**[[1]](#footnote-1)Selected Updates on Circular 230, Certain Penalties and Related Matters**

**©2011 by Mitchell M. Gans & Jonathan G. Blattmachr**

**All Rights Reserved.**

**Certain Miscellaneous Developments.**

A taxpayer may avoid the penalty imposed by section 6662 of the Internal Revenue Code of 1986 as amended (“Code”)[[2]](#footnote-2) for a substantial underpayment of income tax in some cases if there is “substantial authority” for the position taken that resulted in that underpayment. The Tax Court held in *Brown v. Commissioner*, TC Memo 2011-83, that a field service advisory does not constitute substantial authority.

In a decision announced by the Office of Professional Responsibility (“OPR”), the Appellate Authority sustained a disbarment of an attorney for failing to file returns on a timely basis over a period of years. OPR had also alleged that a sanction was appropriate based on a willful failure to pay. The Appellate Authority sustained the sanction without addressing the failure-to-pay issue. See IR-2011-52.

*Haggar v. U.S.*, 772 F. Supp2d 1069 (D.S.D. 2011), indicates that the section 6662 defense is an affirmative defense and imposing the burden of proof on the taxpayer (where the estate tax return failed to disclose an adjusted taxable gift).

*Canal Corporation and Subsidiaries v. Commissioner*, 135 T.C. No. 9 (2010), rejected a section 6664 of the Code defense (which provides that no penalty under either section 6662 or 6663 may be imposed if it is shown that there was a reasonable cause for such portion and that the taxpayer acted in good faith) based at least in part on the nature of the fee paid to the advisor.

On the other hand, in *Seven W. Enterprises, Inc. and Subsidiaries, et al. v. Commissioner*, 136 T.C. No. 26 (2011), the court permitted the section 6664 of the Code defense to a penalty under section 6662 of the Code where the advisor was an independent consultant but not for the return signed by the consultant where he was the taxpayer corporation’s officer.

1. **2011 Amendment to and Other Developments under Section 10.51**

In 2011, section 10.51 was amended in four respects.

First, the section now provides that a tax return preparer’s willful failure to electronically file returns where such filing is mandatory is subject to discipline.[[3]](#footnote-3) The preamble to the regulations adopting this amendment states:

“The Treasury Department and the IRS…conclude that it is appropriate to include as disreputable conduct a tax return preparer's willful failure to electronically file tax returns subject to the mandatory electronic filing requirement. The IRS cannot permit tax return preparers to intentionally disregard the internal revenue laws and continue to practice before the IRS. Section 6011(e)(3) only applies to certain tax return preparers who file a specified number of returns per year and these tax return preparers need to be aware of the new electronic filing requirement. The Treasury Department and the IRS have issued final regulations (TD 9518) published in the Federal Register (76 FR 17521) on March 30, 2011, that provide exclusions from the electronic filing requirement. The exclusions in the final regulations include undue hardship waivers and administrative exemptions. See Rev. Proc. 2011-25 for additional information on hardship waivers and Notice 2011-16 for additional information on administrative exemptions. Moreover, tax return preparers are only subject to sanction under § 10.51(a)(16) of the final regulations for not electronically filing if such a failure is willful. Accordingly, § 10.51(a)(16) is sufficiently narrowly tailored to only apply to these tax return preparers who willfully fail to comply with the electronic filing requirement.”[[4]](#footnote-4)

Second, disreputable conduct now includes preparing a return or refund claim where the practitioner does not have a valid preparer tax identification number (a valid PTIN).[[5]](#footnote-5)

Third, disreputable also includes representing a taxpayer before the IRS if the practitioner is not authorized to do so under the Circular.[[6]](#footnote-6)

Fourth, disreputable conduct also includes improperly disclosing or using a tax return or return information.[[7]](#footnote-7)

The following conduct can also be the predicate for sanction under Circular 230 if done willfully: failing to sign a return prepared by the Practitioner (see section 10.51(a)(14)); improper use or disclosure of return information (see section 10.51(a)(15)); failing to use electronic filing when required to do so (section 10.51(a)(16); preparing a return or refund claim (or substantially all of a return or refund claim) when the preparer does not have a valid PTIN (see section 10.51(a)(17)); and representing a taxpayer before the IRS when not authorized to do so (see section 10.51(a)(18)).

1. **2011 Amendment to Section 10.50**

In 2011, section 10.50 was amended to provide that Internal Revenue Service (“Service” or “IRS”) has the authority to accept a practitioner’s offer to be sanctioned in lieu of pursuing a proceeding against the practitioner.

1. **Registered Tax Return Preparers**

With the adoption of the concept of a registered tax return preparer[[8]](#footnote-8), a concern arose about creating the impression that the preparer was endorsed by the Service. Under the amendment, the registered preparer may not use the term “certified” or otherwise imply that there is an employee/employer relationship with the IRS. The following description is, however, expressly authorized: “designated as a registered tax return preparer by the Internal Revenue Service.”[[9]](#footnote-9)

1. **2011 Amendment to Section 10.36**

Section 10.36 was expanded in 2011 to require firm management to take affirmative steps to ensure the firm’s compliance with the Circular’s duties. Prior to this amendment, this section required such steps to be taken only in connection with the preparation of a Covered Opinion. Under the amendment, the duty to take such steps is now imposed in connection with tax-return-preparation practice. Thus, this section now requires management to take affirmative steps to ensure the firm’s compliance with section 10.34.

**2011 Amendment to Section 10.34**

Section 10.34 now provides that a practitioner who signs a return or a refund claim or who gives advice about a position to be taken on a return or refund claim may violate the section if:

(1) the position is not supported by a reasonable basis;

(2) the position constitutes an unreasonable position within the meaning of section 6694(a)(2) of the Code; or

(3) taking the position is, within the meaning of section 6694(b)(2) of the Code, a willful attempt to understate the tax liability or a reckless or intentional disregard of rules and regulations.[[10]](#footnote-10)

Two qualifications should be noted. First, in the case of a signing practitioner, a violation only occurs if the practitioner knew or reasonably should have known that the return or refund claim contained the problematic position. There is no similar rule applicable to a non-signing practitioner who gives advice about the position. This distinction is a sensible one in that, in the case of a non-signing advisor, it could not reasonably be contended that the practitioner was unaware of the position about which the advice was given. Second, in the case of a signing as well as a non-signing practitioner, a violation of the section only occurs if it occurred on account of willfulness, recklessness or gross incompetence. In this regard, section 10.34(a)(2) provides that a pattern of conduct will be taken into account in determining whether the practitioner acted in a willful, reckless or grossly incompetent manner.

In effect, section 10.34 now incorporates by reference the language of section 6694 of the Code (which imposes tax return preparer penalties) as well the regulations issued under that section.[[11]](#footnote-11) While the two provisions therefore largely overlap, there are some important differences.

First, while section 6694 of the Code has a reasonable-cause defense,[[12]](#footnote-12) there is no such defense under section 10.34. Instead, as indicated, section 10.34 only applies if the practitioner acts willfully, recklessly or with gross incompetence.[[13]](#footnote-13) Hence, while section 6694 of the Code can apparently apply to a single, unintentional error that is not willful, reckless or the product of gross incompetence, section 10.34 cannot apply in such a context. In the Treasury Decision adopting the amendment to section 10.34, the preamble confirms this aspect of the relationship between section 6694 of the Code and section 10.34: “Thus, a practitioner liable for a penalty under section 6694 of the Code is not automatically subject to discipline under § 10.34(a).”[[14]](#footnote-14)

Second, section 10.34 requires a minimum reasonable-basis standard in all cases. Thus, if for some reason section 6694 of the Code is inapplicable, section 10.34 can still apply if there was no reasonable basis for the position.

The following examples illustrate how the reasonable-basis standard in section 10.34 may apply even where section 6694 is not violated.

Example 1: Assume the practitioner gives advice prior to the consummation of the transaction. In this case, section 6694 of the Code cannot apply.[[15]](#footnote-15) But, perhaps, section 10.34, which does not contain a parallel pre-transaction-advice exception, could apply in this context, with a reasonable-basis standard being applicable. On the other hand, it could, perhaps, be argued that a practitioner who gives pre-transaction advice should not be subject to section 10.34 on the ground that the section only applies where there is some proximity between the advice and the preparation of the return – that is, that pre-transaction advice is too remote from the preparation and filing of the return to constitute advice about a position to be taken on the return.

Example 2: Assume a non-signing practitioner gives advice about a position to be taken on a return, but the item does not constitute a substantial portion of the return. In such a case, the practitioner is not subject to section 6694 of the Code,[[16]](#footnote-16) but could be subject to the reasonable-basis standard in section 10.34.

Example 3: Assume there is no underpayment on the return. While section 6694 of the Code cannot apply if the taxpayer’s liability is not understated,[[17]](#footnote-17) there is no corresponding provision in section 10.34. To illustrate, assume that the taxpayer’s understatement attributable to advice given by a professional is offset by an overpayment on account of another, unrelated position on the return. In this case, given the absence of taxpayer liability, section 6694 of the Code cannot apply, but the reasonable-basis standard in section 10.34 apparently does apply.

Example 4: Assume several people within the firm are involved in preparing the return. While only one person in a firm can be held responsible for the section 6694 penalty,[[18]](#footnote-18) all of the people involved can be charged with a violation of section 10.34 – thus triggering the reasonable-basis standard in section 10.34.

Example 5: Assume a practitioner prepares her own return. Although it is clear that section 6694 can only apply in the case of a practitioner who receives compensation for preparing the return or refund claim,[[19]](#footnote-19) it is not clear whether section 10.34 can apply in the case of a practitioner who prepares a return for herself. Nonetheless, because there is no provision in section 10.34 that makes its application hinge on the question of compensation, it would appear, surprisingly, that a practitioner who takes a position on her own return that is not supported by a reasonable basis can be subject to sanction under this provision.[[20]](#footnote-20)

It has been suggested that, if a professional believes that a client will not be able to rely on the professional’s opinion to defeat a penalty under section 6664 of the Code by reason of the professional’s conflict or interest in the transaction, section 10.34 requires that this be disclosed to the client.[[21]](#footnote-21)

1. **Registered Tax Return Preparers and PTINs: 2011 Amendment**

The major thrust of the 2011 amendments to the Circular concerns the expansion of the regulation of tax-return preparers. Prior to these amendments, anyone could prepare a tax return for compensation.[[22]](#footnote-22) And the mere preparation of a return did not make a preparer subject to the Circular’s duties and restrictions.[[23]](#footnote-23) Under the amendments, only the following individuals may prepare a tax return for compensation: attorneys, CPAs, enrolled agents and registered tax return preparers.[[24]](#footnote-24)

The registered-tax-return-preparer concept is new, requiring one who seeks this status to pass a competency exam,[[25]](#footnote-25) to take continuing education[[26]](#footnote-26) and to pass a suitability check.[[27]](#footnote-27) Therefore, under the amendments, anyone who prepares a tax return for compensation and who is not an attorney, CPA or enrolled agent must secure registered-tax-return-preparer status. On the other hand, any individual may, without securing such status, provide assistance in preparing tax returns or refund claims provided the service does not constitute the preparation of substantially all of the return or refund claim.[[28]](#footnote-28) The amendments also expand the scope of the Circular, making all paid preparers of returns and documents that are submitted to the IRS subject to its duties and restrictions.

The registered-tax-return-preparer amendments are largely contained in a handful of sections: 10.3, 10.4, 10.5, 10.7, 10.8 and 10.9. As the preamble to the 2011 amendments explicitly states, attorneys and CPAs need not secure registered-tax-return-preparer status and need not concern themselves with these amendments.

Mirroring Treas. Reg. § 1.6109-2, section 10.8 provides that all tax return preparers, including attorneys and CPAs, must obtain a PTIN. A tax return preparer is defined for this purpose as “any individualwho iscompensated for preparing, or assisting in the preparation of, all or substantially all of a tax return or claim for refund of tax.”[[29]](#footnote-29) In order to obtain a PTIN, as a general rule, the preparer must be an attorney, certified public accountant, enrolled agent or registered tax return preparer.[[30]](#footnote-30) Under an exception, the regulation authorizes individuals under the supervision of certain preparers, such as a paralegal, to obtain a PTIN.[[31]](#footnote-31)

The requirement that a preparer obtain a PTIN does not necessarily apply to all tax professionals. Consider, for example, an attorney who prepares a single return for a single client. The attorney would be required to obtain a PTIN. If, on the other hand, the attorney did not prepare a return (or substantially all of a return) for any client but merely gave clients, for compensation, advice about the treatment of various tax-related issues, the attorney would not need to obtain a PTIN. To be sure, the attorney could be treated as a return preparer for purposes of the section 6694 penalty of the Code.[[32]](#footnote-32) But acting as a return preparer within the meaning of section 6694 does not inexorably lead to a requirement that a PTIN be obtained. In short, the PTIN-related concept of return preparation is different from the counterpart concept in section 6694 of the Code.[[33]](#footnote-33)

In order to secure registered-tax-return-preparer status, an individual must (1) complete a competency examination or otherwise satisfy standards prescribed by the IRS (2) possess a valid PTIN, and (3) not have engaged in conduct that would warrant suspension or disbarment (from practice before the IRS or the Treasury Department) under the Circular.[[34]](#footnote-34) Until the competency exam is operational, preparers hoping to secure registered-tax-return-preparer status can obtain a PTIN on a provisional basis and will be permitted to prepare returns in the interim (as well as appear before the IRS in connection with returns they have prepared provided they were permitted to do so).[[35]](#footnote-35) Registered tax return preparers, as well as enrolled agents and enrolled retirement plan agents, will be required to take continuing education in order to satisfy the Circular’s renewal requirements.[[36]](#footnote-36)

Unlike attorneys, CPAs and enrolled agents, a registered tax return preparer does not enjoy the ability to practice before the IRS on an unlimited basis.[[37]](#footnote-37) Such a preparer may only prepare returns and appear before the IRS with respect to a return he/she has prepared.[[38]](#footnote-38)

Registered tax returns preparers are subject to the duties and restrictions that the Circular imposes on an attorney, CPA or enrolled agent.[[39]](#footnote-39) In addition, under section 10.8(a), any individual who prepares for compensation (or assists in preparing) a tax return or refund claim (or substantially all of the return or claim) becomes subject to these duties and restrictions. Section 10.8(c) extends this provision to documents other than tax returns or refund claims. It provides that an individual who prepares, or assists in preparing, for compensation all or a substantial portion of a document pertaining to any person’s tax liability for submission to the IRS becomes subject to the Circular.[[40]](#footnote-40) As a result, a person who is hoping to become a registered tax return preparer when the competency exam becomes available and who has obtained a PTIN on an interim basis becomes subject to the Circular’s duties and restrictions under subsection (a) by reason of preparing a return or under subsection (c) by reason of preparing a document for submission to the IRS.[[41]](#footnote-41) Also, under subsection (a), any individual who is not an attorney, CPA, enrolled agent or registered tax return preparer and who nonetheless prepares returns for compensation is subject to the Circular’s duties and restrictions. As a consequence, even though such an individual is not authorized to prepare returns for compensation, he or she nonetheless becomes subject to the Circular by reason of actually rendering such service.

While section 10.8(a) and 10.8(c) are essentially parallel provisions, there is an important difference that should be underscored. Although an individual becomes subject to the Circular under subsection (a) by preparing all, or substantially all, of a return or refund claim for compensation, an individual could become subject to the Circular under subsection (c) merely by writing a letter to the IRS on a for-compensation basis. Another difference between these two subsections is also worth noting. Consider an individual who assists in preparing a schedule attached to a return that reflects a deduction that generates a tax savings that is substantial in relation to the taxpayer’s overall liability. Such assistance would appear not to constitute the preparation of the entire return or substantially all of the return. As a result, the individual would not become subject to the Circular’s obligations merely because he or she provided such assistance. In contrast, if the individual assisted in preparing a similar schedule that is attached to a letter to the IRS, rather than to a return, subsection (c) would appear to make the individual subject to the Circular. While the difference in language in the two subsections does seem to call for this distinction, it is not clear whether it was intended.

Finally, the IRS has determined that individuals who prepare for compensation tax returns other than a Form 1040 (Individual Income Tax Return), for example, a corporate income tax return, and who are not attorneys, CPAs or enrolled agents may do so without having to pass a competency exam or take continuing education – though the IRS may change this approach in the future.[[42]](#footnote-42) Such individuals may obtain a PTIN and may sign the returns they prepare.[[43]](#footnote-43) They may also represent the taxpayer before the IRS with respect to a return they signed.[[44]](#footnote-44) They may not, however, represent themselves to the public or to the IRS as a registered tax return preparer or a Circular 230 practitioner.[[45]](#footnote-45) Nonetheless, by reason of preparing a tax return – albeit a return other than a Form 1040 – they become subject to the Circular’s duties and restrictions.[[46]](#footnote-46)

Although not clearly set forth in the section of the Circular defining practice, it seems that practice does not include the preparation of a return or other document to be filed with the IRS or advice with respect to such a return or other document. It should be noted, however, that under Part 4 of the United States Estate (and Generation-Skipping Transfer) Tax Return (Form 706), an attorney, CPA, or enrolled agent may be designated to represent the executor (called the “personal representative” in some jurisdictions) before the IRS.

Note that Section 10.2 provides that a person who is a tax return preparer within the meaning of section 7701(a)(36) of the Code and its implementing regulation[[47]](#footnote-47) is a tax return preparer within the meaning of the Circular. The significance of this definition is unclear. For example, if an attorney gives oral advice about a position to be taken on a return, the attorney could be viewed as a return preparer within the meaning of section 7701(a)(36) of the Code by reason of giving the advice (if the position is sufficiently substantial in terms of the taxpayer’s overall liability).[[48]](#footnote-48) Therefore, given section 10.2, the attorney would be viewed as a return preparer for purposes of the Circular. But if the attorney does not otherwise practice before the IRS and does not prepare returns, refund claims or documents within the meaning of section 10.8, it would appear that the attorney is not subject to the Circular’s duties and restrictions, thereby raising a question about the practical significance of section 10.2 treating the attorney as a return preparer for purposes of the Circular.

1. Portions of this article are derived from Jonathan G. Blattmachr & Mitchell M. Gans, Circular 230 Deskbook (Practising Law Institute, New York, New York 2011) (“Circular 230 Deskbook”). [↑](#footnote-ref-1)
2. Any reference to “section” alone is to a section of Circular 230; any reference to the Internal Revenue Code is followed by “of the Code.” [↑](#footnote-ref-2)
3. See section 10.51(a)(16). [↑](#footnote-ref-3)
4. See T.D. 9527. [↑](#footnote-ref-4)
5. See section 10.51(a)(17). [↑](#footnote-ref-5)
6. See section 10.51(a)(18). For provisions concerning permissible appearances before the IRS, see sections 10.3 and 10.7. [↑](#footnote-ref-6)
7. See section 10.51(a)(15). [↑](#footnote-ref-7)
8. For provisions relating to a registered tax return preparer, see sections 10.4(c) and 10.3(f). [↑](#footnote-ref-8)
9. *United States v. Sommerstedt*, 2010 WL 4180971 (D. Nev. 2010), *aff’d* *in part and rev’d in par*t, 2010 WL 2181190 (9th Cir. 2011) (granting injunction against preparer over First Amendment argument). [↑](#footnote-ref-9)
10. It should be noted that section 10.36 now provides that any practitioner who has oversight responsibility within a firm regarding tax return preparation and advice must take affirmative steps to make certain that people within the firm are complying with section 10.34. See section 10.36(b). [↑](#footnote-ref-10)
11. In the preamble, explicit reference is made to Notice 2009-5, which explains the treatment of tax shelters and discusses the meaning of “substantial authority” for purposes of section 6694 of the Code. See TD 9527. Indicating that section 10.34 is designed to incorporate the rules applicable under section 6694, the preamble explicitly incorporates Notice 2009-5 IRB 2009-3 http://www.irs.gov/irb/2009-03\_IRB/ar08.html. [↑](#footnote-ref-11)
12. See Treas. Reg. § 1.6694-2(e). [↑](#footnote-ref-12)
13. See section 10.34(a). [↑](#footnote-ref-13)
14. See TD 9527. [↑](#footnote-ref-14)
15. See Treas. Reg. § 301.7701-15(b)(2)(i). [↑](#footnote-ref-15)
16. *See* Treas. Reg. § 301.7701-15(a). [↑](#footnote-ref-16)
17. *See* Treas. Reg. § 1.6694-1(c). [↑](#footnote-ref-17)
18. *See* Treas. Reg. § 1.6694-1(b) (indicating that “only one individual within a firm who is primarily responsible for each position on the return” is subject to penalty under section 6694). [↑](#footnote-ref-18)
19. *See* Treas. Reg. § 1.6694-1(b)(1) (cross-referencing Treas. Reg. § 301.7701-15 for the definition of a return preparer, which provides that a person is not a return preparer unless the return is prepared for compensation). [↑](#footnote-ref-19)
20. Perhaps, it should not be surprising that taking a position lack a reasonable-basis on one’s own return is subject to sanction. After all, a failure to file one’s own return is clearly subject to sanction. *See* section 10.51(a)(6). [↑](#footnote-ref-20)
21. *See* Joe Walsh, Tax Court Administers a Painful Root Canal without Anesthesia, 86 Practical Tax Strategies 196 (May 2011). [↑](#footnote-ref-21)
22. See Notice 2011-6; see also Publication 4832. [↑](#footnote-ref-22)
23. *See* section 10.2 (defining practice before the IRS but not including any reference to the preparation of returns). [↑](#footnote-ref-23)
24. Section 10.8(a) provides that only attorneys, CPAs, enrolled agents or registered tax return preparers can obtain a PTIN. In addition, Treas. Reg. 1.6109-2 provides that all tax return preparers must obtain a PTIN. [↑](#footnote-ref-24)
25. *See* Notice 2011-6. [↑](#footnote-ref-25)
26. *See* section 10.6(f). [↑](#footnote-ref-26)
27. *See* section 10.5(d). See also section 10.6 (requiring registered tax return preparers, enrolled agents and enrolled retirement plan agents to satisfy a renewal process). [↑](#footnote-ref-27)
28. *See* section 10.8(b). [↑](#footnote-ref-28)
29. *See* Treas. Reg. § 1.6109-2(g). This regulation makes a distinction between the kind of service that triggers the requirement to obtain a PTIN, on the one hand, and the kind of service that could expose the practitioner to penalty under section 6694, on the other. For purposes of the section 6694 penalty, which imposes penalties on a paid return preparer, Treas. Reg. § 301.7701-15(b)(2) provides that a person is only treated as such a preparer if he or she prepares a substantial portion of the return. That is, a non-signing adviser is treated as a return preparer for section 6694 purposes if advice is given about a position taken on the return where the tax liability attributable to the position is a substantial portion of the taxpayer’s overall liability. *See* Treas. Reg. § 301.7701-15(b)(3). In contrast, Treas. Reg. § 1.6109-2, which requires that a preparer obtain a PTIN, provides that a person is deemed a preparer for this purpose only if he or she prepares all or substantially all of the return. See section Treas. Reg. §1.6109-2(g), Example 4 (providing an example that illustrates this distinction). Thus, as the cited example indicates, a person may be considered a paid return preparer for purposes of the section 6694 penalty but may nonetheless not be required to obtain a PTIN. [↑](#footnote-ref-29)
30. *See* Treas. Reg. § 1.6109-2(d). Note that the IRS has the authority to make exceptions to the general rule stated in text. *See* Treas. Reg. § 1.6109-2(h). Pursuant to this provision, the IRS has indicated that certain returns can be filed by a person who does not obtain a PTIN. *See* Notice 2011-6. [↑](#footnote-ref-30)
31. Pursuant to the authority granted the IRS in Treas. Reg. § 1.6109-2(h), certain individuals who are supervised by a practitioner – but not a registered tax return preparer – may obtain a PTIN and prepare returns for compensation. *See* Notice 2011-6. Unlike a registered tax return preparer, such a supervised individual need not pass a competency exam or take continuing education in order to obtain a PTIN. Although such supervised individuals become subject to the Circular’s duties and restrictions by reason of the Notice and section 10.8(a), the Notice explicitly prohibits them from signing the returns they prepare. Thus, for example, a person who works for an attorney and who assists in preparing returns or actually prepares returns that are signed by the attorney may obtain a PTIN if over the age of 18. *See* Notice 2011-6. If the employee failed to obtain a PTIN, he or she would be in violation of Treas. Reg. § 1.6109-2(d) as well as the Circular. *See* section 10.8(a) (requiring any individual who prepares a return, or substantially all of a return, to secure a PTIN and imposing the Circular’s duties on such an individual). [↑](#footnote-ref-31)
32. *See* Treas. Reg. § 301-7701-15 (defining the term “tax return preparer” for purposes of section 6694). [↑](#footnote-ref-32)
33. Treas. Reg. § 1.6109-2 makes a distinction between the kind of service that triggers the requirement to obtain a PTIN, on the one hand, and the kind of service that could expose the practitioner to penalty under section 6694, on the other. For purposes of the section 6694 penalty, which imposes penalties on a paid return preparer, Treas. Reg. § 301.7701-15(b)(2) provides that a person is only treated as such a preparer if he or she prepares a substantial portion of the return. That is, a non-signing adviser is treated as a return preparer for section 6694 purposes if advice is given about a position taken on the return where the tax liability attributable to the position is a substantial portion of the taxpayer’s overall liability. *See* Treas. Reg. § 301.7701-15(b)(3). In contrast, Treas. Reg. § 1.6109-2, which requires that a preparer obtain a PTIN, provides that a person is deemed a preparer for this purpose only if he or she prepares all or substantially all of the return. *See* section Treas. Reg. § 1.6109-2(g), Example 4 (providing an example that illustrates this distinction). Hence, as the cited example indicates, a person may be considered a paid return preparer for purposes of the section 6694 penalty but may nonetheless not be required to obtain a PTIN. [↑](#footnote-ref-33)
34. *See* section 10.4(c). [↑](#footnote-ref-34)
35. *See* Notice 2011-6. [↑](#footnote-ref-35)
36. *See* section 10.6; see also section 10.9. In Notice 2011-61, the IRS requested public comments regarding the continuing-education process. [↑](#footnote-ref-36)
37. *See* section 10.3. [↑](#footnote-ref-37)
38. See section 10.3(f). A registered tax return preparer may not appear “before appeals officers, revenue officers, Counsel or similar officers or employees of the Internal Revenue Service or the Treasury Department.” *See* section 10.3(f)(3); section 10.7(c)(1)(viii). [↑](#footnote-ref-38)
39. *See* section 10.2(f)(4). [↑](#footnote-ref-39)
40. Note that section 10.8(c) creates an exception by cross-referencing Treas. Reg. § 301.7701-15(f). So, for example, a person who supplies typing or similar assistance in preparing a document for the Service does not become subject to the Circular’s duties. [↑](#footnote-ref-40)
41. *See also* Notice 2011-6 (imposing the Circular’s duties and restrictions on individuals who practice before the IRS on an interim basis). [↑](#footnote-ref-41)
42. *See* Notice 2011-6. [↑](#footnote-ref-42)
43. *See id*. [↑](#footnote-ref-43)
44. *See id*. [↑](#footnote-ref-44)
45. *See id*. [↑](#footnote-ref-45)
46. *See id; see also* section 10.8(a). [↑](#footnote-ref-46)
47. *See* Treas. Reg. § 301.7701-15. [↑](#footnote-ref-47)
48. *See id.* [↑](#footnote-ref-48)