ENROLLED AGENT | AMERICA'S TAX EXPERT

NATIONAL ASSOCIATION OF ENROLLED AGENTS

BY U.S. MAIL and through www.regulations.gov

November 16, 2012

Internal Revenue Service
CC:PA:LPD:RP (REG-138367-06), Room 5205
P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Re: Proposed Regulations Governing Practice Before the Internal Revenue Service (REG-138367-06)

The National Association of Enrolled Agents (NAEA) appreciates the opportunity to comment on the notice of proposed rulemaking that would modify provisions of Circular 230 (31 CFR Part 10) relating to standards governing written advice and update certain other provisions. NAEA is the only organization solely representing the interests of 46,000 enrolled agents (EAs), America's tax experts. We are committed to increasing the professionalism of our industry, increasing the integrity of the nation's tax administration system, and protecting the representation rights of taxpayers.

The proposed amendments streamline certain Circular 230 provisions with respect to standards governing written advice and otherwise update other provisions. For the most part, we believe the amendments are reasonable and necessary. Proposed changes that clarify the scope of the Office of Professional Responsibility, update prohibitions on negotiating taxpayer refunds, and eliminate use of the Circular 230 disclaimer, for instance, are all welcome. At the same time, we believe that this iteration of rulemaking provides opportunity for Treasury to articulate the distinction between legacy Circular 230 practitioners[1] and registered tax return preparers.

We respectfully offer these comments on the Proposed Rule:

- **Scope of the Office of Professional Responsibility.** We welcome the §10.1 revision explicitly stating OPR has exclusive responsibility for matters related to practitioner discipline, including disciplinary proceedings and sanctions.

  IRS has recently made other efforts to realign administrative responsibilities for those practicing before the agency (as in Chief Counsel Notice CC-2012-18,

[1] Throughout this document, we use the term "legacy Circular 230 practitioner" to refer to enrolled agents, attorneys, and certified public accountants, the full-service tax practitioners also governed by prior versions of Circular 230.

which delegated to the Director, Office of Professional Responsibility, authority to decide appeals of Circular 230 enrollment decisions), and this revision is consistent with those efforts.

- **Electronic Negotiation of Taxpayer Refunds.** Proposed §10.31 updates longstanding prohibitions against return preparers negotiating government checks issued to a taxpayer and attempts to address the electronic nature of the 21st century.

  This section now clearly applies to:
  - all payments, paper, electronic or otherwise;
  - all practitioners, regardless of whether they prepare a taxpayer's return; and,
  - all bank accounts, whether owned by the practitioner, the practitioner's firm, or any other firm or entity with which the practitioner is associated.

  We welcome these proposed changes.

- **Revision of Requirements for Written Advice.** Enrolled agents join the hallelujah chorus of those praising the decision to streamline rules for written tax advice and to rewrite §§10.35 and 10.37 in a fashion that eliminates the use of a Circular 230 disclaimer.

  The preamble addresses the "unrestrained" use of disclaimers on nearly every practitioner communication regardless of whether the communication includes tax advice. We concur with the concerns outlined by practitioners, that the disclaimers confuse clients, who cannot understand the disclaimer or its significance (assuming the disclaimer applies to the content of the communication in question). Given the proliferation of disclaimers taxpayers see in any given transaction, they cannot distinguish this disclaimer from others and tend to ignore all of them.

- **General Standard of Competence.** The overhauled proposed §10.35 plants a stake in the ground with respect to competence:

  > A practitioner must possess the necessary competence to engage in practice before the Internal Revenue Service. Competent practice requires the knowledge, skill, thoroughness, and preparation necessary for the matter for which the practitioner is engaged.

  The brevity of the section belies its importance both to tax professionals and to taxpayers. We take this opportunity to stress our longstanding position that tax professionals ought to demonstrate competency with respect to the services they provide. Without putting too fine a point on it, we believe this section would be far stronger if it clearly articulated the distinction between legacy Circular 230 practitioners and other preparers: non-legacy Circular 230

practitioners are authorized only to prepare tax returns commensurate with their level of competence, not to represent taxpayers and not to provide tax advice except as necessary to prepare a tax return.

Treasury itself has consistently indicated its interest in this issue. The preamble to the 2010 proposed changes to Circular 230 (REG-138637-07) stated, "A registered tax return preparer may prepare all or substantially all of a tax return or claim for refund, and sign a tax return or claim for refund, **commensurate with the registered tax return preparer's level of competence as demonstrated by written exam**." [Emphasis added.]

In 2006 proposed revisions to Circular 230 (REG-122380-02), we saw the proposed removal of then- § 10.7 (c)(1)(viii), which at that time granted limited practice rights to one who prepares and signs a return. In explaining the proposal, Treasury stated, "The proposed regulations revoke this authorization because **it is inconsistent with the requirement that all individuals permitted to practice before the IRS demonstrate their qualifications to advise and assist** persons in presenting their cases to the IRS." [Emphasis added.]

We believe that a section highlighting the critical nature of competency is appropriate and we believe the section re-opens the question of limited examination representation as well as some unresolved elements of collection representation.

With respect to limited practice, if we expect preparers to demonstrate competency, is it reasonable to allow registered tax return preparers to: negotiate with IRS on behalf of a taxpayer during an examination; bind a taxpayer to a position during an examination; or agree to any adjustment to a taxpayer's reported liability?

In 2006, Treasury offered the following in its explanatory statement:

> "Individuals who prepare an original return [but are not permitted to represent] may assist in the exchange of information with the IRS regarding a taxpayer's return if the taxpayer has specifically authorized the preparer to received confidential tax information from the IRS. Revocation of the authority for limited practice will not preclude a return preparer from assisting a taxpayer in responding to questions regarding the taxpayer's return."

This conclusion is as logical, coherent and compelling today as it was six-plus years ago.

With respect to collection, an area unambiguously the domain of legacy Circular 230 practitioners, we believe this new section offers the Service the opportunity to make clear and state unequivocally that non-legacy Circular

230 practitioners may not negotiate on behalf of taxpayers with balances due IRS. One could argue §10.3(f)(3) already makes this clear:

> ...Unless otherwise prescribed by regulation or notice, this [limited practice] right does not permit [registered tax return preparers] 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.

We believe the time has come to clarify that registered tax return preparers may not bind a taxpayer to an agreement when the taxpayer has a balance due to IRS (*e.g.,* by negotiating installment agreements (whether with Form 9465 or by exercising so-called "check box" authority); by documenting and evaluating ability-to-pay computations (Form 433); by negotiating offers-in-compromise (Form 656); or, by demonstrating that an account is currently not collectible (aka Collection Status 53)). For all intents and purposes, such dialogue constitutes representation and should be treated accordingly.

- **Expedited Suspension Procedures.** In adding an additional element to §10.82 provisions for expedited suspension, we note Treasury makes a distinction between filing noncompliance and payment noncompliance. While we can imagine circumstances beyond a practitioner's control that cause payment noncompliance, we are hard-pressed to imagine similar circumstances that would cause repeated filing noncompliance.

  The proposed §10.82 provisions appear perfectly reasonable. At the same time, §10.81 provisions for reinstatement require the Service to be "satisfied that the petitioner is not likely to engage thereafter in conduct contrary to the regulations" and we presume that anyone reinstated would have been in filing compliance in the intervening five years.

NAEA appreciates the opportunity to respond in writing to the Circular 230 Notice of Proposed Rulemaking and looks forward to the December 7th hearings at which time we will be pleased to further explain our positions.

Sincerely,

Francis X. Degen, EA, USTCP
President

cc: Carol Campbell, Director, Return Preparer Office
Karen Hawkins, Director, Office of Professional Responsibility