NEW YORK STATE BAR ASSOCIATION TAX SECTION

REPORT ON

PROPOSED AMENDMENTS TO CIRCULAR 230

RELATING TO STANDARDS WITH RESPECT TO WRITTEN TAX ADVICE

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New York State Bar Association Tax Section

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I. Introduction

This Report[1] comments on proposed amendments published on September 17, 2012 (the "**Proposed Regulations**") to the regulations governing practice before the Internal Revenue Service (the "**IRS**"), which are reprinted as Treasury Department Circular 230 ("**Circular 230**").[2] Over the past 12 years, the Tax Section of the New York State Bar Association has submitted numerous reports addressing various aspects of Circular 230, including many of the amendments proposed over this period.[3] We and

[1] This report was prepared by an ad hoc committee chaired by Kathleen L. Ferrell. Significant contributions were made by Peter J. Connors, Edward E. Gonzalez, Elizabeth T. Kessenides, Lisa A. Levy, Andrew W. Needham, Andrew L. Oringer, Michael L. Schler, Bryan C. Skarlatos and Diana L. Wollman. The assistance of Tracy L. Matlock and T. Daris Isbell is gratefully acknowledged. This Report reflects solely the views of the Tax Section of the NYSBA and not those of the NYSBA Executive Committee or House of Delegates.

[2] Regulations Governing Practice Before the Internal Revenue Service, 31 C.F.R. pt. 10 (2011) [hereinafter Circular 230]; Regulations Governing Practice Before the Internal Revenue Service, 77 Fed. Reg. 57,055 (proposed Sept. 17, 2012) (to be codified at 31 C.F.R. pt. 10).

[3] *See, e.g.*, N.Y. STATE BAR ASS'N TAX SECTION, REPORT NO. 1149, REPORT ON THE PROPOSED AMENDMENTS TO CIRCULAR 230 RELATING TO STANDARDS WITH RESPECT TO TAX RETURNS (Jan. 29, 2008); N.Y. STATE BAR ASS'N TAX SECTION, LETTER NO. 1108, LETTER ON CIRCULAR 230 (May 1, 2006) [hereinafter 2006 LETTER]; N.Y. STATE BAR ASS'N TAX SECTION, REPORT NO. 1081, REPORT ON CIRCULAR 230 REGULATIONS (Mar. 3, 2005) [hereinafter 2005 REPORT]; N.Y. STATE BAR ASS'N TAX SECTION, REPORT NO. 1057, REPORT ON PROPOSED AMENDMENTS TO CIRCULAR 230 (Mar. 24, 2004); N.Y. STATE BAR ASS'N TAX SECTION, COMMENTS ON ISSUES RELATING TO CIRCULAR 230 (Feb. 14, 2003); N.Y. STATE BAR ASS'N TAX SECTION, REPORT NO. 995, REPORT ON PROPOSED MODIFICATIONS TO CIRCULAR NO. 230 (July 25, 2001); N.Y. STATE BAR ASS'N TAX SECTION, REPORT NO. 978, REPORT ON PROPOSED AMENDMENTS TO CIRCULAR NO. 230 (July 31, 2000).

many other commentators have participated in robust dialog with the IRS and Treasury as Circular 230 has been modernized, expanded and refined.

We support the new direction of the Proposed Regulations and endorse the goals of Circular 230 to provide appropriate standards of competence, integrity and conduct for tax professionals practicing before the IRS which, in the words of the preamble to the Proposed Regulations (the "**Preamble**"), "foster an ethical environment for practitioners and taxpayers."[4] This Report provides some comments regarding the provisions in the Proposed Regulations that deal with standards for written tax advice and the competence of practitioners, which we summarize as follows:

- We strongly support the elimination of Current Section 10.35, which will make obsolete the provisions that currently allow practitioners to "opt out" of the covered-opinion rules by adding disclaimers to certain types of written advice.
- We support the approach of Section 10.37 of the Proposed Regulations ("**Revised Section 10.37**"), which would govern all written advice, including advice currently subject to Current Section 10.35, but recommend that final regulations (i) clarify that, as an over-arching matter, the Rules of Revised Section 10.37 are intended to require practitioners to exercise their professional judgment in providing written tax advice that complies with the Circular 230 principles, taking into account all the facts and circumstances, (ii) clarify that, as to both practitioners and the IRS

[4] Regulations Governing Practice Before the Internal Revenue Service, 77 Fed. Reg. at 57,056 (preamble).

Office of Professional Responsibility ("**OPR**"), the standards of Revised Section 10.37 will apply based upon what is reasonable under the circumstances as determined at the time the advice is given, and (iii) expand the discussion of the facts and circumstances that may be relevant to this determination in the body of the rule.

- We also agree with the guiding principle of Section 10.35 of the Proposed Regulations ("**New Section 10.35**"), which we believe articulates the appropriate aspirational standard. We understand that sanctions based solely on failure to meet this standard would be imposed only in situations where the violation was "willful." We recommend that for purposes of enforcing New Section 10.35, the final regulations clarify that a pattern of incompetent conduct that violates New Section 10.35 may be sufficient to establish willfulness in appropriate cases.

Although the Proposed Regulations would also modify other provisions of Circular 230, including those governing the obligations of persons responsible for overseeing a professional tax practice to ensure compliance with Circular 230, the expedited suspension procedures for practitioners who engage in certain types of willfully disreputable conduct, and the scope of OPR's authority to discipline practitioners, we have no comments on any of these proposed changes.

II. Comments

A. Elimination of Current Section 10.35

In general, current Circular 230 divides written tax advice into two categories: "covered opinions" and "other written tax advice." Subject to certain exclusions, Current

Section 10.35 defines a "covered opinion" as written tax advice concerning (i) a listed transaction, (ii) a plan or arrangement the principal purpose of which is tax avoidance or evasion or (iii) a plan or arrangement a significant purpose of which is tax avoidance or evasion if the advice is a "reliance opinion,"[5] a "marketed opinion,"[6] subject to conditions of confidentiality or subject to contractual protection. A tax practitioner who provides a covered opinion is required to comply with a number of rules that do not apply to other forms of written tax advice. Perhaps the most burdensome of these relate to what must be set out specifically in the written advice and precisely how these items must be set out. These requirements include the following: all facts that the practitioner determines to be "relevant" must be set out in the written advice; all factual assumptions relied upon by the practitioner must be set out *in a separate section of the written advice* (and a similar requirement applies to all factual representations, statements or findings relied upon by the practitioner); the opinion must state the practitioner's conclusions as to the likelihood of the taxpayer prevailing *with respect to each significant Federal tax issue* and each conclusion must be set out *separately*, and state the facts and analysis supporting that conclusion; and the opinion must also state the practitioner's "overall conclusion" as to the likelihood that the Federal tax treatment described in the opinion is "the proper treatment" and the reasons for that overall conclusion.[7] These requirements apply across the board to all covered opinions without regard to the formality of the

[5] A reliance opinion is one that reaches a conclusion at a confidence level of at least "more likely than not" that one or more significant Federal tax issues would be resolved in the taxpayer's favor.

[6] A marketed opinion is one that the practitioner knows or has reason to know will be used in promoting, marketing or recommending the transaction.

[7] Circular 230 § 10.35(c).

written communication, the nature of the client relationship or other facts and circumstances. A practitioner may "opt out" of these requirements by including one or more prescribed disclosures prominently in the written advice, but this is only possible in the case of "reliance opinions" and "marketed opinions."[8] The opt-out disclosures state (among other things) that the opinion cannot be used by the taxpayer to avoid penalties that may be imposed on the taxpayer.[9]

Although the covered opinion rules were generally intended to regulate written tax advice concerning transactions that possess one or more of the typical features of a tax shelter,[10] tax practitioners have been bedeviled by the uncertainty inherent in the definitions of "reliance opinion" and "marketed opinion." Among other things, if there is any risk that written advice could fit within these definitions, the rules effectively require a practitioner to choose between complying with the detailed requirements of the covered opinion rules or branding the transaction (or other subject of the written advice) as "bad" by adding the prescribed "reliance opinion" or "marketed opinion" disclosures. Practitioners nationwide have responded to this conundrum by adopting a single solution: first devise a boilerplate disclaimer that accomplishes an opt-out of both the "reliance

[8] Thus, listed transaction, the principal-purpose, conditions-of-confidentiality and contractual-protection opinions must always comply with all the covered opinion requirements.

[9] Notwithstanding the focus of Current Section 10.35 on the use of opinions to provide penalty protection for the taxpayer, the provisions of Current Section 10.35 and the regulations under Sections 6662 and 6664(e) of the Internal Revenue Code have not been coordinated and this aspect of Current Section 10.35 has been the subject of much criticism.

[10] Compare the release of the proposed regulations (Regulations Governing Practice Before the Internal Revenue Service, 68 Fed. Reg. 75,186, 75,187 (proposed Dec. 30, 2003) (framing Section 10.35 in terms of "tax shelter opinions")), with the release of the final regulations one year later (Regulations Governing Practice Before the Internal Revenue Service, 69 Fed. Reg. 75,839, 75,840 (Dec. 20, 2004) (reframing Section 10.35 in terms of "covered opinions")).

opinion" rules and the "marketed opinion" rules, and then put that disclaimer on everything in writing that includes, or might include, any tax advice. By adopting this approach, a practitioner does not have to "brand" a transaction (or other subject of written advice) with the prescribed disclosures or comply with the rigid requirements of Current Section 10.35 unless the written advice is (i) addressing a "listed transaction" or one the principal purpose of which is tax avoidance, (ii) subject to conditions of confidentiality or subject to contractual protection, or (iii) an opinion intended to be used to avoid penalties or market the transaction. One of the effects of the intense practitioner focus on the covered opinion rules of Current Section 10.35 and the use of legends to "opt out" of those rules has been to obscure the role of Section 10.37 in the Current Circular 230 (**"Current Section 10.37"**), which applies to "other written advice." We believe that the general approach of Current Section 10.37, which articulates principles for what constitutes appropriate written advice, ultimately will be more effective in achieving OPR's goals than one that seeks to dictate, in minute detail, the form and content of written advice.

The Preamble discusses at length why Treasury, the IRS and OPR believe that the covered opinion rules have not achieved their intended goals and why it would be beneficial to replace them with a single set of rules for written advice as set forth in Revised Section 10.37. The discussion in the Preamble of the failure of the covered opinion rules to accomplish their goals resonates with us and we strongly support the removal of Current Section 10.35. We also believe that streamlining these rules to provide a single set of standards applicable to all written advice provides better guidance for practitioners. While it has always been the case that Current Section 10.37 applies to

written advice that would be subject to Current Section 10.35 but for the opt-out legend, this is not necessarily clearly understood by all practitioners. We believe that a standard that is sufficiently flexible to accommodate the many different forms of tax advice and many different specific circumstances in which practitioners provide written advice will be more likely to encourage practitioners to comply with their professional and ethical obligations and thus better serve the taxpayer community and the tax system as a whole. This view informs the remainder of our comments on the Proposed Regulations.

B. Revised Section 10.37: Requirements for Written Advice[11]

Revised Section 10.37 would reword Current Section 10.37 and extend it to apply to all written tax advice. Current Section 10.37 applies only to written advice that is not a "covered opinion."[12] As noted above, we believe that eliminating the complex definitions and detailed requirements of Current Section 10.35 will directly address the problems practitioners have faced in working with the existing rules, and is a positive step in encouraging high quality written tax advice. We also agree that the more principles-based approach of Revised Section 10.37 is better suited to promoting an

[11] While all written advice will be governed by Revised Section 10.37, other sections of Circular 230 will continue to apply to both written and oral advice. For example, Section 10.22(a)(3) requires a practitioner to exercise due diligence to determine that all oral and written representations to clients are correct, and Section 10.34(a)(1)(ii) limits the type of advice a practitioner can give a client regarding taking a position on a tax return or claim for refund. Sanctions will continue to be authorized under Section 10.52(a) if a practitioner willfully violates Section 10.22, 10.34 or 10.37, or if a practitioner recklessly or through gross incompetence violates Section 10.34 or 10.37. These provisions are in addition to authority to impose sanctions for giving a "false opinion" as described in Section 10.51(a)(13).

[12] Current Section 10.35 applies to advice addressing "Federal tax issues," as defined in Section 10.35(b)(3), while Revised Section 10.37 would apply to "Federal tax matters," which does not appear to have been accorded a specific meaning. *Compare* Circular 230 § 10.35(b), *with* Regulations Governing Practice Before the Internal Revenue Service, 77 Fed. Reg. at 57,061 (to be codified at 31 C.F.R. § 10.37(a)(1)).

ethical environment and better accommodates the wide variety of written advice that practitioners are called upon to render on a daily basis. This is particularly true for emails and other forms of informal written advice that may be communicating tax advice that the practitioner and the client clearly understand is neither final nor comprehensive.

Current Section 10.37 is phrased as a prohibition that describes what a practitioner must *not* do with respect to giving written advice. Revised Section 10.37 reframes the rule in the affirmative to state what the practitioner *must* do in connection with providing written advice. Specifically, Revised Section 10.37 requires that the practitioner:

(i) base the written advice on reasonable factual and legal assumptions;

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

(iii) use reasonable efforts to identify and ascertain the relevant facts;

(iv) not rely on representations, statements, findings or agreements of the taxpayer or any other person if reliance on them would be unreasonable; and

(v) not take into account the possibility that a tax return will not be audited or that a matter will not be raised on audit.[13]

[13] Unlike Current Section 10.37, Revised Section 10.37 would allow practitioners to take into account and advise taxpayers on the likelihood of settling an issue with the IRS. Because the tax law is rarely straightforward, and because most tax issues, once raised on audit, are ultimately settled before litigation based on the relative strengths and weaknesses of each party's position on the issues, we have long supported the elimination of this prohibition on written tax advice. *See* 2005 REPORT, *supra* note 3, at 37; 2006 LETTER, *supra* note 3, at 5.

Most of what is in Revised Section 10.37 is already included in Current Section 10.37 and is clear, practical and appropriate. There are, however, a few points that would benefit from clarification. Because Revised Section 10.37 is intended to apply to all types of written advice, it necessarily must incorporate a flexible approach. Our comments on Revised Section 10.37 primarily relate to ensuring that the text of the rule properly describes the flexibility we believe Treasury and the IRS intended, [14] and we offer the following suggestions in that regard.

a. When and How Are Facts and Circumstances Relevant?

Although both Current Section 10.37 and Revised Section 10.37 contain an "all the facts and circumstances" element and a "reasonableness" element, the elements are incorporated into the two provisions differently. These two elements are particularly important because of the myriad of circumstances to which these rules will apply and because of the significant consequences that could result from a finding that a practitioner has violated these rules. Current Section 10.37 states that the facts and circumstances are "considered in determining whether a practitioner has failed to comply with this section."[15] Revised Section 10.37, on the other hand, expresses this concept in new subsection (c)(1), which states that "the Commissioner, or delegate, will apply a

[14] *See* Regulations Governing Practice Before the Internal Revenue Service, 77 Fed. Reg. at 57,058 (preamble) (stating that "the scope of the engagement and the type and specificity of the advice sought by the client, in addition to all other appropriate facts and circumstances, are factors in determining the extent that the relevant facts, application of the law to those facts, and the practitioner's conclusion with respect to the law and the facts must be set forth in the written advice" and that the practitioner "may consider these factors in determining the scope of the written advice").

[15] Circular 230 § 10.37(a).

reasonableness standard, considering all facts and circumstances" in "evaluating whether a practitioner . . . complied with the requirements of this section . . . ."[16]

Under Revised Section 10.37, we believe that it is intended that the scope of the written advice, the manner in which the practitioner determines the relevant facts and what factual assumptions are appropriate, as well as the amount of detail provided regarding the facts, the law, the issues considered and the legal analysis, will be dictated by the practitioner's professional judgment as to what is reasonable under all the facts and circumstances. We are concerned that Revised Section 10.37 is not sufficiently clear regarding when and how (or in what respect) such a reasonableness standard applies to a practitioner who is providing written tax advice. Specifically, because the reasonableness concept was moved to a subsection that addresses how the Commissioner (rather than the practitioner) should apply the rules, it is not entirely clear that a practitioner may reasonably consider all the facts and circumstances in determining how to deliver written advice that complies with the principles of Revised Section 10.37. Final regulations should clarify this point and state affirmatively that, prior to giving written advice, practitioners should consider all the facts and circumstances in determining their obligations under Revised Section 10.37. We also recommend that final regulations clarify that each requirement of Revised Section 10.37 is intended to be applied on the basis of what is reasonable under the particular facts and circumstances. Thus, a reasonableness standard applies to (i) what constitutes reasonable efforts to identify and ascertain the facts relevant to the written advice, (ii) what facts the practitioner "should"

[16] Regulations Governing Practice Before the Internal Revenue Service, 77 Fed. Reg. at 57,062 (to be codified at 31 C.F.R. § 10.37(c)(1)).

know, (iii) what factual and legal assumptions are reasonable to rely upon, (iv) whether reliance on specific representations, statements, findings or agreements of the taxpayer or another person is reasonable, and (v) whether the practitioner "should know" that any of the foregoing are incorrect or incomplete. We also recommend that final regulations clarify that in considering sanctions OPR will evaluate reasonableness based upon those facts and circumstances known by the practitioner at the time the written advice was rendered, so long as the practitioner used reasonable efforts to ascertain those facts prior to giving the written advice.

Revised Section 10.37 provides two examples of facts and circumstances that can be considered: "the scope of the engagement and the type and specificity of the advice sought by the client."[17] We understand this language as permitting practitioners to take direction from their clients as to the form and scope of the advice to be rendered, and thus as permitting opinions with a limited scope, if the terms of the particular engagement so contemplate.[18] We also understand this language, together with the reasonableness standard, as consistent with the notion that a competent practitioner may provide general advice on discrete issues without necessarily being required to engage in extensive

[17] *Id.* at 57,062 (to be codified at 31 C.F.R. § 10.37(c)(1)).

[18] Unlike the rules for "covered opinions" in Current Section 10.35, neither Current Section 10.37 nor Revised Section 10.37 impose special limitations on the scope of written tax advice. We think this is appropriate. Clients often seek advice limited to the application of a specific section or set of rules under the Code and the vast majority of tax advice is so limited in scope. For example, in-house tax personnel often seek outside tax advice only in the context of particularly complex or novel questions and resolve most other tax issues without outside advice. Similarly, an individual may seek, and be willing to pay for only, advice regarding a single, specific tax issue. Taxpayers and the federal tax system as a whole are better served by permitting the practitioner to provide the limited advice sought, rather than by discouraging written advice for fear of violating Circular 230. See 2005 REPORT, *supra* note 3, at 24-30, for a fuller discussion of a number of examples of these types of common inquiries from clients.

factual development or inquire into other aspects of the client's tax situation, as long as the circumstances of the engagement and the context in which it is rendered are such that the practitioner is not leading the client to an incorrect understanding of the comprehensiveness of the advice. We believe final regulations should more clearly state that the exercise of professional judgment regarding the form and scope of written advice, factual development and reliance on representations requires consideration of all the facts and circumstances, and that the text of the final regulations should expand the description of the types of facts and circumstances that may be considered beyond those mentioned in the Preamble.

Examples of other facts and circumstances that may be considered should include: (i) the relative sophistication of the client (which would include the experience and familiarity of the client with the tax laws in general as well as the specific tax issues involved, the client's expectations as to the role of the tax practitioner in advising the client and the extent to which the client understands the responsibility to make his or her own judgments and decisions), (ii) the client's purpose in seeking the advice (which would include whether the advice is being used by the client to decide whether to proceed with a transaction, to assess risk for purposes of establishing reserves and/or preparing financial statements, to obtain potential protection against understatement penalties, and/or to determine how to complete a tax return) and (iii) the length and nature of the practitioner's relationship with the client.

The relative sophistication of the client is particularly relevant to whether it is reasonable to rely on representations made by the client and whether the practitioner has made reasonable efforts to ascertain the relevant facts. For example, if the client is

sophisticated or has previous knowledge or experience with the relevant tax issues, it may be reasonable to rely solely on the client's oral or written representations regarding the relevant facts. However, if the client is less sophisticated or is unfamiliar with the relevant tax issues, it may be unreasonable for a practitioner to rely on the same representations or to fail to make reasonable efforts to ascertain the relevant facts.

Similarly, the client's purpose for seeking advice may also be relevant to what constitutes reasonable efforts to ascertain the relevant facts as well as to the appropriate form and scope of the advice. For example, to evaluate whether a potential opportunity is worth pursuing, clients often seek advice regarding purely hypothetical transactions, in which case all the relevant facts must be assumed and the client will know this is the case. In the case of written advice regarding a completed transaction, the situation will be very different and what is appropriate may depend in large part upon the client's purpose for seeking the advice.

The nature and length of a practitioner's relationship with the client is also relevant to whether it is reasonable to rely on representations made by the client, and affects what types of inquiries are reasonable under the circumstances. For example, it may be reasonable for a practitioner *not* to inquire into certain facts from a longstanding client even though it would be *un*reasonable not to make the same inquiry in the case of a new client.

We also believe that Revised Section 10.37 should make clear that any discussion of facts and circumstances therein is illustrative and should not be read to preclude consideration of other facts and circumstances.

b. What Burden (if any) Does the "Heightened Standard of Review" Impose?

Under Revised Section 10.37, a "heightened standard of review" applies when a practitioner knows or has reason to know that the written advice provided will be used or referred to by another person to promote, market or recommend a transaction with a significant purpose of avoiding or evading tax.[19] Current Section 10.37 expresses this concept slightly differently; it imposes a "heightened standard of care" on practitioners who provide this type of advice.[20] Both Current Section 10.37 and Revised Section 10.37 include an explanation of why a heightened standard is appropriate in such circumstances and we think that provides helpful guidance to practitioners. We agree that practitioners should be particularly mindful of their ethical obligations when writing opinions that they know will be used in this way, and we would interpret the reasonableness standard in Revised Section 10.37(a) as requiring additional care in these circumstances. Although the Preamble does not explain the reason for the change in the way the "heightened standard" is expressed, we interpret the heightened standard of review as indicating that OPR will scrutinize the advice given in these circumstances more closely, but under the same standard of reasonableness that governs other types of written advice. We request that Treasury confirm this interpretation in final regulations. If Treasury intended that a different substantive standard apply to this type of advice, we recommend that final regulations describe it specifically.

[19] Regulations Governing Practice Before the Internal Revenue Service, 77 Fed. Reg. at 57,062 (to be codified at 31 C.F.R. § 10.37(c)(2)).

[20] Circular 230 § 10.37(a).

C. New Section 10.35

The Proposed Regulations add New Section 10.35, which provides that a practitioner must meet a general standard of competence when practicing before the IRS. New Section 10.35 defines competence as requiring the "knowledge, skill, thoroughness and preparation necessary for the matter for which the practitioner is engaged."[21] The Preamble states that this new section is proposed because Section 10.51 of current Circular 230 allows a practitioner to be sanctioned for incompetence,[22] but Circular 230 does not include an explicit affirmative requirement of competency. While the current rules do not include an explicit requirement of "competence" or a definition of "competence," Circular 230 as a whole is intended to ensure a minimum level of competency for tax practitioners and we believe New Section 10.35 should be understood in that vein.

We believe that unintentional failure to meet the general standards of competency under New Section 10.35 should not establish an independent basis for sanctions, and that is how we understand the Proposed Regulations. Specifically, Section 10.52, as amended by the Proposed Regulations, authorizes the imposition of sanctions for a

[21] Regulations Governing Practice Before the Internal Revenue Service, 77 Fed. Reg. at 57,061 (to be codified at 31 C.F.R. § 10.35).

[22] Section 10.51 currently provides 18 different ways that a practitioner can be incompetent or disreputable, including "giving a false opinion, knowingly or recklessly, or through gross incompetence . . . ." Circular 230 § 10.51(a)(13). Gross incompetence within the meaning of Section 10.51(a)(13) includes "conduct that reflects gross indifference, preparation which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client." *Id.* Sanctions can be imposed under Section 10.50 on incompetence "within the meaning of Section 10.51."

violation of New Section 10.35 only if the violation was willful.[23] Because repeated failure to be competent can be an indication of a willful failure to meet the standard, we recommend that Treasury clearly indicate in New Section 10.35 that a pattern of incompetent conduct is a factor that will be taken into account in determining whether a practitioner willfully violated the standard, similar to the provisions contained in Sections 10.34(a)(2) and 10.51(a)(13).

III. Conclusion

The Proposed Regulations make an important improvement to the Circular 230 standards for written advice, and we would like to express our appreciation for the efforts of the IRS and Treasury to respond in a constructive manner to the concerns of the practitioner community. The principles-based approach of Revised Section 10.37 is better suited to deal with the written advice routinely given in ongoing representation and, with some refinement, should strike an appropriate balance between allowing taxpayers to obtain cost effective, timely written advice and policing the behavior of unscrupulous practitioners. In particular, as detailed above, we respectfully request that Treasury clarify that the rules of Revised Section 10.37 are intended to require practitioners to exercise their professional judgment in providing written tax advice that complies with the Circular 230 principles, and that in doing so practitioners should apply a reasonableness standard based on consideration of all the facts and circumstances.

[23] The Proposed Regulations delete the reference in Section 10.52(a)(2) to Current Section 10.35, thereby omitting the basis upon which sanctions could be imposed for reckless failure to meet the New Section 10.35 standard.