National Association of State Boards of Accountancy

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Internal Revenue Service
CC:PA:01:PR (REG-116610-20)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, D.C. 20044

Via Federal eRulemaking Portal: https://www.regulations.gov

Re: **REG-116610-20: Proposed Rule – Regulations Governing Practice Before the Internal Revenue Service**

Dear Internal Revenue Service:

The National Association of State Boards of Accountancy (NASBA) appreciates the opportunity to comment on the Proposed Rule, ***Regulations Governing Practice Before the Internal Revenue Service*** (the Proposed Rule).

Founded in 1908, NASBA serves as a forum for the nation's State Boards of Accountancy (State Boards), representing fifty-five jurisdictions. NASBA's mission is to enhance the effectiveness and advance the common interests of the State Boards that regulate all Certified Public Accountants (CPAs) and their firms in the United States and its territories, which includes all audit, attest and other services provided by CPAs. State Boards are charged by law with protecting the public.

In furtherance of that objective, NASBA offers the following comments.

General Comments

The Treasury Department Circular No. 230 (Title 31 Code of Federal Regulations, Subtitle A, Part 10) contains the rules governing the practice of attorneys, CPAs, enrolled agents, registered tax return preparers, and other persons representing taxpayers before the IRS. As noted in the supplementary information to the Proposed Rule, the last revisions to Circular 230 were issued in June 2014. Since these revisions were issued, several judicial decisions have restricted the scope and limited the applicability of these rules to only those tax practitioners representing clients before the IRS.

NASBA commends the IRS for their efforts in updating Circular 230. NASBA recommends consideration of establishing a process or methodology to review and update regulations more frequently. Timely incorporation of judicial decisions and other updates provides practitioners with the necessary information to effectively implement Circular 230, which is in the public interest.

Contingent Fees

Current §10.27 prohibits practitioners from entering into contingent fee arrangements for services rendered in connection with a matter before the IRS, with the intent to discourage practitioners and their clients in taking unduly aggressive tax positions. However, the current rules provide for exceptions for contingent fees in situations described in §10.27 paragraphs (b)(2), (3), and (4).

The Proposed Rule would remove current §10.27 and, under subpart C, define disreputable conduct under proposed §10.51 to include both charging contingent fees in connection with the preparation of an original or amended tax return or claim for refund or credit, and charging fees that, under facts and circumstances, are unconscionable fees.

The supplementary information to the Proposed Rule cites the American Institute of Certified Public Accountants (AICPA) Code of Professional Conduct as well as several State Board rules in the prohibition from charging contingent fees for the preparation of original returns, amended returns and ordinary refund claims. However, the reference to those citations does not acknowledge that those professional rules allow practitioners to charge contingent fees in limited circumstances. Those same professional rules state that a fee is not contingent if it is based upon the results of a judicial proceeding or the findings of a governmental agency. For example, in the AICPA Code of Professional Conduct, ET 1.510.001.03 indicates a fee is not considered contingent if determined based on the results of judicial proceedings or the findings of governmental agencies; and ET 1.510.010.04 includes examples of when contingent fees are permitted for tax services.

NASBA generally supports a prohibition against contingent fees. However, NASBA recommends the IRS reconsider and allow for exceptions in those circumstances for which contingent fees have been found to be acceptable by the AICPA and certain regulatory bodies. Coordination with other professional rules regarding contingent fees wherever possible helps avoid confusion and aids in enforcement from a regulatory perspective, which is in the public interest.

Proposed §10.51 provides that unconscionable fees are fees that constitute disreputable conduct; however, there is no definition of unconscionable fees. NASBA recommends that unconscionable fees be defined and examples provided so that practitioners have guidance for application of the term and regulators have a basis for assessing their conduct.

Best Practices for Tax Practitioners

Current §10.33 provides best practices for practitioners related to client representation. Proposed §10.33(a)(5) would establish that it is a best practice to identify, evaluate, and address a mental impairment arising out of, or related to, age, substance abuse, a physical or mental condition, or some other circumstance that could adversely impact a practitioner’s ability to effectively represent a client before the IRS.

While NASBA agrees with the notion of best practices, the inclusion to identify, evaluate and address a mental impairment provides a range of risks to practitioners being required to make determinations that fall well outside their areas of professional expertise as well as take actions in direct conflict with other regulations, such as the Americans with Disabilities Act (ADA) and the Health Insurance Portability and Accountability Act (HIPAA).

Some of the factors included in proposed §10.33(a)(5) are matters that might fall within the realm of competency. There are other factors that can indicate competency issues such as inexperience in an area that may also lead to bad judgment in a particular fact pattern. The baseline expectation should be a measure of professional competence. Requirements of competence, including the practitioner's appropriate level of knowledge, skill, thoroughness and preparation, are already detailed in the current §10.35 of Circular 230.

In addition, proposed §10.33(a)(6) would establish that it is a best practice for practitioners to have a business continuity and succession plan that includes procedures and safeguards related to both the cessation of a practitioner's practice or the occurrence of an outside event, such as a natural disaster or cyberattack.

While succession planning and business continuity are certainly important matters for practitioners to consider, the critical element is for clients to have access to and the ability to retrieve their documentation and records. Requirements for the return of client's records are already detailed in the current §10.28 of Circular 230.

From a regulatory perspective, enforcing a best practice (versus a requirement) would be difficult. NASBA strongly recommends the removal of proposed §10.33(a)(5) and (6).

Appraiser Standards

Proposed §10.61, under new subpart D, would require appraisals submitted in an administrative proceeding before the IRS to conform to the substance and principles of the Uniform Standards of Professional Appraisal Practice (USPAP) promulgated by the Appraisal Standards Board or the International Valuation Standards (IVS) promulgated by the International Valuation Standards Council.

While NASBA agrees that establishing baseline standards to raise the quality of appraisal work performed before the IRS is in the public interest, there are other standards and certifications that practitioners utilize to perform valuation and appraisal services that are also intended to result in high quality work, such as the AICPA's Accredited in Business Valuation (ABV) and the National Association of Certified Valuators and Analysts' (NACVA's) Certified Valuation Analyst (CVA) certifications. It is also not clear how differences between USPAP and IVS would be handled. Practitioners/appraisers might find themselves in situations where the standards differ and guidance would be needed on which standard takes precedence to ensure compliance. Also, if USPAP and

IVS are the only standards to be used, that could limit the pool of individuals that could represent a client in the appraisal role. That would not be in the public interest.

NASBA recommends that if the proposed regulations are included in the final issued regulations, provisions are made to allow for other standards and certifications for appraisals.

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We appreciate the opportunity to comment on the Proposed Rule.

Very truly yours,

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