand that you, as a tax practitioner, will disclose to us any conflict that arises that may jeopardize your ability to provide competent and diligent representation of both of us. If this occurs, you may withdraw from representation of both of us immediately. We have read this agreement and fully understand it.

Taxpayer name ____

Signature and date ____

Taxpayer name ____

Signature and date ____

Period of validity ____

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4. Conflict of interest waiver (preparation of joint tax return of divorced spouses)

Tax practitioner/firm ____

We the undersigned divorced taxpayers express our desire to retain the above stated tax practitioner/firm to:

1. Prepare our personal income tax returns,
2. Prepare our business tax returns (where applicable),
3. Prepare any other required returns and filings, and
4. Provide us with tax advice.

We hereby confirm that no disagreement or dispute currently exists within our tax situation and that we understand that all information contained in or used to prepare our tax returns (or those of our business) is available to both of us at all times. Furthermore, we agree to file our personal tax returns jointly for the tax year(s) ____________________ .

We understand that because of differing or conflicting interests inherent in our personal or business affairs, your advice and any agreements reached by us may benefit one of us over the other or, where applicable, benefit the business entity over us and that at such times, advice and agreements between us may be necessary. Both of us wish to enter into this agreement, even though our interests are or may become adverse, including in situations not presently known or anticipated.

We have determined that the benefits of entering into this agreement to retain your professional services outweigh any adverse implications or consequences of doing so. Both of us expressly and forever waive the conflict of interest on your part that may arise during the performance of tax preparation, tax advising, and related or ancillary services.

We understand that you, as a tax practitioner, will disclose to us any conflict that arises that may jeopardize your ability to provide competent and diligent representation of both of us. If this occurs, you may withdraw from representation of both of us immediately. We have read this agreement and fully understand it.

Full names ____

Signatures ____

Date ____

Date of divorce ____

Period of validity ____

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5. Letter for notifying clients of data breach based on FTC template[132]

[Date]

[Tax practitioner firm name and address]

NOTICE OF DATA BREACH

Dear [Insert Name]:

We are contacting you about a data breach that has occurred at [insert Company Name].

What Happened?

[Describe how data breach happened, the date of breach, and how the stolen information has been misused (if known)].

What Information Was Involved?

This incident involved your [describe the type of personal information that may have been exposed due to the breach].

What We Are Doing

[Describe how the firm is responding to the data breach, including: what actions are being taken to remedy the situation; what steps are being taken to protect individuals whose information has been breached; and what services are being offered (like credit monitoring or identity theft restoration services).]

What You Can Do

It is recommended that you place a fraud alert on your credit file. A fraud alert tells creditors to contact you before they open any new accounts or change your existing accounts. Call any one of the three major credit bureaus. As soon as one credit bureau confirms your fraud alert, the others are notified to place fraud alerts. The initial fraud alert stays on your credit report for 90 days. You can renew it after 90 days.

- Equifax: www.equifax.com or 1-800-525-6285
- Experian: www.experian.com or 1-888-397-3742
- TransUnion: www.transunion.com or 1-800-680-7289

Request that all three credit reports be sent to you, free of charge, for your review. Even if you do not find any suspicious activity on your initial credit reports, the Federal Trade Commission (FTC) recommends that you check your credit reports periodically. Thieves may hold stolen information to use at different times. Checking your credit reports periodically can help you spot problems and address them quickly.

If you find suspicious activity on your credit reports or have reason to believe your information is being misused, file a police report and call [insert contact information for law enforcement if authorized to do so]. Get a copy of the police report; you may need it to clear up the fraudulent debts.

If your personal information has been misused, visit the FTC's site at www.IdentityTheft.gov to get recovery steps and to file an identity theft complaint. Your complaint will be added to the FTC's Consumer Sentinel Network, where it will be accessible to law enforcers for their investigations.

You also may want to consider contacting the major credit bureaus at the telephone numbers above to place a credit freeze on your credit file. A credit freeze means potential creditors cannot get your credit report. That makes it less likely that an identify thief can open new accounts in your name. The cost to place and lift a freeze depends on state law. Find your state Attorney General's office at www.naag.org to learn more.

Enclosed is a copy of *Identity Theft: A Recovery Plan,* a comprehensive guide from the FTC to help you guard against and deal with identity theft. Also attached is information from www.IdentityTheft.gov about steps you can take to help protect yourself from identity theft, depending on the type of information exposed.

Other Important Information

[Insert other important information here. For example, see additional guidance for exposed social security number]

For More Information

Call [telephone number] or go to [Internet website]. [State how additional information or updates will be shared/or where they will be posted.]

[Insert closing paragraph]

[Signature]

SAMPLE

132. IRS Pub. 1345, *Handbook for Authorized IRS e-file Providers of Individual Income Tax Returns; Data Breach Response — A Guide for Business.* May 2019. FTC. [www.ftc.gov/system/files/documents/plain-language/pdf-0154_data-breach-response-guide-for-business-042519-508.pdf] Accessed on Aug. 6, 2019.

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Additional guidance for exposed social security number[133]

- Take advantage of free credit monitoring offers.
- Get free credit reports from **www.annualcreditreport.com** and check for any accounts or charges you don't recognize.
- Consider placing a credit freeze. A credit freeze makes it harder for someone to open a new account in your name.
  - If you place a freeze, be ready to take a few extra steps the next time you apply for a new credit card or cell phone — or any service that requires a credit check.
  - If you decide not to place a credit freeze, at least consider placing a fraud alert.
- Try to file your taxes early — before a scammer can. Tax identity theft happens when someone uses your social security number to get a tax refund or a job. Respond right away to letters from the IRS.
- Don't believe anyone who calls and says you'll be arrested unless you pay for taxes or debt — even if they have part or all of your social security number, or they say they're from the IRS.
- Continue to check your credit reports at **www.annualcreditreport.com.** You can order a free report from each of the three credit reporting companies once a year.

5

133. *Data Breach Response — A Guide for Business.* May 2019. FTC. [www.ftc.gov/system/files/documents/plain-language/pdf-0154_data-breach-response-guide-for-business-042519-508.pdf] Accessed on Aug. 6, 2019.

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6. Safe harbor form for compliance with GLBA disclosure requirements of client's NPI[134]

Rev. [insert date]

FACTS	**WHAT DOES [NAME OF FINANCIAL INSTITUTION] DO WITH YOUR PERSONAL INFORMATION?**
Why?	Financial companies choose how they share your personal information. Federal law gives consumers the right to limit some but not all sharing. Federal law also requires us to tell you how we collect, share, and protect your personal information. Please read this notice carefully to understand what we do.
What?	The types of personal information we collect and share depend on the product or service you have with us. This information can include: ■ Social Security number and [income] ■ [account balances] and [payment history] ■ [credit history] and [credit scores]
How?	All financial companies need to share customers' personal information to run their everyday business. In the section below, we list the reasons financial companies can share their customers' personal information; the reasons [name of financial institution] chooses to share; and whether you can limit this sharing.

Reasons we can share your personal information	Does [name of financial institution] share?	Can you limit this sharing?
For our everyday business purposes— such as to process your transactions, maintain your account(s), respond to court orders and legal investigations, or report to credit bureaus		
For our marketing purposes— to offer our products and services to you		
For joint marketing with other financial companies		
For our affiliates' everyday business purposes— information about your transactions and experiences		
For our affiliates' everyday business purposes— information about your creditworthiness		
For our affiliates to market to you		
For nonaffiliates to market to you		

To limit our sharing	■ Call **[phone number]**—our menu will prompt you through your choice(s) ■ Visit us online: **[website] or** ■ Mail the **form** below **Please note:** If you are a *new* customer, we can begin sharing your information [30] days from the date we sent this notice. When you are *no longer* our customer, we continue to share your information as described in this notice. However, you can contact us at any time to limit our sharing.
Questions?	Call [phone number] or go to [website]

Mail-in Form

Leave Blank OR [If you have a joint account, your choice(s) will apply to everyone on your account unless you mark below. ❑ Apply my choices only to me]	Mark any/all you want to limit: ❑ Do not share information about my creditworthiness with your affiliates for their everyday business purposes. ❑ Do not allow your affiliates to use my personal information to market to me. ❑ Do not share my personal information with nonaffiliates to market their products and services to me.	
	Name	**Mail to:** [Name of Financial Institution] [Address1] [Address2] [City], [ST] [ZIP]
	Address	
	City, State, Zip	
	[Account #]	

[134]. *Final Model Privacy Form Under the Gramm-Leach-Bliley Act.* FTC. [www.ftc.gov/sites/default/files/documents/federal_register_notices/final-model-privacy-form-under-gramm-leach-bliley-act-16-cfr-part-313/091201gramm-leach.pdf] Accessed on Aug. 6, 2019.

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Page 2

Who we are	
Who is providing this notice?	[insert]

What we do	
How does [name of financial institution] protect my personal information?	To protect your personal information from unauthorized access and use, we use security measures that comply with federal law. These measures include computer safeguards and secured files and buildings. [insert]
How does [name of financial institution] collect my personal information?	We collect your personal information, for example, when you ■ [open an account] or [deposit money] ■ [pay your bills] or [apply for a loan] ■ [use your credit or debit card] [We also collect your personal information from other companies.] **OR** [We also collect your personal information from others, such as credit bureaus, affiliates, or other companies.]
Why can't I limit all sharing?	Federal law gives you the right to limit only ■ sharing for affiliates' everyday business purposes—information about your creditworthiness ■ affiliates from using your information to market to you ■ sharing for nonaffiliates to market to you State laws and individual companies may give you additional rights to limit sharing. [See below for more on your rights under state law.]
What happens when I limit sharing for an account I hold jointly with someone else?	[Your choices will apply to everyone on your account.] **OR** [Your choices will apply to everyone on your account—unless you tell us otherwise.]

Definitions	
Affiliates	Companies related by common ownership or control. They can be financial and nonfinancial companies. ■ *[affiliate information]*
Nonaffiliates	Companies not related by common ownership or control. They can be financial and nonfinancial companies. ■ *[nonaffiliate information]*
Joint marketing	A formal agreement between nonaffiliated financial companies that together market financial products or services to you. ■ *[joint marketing information]*

Other important information
[insert other important information]

5

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7. Client consent to disclosure of tax return information to another U.S.-based practitioner for tax preparation purposes

Tax practitioner/firm ____

The taxpayer(s) listed at the bottom of this form hereby provide consent to the above-stated tax practitioner/firm to disclose their tax return information to the following U.S.-based tax return preparer(s).

____

____

____

____

This consent applies to tax years: ____________________________________

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose your tax return information to third parties for purposes other than those related to the preparation and filing of your tax return without your consent. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form. Because our ability to disclose your tax return information to another tax return preparer affects the tax return preparation service(s) that we provide to you and its (their) cost, we may decline to provide you with tax return preparation services or change the terms (including the cost) of the tax return preparation services that we provide to you if you do not sign this form. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year from the date of signature.

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

Taxpayer names ____

Signatures ____

Date ______________________

Period of validity __________________________

SAMPLE

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8. Client consent to disclosure of tax return information to another party for other (non-tax preparation) purposes

Tax practitioner/firm ____

The taxpayer(s) listed at the bottom of this form hereby provide consent to the above-stated tax practitioner/firm to disclose their tax return information for the following purpose(s).

____

____

____

This consent applies to tax years: ______________________________

Name and address of parties to whom this information can be disclosed:

____

____

____

SAMPLE

Federal law requires this consent form be provided to you. Unless authorized by law, we cannot disclose your tax return information to third parties for purposes other than the preparation and filing of your tax return without your consent. If you consent to the disclosure of your tax return information, Federal law may not protect your tax return information from further use or distribution.

You are not required to complete this form to engage our tax return preparation services. If we obtain your signature on this form by conditioning our tax return preparation services on your consent, your consent will not be valid. If you agree to the disclosure of your tax return information, your consent is valid for the amount of time that you specify. If you do not specify the duration of your consent, your consent is valid for one year from the date of signature.

If you believe your tax return information has been disclosed or used improperly in a manner unauthorized by law or without your permission, you may contact the Treasury Inspector General for Tax Administration (TIGTA) by telephone at 1-800-366-4484, or by email at complaints@tigta.treas.gov.

Taxpayer names ____

Signatures ____

Date ______________________

Period of validity ______________________

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REFERENCE MATERIAL: CIRCULAR 230

The following sections of Circular 230, as published in June 2014, are mentioned in this chapter. These sections are reproduced here for the reader's convenience.

§10.2 Definitions.

a. As used in this part, except where the text provides otherwise —

1. *Attorney* means any person who is a member in good standing of the bar of the highest court of any state, territory, or possession of the United States, including a Commonwealth, or the District of Columbia.

2. *Certified public accountant* means any person who is duly qualified to practice as a certified public accountant in any state, territory, or possession of the United States, including a Commonwealth, or the District of Columbia.

3. *Commissioner* refers to the Commissioner of Internal Revenue.

4. *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 documents; filing documents; corresponding and communicating with the Internal Revenue Service; rendering written advice with respect to any entity, transaction, plan or arrangement, or other plan or arrangement having a potential for tax avoidance or evasion; and representing a client at conferences, hearings, and meetings.

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

6. A *tax return* includes an amended tax return and a claim for refund.

7. *Service* means the Internal Revenue Service.

8. *Tax return preparer* means any individual within the meaning of section 7701(a)(36) and 26 CFR 301.7701-15.

b. Effective/applicability date. This section is applicable on August 2, 2011.

§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 Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the attorney is currently qualified as an attorney and is authorized to represent the party or parties. Notwithstanding the preceding sentence, attorneys who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under §10.37, but their rendering of this advice is practice before the Internal Revenue Service.

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 Internal Revenue Service by filing with the Internal Revenue Service a written declaration that the certified public accountant is currently qualified as a certified public accountant and is authorized to represent the party or parties. Notwithstanding the preceding sentence, certified public accountants who are not currently under suspension or disbarment from practice before the Internal Revenue Service are not required to file a written declaration with the IRS before rendering written advice covered under §10.37, but their rendering of this advice is practice before the Internal Revenue Service.

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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 Internal Revenue 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 Internal Revenue Service by filing with the Internal Revenue Service a written declaration stating that he or she is currently qualified as an enrolled actuary and is authorized to represent the party or parties 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), 7805(b) (relating to the extent to which an 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, enrolled agents, enrolled retirement plan agents, and registered tax return preparers.

e. *Enrolled retirement plan agents* —

1. Any individual enrolled as a retirement plan agent pursuant to this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service.

2. Practice as an enrolled retirement plan agent is limited to representation with respect to issues involving the following programs: Employee Plans Determination Letter program; Employee Plans Compliance Resolution System; and Employee Plans Master and Prototype and Volume Submitter program. In addition, enrolled retirement plan agents are generally permitted to represent taxpayers with respect to IRS forms under the 5300 and 5500 series which are filed by retirement plans and plan sponsors, but not with respect to actuarial forms or schedules.

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

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f. *Registered tax return preparers.*

1. Any individual who is designated as a registered tax return preparer pursuant to §10.4(c) of this part who is not currently under suspension or disbarment from practice before the Internal Revenue Service may practice before the Internal Revenue Service.

2. Practice as a registered tax return preparer is limited to preparing and signing tax returns and claims for refund, and other documents for submission to the Internal Revenue Service. A registered tax return preparer may prepare all or substantially all of a tax return or claim for refund of tax. The Internal Revenue Service will prescribe by forms, instructions, or other appropriate guidance the tax returns and claims for refund that a registered tax return preparer may prepare and sign.

3. A registered tax return preparer may represent taxpayers before revenue agents, customer service representatives, or similar officers and employees of the Internal Revenue Service (including the Taxpayer Advocate Service) during an examination if the registered tax return preparer signed the tax return or claim for refund for the taxable year or period under examination. Unless otherwise prescribed by regulation or notice, 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 Internal Revenue Service or the Treasury Department. A registered tax return preparer's authorization to practice under this part also does not include the authority to provide tax advice to a client or another person except as necessary to prepare a tax return, claim for refund, or other document intended to be submitted to the Internal Revenue Service.

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

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

h. *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.

i. *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.

j. *Effective/applicability date.* Paragraphs (a), (b), and (g) of this section are applicable beginning June 12, 2014. Paragraphs (c) through (f), (h), and (i) of this section are applicable beginning August 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.

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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.

c. *Effective/applicability date.* This section is applicable beginning August 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.

§10.23 Prompt disposition of pending matters.

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

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§10.27 Fees.

a. *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 —

1. *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.

2. *Matter before the Internal Revenue Service* includes tax planning and advice, preparing or filing or assisting in preparing or filing returns or claims for refund or credit, and 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, rendering written advice with respect to any entity, transaction, plan or arrangement, and representing a client at conferences, hearings, and meetings.

d. *Effective/applicability date.* This section is applicable for fee arrangements entered into after March 26, 2008.

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§10.28 Return of client's records.

a. In general, a practitioner must, at the request of a client, promptly return any and all records of the client that are necessary for the client to comply with his or her Federal tax obligations. The practitioner may retain copies of the records returned to a client.The existence of a dispute over fees generally does not relieve the practitioner of his or her responsibility under this section. Nevertheless, if applicable state law allows or permits the retention of a client's records by a practitioner in the case of a dispute over fees for services rendered, the practitioner need only return those records that must be attached to the taxpayer's return. The practitioner, however, must provide the client with reasonable access to review and copy any additional records of the client retained by the practitioner under state law that are necessary for the client to comply with his or her Federal tax obligations.

b. For purposes of this section — Records of the client include all documents or written or electronic materials provided to the practitioner, or obtained by the practitioner in the course of the practitioner's representation of the client, that preexisted the retention of the practitioner by the client. The term also includes materials that were prepared by the client or a third party (not including an employee or agent of the practitioner) at any time and provided to the practitioner with respect to the subject matter of the representation. The term also includes any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner, or his or her employee or agent, that was presented to the client with respect to a prior representation if such document is necessary for the taxpayer to comply with his or her current Federal tax obligations. The term does not include any return, claim for refund, schedule, affidavit, appraisal or any other document prepared by the practitioner or the practitioner's firm, employees or agents if the practitioner is withholding such document pending the client's performance of its contractual obligation to pay fees with respect to such document.

§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; and

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.

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§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, enrolled retirement plan agents, or registered tax return preparers, in describing their professional designation, may not utilize the term "certified" or imply an employer/employee relationship with the Internal Revenue Service. Examples of acceptable descriptions for enrolled agents 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." Similarly, examples of acceptable descriptions for enrolled retirement plan agents are "enrolled to represent taxpayers before the Internal Revenue Service as a retirement plan agent" and "enrolled to practice before the Internal Revenue Service as a retirement plan agent." An example of an acceptable description for registered tax return preparers is "designated as a registered tax return preparer by the Internal Revenue Service."

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 conduct rules applicable to all attorneys in their State(s) of licensure. Any lawful solicitation made by or on behalf of a practitioner eligible to practice before the Internal Revenue 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 at least 30 calendar days after the last date on which the schedule of fees was published.

c. *Communication of fee information.* Fee information may be communicated in professional lists, telephone directories, print media, mailings, and 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 this part. 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.

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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.

e. *Effective/applicability date.* This section is applicable beginning August 2, 2011.

§10.31 Negotiation of taxpayer checks.

a. A practitioner may not endorse or otherwise negotiate any check (including directing or accepting payment by any means, electronic or otherwise, into an account owned or controlled by the practitioner or any firm or other entity with whom the practitioner is associated) issued to a client by the government in respect of a Federal tax liability.

b. Effective/applicability date. This section is applicable beginning June 12, 2014.

§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 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 Internal Revenue Service.

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 Service 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.

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§10.34 Standards with respect to tax returns and documents, affidavits and other papers.

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 and other papers —*

1. A practitioner may not advise a client to take a position on a document, affidavit or other paper submitted to the Internal Revenue Service unless the position is not frivolous.

2. A practitioner may not advise a client to submit a document, affidavit or other paper to the Internal Revenue Service —

i. The purpose of which is to delay or impede the administration of the Federal tax laws;

ii. That is frivolous; or

iii. That contains or omits information in a manner that demonstrates an intentional disregard of a rule or regulation unless the practitioner also advises the client to submit a document that evidences a good faith challenge to the rule or regulation.

c. *Advising clients on potential penalties —*

1. A practitioner must inform a client of any penalties that are reasonably likely to apply to the client with respect to —

i. A position taken on a tax return if —

A. The practitioner advised the client with respect to the position; or

B. The practitioner prepared or signed the tax return; and

ii. Any document, affidavit or other paper submitted to the Internal Revenue Service.

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2. The practitioner also must inform the client of any opportunity to avoid any such penalties by disclosure, if relevant, and of the requirements for adequate disclosure.

3. This paragraph (c) applies even if the practitioner is not subject to a penalty under the Internal Revenue Code with respect to the position or with respect to the document, affidavit or other paper submitted.

d. *Relying on information furnished by clients.* A practitioner advising a client to take a position on a tax return, document, affidavit or other paper submitted to the Internal Revenue Service, 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.

e. *Effective/applicability date.* Paragraph (a) of this section is applicable for returns or claims for refund filed, or advice provided, beginning August 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.

§10.35 Competence.

a. A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the appropriate level of knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged. A practitioner may become competent for the matter for which the practitioner has been engaged through various methods, such as consulting with experts in the relevant area or studying the relevant law.

b. *Effective/applicability date.* This section is applicable beginning June 12, 2014.

§10.36 Procedures to ensure compliance.

a. Any individual subject to the provisions of this part who has (or individuals 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 refund, 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 this 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 that 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

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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 individual, through willfulness, recklessness, or gross incompetence fails to take prompt action to correct 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; and

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.

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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)(1)(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.

§10.50 Sanctions.

a. *Authority to censure, suspend, or disbar.* The Secretary of the Treasury, or delegate, 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 (within the meaning of §10.51), fails to comply with any regulation in this part (under the prohibited conduct standards of §10.52), 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 delegate, after due notice and opportunity for hearing, may disqualify any appraiser for a violation of these rules as applicable to appraisers.

1. If any appraiser is disqualified pursuant to this subpart C, the appraiser is barred from presenting evidence or testimony in any administrative proceeding before the Department of Treasury or the Internal Revenue Service, unless and until authorized to do so by the Internal Revenue Service pursuant to §10.81, regardless of whether the evidence or testimony would pertain to an appraisal made prior to or after the effective date of disqualification.

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. 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.

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c. *Authority to impose monetary penalty —*

1. *In general.*

i. The Secretary of the Treasury, or delegate, after notice and an opportunity for a proceeding, may impose a monetary penalty on any practitioner who engages in conduct subject to sanction under paragraph (a) of this section.

ii. If the practitioner described in paragraph (c)(1)(i) of this section was acting on behalf of an employer or any firm or other entity in connection with the conduct giving rise to the penalty, the Secretary of the Treasury, or delegate, may impose a monetary penalty on the employer, firm, or entity if it knew, or reasonably should have known of such conduct.

2. *Amount of penalty.* The amount of the penalty shall not exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty.

3. *Coordination with other sanctions.* Subject to paragraph (c)(2) of this section —

i. Any monetary penalty imposed on a practitioner under this paragraph (c) may be in addition to or in lieu of any suspension, disbarment or censure and may be in addition to a penalty imposed on an employer, firm or other entity under paragraph (c)(1)(ii) of this section.

ii. Any monetary penalty imposed on an employer, firm or other entity may be in addition to or in lieu of penalties imposed under paragraph (c) (1)(i) of this section.

d. *Authority to accept a practitioner's consent to sanction.* The Internal Revenue Service may accept a practitioner's offer of consent to be sanctioned under §10.50 in lieu of instituting or continuing a proceeding under §10.60(a).

e. *Sanctions to be imposed.* The sanctions imposed by this section shall take into account all relevant facts and circumstances.

f. *Effective/applicability date.* This section is applicable to conduct occurring on or after August 2, 2011, except that paragraphs (a), (b)(2), and (e) apply to conduct occurring on or after September 26, 2007, and paragraph (c) applies to prohibited conduct that occurs after October 22, 2004.

§10.51 Incompetence and disreputable conduct

a. *Incompetence and disreputable conduct.* Incompetence and disreputable conduct for which a practitioner may be sanctioned under §10.50 includes, but is not limited to —

1. Conviction of any criminal offense under the Federal tax laws.

2. Conviction of any criminal offense involving dishonesty or breach of trust.

3. 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.

4. Giving false or misleading information, or participating in any way in the giving of false or misleading information to the Department of the Treasury or any officer or employee thereof, or to any tribunal authorized to pass upon Federal tax matters, in connection with any matter pending or likely to be pending before them, knowing the information to be false or misleading. Facts or other matters contained in testimony, Federal tax returns, financial statements, applications for enrollment, affidavits, declarations, and any other document or statement, written or oral, are included in the term "information."

5. 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 any officer or employee thereof.

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6. Willfully failing to make a Federal tax return in violation of the Federal tax laws, or willfully evading, attempting to evade, or participating in any way in evading or attempting to evade any assessment or payment of any Federal tax.

7. Willfully assisting, counseling, encouraging a client or prospective client in violating, or suggesting to a client or prospective client to violate, any Federal tax law, or knowingly counseling or suggesting to a client or prospective client an illegal plan to evade Federal taxes or payment thereof.

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

9. 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 an advantage or by the bestowing of any gift, favor or thing of value.

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

11. 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.

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

13. 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 (a)(l3) include those which reflect or result from a knowing misstatement of fact or law, from an assertion of a position known to be unwarranted under existing law, from counseling or assisting in conduct known to be illegal or fraudulent, from concealing matters required by law to be revealed, or from consciously disregarding information indicating that material facts expressed in the opinion or offering material are false or misleading. For purposes of this paragraph (a)(13), reckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances. A pattern of conduct is a factor that will be taken into account in determining whether a practitioner acted knowingly, 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.

14. Willfully failing to sign a tax return prepared by the practitioner when the practitioner's signature is required by Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

15. Willfully disclosing or otherwise using a tax return or tax return information in a manner not authorized by the Internal Revenue Code, contrary to the order of a court of competent jurisdiction, or contrary to the order of an administrative law judge in a proceeding instituted under §10.60.

16. Willfully failing to file on magnetic or other electronic media a tax return prepared by the practitioner when the practitioner is required to do so by the Federal tax laws unless the failure is due to reasonable cause and not due to willful neglect.

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17. Willfully preparing all or substantially all of, or signing, a tax return or claim for refund when the practitioner does not possess a current or otherwise valid preparer tax identification number or other prescribed identifying number.

18. Willfully representing a taxpayer before an officer or employee of the Internal Revenue Service unless the practitioner is authorized to do so pursuant to this part.

b. *Effective/applicability date.* This section is applicable beginning August 2, 2011.

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