TAX SECTION
State Bar of Texas

OFFICERS:

Renesha Fountain (Chair)
Chamberlain, Hrdlicka, White, Williams & Aughtry, PC
1200 Smith Street, Suite 1400
Houston, Texas 77002
(713) 658-2517
renesha.fountain@chamberlainlaw.com

Robert D. Probasco (Chair-Elect)
Texas A&M University School of Law
307 W. 7th Street, Suite LL50
Fort Worth, Texas 76102
(214) 335-7549
probasco@law.tamu.edu

Abbey B. Garber (Secretary)
Holland & Knight
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1640
abbey.garber@hklaw.com

Leonora (Lee) S. Meyercord (Treasurer)
Holland & Knight
1722 Routh Street, Suite 1500
Dallas, Texas 75201
(214) 969-1315
lee.meyercord@hklaw.com

COUNCIL MEMBERS:

Term Expires 2025
Christopher Cunningham (Dallas)
Jessica Palvino (Austin)
Daniel Richard Smith (Austin)

Term Expires 2026
Joshua Smeltzer (Dallas)
Laurel Stephenson (Dallas)
Harriet Wessel (Houston)

Term Expires 2027
Jessica Kirk (Dallas)
John Woodruff (Houston)
Tim Carey (Dallas)

Continuing Legal Education
Michael Threet (Dallas)

Government Submissions
Leonora (Lee) Meyercord (Dallas)

Pro Bono
Jaime Vasquez (San Antonio)
Luciana Cristina Petry (Houston)

February 24, 2025

Via Federal eRulemaking Portal
at www.regulations.gov

Internal Revenue Service

RE: Comments on Proposed Regulations under 31 CFR Part 10, *reprinted as* Treasury Department Circular No. 230 (REG-116610-20)

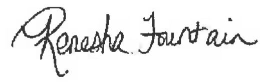
Ladies and Gentlemen:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed response to the request of the Department of the Treasury (the "Treasury") and Internal Revenue Service (the "IRS" or "Service") for comments in the Notice of Proposed Rulemaking (REG-116610-20) issued on December 26, 2024 (the "Proposed Regulations"), under 31 CFR Part 10, *reprinted as* Treasury Department Circular No. 230 ("Circular 230").

THE COMMENTS ENCLOSED WITH THIS LETTER ARE BEING PRESENTED ONLY ON BEHALF OF THE TAX SECTION OF THE STATE BAR OF TEXAS. THE COMMENTS SHOULD NOT BE CONSTRUED AS REPRESENTING THE POSITION OF THE BOARD OF DIRECTORS, THE EXECUTIVE COMMITTEE OR THE GENERAL MEMBERSHIP OF THE STATE BAR OF TEXAS. THE TAX SECTION, WHICH HAS SUBMITTED THESE COMMENTS, IS A VOLUNTARY SECTION OF MEMBERS COMPOSED OF LAWYERS PRACTICING IN A SPECIFIED AREA OF LAW.

THE COMMENTS ARE SUBMITTED AS A RESULT OF THE APPROVAL OF THE COMMITTEE ON GOVERNMENT SUBMISSIONS OF THE TAX SECTION AND PURSUANT TO THE PROCEDURES ADOPTED BY THE COUNCIL OF THE TAX SECTION, WHICH IS THE GOVERNING BODY OF THAT SECTION. NO APPROVAL OR DISAPPROVAL OF THE GENERAL MEMBERSHIP OF THIS SECTION HAS BEEN OBTAINED AND THE COMMENTS REPRESENT THE VIEWS OF THE MEMBERS OF THE TAX SECTION WHO PREPARED THEM.

Respectfully submitted,



Renesha Fountain, Chair
State Bar of Texas, Tax Section

Enclosure

COMMENTS ON PROPOSED REGULATIONS UNDER 31 C.F.R. 10, *REPRINTED AS* CIRCULAR 230

These comments on the Proposed Regulations (the "Comments") are submitted on behalf of the Tax Section of the State Bar of Texas. Matthew Roberts, Vice Chair of the Tax Controversy Committee primarily drafted these Comments. Jeffrey M. Glassman, Chair of the Tax Controversy Committee reviewed these Comments and provided substantive comments. Lee Meyercord, Treasurer and the Chair of the Committee on Government Submissions, and Joshua D. Smeltzer, Council Member for the Tax Section and Vice Chair of the Committee on Government Submissions also reviewed these comments.

Although members of the Tax Section who participated in preparing these Comments have clients who would be affected by the principles addressed by these Comments or have advised clients on the application of such principles, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make this government submission.

Contact Persons:

Jeffrey M. Glassman
Chair, Tax Controversy Committee
Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P.
901 Main Street, Suite 3700
Dallas, Texas 75202
jglassman@meadowscollier.com

Matthew L. Roberts
Vice Chair, Tax Controversy Committee
Meadows, Collier, Reed, Cousins, Crouch & Ungerman, L.L.P.
901 Main Street, Suite 3700
Dallas, Texas 75202
mroberts@meadowscollier.com

Date: February 24, 2025

I. INTRODUCTION

These comments are provided in response to Treasury's and the IRS's request for comments regarding the Proposed Regulations. The Proposed Regulations relate to proposed revisions under Circular 230.

31 U.S.C. § 330(a)(1) provides that, subject to 5 U.S.C. § 500, the Treasury Secretary ("Secretary") may "regulate the practice of representatives of persons before the Department of the Treasury." In addition, 31 U.S.C. § 330(a)(2) states that, before admitting a representative to practice, the Secretary may require the representative to demonstrate: (A) good character; (B) good reputation; (C) necessary qualifications to enable the representative to provide valuable services; and (D) competency to advise and assist persons in presenting their cases.

Under this authority, Treasury issued the most recent regulations, referred to as Circular 230, on June 12, 2014 ("Current Circular 230"). If a practitioner fails to comply with any regulation under Circular 230, the Secretary, or proper delegate, may censure, suspend, or disbar the practitioner from practice before the IRS.[1]

II. NONCOMPLIANCE, ERRORS, AND OMISSIONS

A. Background

Current Circular 230 requires practitioners to advise their clients promptly of any known noncompliance, error, or omission if the client retains the practitioner with respect to a matter administered by the IRS.[2] Noncompliance may relate to any revenue law of the United States, and an error or omission may relate to any return, document, affidavit, or other paper which the client submitted or executed under the revenue laws of the United States.[3] In addition to promptly notifying the client, Current Circular 230 requires the practitioner to inform the client of any potential consequences of the noncompliance, error, or omission.[4]

B. Proposed Regulations

Similar to Current Circular 230, the Proposed Regulations maintain the practitioner's duties to inform the client of any known noncompliance, error, or omission and the potential consequences of such conduct.[5] However, the Proposed Regulations impose an additional duty on the practitioner in these instances to "recommend the corrective actions, such as disclosure, to be taken."[6] If the client refuses to take the recommended corrective actions, the Proposed Regulations require the practitioner to "consider whether the practitioner can continue to represent the client before the Internal Revenue Service[.]"[7]

---

[1] Circular 230 (6/12/2014), §§ 10.50, 10.52(a).
[2] *Id.* at § 10.21.
[3] *Id.*
[4] *Id.*
[5] Prop. Reg. § 10.21(a).
[6] *Id.*
[7] Prop. Reg. § 10.21(b).

C. Discussion

Rules of professional responsibility also govern the duties and obligations attorneys have to their clients.[8] Generally, these rules require attorneys to exercise independence in their judgment and advisement of clients so that clients may make informed decisions regarding the representation.[9] Indeed, a bedrock principle of the attorney-client relationship is the attorney's role in independently advising the client of their legal rights and obligations and any recommended course of action in light of the facts and circumstances of that particular client's case and objectives.[10] Federal courts have also recognized the significance of an attorney's role in the attorney-client relationship, including the risks to the client and the judiciary of unnecessary interference and intrusion.[11] In addition, federal courts have recognized that clients, as a general matter, have significant rights in freely choosing their legal counsel.[12]

Unlike Current Circular 230, the Proposed Regulations interfere with the attorney's role as advisor in the attorney-client relationship. Rather than permitting an attorney to formulate a proper strategy for the client, the Proposed Regulations require the attorney to recommend corrective actions, including a disclosure, to remedy noncompliance, error, or omission. In the event the client of an attorney refuses to take the recommended corrective actions, the Proposed Regulations require the attorney to consider terminating the engagement. The termination of an engagement also interferes with the attorney-client relationship in that it interferes with client rights to choose their own counsel.

In addition, the Proposed Regulations' requirement for all practitioners to recommend corrective actions fails to specify whether there are reasonable exceptions to this general rule. For example, a client's noncompliance, error, or omission may expose the client to potential criminal sanctions. In these circumstances, the client need not take correct action, including disclosure, because the client would have a constitutional right against self-incrimination.[13]

Moreover, the Proposed Regulations fail to provide a reasonable exception for instances in which the practitioner discovers the noncompliance, error, or omission at a time when the applicable statute of limitations has expired.[14]

---

[8] *See, e.g.*, ABA Model Rules of Professional Conduct ("ABA Model Rules"); Texas Disciplinary Rules of Professional Conduct ("TDRPC").

[9] ABA Model Rules, Preamble, ¶ 2; Texas Disciplinary Rules of Professional Conduct, Preamble, ¶ 2.

[10] ABA Model Rules, Preamble, ¶ 2 ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system."); ¶ 8 ("Thus, when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.").

[11] *See, e.g.*, *In re Grand Jury Subpoena for Attorney Representing Criminal Defendant Reyes-Requena*, 913 F.2d 1118 (5th Cir. 1990) (quashing subpoena because it created "a serious interference" with the attorney-client relationship).

[12] *See, e.g.*, *U.S. v. McMichael*, No. 1:11CR180 (N.D. Ohio Nov. 14, 2011) ("At the same time, the court must diligently guard the defendant's right to choose his own counsel and must avoid the appearance or reality of unwarranted interference with the attorney-client relationship.").

[13] The Fifth Amendment of the U.S. Constitution provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The Fifth Amendment protections apply to statements that would support a conviction under a criminal statute and also those that would "furnish a link in the chain of evidence needed to prosecute the claimant" for a crime. *See Ohio v. Reiner*, 532 U.S. 17, 20 (2001).

[14] *See* I.R.C. § 6501.

D. Recommendation

We believe that in order to accomplish the IRS's goals of a fair and administrable tax system, Treasury and the IRS should consider amending the Proposed Regulations to eliminate an attorney practitioner from the requirement to recommend corrective action to a client. In addition, we believe that reasonable exceptions to the recommended corrective action requirement should be specified in the Proposed Regulations to provide better clarity to practitioners that fall under the requirement.

III. CONTINGENCY FEES

A. Background

Current Circular 230 prohibits practitioners from charging contingency fees for services rendered in connection with certain matters before the IRS.[15] The prohibition on contingency-fee arrangements does not apply to arrangements for services rendered in connection with: (A) the IRS's examination of, or challenge to, an original return or an amended return or claim for refund or credit if filed within 120 days of the taxpayer receiving written notice of the examination of, or a written challenge to, the original tax return; (B) a claim for credit or refund filed solely in connection with the determination of statutory interest or penalties assessed by the IRS; or (C) any judicial proceeding arising under the Internal Revenue Code.[16] For these purposes, Current Circular 230 defines a "contingency fee" as "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 [IRS] or in litigation," including fees based on a percentage of the refund reported on a tax return, the taxes saved, or a specific result attained."[17] The rules related to contingency-fee arrangements are located in § 10.27 of Current Circular 230.

B. Proposed Regulations

The Proposed Regulations would remove entirely § 10.27—*i.e.*, the contingency fee provisions—and would expand the definition of "disreputable conduct" to prohibit certain specified contingency-fee arrangements. Under the Proposed Regulations, these prohibited contingency-fee arrangements would include: (A) charging a contingency fee in connection with the preparation of an original or amended tax return or claim for refund or credit prepared prior to the examination of the tax return; and (B) charging a contingency fee that is "unconscionable".[18]

C. Discussion

The Proposed Regulations recognize that contingency-fee arrangements may cause practitioners and clients to take aggressive tax positions "with the hope that they will not be audited." Therefore, the Proposed Regulations permit certain contingency-fee arrangements that do not have these same risks of aggressive tax return reporting. Under the Proposed Regulations, a practitioner

---

[15] Circular 230 (6/12/2024), § 10.27(b).
[16] *Id.* IRS Notice 2008-43 also permitted practitioners to charge a contingency fee for services rendered in connection with a whistleblower claim under I.R.C. § 7623.
[17] Circular 230 (6/12/2024), § 10.27(c)(1).
[18] Prop. Reg. § 10.51.

may engage in a contingency-fee arrangement provided the arrangement is not: (A) unconscionable, or (B) entered into in connection with the preparation of an original or amended tax return or claim for refund or credit prepared prior to the examination of the tax return.

The Proposed Regulations do not appear to significantly modify the exceptions to permissible contingency-fee arrangements previously located in § 10.27 of Current Circular 230. However, there is ambiguity in whether practitioners may charge a contingency fee arrangement—that is not unconscionable—in the following circumstances: (A) a client engages a practitioner to represent the client with respect to a claim for refund related to interest or penalties prior to any examination; and (B) a client engages a practitioner to represent the client with respect to a judicial proceedings in which no examination was initiated (*e.g.*, a claim for refund or credit in which the IRS did not act upon the claim within six months).

D. Recommendation

We believe that in order to accomplish the IRS's goals of a fair and administrable tax system, Treasury and the IRS should consider clarifying whether the exceptions located in § 10.27 of Current Circular 230 continue to apply with respect to contingency-fee arrangements.