

# Regulatory Considerations and Opinion Standards

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*Fundamentals of Taxation Program*

October 12, 2017

# Introduction

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## Regulation of Tax Advice

- Circular 230
- Rules of Professional Conduct
- ABA Opinion Practice
- Return Preparer Penalties under Section 6694 of the Internal Revenue Code of 1986, as amended (“Code”).

# Overview of Circular 230

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## Background

- 31 U.S.C. § 330(a) authorizes the Department of the Treasury to “regulate the practice of representative of persons before the Department of the Treasury.”
- What is the “practice” before the Department of the Treasury?
- *Loving*, 917 F. Supp. 2d 67 (DC D.C. 2013), *aff’d* 742 F.3d 1013 (D.C. Cir. 2014)

# Pertinent Provisions of Circular 230

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- Section 10.29 sets forth the rules governing conflicts of interest
- Section 10.33 – Best Practices
- Section 10.34 – Standard with respect to tax returns and documents, affidavits and other papers
- Section 10.37 – Requirements for Written Advice

# Tax Opinions and Purposes: Civil Penalty Defenses and Other Reasons

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- There are varying degrees of confidence a practitioner can use to express as to the likelihood that a transaction will be accorded the desired tax treatment.
  - Will
  - Should
  - More Likely Than Not
  - Substantial Authority
  - Realistic Possibility of Success
  - Reasonable Basis
  - Non-Frivolous
  - Fraud

# Code Section 6662 Accuracy Related Penalties and Defenses

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- The accuracy related penalty of Code Section 6662 is equal to 20% of the amount of understatement of tax required to be shown on the return that is attributable to the type of conduct outlined below.
- Summary of penalties under Section 6662:
  - Negligence or disregard of rules or regulations;
  - Substantial understatement of income tax (10% of tax required to be shown on return); and
  - Substantial valuation misstatement

# Substantial Authority

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- The substantial understatement penalty does not apply if the tax position for the particular tax item is based on “substantial authority”.
- Treasury Regulations § 1.6662-4(d)(2) defines the “substantial authority” standard to mean a standard that “is less stringent than the more likely than not standard (the standard that is met when there is a greater than 50-percent likelihood of the position being upheld), but more stringent than the reasonable basis standard.”

# Return Preparer Penalties under Code Section 6694

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- Section 6694 imposes a penalty on a return preparer equal to the greater of \$1,000 or 50% of the income derived (or to be derived) by the return preparer with respect to the return or claim.
- Prepares any return or claim of refund to which any part of an understatement of liability is due to an unreasonable position and the return preparer knew or should have known of the unreasonable position.



# Tax Opinion Practice

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- Comfort Standard
- Diligence and Factual Development
- Delivery of the Opinion