

# TAX SECTION

## State Bar of Texas



### OFFICERS:

**Elizabeth A. Copeland, Chair**  
Strasburger Price Oppenheimer Blend  
711 Navarro, Suite 600  
San Antonio, Texas 78205-1796  
(210) 250.6121  
(210) 258.2732 (fax)  
elizabeth.copeland@strasburger.com

**Andrius R. Kontrimas (Chair-Elect)**  
Norton Rose Fulbright  
1301 McKinney, Suite 5100  
Houston, Texas 77010-3095  
713-651-5482  
713-651-5246 (fax)  
akontrimas@nortonrosefulbright.com

**Alyson Outenreath (Secretary)**  
Texas Tech University  
School of Law  
1802 Hartford Ave.  
Lubbock, Texas 79409-0004  
806-742-3990 Ext. 238  
806-742-1629 (fax)  
alyson.outenreath@ttu.edu

**David E. Colmenero (Treasurer)**  
Meadows, Collier, Reed, Cousins,  
Crouch & Ungerman, LLP  
901 Main Street, Suite 3700  
Dallas, Texas 75202  
214-744-3700  
214-747-3732 (fax)  
dcolmenero@meadowscollier.com

### COUNCIL MEMBERS:

#### Term Expires 2014

Matthew L. Larsen (Dallas)  
Robert D. Probasco (Dallas)  
Catherine C. Scheid (Houston)

#### Term Expires 2015

Jeffrey M. Blair (Dallas)  
Lisa Rossmiller (Houston)  
Susan A. Wetzel (Dallas)

#### Term Expires 2016

Ira Lipstet (Austin)  
Melissa Willms (Houston)  
Henry Talavera (Dallas)

#### CLE Committee Chair

J. Michael Threet (Dallas)

#### Governmental Submissions

Stephanie M. Schroepfer (Houston)  
Robert D. Probasco (Dallas)

#### Leadership Academy Program

Daniel Baucum (Dallas)

#### Pro Bono Committee Chair

Juan F. Vasquez, Jr. (Houston/San Antonio)

#### Publications Editor

Robert Morris (Houston)

#### Ex Officio

Tina R. Green (Texarkana)  
*Immediate Past Chair*  
Christopher H. Hanna (Dallas)  
*Law School Representative*  
Abbey B. Garber (Dallas)  
*IRS Representative*  
Kari Honea (Austin)  
*Comptroller Representative*

June 26, 2014

### Via U.S. Mail

Mr. John Koskinen, Commissioner  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, D.C. 20024

Ms. Karen L. Hawkins, Director  
Office of Professional Responsibility  
Internal Revenue Service  
1111 Constitution Avenue, NW  
Washington, D.C. 20024

### RE: Proposed Revision to Circular 230

Dear Commissioner Koskinen and Director Hawkins:

On behalf of the Tax Section of the State Bar of Texas, I am pleased to submit the enclosed proposal for a revision to 31 Code of Federal Regulations, Subtitle A, Part 10, Regulations Governing Practice Before the Internal Revenue Service ("Circular 230"). The Circular 230 rules for written advice were changed in final regulations (T.D. 9668) issued on June 9, 2014. Our proposal here is not related to those June 9<sup>th</sup> changes to 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.

We appreciate the opportunity to provide input on how best to regulate practice before the Service and we appreciate your consideration of our recommendation.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Elizabeth Copeland", written in a cursive style.

Elizabeth Copeland

Chair, Tax Section

The State Bar of Texas

## PROPOSED REVISION TO CIRCULAR 230

This proposed revision to Circular 230 is submitted on behalf of the Tax Section of the State Bar of Texas. Principal responsibility for drafting these comments was exercised by Robert D. Probasco and Dustin Whittenburg. Richard L. Hunn, the Chair of the Tax Controversy Committee, reviewed the comments and made substantive suggestions. The Committee on Government Submissions (COGS) of the Section of Taxation of the State Bar of Texas has approved these comments. David Colmenero reviewed the comments and made substantive suggestions on behalf of COGS. Stephanie Schroepfer, the Co-Chair of COGS, also reviewed the comments on behalf of COGS.

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 a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contact Person:                Robert D. Probasco  
   [bob.probasco@gmail.com](mailto:bob.probasco@gmail.com)  
   (214) 335-7549

   Dustin Whittenburg  
   [dustin@whittenburgtax.com](mailto:dustin@whittenburgtax.com)  
   (210) 826-1900

Date: June 26, 2014

## PROPOSED REVISION TO CIRCULAR 230

Section 10.27(b)(1) of Circular 230 prohibits, with certain exceptions, charging a contingent fee for services rendered in connection with any matter before the Internal Revenue Service (the “Service”). The “audit exception,” in Section 10.27(b)(2), allows a practitioner to charge a contingent fee for services rendered in connection with the Service’s examination of, or challenge to, either an original tax return or an amended return (or claim for refund or credit) filed within 120 days of the taxpayer receiving a written notice of the examination of, or a written challenge to, the original tax return.

We understand the Service’s concerns with respect to the use of contingent fees in representing a taxpayer before the Service. We appreciate the exceptions included in Section 10.27(b), allowing the use of contingent fees for situations less likely to involve the Service’s concerns. We believe, however, that it would be appropriate to expand the scope of Section 10.27(b)(2) slightly.

We understand the audit exception as justified by two factors, which are often not applicable to other representation before the Service. First, the audit exception only applies when the Service is already examining the tax return. Charging a contingent fee for pre-filing advice or preparing a return might encourage a taxpayer to take overly aggressive positions. For services rendered in connection with an audit, however, there is no question of playing the “audit lottery.” Second, audits and Appeals hearings are by their nature adversarial proceedings for which professional assistance is important. Taxpayers may be ill-equipped to participate in such proceedings without the assistance of a qualified professional. Without the possibility of a contingent fee arrangement, the taxpayer may find it more difficult to arrange competent representation. For these reasons, the audit exception to the prohibition against contingent fees is well justified. However, those two factors that justify the audit exception also apply in other circumstances that are not clearly covered by the literal language of Section 10.27(b)(2), because the Service is not examining or challenging the tax liability on the tax return.

For example, examinations to determine whether to impose the trust fund recovery penalty of Internal Revenue Code (“Code”) Section 6672 on a responsible person, whether to impose transferee liability under Code Section 6901, or whether to extend Code Section 6015 innocent spouse relief from joint and several liability, normally are not examinations of or challenges to the tax liability reflected on the return. The Service is merely determining against whom it will collect that tax liability.

Similarly, services rendered in connection with a collection due process (“CDP”) hearing under Code Section 6320 or 6330 do not fall clearly within the scope of any of the exceptions to the prohibition against contingent fees. CDP hearings may involve challenges to the liability, for items that the taxpayer has not previously had an opportunity to contest such as assessable penalties or interest. In such situations, the CDP hearing is a limited post-assessment, pre-payment alternative to a claim for credit or refund with respect to penalties or interest. But because the CDP hearing is post-assessment and pre-payment, it is not clear whether it falls within the literal language of “in connection with the Service’s examination of, or challenge to” a return, in Section 10.27(b)(2), or a refund claim for penalties and interest, in Section 10.27(b)(3). Allowing a contingent fee for representing the taxpayer in a CDP hearing, when the taxpayer is

disputing liability for the amount owed, would be helpful to taxpayers who are not in the financial position to pay these amounts and then file a refund claim.

For all of these examples, the Service should already be aware of the tax issues involved, so there is no reliance on the audit lottery. Further, these are adversarial proceedings for which the assistance of a competent representative is important. Therefore, we respectfully suggest that Section 10.27(b)(2) be revised to allow additional contingent fees situations.

A revision to Section 10.27(b), taking into account the considerations detailed in the paragraphs above, might read as follows:

- (2) A practitioner may charge a contingent fee for services rendered in connection with –
  - (i) The Service's examination of, or challenge to –
    - (a) An original tax return; or
    - (b) 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;
  - (ii) The Service's determination of whether to impose a penalty under Section 6672 of the Internal Revenue Code ("Code"), whether to impose transferee liability under Section 6901 of the Code, or whether to provide relief from joint and several liability under Section 6015 of the Code; or
  - (iii) A collection due process hearing under Section 6320 or 6330 of the Code, to the extent that the taxpayer disputes liability.

Thank you in advance for your consideration of this recommendation.