February 18, 2025

Mr. Douglas O'Donnell
Deputy Commissioner of Internal Revenue
Internal Revenue Service
CC:PA:01:PR (REG-116610-20)
Room 5203
P.O. Box 7604, Ben Franklin Station
Washington, DC 20044
pra.comments@irs.gov

RE: Notice of Proposed Rulemaking Regarding Regulations Governing Practice Before the IRS (REG-116610-20)

Dear Deputy Commissioner O'Donnell:

We appreciate the Treasury Department's request for public comments published in the Federal Register on Dec. 26, 2024, concerning proposed regulations governing practice before the Internal Revenue Service. While we generally applaud Treasury's efforts to balance the need for effective taxpayer representation with enforcement of the Internal Revenue Code, we have concerns with several provisions as highlighted below.

I. Knowledge of Error or Omission

Currently, practitioners who become aware of a taxpayer's error or omission have a duty to inform the client of the noncompliance, as well as the consequences for such noncompliance. Armed with that knowledge, the decision on how to proceed is left with the taxpayer.

The proposed regulations burden practitioners with a third requirement. The practitioner "must . . . recommend the corrective actions, such as disclosure, to be taken."

While this may be the appropriate result in most cases and practitioners likely already make these recommendations, we are concerned that the proposed requirement may be ambiguous and would likely create a conflict in cases where taxpayers have criminal exposure. Mandating that practitioners "must" recommend "corrective actions, such as disclosure" in cases with potential criminal exposure might force tax practitioners, many of whom do not benefit from the attorney-client privilege, to advocate that their clients waive their Fifth Amendment right against self-incrimination by disclosing their error or omission (because the disclosure becomes an act of self-incrimination).

We reviewed the AICPA *Statements on Standards for Tax Services* (SSTS) and believe they offer a more effective and intelligible approach. SSTS 1.2.6. provides that members should, "advise the taxpayer of the consequences of the error and *advise on corrective measures to be* taken" [emphasis added]. This is more appropriate because it does not mandate a recommendation to disclose the error, but rather that the practitioner "advise on corrective measures." SSTS 1.2.9. further clarifies that advice may be different when there is potential fraud or criminal misconduct.

Treasury's proposed regulations have no such exception or clarification in the case of potential fraud or criminal misconduct.

We recommend that Treasury modify Section 10.21(a) to the extent it mandates a practitioner to "recommend corrective actions, such as disclosure." The decision on whether to correct noncompliance should reside with the

fully informed taxpayer who is aware of the error or omission, as well as the penalties for such noncompliance. A "required" recommendation to take corrective action could result in taxpayers incriminating themselves and thus waiving their Fifth Amendment right against self-incrimination. Another option is to make clear that exceptions provided in other professional standards (such as the AICPA SSTS referenced in the preamble) continue to apply to practitioners and are not superseded by Circular 230.

II. Contingent Fees

Currently, Section 10.27 (as modified by Notice 2008-43) allows practitioners to charge contingent fees in the following circumstances:

- When there is an examination of an original return;
- When there is an examination of an amended return;
- When an amended return is filed within 120 days of receiving an examination notice;
- When a claim for credit or refund involves interest or penalties;
- When a whistleblower claim under Section 7623 is submitted; or
- When a claim is in connection with a judicial proceeding.

These exceptions have been deleted by the proposed regulations and a new Section 10.51 has been added that broadly makes contingent fees disreputable conduct. The new language is overly expansive and can create problems.

Specifically, the proposed rule defines a contingent fee as one, "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 is sustained either by the [IRS] or in litigation" [emphasis added]. We are concerned that the "other filing" language would improperly exclude whistleblower claims, post-examination challenges, penalty challenges and judicial challenges because all of these involve "filings." To avoid ambiguity, the proposed regulation should be clarified to allow all the exceptions listed under Section 10.27 (as modified by Notice 2008-43).

Keeping the contingent fee exceptions in place is important for several reasons.

First, taxpayers under examination often face steep fees for representation with no guarantee of success. The same is true of taxpayers subject to penalties. The resources required for an examination often result in an unlevel playing field between the taxpayer and the government. And the consistent concern among *all* taxpayers subject to a proposed liability is the estimate for fees to defend against it. A contingent fee can ensure that taxpayers, particularly those of modest means, are able to receive competent representation in the face of a government action. Otherwise, taxpayers' right to due process may be denied because the agency has dictated that the only practical fee arrangement is prohibited.

There is also an inherent efficiency with contingency fees in some matters because professionals will accept the engagements only where they believe the cases have merit. The fee structure further encourages efficient use of resources to achieve a resolution. A practitioner is more likely to decline to proceed in a matter where discovery, facts, experience and case development determine that the prospect of resolution has deteriorated.

Absent a contingent fee option, there can be a disincentive for taxpayers to defend themselves in matters where the IRS prolongs an examination or judicial proceeding to such an extent that hourly fees would be prohibitively expensive.

The rule should thus be clarified to allow contingent fees in certain disputes with the IRS where the agency is substantively involved.

Second, whistleblower provisions are designed to encourage individuals to come forward with evidence of noncompliance and increase collections for the federal government. But the cost of hiring a professional to assist in pursuing a claim (which may take many years) is often a hindrance. Contingent fees in those scenarios only encourage efficiency towards the goal of maximizing federal revenue. The rule should thus be clarified to allow contingent fees in whistleblower claims.

In sum, it is unclear in the proposed regulation whether "other filings" would effectively label *all* contingent fees as disreputable conduct (because any interaction with the IRS involves a filing). Thus, the rule should be clarified to allow contingent fees in the circumstances currently allowed under Section 10.27 (as modified by Notice 2008-43). This is important to protect taxpayers' due process rights, their right to negotiate their fee arrangement and their right to competent representation. Whatever abuse perceived by the IRS is outweighed by the taxpayer's right to representation and assistance.

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We would be pleased to further discuss this issue with you or your staff. Please feel free to contact me at 214-276-5001 or jsmith@dallascpas.com or TXCPA Staff Liaison Patty Wyatt at 817-656-5100 or pwyatt@tx.cpa.

Sincerely,

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Principal responsibility for drafting these comments was exercised by Leo Unzeitig, JD, CPA, David Colmenero, JD, CPA, and Christi Mondrik, JD, CPA.

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