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THE DECLINE IN TAX ADVISER PROFESSIONALISM IN AMERICAN SOCIETY

John S. Dzienkowski & Robert J. Peroni***

INTRODUCTION

The United States faces a tax-avoidance crisis that seriously undermines the integrity and effectiveness of the federal income tax system[1] and creates a significant tax revenue gap.[2] Some tax practitioners and some prominent law and accounting firms have participated in creating and intensifying this crisis.[3] Yet, more than a century after the enactment of the modern federal income tax statute, academics, tax lawyers, and accountants continue to debate the appropriate role of the tax practitioner in the tax system. This vigorous discussion has involved many of the leading tax advisers and academic commentators of their time.[4] Many of these advisers and

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** Fondren Foundation Centennial Chair for Faculty Excellence and Professor of Law, University of Texas School of Law. Professor Peroni dedicates this Article to his loving parents, Betty Peroni and the late Emil Peroni, for their tremendous support and inspiration over the years.

1. *See, e.g.*, Henry Ordower, *The Culture of Tax Avoidance*, 55 ST. LOUIS U. L.J. 47, 53 (2010) (describing the past fifty years as having developed "a culture of tax avoidance"); Alex Raskolnikov, *Crime and Punishment in Taxation: Deceit, Deterrence, and the Self-Adjusting Penalty*, 106 COLUM. L. REV. 569, 570 (2006); Daniel N. Shaviro, *Economic Substance, Corporate Tax Shelters and the* Compaq *Case*, 88 TAX NOTES 221, 230 (2000); David A. Weisbach, *Ten Truths About Tax Shelters*, 55 TAX L. REV. 215, 243 (2002).

2. Estimates vary as to the amount of the tax gap, but there is general agreement that the gap is large and growing. One estimate of the individual tax gap for the 2006 taxable year was $450 billion. *See, e.g.*, Leandra Lederman, *The Use of Voluntary Disclosure Initiatives in the Battle Against Offshore Tax Evasion*, 57 VILL. L. REV. 499, 499 (2012). A Treasury study estimated the tax gap for the 2001 taxable year as amounting to $345 billion. U.S. TREASURY DEP'T, OFFICE OF TAX POLICY, A COMPREHENSIVE STRATEGY FOR REDUCING THE TAX GAP 5 (2006).

3. *See, e.g.*, TANINA ROSTAIN & MILTON C. REGAN, JR., CONFIDENCE GAMES—LAWYERS, ACCOUNTANTS, AND THE TAX SHELTER INDUSTRY (2014) (discussing corporate tax shelter abuses and the tax practitioners and law and accounting firms involved in those abuses); Jay A. Soled, *Tax Shelter Malpractice Cases and Their Implications for Tax Compliance*, 58 AM. U. L. REV. 267 (2008).

4. *See* Michael Hatfield, *Legal Ethics and Federal Taxes, 1945–1965: Patriotism, Duties, and Advice*, 12 FLA. TAX REV. 1, 2–3 (2012) [hereinafter Hatfield, *1945–1965*]

commentators have maintained that tax professionals owe a special professional duty to the tax system as well as to their clients, despite the detrimental effect that duty to the system may have on their ability to represent their clients with maximum zeal.[5] Under this view, because tax practitioners serve as intermediaries between the Internal Revenue Service (IRS) and business and high-income taxpayers, their behavior has a potentially significant effect on the level of compliance by such taxpayers and the level of respect all taxpayers have for the tax system.[6] Thus, tax practitioner ethics play an important role in the government's ability to collect taxes efficiently[7] and, therefore, play an important role in helping pay for a civilized society[8] and in upholding the democratic social

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(discussing this debate during the period from 1945 to 1965); Michael Hatfield, *Committee Opinions and Treasury Regulation: Tax Lawyer Ethics, 1965–1985*, 15 FLA. TAX REV. 675, 718–19 (2014) (discussing this debate during the period from 1965 to 1985).

5. *See, e.g.*, BERNARD WOLFMAN, DEBORAH H. SCHENK & DIANE RING, ETHICAL PROBLEMS IN FEDERAL TAX PRACTICE 1–2 (4th ed. 2008); Mortimer M. Caplin, *Responsibilities of the Tax Advisor—A Perspective*, 40 TAXES 1030, 1032 (1962); Frederic G. Corneel, *Guidelines to Tax Practice Second*, 43 TAX LAW. 297, 301–02 (1990); Michael C. Durst, *The Tax Lawyer's Professional Responsibility*, 39 U. FLA. L. REV. 1027, 1028 (1987); Linda Galler, *The Tax Lawyer's Duty to the System*, 16 VA. TAX REV. 681, 687–98 (1997) (book review); Anthony C. Infanti, *Eyes Wide Shut: Surveying Erosion in the Professionalism of the Tax Bar*, 22 VA. TAX REV. 589, 605–07 (2003); Randolph E. Paul, *The Responsibilities of the Tax Adviser*, 63 HARV. L. REV. 377, 384–85 (1950); Loren D. Prescott, Jr., *Challenging the Adversarial Approach to Taxpayer Representation*, 30 LOY. L.A. L. REV. 693, 715 (1997); Deborah H. Schenk, *Tax Ethics*, 95 HARV. L. REV. 1995, 2004 (1982) (book review); William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1457–58 (2007); *cf.* William D. Popkin, *Client-Lawyer Confidentiality*, 59 TEX. L. REV. 755, 783–85 (1981); William D. Popkin, *Standing to Challenge Generous Tax Rulings: The Case for Congressional Action*, 6 TAX NOTES 163, 168 (1978) [hereinafter Popkin, *Standing*].

6. *See, e.g.*, Dennis J. Ventry, Jr. & Bradley T. Borden, *Probability, Professionalism, and Protecting Taxpayers*, 68 TAX LAW. 83, 105 (2014) ("[A]ccurate advice and accurate returns protect the tax system by raising compliance among taxpayers at all income levels and by bolstering fairness, both real and perceived, under the tax laws."); *cf.* ROMAN TOMASIC & BRENDAN PENTONY, DEFINING ACCEPTABLE TAX CONDUCT: THE ROLE OF PROFESSIONAL ADVISERS IN TAX COMPLIANCE—A PROGRESS REPORT TO THE CRIMINOLOGY RESEARCH COUNCIL 1 (1990) (describing the role of tax practitioners in the Australian tax system). The tax practitioner's attitude can affect taxpayer compliance in a number of ways. As one important facet of this effect, if the tax practitioner treats tax laws as lacking legitimacy, then her clients' attitudes toward those laws will be undermined; by contrast, if a tax practitioner displays respect for the tax system, then such behavior helps foster respect for the tax system by the practitioner's clients.

7. *See* Marjorie E. Kornhauser, *Doing the Full Monty: Will Publicizing Tax Information Increase Compliance?*, 18 CAN. J.L. & JURIS. 95, 95 (2005) (noting that a self-assessment tax system is an efficient manner of collecting revenue, and arguing that greater transparency in tax reporting is necessary to improve tax compliance). Although we would not necessarily recommend the adoption of Professor Kornhauser's various proposals, we do agree that greater tax reporting transparency is a necessary part of solving the tax compliance problem. Also, applying tax withholding obligations to the payors of additional types of income would increase tax compliance significantly. Any detailed discussion of the important topics of increased tax reporting transparency and tax withholding are beyond the scope of this Article.

8. *See* Moran Harari Ofer Sitbon & Ronit Donyets-Kedar, *Aggressive Tax Planning and Corporate Social Responsibility in Israel*, 12 J. ACCT. BUS. & PUB. INT. 1, 5 (2013)

consensus embodied in the tax system.[9] In contrast to these views, other tax advisers and academic commentators reject the notion that tax professionals owe any such duty to the tax system and argue that a tax professional's sole duty is to represent vigorously his or her clients within the bounds of the law.[10]

The debate has had numerous facets. First, a debate within the American Bar Association (ABA) ensued over the appropriate standard for determining whether an attorney can ethically advise a client to take a questionable tax return position, shifting from a "reasonable basis" standard[11] to a "realistic possibility of success" standard[12] and, finally, to a "more likely than not" standard with respect to marketed tax shelters.[13] Some commentators argued that a higher standard should be required with respect to return positions, even if not related to a tax shelter, such as "substantial authority" or "more likely than not," unless the client adequately discloses the position on the return.[14] The Treasury and the IRS have similarly debated their tax practitioner standards under Circular 230,[15] which applies to both lawyers and accountants who practice before the IRS and, over the years, those standards have shifted from a "reasonable basis" standard to a "more likely than not" standard to a "substantial authority"

("Tax payment is the main source for financing the state budget that the elected government uses to carry out national priorities.").

9. *See id.* at 6 ("Tax collection is one of the pillars of democracy, being the result of a broad social consensus regarding the participation of individuals in the funding and allocation of the resources needed for the welfare of society as a whole."). In essence, in a self-assessment system, the government looks to tax practitioners to help support tax law enforcement. *See, e.g.*, Yuka Sakurai & Valerie Braithwaite, *Taxpayers' Perceptions of Practitioners: Finding One Who Is Effective and Does the Right Thing?*, 46 J. BUS. ETHICS 375, 375–76 (2003) (studying Australian taxpayers).

10. *See, e.g.*, David J. Moraine, *Loyalty Divided: Duties to Clients and Duties to Others—the Civil Liability of Tax Attorneys Made Possible by the Acceptance of a Duty to the System*, 63 TAX LAW. 169, 170 (2009) (arguing, in part, that imposing a duty to the tax system on tax lawyers is inconsistent with our adversarial legal system established by the Constitution); Camilla E. Watson, *Tax Lawyers, Ethical Obligations, and the Duty to the System*, 47 KAN. L. REV. 847, 851, 871, 909 (1999) (stating that tax lawyers owe no duty to the tax system or society in general); *see also* Simon, *supra* note 5, at 1457–58 (noting that a substantial segment of the tax bar are "formalists" who do not accept the applicability of a tax professional's duty to the system).

11. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 314 (1965).

12. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 352 (1985).

13. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 346 (1982) (revised).

14. *See, e.g.*, Matthew C. Ames, Note, *Formal Opinion 352: Professional Integrity and the Tax Audit Lottery*, 1 GEO. J. LEGAL ETHICS 411, 423–25 (1987) (arguing that ABA Opinion 352 does nothing to stop the audit lottery and tax lawyers' participation in it). The ABA Section of Taxation has long played an important role in the development of ethical standards for tax lawyers. *See, e.g.*, Phillip L. Mann, *A Brief History of the Tax Section, 1939–2014*, 68 TAX LAW. 13, 15 (2014).

15. U.S. TREASURY DEP'T, CIRCULAR NO. 230, REGULATIONS GOVERNING PRACTICE BEFORE THE INTERNAL REVENUE SERVICE (rev. 2014) [hereinafter CIRCULAR 230]. The original version of Circular 230 was published in 1921. *See* U.S. TREASURY DEP'T, CIRCULAR NO. 230, LAWS AND REGULATIONS GOVERNING THE RECOGNITION OF ATTORNEYS AND AGENTS AND OTHER PERSONS REPRESENTING CLAIMANTS BEFORE THE TREASURY DEPARTMENT (1921). The statutory authority for Circular 230 regulation is in 31 U.S.C. § 330(a), first enacted in 1884.

standard in non-tax shelter situations where the client does not adequately disclose the position on the return.[16] The Circular 230 changes mirrored congressional changes in the standard for imposing understatement penalties on tax preparers under section 6694(a) of the Internal Revenue Code[17] ("the Code"). Tax professionals writing tax opinions without sufficient inquiry into the factual details underlying the clients' transactions provoked changes to Circular 230, including particularized and complex rules on "covered opinions," which were substantially scaled back in 2014.[18] An era of tax shelter abuses involving individual taxpayers resulted in the increasing application of judicial doctrines to counteract tax abuse, congressional tax reform legislation,[19] new penalties for taxpayers and tax professionals, and, as already mentioned, new standards for tax practitioners in opinion writing.[20] Despite this wave of increased regulation of tax-motivated transactions and tax professionals, a decade later tax lawyers and accountants became involved in the marketing of a different kind of abusive tax shelters to corporate taxpayers.[21] This led to a wave of criminal and civil enforcement actions against taxpayers and the firms and tax professionals who advised taxpayers with respect to these transactions.[22] The involvement of prestigious law and accounting firms and tax professionals in the corporate tax shelter abuses, and in other overly aggressive tax planning strategies, has been properly viewed as reflecting a decline in tax adviser professionalism[23] and as raising serious questions

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16. CIRCULAR 230, *supra* note 15, § 10.34(a)(1) (referring to an "unreasonable position" under section 6694(a)(2) of the Internal Revenue Code, which uses a "substantial authority" standard for undisclosed return positions not related to tax shelters or reportable transactions). If the return position is disclosed on the taxpayer's return and does not relate to a tax shelter or reportable transaction, the tax practitioner need only have a "reasonable basis" for the position under the current version of Circular 230. *Id.* If the return position relates to a tax shelter or reportable transaction, it must be reasonable for the tax practitioner to believe that it is more likely than not that the return position will be sustained on its merits, without regard to whether it is disclosed. *Id.*

17. I.R.C. § 6694(a) (2012) (prescribing penalties for understatement of a taxpayer's liability by a tax preparer due to an "unreasonable position" taken on the taxpayer's return).

18. *See* Ventry & Borden, *supra* note 6, at 110–11. The 2014 amendments to Circular 230 eliminated the complex "covered opinions" rules in former section 10.35. *Id.*

19. *See generally* Robert J. Peroni, *A Policy Critique of the Section 469 Passive Loss Rules*, 62 S. CAL. L. REV. 1 (1988).

20. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 40–43; Richard Lavoie, *Am I My Brother's Keeper? A Tax Law Perspective on the Challenge of Balancing Gatekeeping Obligations and Zealous Advocacy in the Legal Profession*, 44 LOY. U. CHI. L.J. 813, 834–36 (2013).

21. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 45–73; Susan Cleary Morse, *The How and Why of the New Public Corporation Tax Shelter Compliance Norm*, 75 FORDHAM L. REV. 961, 994–97 (2006).

22. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 273–324; Morse, *supra* note 21, at 986–91, 997–1000.

23. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 70–73 (discussing the decline in tax lawyer professionalism); Infanti, *supra* note 5, at 591–92, 608–13 (discussing corporate inversions and an estate/gift tax-avoidance scheme involving life insurance as evidencing the decline in tax lawyer professionalism).

about the level of moral reasoning of tax practitioners.[24] These events have reinvigorated the debate over the proper role of tax professionals in American society and what can be done to remedy this professionalism decline.

In Part I, this Article briefly examines the debate over the proper role of the tax professional in representing clients.[25] Part II discusses whether tax professionals owe special duties to the tax system. Part III analyzes how the tax professionals' involvement in several waves of tax shelter abuses is in sharp contrast to the high-minded rhetoric of the tax ethics debate. This part also discusses changes in the legal and accounting professions that have contributed to the current state of taxpayer representation. This Article advocates for the position that tax professionals owe a duty to the tax system and such a duty must be grounded in concrete guidance. Part IV proposes several changes that would delineate more clearly the tax professionals' duty to the system while preserving the professionals' duty and right to vigorously represent their clients within the bounds of the law. We believe that the Circular 230 standards of practice, the preparer tax penalty provisions in section 6694 of the Code, and the taxpayer substantial understatement penalty provisions in section 6662 should be harmonized to require that the advice of tax professionals to taxpayers with respect to tax return positions meet the "more likely than not" standard, except, in the case of non-tax shelter transactions, when the taxpayer discloses the position on the return. Disclosed positions should be required to meet an enhanced "reasonable basis" standard.

I. SPECIAL DUTIES OF TAX PROFESSIONALS

During the formative years of the modern federal income tax system, tax practitioners and scholars engaged in a policy debate that elevated concerns about tax practitioner ethics to a philosophical dialogue.[26] This debate examined the proper role of tax advisers in a voluntary, self-assessment tax system that was enacted through democratic processes and that presumably reflects the democratic values of American society. The involvement of leading tax professionals in such a high-level philosophical debate stands in sharp contrast to the ethical debates that took place more generally in the legal profession during these years. During this time, the organized bar was having great difficulty in its efforts to recodify the 1908 Canons of

24. *See, e.g.*, Elaine Doyle, Jane Frecknall Hughes & Barbara Summers, *An Empirical Analysis of the Ethical Reasoning of Tax Practitioners*, 114 J. BUS. ETHICS 325 (2013) (discussing an empirical study showing that the moral reasoning of tax practitioners in the tax-dilemma context is significantly lower than that used in the social context).

25. Our discussion about the appropriate role of the tax practitioner vis-à-vis the tax system encompasses tax advice provided to clients in its various forms, including tax planning, tax return preparation, and tax opinions issued to support a client's transaction. Given space and time constraints, however, we do not focus on the specialized requirements applicable to tax opinions, including those in Circular 230. *See, e.g.*, CIRCULAR 230, *supra* note 15, § 10.37.

26. *See* Hatfield, *1945–1965*, *supra* note 4, at 8–11.

Professional Ethics.[27] Such efforts were unsuccessful until the late 1960s, when the ABA promulgated the Model Code of Professional Responsibility.[28] In the latter efforts, parochial concerns of the legal profession often dominated the debate,[29] and the role of the lawyer as a zealous advocate and nothing more seemed to be the central focus of the ethics code commentators.[30]

Tax professionals recognized that ethics were important and that development of ethical standards for tax professionals was important to the proper functioning of our self-assessment tax system.[31] The importance of our tax system in a post-World War II economy burdened by the Cold War environment was evident.[32] In addition, the need for the United States to be prepared for another major armed conflict played a role in shaping sentiment toward professional ethics.[33] In part, tax lawyers may have viewed this dialogue as central to raising the status of the tax bar as major participants, along with other transactional lawyers, in the development of the modern legal ethics codes and reducing the influence of litigators who had dominated the development of legal ethics codes up to that point.[34]

The debate over the responsibilities of a tax professional focuses on whether tax is different from other areas of practice. Some adopt the view that tax is different because the special nature of the government as an opponent creates a dual duty. In other words, a tax professional owes an obligation to represent the client but also owes an obligation to the government as the collector of revenue in the tax system. Tax was one of the first areas where a significant segment of professionals argued they owed duties to the system (i.e., in effect to the regulators) as well as to their clients. Subsequent developments in banking and securities law brought

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27. CANONS OF PROF'L ETHICS (AM. BAR ASS'N 1908); *see* Edward L. Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1, 3–5 (1970) (describing difficulties the organized bar encountered in recodifying the 1908 Canons).

28. MODEL CODE OF PROF'L RESPONSIBILITY (AM. BAR ASS'N 1969). *See generally* John F. Sutton, Jr., *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 TEX. L. REV. 255 (1970) [hereinafter Sutton, Jr., *The American Bar Association*] (discussing the history of the ABA's promulgation of the 1969 Model Code); John F. Sutton, Jr., *Re-Evaluation of the Canons of Professional Ethics: A Reviser's Viewpoint*, 33 TENN. L. REV. 132 (1966) [hereinafter Sutton, Jr., *Re-Evaluation*] (discussing problems with the 1909 Canons as a legal ethics code and considerations that should be taken into account in drafting an appropriate legal ethics code).

29. *Cf.* John S. Dzienkowski, *Ethical Decisionmaking and the Design of Rules of Ethics*, 42 HOFSTRA L. REV. 55, 61–62 (2013).

30. *Cf. id.* Despite these pressures, the 1969 Model Code drafters produced a set of ethical rules that were a substantial improvement over the predecessor ABA Canons. *See, e.g.*, *id.* at 62; Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251–52 (1991) (discussing the organized bar's movement from the 1908 Canons to the 1969 Model Code as a significant transformation of ethical norms); *cf.* Sutton, Jr., *Re-Evaluation*, *supra* note 28 (discussing the failure of the 1909 Canons as a legal ethics code).

31. Hatfield, *1945–1965*, *supra* note 4, at 15–18.

32. *Id.* at 12–14 (discussing the Cold War environment and its effect on the development of tax ethics).

33. *Id.* at 11–15, 19 (discussing "patriotism" as playing an important role in discussions of tax ethics).

34. *See* Dzienkowski, *supra* note 29, at 62.

similar arguments in those areas. The early debate did not characterize the professional as the gatekeeper; instead, the view was that tax lawyers and accountants had a dual role to represent clients within the bounds of the law in light of an obligation to the tax system.

The decision by the Treasury and the IRS to permit a range of professionals to offer tax services led the Treasury to promulgate the modern version of Circular 230 in 1966. Tax advice could be provided to clients by tax lawyers, tax accountants, and enrolled agents.[35] Tax returns could be prepared by nonlawyers. The preemption of unauthorized practice of law rules by the federal system gave the Treasury a greater incentive to monitor the behavior of tax professionals. And, in turn, lawyers were pushed to differentiate their services both in terms of quality and reputational value. Therefore, if lawyers could offer clients services that were more respected by the tax authorities than the other professionals, it would give lawyers an advantage in the highly competitive marketplace for tax services.

The promulgation of Circular 230 as a code for regulating tax practitioners' conduct essentially federalized the regulation of the professional conduct of tax advisers. Despite the claims for self-regulation of lawyers practicing tax law and arguments that tax practice is similar to all other law practice, the federal government has chosen to regulate the conduct of tax professionals, including tax lawyers, for decades. This federal regulation is in addition to state bar regulation of lawyers and the state regulation of other tax professionals, such as accountants. Circular 230 obligates all tax practitioners to exercise due diligence in the preparation and filing of all documents with the IRS. That duty requires practitioners to verify the accuracy of all statements made to the government. Thus, going back to 1966, tax professionals have had a duty similar to those owed to tribunals in the codes of ethics.

The creation of a dual duty to the client and the Treasury presents significant difficulties because our system of taxation gives the government a multiplicity of roles. First, the Treasury and the IRS interpret congressional statutes by proposing and adopting regulations under the Administrative Procedure Act.[36] Second, the IRS issues published- and private-letter rulings and other forms of administrative guidance interpreting the application of the tax laws to specific fact patterns. The IRS has the responsibility for collecting revenue and for auditing taxpayers to determine compliance with the tax laws. The IRS also, in conjunction with the Justice Department, conducts litigation in the administrative appeals and federal trial and appellate courts. This multiplicity of roles makes the analogy of a duty to a tribunal more complicated and in fact serves as the basis for the argument that tax professionals should have little or no duty to the government. In a sense, the Treasury and the IRS are both

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35. *See* John S. Dzienkowski & Robert J. Peroni, *Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century*, 69 FORDHAM L. REV. 83, 106–12 (2000).

36. Pub. L. No. 79-404 (1946).

potential adversaries of taxpayers and a quasi-tribunal; therefore, the traditional arguments of a duty to the tribunal are not completely applicable, without some appropriate modification.

The debate over whether tax professionals have a dual role has two more practical applications in the representation of clients.[37] First, should the traditional role of representing clients zealously be tempered somewhat because of this obligation? Second, scholars and lawyers have questioned whether tax advisers should have a duty of broader disclosure to the government.

Tax professionals have an obligation to represent their clients zealously within the bounds of the law. In other words, no one suggests that a tax adviser should advise clients to falsify documents or backdate documents that have tax effect. In 1965, the ABA, in Ethics Opinion 314, conceptualized the filing of a tax return as falling into the category of an adversarial proceeding and, therefore, opined that a lawyer may advise the client to take a position on the return without disclosure to the IRS if the position is supported by a reasonable basis.[38] The "reasonable basis" standard was viewed as a relatively low one that encouraged taxpayers to exploit the lack of audit enforcement for the vast majority of tax returns.[39] In the 1980s, the ABA Section of Taxation, after careful study, sought to change the guidance provided in Opinion 314 to require a meritorious basis for advice given to taxpayers—a position that would not permit tax advisers to exploit the audit selection process in preparing information for reliance by taxpayers.[40] It also sought to clarify that advice in the context of tax return preparation is not an adversarial proceeding.[41] In 1985, the ABA, in Ethics Opinion 352, changed the standard from reasonable basis to a good faith belief that the position was warranted in existing law or supported by a good faith argument for extension, modification, or reversal of existing law, which incorporates language used in the Model Rules provision dealing with frivolous filings as a disciplinary violation.[42] Under this opinion, to be in good faith, there must be a realistic possibility of success of the position being sustained if the position is challenged in litigation.[43]

In light of the problems created by taxpayer reliance on advice grounded in only a reasonable basis for taking a return position, Congress modified the Code to increase the penalties on taxpayers taking questionable return positions. Under section 6662, a taxpayer who files a return with a

37. Professor Fred Zacharias characterized this issue in taxation as creating a secondary obligation to a nonclient, in this case the Treasury. *See* Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 185 (1997) (defining the duty as "prohibiting the lawyer to counsel noncompliance with regulations, but allowing her to help a client maximize legal deductions").

38. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 314 (1965).

39. *See, e.g.*, Ames, *supra* note 14, at 412 (defining and discussing the audit lottery); *Discussion on "Questionable Positions"—Meeting of ABA Section of Taxation*, 32 TAX LAW. 13, 20 (1978) (remarks by then-IRS Commissioner Jerome Kurtz).

40. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 352 (1985).

41. *Id.*

42. MODEL RULES OF PROF'L CONDUCT r. 3.1 (AM. BAR ASS'N 2015).

43. ABA Comm'n on Ethics & Prof'l Responsibility, Formal Op. 352.

substantial understatement of tax liability will be subject to a penalty unless the taxpayer had substantial authority for the return position or, if the authority was less than substantial, if the taxpayer had a reasonable basis for the position and disclosed it on the tax return.[44] The regulations specifically reject the taxpayer's reliance on the audit lottery to avoid the substantial understatement penalty.[45] Under section 6662,[46] if the taxpayer is involved in a transaction that constitutes a tax shelter, the substantial understatement penalty will be imposed without regard to disclosure and without regard to the level of authority for the taxpayer's return position.

Effectively, Congress has used the penalties and disclosure system to raise the standards of tax professionals and establish a standard of care for tax professionals. Because professionals seek to ensure that their clients are not penalized for tax return provisions based on their tax advice, they must seek to support their positions with substantial authority or must encourage their clients to disclose the positions on their tax returns.

II. TAX SHELTER ABUSES: THE DIVERGENCE OF ETHICS RHETORIC FROM PRACTICE REALITY

Despite the rhetoric from elite tax professionals about the need to maintain high ethical standards in tax practice, tax professionals and their taxpayer clients have been involved in at least two major waves of tax shelter abuses. Each of these tax shelter episodes involved many tax professionals aiding their clients to avoid significant tax liability in transactions having questionable validity.[47] And each led to significant litigation by the government seeking to invalidate the transactions using judicial doctrines such as the economic substance doctrine, a congressional

44. I.R.C. §§ 6662(a), (b)(2), (d) (2012). The substantial understatement penalty was formerly in section 6661 before its repeal by Pub. L. No. 101-239, § 7721 (1989).

45. Treas. Reg. § 1.6662-4(d)(2) (2012) ("The possibility that a return will not be audited or, if audited, that an item will not be raised on audit, is not relevant in determining whether the substantial authority standard (or the reasonable basis standard) is satisfied.").

46. I.R.C. §§ 6662(a), (b)(2), (d)(2)(C). Before Pub. L. No. 108-357, § 812(d) (2004) amended section 6662, noncorporate taxpayers could avoid the substantial understatement penalty with respect to a tax shelter item if they reasonably believed that it was more likely than not that the taxpayer's treatment of the item on the return was the proper tax treatment. I.R.C. § 6662(d)(2)(C) (2004). Under this prior version of section 6662, the substantial understatement penalty applied to tax shelter items of corporate taxpayers without regard to disclosure or the level of authority for the corporate taxpayer's return position. *Id.*

47. There is an ongoing debate concerning whether tax professionals lead taxpayers into greater noncompliance or whether they are merely service providers responding to the demand of their clients for tax minimization. *See* Sakurai & Braithwaite, *supra* note 9, at 376; *see also* Don R. Hansen, Rick L. Crosser & Doug Laufer, *Moral Ethics V. Tax Ethics: The Case of Transfer Pricing Among Multinational Corporations*, 11 J. BUS. ETHICS 679 (1992). For example, some research suggests that taxpayers generally do not prefer aggressive tax advice and that tax practitioners who market such advice may be doing so independent of their clients' desires and based on a misinterpretation of what their clients want. *See* Peggy A. Hite & Gary A. McGill, *An Examination of Taxpayer Preference for Aggressive Tax Advice*, 45 NAT'L TAX J. 389, 399 (1992). In any event, in both waves of tax shelter transactions, tax practitioners played a major role in the proliferation of these abusive transactions, whether or not they were responding to client demand for such tax-minimization products.

response in the form of new statutory provisions seeking to eliminate such transactions, and new and revised penalties on taxpayers and preparers.

The first wave of tax shelters began in the 1960s, proliferated in the 1970s, and lasted until the mid-1980s.[48] These tax shelters were primarily targeted at individual taxpayers and involved tax professionals who encouraged their clients to enter into transactions, often involving depreciable real estate or equipment, that generated large tax losses and were primarily motivated to obtain tax benefits and not economic gain.[49] These shelters often involved purchase-money nonrecourse debt and overstatements of the value of the underlying properties.[50] They were designed by tax professionals and presented to their clients as ways to minimize tax liability, with the professionals supplying tax opinions supporting the validity of the transactions.[51]

The reform to remedy the first wave of tax shelters began in the courts and involved the assertion of the substance over form, step transaction, and sham transaction doctrines.[52] The first wave of tax shelters exposed serious weaknesses in the Code's structure, which allowed high-income taxpayers to claim depreciation and other deductions supported by nonrecourse debt and use the resulting noneconomic investment losses to offset income from services and portfolio investments.[53] Congress enacted at-risk limitations on the deductions from nonrecourse debt and the passive activity loss rules that prevent the use of passive losses from activities in which the taxpayer does not materially participate to offset income from services or other active trades or businesses or from portfolio investments.[54] Congress also enacted new and revised penalty provisions directed at taxpayers, tax advisers, and tax preparers participating in these transactions.[55] Although these remedies were successful in shutting down the individual tax shelters at which these rules were aimed, they did not prevent the next wave of tax shelters from emerging.

The second wave of tax shelters began in the late 1990s and continued into the 2000s.[56] It involved a desire by corporations and wealthy individuals to save taxes and seek advice from professionals that focused upon tax minimization, and eventually it led to the active marketing by tax professionals to corporations and wealthy individuals of tax shelters based

48. *See* Lavoie, *supra* note 20, at 832–37.

49. *See* Peroni, *supra* note 19, at 7–11.

50. *See, e.g.*, Theodore S. Sims, *Debt, Accelerated Depreciation, and the Tale of a Teakettle: Tax Shelter Abuse Reconsidered*, 42 UCLA L. REV. 263, 268–71, 356–63 (1994).

51. *See* Lavoie, *supra* note 20, at 832–38.

52. The economic substance doctrine eventually was codified in 2010 in section 7701(o), accompanied by enactment of a 40 percent strict liability penalty for tax understatements attributable to nondisclosed, non-economic substance transactions in sections 6662(b)(6) and (i). Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, §§ 1409(a), (b)(1), (2) (adding sections 6662(b)(6), 6662(i), and 7701(o) to the Internal Revenue Code).

53. *See* Peroni, *supra* note 19, at 20–61.

54. *See* I.R.C. §§ 465, 469 (2012); Peroni, *supra* note 19, at 20–61.

55. *See* Lavoie, *supra* note 20, at 835–36.

56. *See id.* at 838.

on exploitation of narrow loopholes in the tax law.[57] Large accounting firms and law firms developed these shelters and sold them as "products" to large numbers of taxpayers through confidential memorandums.[58] The tax professionals sold these products under fee arrangements that allowed them to collect a portion of the tax savings obtained by their clients' use of the shelters.[59]

Some of the pressure for tax savings came from corporations that viewed taxes as a cost center and from wealthy individuals who sought relief from progressive tax rates. However, a key feature to the second wave of tax shelters was the role of the tax professionals. Lawyers and accountants in large firm structures viewed the marketing of tax-minimization products as part of their tax adviser role.[60] This resulted from the commoditization of tax practice into the sale of tax-minimization structures that were adapted for corporate and wealthy individual taxpayers and from the pressures arising from changes in the accounting and legal professions.[61]

Structural changes in the practices of professionals in the modern global economy unquestionably have had an effect upon tax professionals' attitudes toward taxpayer compliance with the law. The shift in legal services from relational to transactional work had significant implications for the legal profession. Corporate clients relied upon lawyers to structure deals and to address the tax consequences of deals, and this changed the nature of the advice that lawyers gave to clients. Since the 1980s, the Big Eight accounting firms have been reduced to four due to merger and dissolution.[62] Accounting firms in the 1990s became involved in the delivery of multidisciplinary (MDP) services throughout the world, and such firms sought to offer legal services in the United States.[63] Despite the ABA's rejection of the MDP movement in 1999 and 2000,[64] accounting firms increased services in federal income taxation, the one area of law that

57. *See generally* Tanina Rostain, *Sheltering Lawyers: The Organized Tax Bar and the Tax Shelter Industry*, 23 YALE J. REG. 77 (2006).

58. *See* Lavoie, *supra* note 20, at 838 (noting that the 1990s tax shelters were confidentially marketed as templates to corporate and wealthy taxpayers).

59. *See* Ben Wang, Note, *Supplying the Tax Shelter Industry: Contingent Fee Compensation for Accountants Spur Production*, 76 S. CAL. L. REV. 1237, 1260–62 (2003) (examining the role of accounting firms in the growth of the corporate tax shelter industry and the extent to which the firms' use of contingent fees contributed to that growth).

60. *See* Jared T. Meier, Comment, *Understanding the Statutory Tax Practitioner Privilege: What Is Tax Shelter "Promotion"?*, 78 U. CHI. L. REV. 671 (2011).

61. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 202–06 (discussing the marketing of tax shelters to wealthy individuals and corporations). *See generally* THOMAS D. MORGAN, THE VANISHING AMERICAN LAWYER 23–25 (2010) (discussing the commodification of law practice and its effect on the professionalism ideal).

62. *See generally* Mary W. Sullivan, *The Effect of the Big Eight Accounting Firm Mergers on the Market for Audit Services*, 45 J.L. & ECON. 375 (2002) (discussing whether the Big Eight accounting firm mergers were anticompetitive or efficiency enhancing).

63. *See* Charles W. Wolfram, *The ABA and MDPs: Context, History, and Process*, 84 MINN. L. REV. 1625, 1635–48 (2000) (discussing the role of the then-Big Five accounting firms in the debate over multidisciplinary practice).

64. *See* Dzienkowski & Peroni, *supra* note 35, at 86–87, 88, 104, 106–07.

was available because of federal preemption.[65] This expansion of tax-related services involved the hiring of many tax lawyers and the promise of significant compensation to these professionals.[66] As economic pressures increased upon accounting firms to generate more income, some of them began to offer aggressive tax shelter products to their clients, which provided them with substantial fees based upon tax savings.[67]

As accounting firms moved into direct competition with law firms in the United States and around the world, lawyers were facing significant economic pressures from dramatic changes in the legal profession.[68] Until the mid-2000s, law firms were growing in size despite the economic challenges from the various corporate financial scandals, the housing crisis and related problems in the banking and mortgage loan industries, and the scandals involving derivatives trading and other financial products.[69] Such growth placed significant pressures upon the various departments to produce increased revenue.[70] Changes in client demand for legal services also had a significant impact upon law firm business. As corporations brought more work in house into growing departments of lawyer employees,[71] they pressured law firms to limit fees and costs.[72] These efforts brought outsourcing and a greater involvement of nonlawyers into the delivery of legal services.[73]

These structural changes contributed to the involvement of several accounting and law firm professionals in marketing tax shelters to corporations and wealthy individual clients. The accounting firm KPMG played a central role in the marketing of tax shelters to its clients, generating over $100 million in professional fees and imposing billions of dollars of illegitimate deductions upon the tax system.[74] Several other major accounting firms, including Ernst & Young, Arthur Andersen, PricewaterhouseCoopers, and BDO Seidman, were involved in similar efforts to market tax shelters to their clients.[75] As the accounting firms were marketing products to their clients, law firms similarly became

65. *See id.* at 106–07 (discussing the expansion of tax services by the large accounting firms in the United States and throughout the world).

66. *See* Rostain, *supra* note 57, at 79 (citing Susan Beck, *The Trojan Accountant*, AM. LAW., Nov. 1999, at 18).

67. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 56–57; Rostain, *supra* note 57, at 88–92; Wang, *supra* note 59, at 1260–62.

68. *See* MORGAN, *supra* note 61, at 71–72.

69. *See* Eli Wald, *Foreword: The Great Recession and the Legal Profession*, 78 FORDHAM L. REV. 2051 (2010).

70. *See* TERRENCE E. SIMON, A GUIDE TO ETHICAL PRACTICES IN THE UNITED STATES TAX INDUSTRY 12 (2013) (discussing increased competition leading to the development of marketing practices to increase business).

71. *See* Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 760.

72. *See generally* Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008) (examining factors that contribute to change in Big Law practice).

73. *See* John S. Dzienkowski, *The Future of Big Law: Alternative Legal Service Providers to Corporate Clients*, 82 FORDHAM L. REV. 2995, 3000–01 (2014).

74. *See* ROSTAIN & REGAN, *supra* note 3, at 131.

75. *See id.* at 133–74.

involved in the tax shelter industry. The law firm of Jenkins & Gilchrist through mergers expanded dramatically and played a central role in lawyering these deals.[76] Other law firms, including Brown & Wood, Locke Liddell, Sidley Austin, and Arnold & Porter, were alleged to have been involved in writing opinion letters for these deals.[77] In 2001, the government announced a voluntary disclosure program for taxpayers to avoid penalties.[78] Those efforts, in turn, led to subpoenas and summonses to the accounting and law firms to discover all of the clients who had invested in the ventures.[79] In the end, the government obtained some substantial civil settlements and criminal indictments in these cases.[80] And, as the government sought to collect the taxes from clients, the clients brought malpractice cases against the lawyers and the accountants to recover the amounts paid to the IRS.[81] The important point here is that some leading tax professionals and the firms that employ them were the driving force behind very serious abuses of the tax system.

The two rounds of tax professional involvement in tax shelters arose in the context of advisers adopting an aggressively adversarial posture with respect to the tax system. Of course, professionals sought personal gain through the marketing of tax shelters, but they did so by seeking to take advantage of a tax system that was not prepared to discover these products. These tax professionals took the view that a tax return filing is an adversarial proceeding that requires only a low threshold of a nonfrivolous argument to support a taxpayer's return position. In a self-assessment system, the taxpayer is in a superior position vis-à-vis the government in terms of knowledge about the transaction, control over what to disclose, and realizing the low likelihood of government audit.[82] By commoditizing the tax shelters and selling them as products to many taxpayers, tax professionals multiplied substantially the revenue losses to the government. The involvement of accounting and law firms in the marketing of these products demonstrates that this was more than an isolated incident by a handful of professionals. These acts were done deliberately and purposefully despite the slim authority upon which these transactions were based.

Aside from the structural changes in accounting and law firms, the norms adopted by tax professionals must be examined in the context of the evolution of U.S. culture. Post-World War II patriotism and attitudes toward the government were undermined by the Vietnam War, Watergate, and numerous other scandals. One of the dominant issues in U.S. political discourse over the last sixty-five years has been the appropriate level of

76. *See id.* at 177–216.
77. *See id.* at 218–39.
78. *See id.* at 272–73.
79. *See id.* at 273–77.
80. *See id.* at 295, 309–24, 327–29.
81. *See, e.g.*, Soled, *supra* note 3, at 273–74.
82. *See* Anthony C. Infanti, *Deconstructing the Duty to the Tax System: Unfettering Zealous Advocacy on Behalf of Lesbian and Gay Taxpayers*, 61 TAX LAW. 407, 411 (2008).

federal income taxes.[83] And, the rise of the Tea Party as a wing of the Republican Party has accentuated anti-taxation sentiments in the political debate. Instead of a debate over the merits of specific tax provisions and their policy implications, the rhetoric often has involved attacks on the integrity of the IRS. Those attacks have found their way into congressional hearings. Any misstep by the IRS often leads to significant negative publicity that undermines confidence in the tax system. The negative attitude toward the tax system and its collection agency has an effect upon tax professionals' ethics and taxpayer compliance. Attacks on legitimacy provide professionals and taxpayers with justifications, albeit improper, to take overly aggressive positions on tax returns. These attitudes also tie into the view that the tax return filing is an adversarial proceeding.

The two rounds of tax shelter abuses show us that a significant number of tax professionals do not view overly aggressive tax avoidance as a breach of a taxpayer's social contract with the government and are all too willing to assist their clients in achieving that breach.[84] Taxpayers benefit from the services that government provides to all of society. Taxes help implement our constitutional system of government with the executive, legislative, and judicial branches. Government provides a system of laws and implements processes in which the civil and criminal laws are enforced. Taxes fund the military that is responsible for protecting the country's citizens and residents from enemy forces.[85] Without the government funding provided by taxation, fundamental aspects of government that help facilitate trade—such as market regulation, transportation, energy security, and import and export requirements—would not exist. Taxes fund public welfare systems for retirement, health care, and unemployment. When taxpayers choose to underpay their tax obligations, the revenue shortfall must be made up by other taxpayers. Although in a democratic society disputes of course will exist as to the proper size of government, those disputes should be resolved democratically through the give and take of the political process, not through actions by high-income corporations and individuals to underpay their tax obligations through overly aggressive tax planning. In a sense,

83. *See generally* Andrea Louise Campbell, *Tax Attitudes in the Obama Era*, 67 TAX L. REV. 647 (2014) (discussing the U.S. public's varying attitudes toward federal individual income taxes over the past eighty years).

84. Professor Tanina Rostain's insightful work points out that elite tax lawyers rallied behind the efforts to limit aggressive tax shelters and to punish those professionals who were involved in the second wave of tax shelters. *See* Rostain, *supra* note 57, at 94–113. She opines that although such acts were seemingly against the short-term economic interest of tax professionals, the elite lawyers sought to regain control over professional self-regulation and to reestablish reputational capital that had been lost during this era. *Id.* at 105–06, 108–09, 118–19.

85. *See, e.g.*, Popkin, *Standing*, *supra* note 5, at 168 ("The argument for a special judicial concern with tax equity is that tax obligations are, with the possible exception of military service, the most fundamental duty a member of a polity bears to the political community.").

when taxpayers choose to underpay their tax obligations to the government, they are acting in an undemocratic manner.[86]

For corporate taxpayers, compliance with tax laws raises both a fundamental aspect of corporate social responsibility[87] and an aspect of fairness in competition. Corporations who adopt overly aggressive positions to minimize taxes can be viewed as not contributing their fair share of paying the costs of government. This is especially true because government provides corporate actors with significant benefits, such as limited liability and support for the public equity markets, which allow corporations to raise large amounts of capital from unrelated investors. In recent years, corporations have sought to embrace the concepts of the good corporate citizen and social responsibility. Such statements appear in annual reports, appear as part of advertising campaigns, and are made in the context of corporate accidents and other mass torts and environmental issues.[88] Corporate social responsibility often has focused upon saving the environment or providing workers with fair labor conditions, but corporations almost never boast about paying their fair share of taxes. If a corporation seeks to act in a socially responsible manner, such actions should lead it to reject the adoption of overly aggressive tax positions. As persuasively argued by some commentators, corporate social responsibility should include good faith compliance with the tax laws.[89] Stated differently, a corporation's participation in aggressive tax planning is inconsistent with claims of corporate social responsibility. In addition, corporations that significantly understate their tax liability through overly aggressive tax positions may obtain a competitive advantage vis-à-vis their competitors who do not engage in such behavior because they may be able to charge lower prices for their products or services or, alternatively, realize larger after-tax profits.

In the United States, political attacks on the tax system[90] and the IRS[91]—the administrative agency in charge of collecting taxes—have undercut

86. *See, e.g.*, Harari, Sitbon & Donyets-Kedar, *supra* note 8, at 17; *cf.* Popkin, *Standing*, *supra* note 5, at 168.

87. *See* William E. Shafer & Richard S. Simmons, *Social Responsibility, Machiavellianism, and Tax Avoidance*, 21 ACCT. AUDITING & ACCOUNTABILITY J. 695 (2008).

88. *See* Douglas M. Branson, *Corporate Social Responsibility Redux*, 76 TUL. L. REV. 1207, 1222 (2002) (citing Christopher Cooper, *Kyoto Pact Offers Opportunities to Crow*, WALL STREET J., Nov. 1, 2001, at A14, which discusses Royal Dutch Shell's and BP-Amoco's disclosures of their environmental and other social responsibility efforts in their annual reports); Miriam A. Cherry & Judd F. Sneirson, *Beyond Profit: Rethinking Corporate Social Responsibility and Greenwashing After the BP Oil Disaster*, 85 TUL. L. REV. 983, 999–1009 (2011) (discussing BP's advertising campaign after the Deepwater Horizon oil spill).

89. *See, e.g.*, Harari, Sitbon & Donyets-Kedar, *supra* note 8, at 17–21 (arguing that aggressive tax planning is incompatible with corporate social responsibility).

90. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 13–16 (describing the anti-tax crusade).

91. *See, e.g.*, Ordower, *supra* note 1, at 119–20 (describing the "demonization" of the IRS as having become "a commonplace rhetorical device for members of Congress"). Political attacks on the IRS may have a chilling effect on enforcement by the IRS. *See* Lily

taxpayer respect for the tax system. Tax professionals engaging in abusive and highly publicized tax-avoidance schemes has further eroded taxpayer respect for the tax system. These actions in turn have frayed the social norm supporting the payment of taxes as part of one's obligations as a member of society, a social norm that is crucial to sustaining a self-assessment tax system in a democratic society. Lack of belief in social and corporate responsibility may result in more participation by tax professionals in overly aggressive tax planning.[92] Although such cultural attitudes are difficult to change through any type of regulation, particularly in a country with broad First Amendment protections, it is vital that we try to do something to increase the level of tax practitioner ethics.[93]

It is important to recognize that cultural differences among different societies may affect attitudes by tax professionals and taxpayers regarding tax ethics and the propriety of aggressive tax planning.[94] Thus, in some other countries, the attitudes of citizens toward the government and its revenue collection system are consistent with respect for, and recognition of, the obligation to pay taxes as an important societal obligation.[95] Because other countries with collectivistic tendencies may have broader social programs, and such programs are necessarily funded by revenue

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Kahng, *The IRS Tea Party Controversy and Administrative Discretion*, *in* ETHICAL DUTIES TO THE TAX SYSTEM: A HANDBOOK 123, 133 (Scott A. Schumacher & Michael Hatfield eds., 2015). Moreover, in our view, tax practitioners who engage in unsubstantiated attacks on the IRS are acting in an unprofessional manner and harming tax compliance by unfairly undercutting respect for the federal tax collection agency.

92. For example, one study of Hong Kong tax professionals showed that a lack of belief by such professionals in social and corporate responsibility was likely to facilitate overly aggressive corporate tax planning. *See* Shafer & Simmons, *supra* note 87, at 698 (concluding that "attitudes toward corporate ethics and social responsibility will have a significant impact on the ethical decision-making processes of tax professionals"); *cf.* Dipankar Ghosh & Terry L. Crain, *Ethical Standards, Attitudes Toward Risk, and Intentional Noncompliance: An Experimental Investigation*, 14 J. BUS. ETHICS 353, 358–59 (1995) (study finding that taxpayers with lower ethical standards are more likely to engage in intentional tax noncompliance). Research in the business ethics area supports the theory that attitudes toward the importance of corporate ethics and social responsibility have an important effect on ethical decision-making processes. *See, e.g.*, John M. Etheredge, *The Perceived Role of Ethics and Social Responsibility: An Alternative Scale Structure*, 18 J. BUS. ETHICS 51, 60–61 (1999); Shafer & Simmons, *supra* note 87, at 697–98; Anusorn Singhapakdi, Karan Karande, C.P. Rao & Scott J. Vitell, *How Important Are Ethics and Social Responsibility: A Multinational Study of Marketing Professionals*, 35 EUROPEAN J. MARKETING 133, 149–50 (2001); Anusorn Singhapakdi, Scott J. Vitell, Kumar C. Rallapalli & Kenneth L. Kraft, *The Perceived Role of Ethics and Social Responsibility: A Scale of Development*, 15 J. BUS. ETHICS 1131, 1137–38 (1996).

93. *Cf.* Dennis J. Ventry Jr., *Americans Don't Hate Taxes, They Hate* Paying *Taxes*, 44 U.B.C. L. REV. 835, 842–43 (2011) (arguing for increased "tax consciousness" to inform citizens about the role of government revenue in society).

94. *See generally* Alfonso Morales, *Income Tax Compliance and Alternative Views of Ethics and Human Nature*, 1 J. ACCT. ETHICS & PUB. POL'Y 380, 382 (1998) (arguing that attitudes toward tax compliance and taxation "are rarely homogenous").

95. For example, in Japan, a comparatively high level of tax compliance can be explained in part by the general respect that the Japanese have for their legal system. *See, e.g.*, Jin Kwon Hyun, Tax Compliances in Korea and Japan: Why Are They Different (Feb. 2005) (unpublished draft manuscript prepared for seminar held by the Policy Research Institute, Ministry of Finance, Japan).

collection, taxpayers may view themselves as having a greater stake in the revenue collection system. Moreover, in such countries, tax professionals may be less likely to engage in aggressive tax planning.[96] On the other hand, despite the cultural influences, the United States has relatively high (although declining) tax compliance as compared to most other countries, because of its strong withholding and tax information reporting requirements and its relatively effective tax collection agency.[97] In addition, the studies are divided on whether tax professionals in the United States are more or less likely to engage in ethical decision making and, hence, are more or less likely to engage in aggressive tax planning.[98] A general program of education directed at the American public and professionals could stress the obligations of residents to pay taxes and the benefits that residents enjoy from the publicly supported system of government.

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96. *Cf., e.g.*, Aileen Smith & Evelyn C. Hume, *Linking Culture and Ethics: A Comparison of Accountants' Ethical Belief Systems in the Individualism/Collectivism and Power Distance Contexts*, 62 J. BUS. ETHICS 209, 217 (2005) (concluding that accountants in individualistic societies, such as the United States, are "more likely to adhere to personal principles even if the results are detrimental to the organization"; whereas accountants in collectivistic societies, such as Mexico and Venezuela, "are more likely to subordinate individual values for those that benefit their organization"). *See generally* Donna D. Bobek, Robin W. Roberts & John T. Sweeney, *The Social Norms of Tax Compliance: Evidence from Australia, Singapore, and the United States*, 74 J. BUS. ETHICS 49, 50 (2007) ("There is evidence in the U.S. that public opinion toward cheating is becoming more lax."); Jeffrey R. Cohen, Laurie W. Pant & David J. Sharp, *Cultural and Socioeconomic Constraints on International Codes of Ethics: Lessons from Accounting*, 11 J. BUS. ETHICS 687 (1992) (discussing the effects of individualism versus collectivism on ethical decision making); Jana L. Craft, *A Review of the Empirical Ethical Decision-Making Literature: 2004–2011*, 117 J. BUS. ETHICS 221 (2013); Mark A. Davis, Nancy Brown Johnson & Douglas G. Ohmer, *Issue-Contingent Effects on Ethical Decision Making: A Cross-Cultural Comparison*, 17 J. BUS. ETHICS 373 (1998); Michael J. O'Fallon & Kenneth D. Butterfield, *A Review of the Empirical Ethical Decision-Making Literature: 1996–2003*, 59 J. BUS. ETHICS 375 (2005) (concluding that nationality does appear to influence ethical decision making, but it is unclear to what extent).

97. *See* Michael Hatfield, *Tax Lawyers, Tax Defiance, and the Ethics of Casual Conversation*, 10 FLA. TAX REV. 841, 845 (2011) (stating that the United States has "one of the highest voluntary compliance rates in the world"); *see also* Leandra Lederman, *The Interplay Between Norms and Enforcement in Tax Compliance*, 64 OHIO ST. L.J. 1453, 1475–77 (2003) (discussing possible societal norm of tax compliance in the United States); Leandra Lederman, *Statutory Speed Bumps: The Roles Third Parties Play in Tax Compliance*, 60 STAN. L. REV. 695, 697–98 (2007) (discussing effectiveness of withholding and information reporting in increasing tax compliance in the United States); Leandra Lederman, *Tax Compliance and the Reformed IRS*, 51 U. KAN. L. REV. 971, 973 (2003) (discussing the lack of causation between increased penalties and increased voluntary compliance). However, seriously inadequate budget resources and never-ending attacks by politicians and the news media have demoralized the IRS and undermined its effectiveness as a revenue collection agency. *See, e.g.*, Bruce Bartlett, *Slashing the IRS Budget—Penny-Wise and Pound-Foolish*, FISCAL TIMES (Jan. 17, 2014), http://www.thefiscaltimes.com/Columns/2014/01/17/Slashing-IRS-Budget-Penny-Wise-and-Pound-Foolish (opining that cuts to the IRS budget are undermining tax compliance) [https://perma.cc/8LWY-HQNC].

98. *See, e.g.*, O'Fallon & Butterfield, *supra* note 96, at 387–91; *cf.* Ordower, *supra* note 1, at 120–24 (discussing the culture of tax avoidance in the United States and Europe, and noting that such culture has spread to lower- and middle-income taxpayers).

A significant factor in tax professional conduct involves the way these highly educated individuals embrace a professional identity that ties their obligations to the integrity of the tax system.[99] For lawyers, this principle is referred to as "lawyer professionalism" and often includes notions of what it means to be an officer of the court and a professional acting within an adversarial system.[100] When lawyers began to engage in "Rambo litigation" tactics, bar authorities and courts turned to civility codes based upon notions of professionalism.[101] For a tax professional advising a client, the question becomes whether the individual is a "consultant or information specialist[]"[102] or a member of a profession that has a higher calling or obligation to the system, which, in turn, places constraints upon the individual's conduct on behalf of the client. For a tax professional, the participation in the client's tax reporting process ties the individual professional to the civic fiscal obligations of a resident of the United States.[103] Moreover, the professional's representation of the taxpayer in this revenue collection process involves both parties in the civic virtues of a self-assessment system.[104] As mentioned above, it is difficult to know with any degree of certainty whether tax professionals are simply agents of their clients or the drivers of aggressive noncompliant behavior with respect to payment of taxes. Regardless of the answer to this important question, the regulation of tax professionals has the potential to change significantly the behavior of their clients regarding the payment of taxes.

III. PROPOSALS FOR REFORMING THE REGULATION OF TAX ADVISERS

When a tax professional gives a client advice to take an aggressive tax position or when a tax professional lures a client into a tax-motivated transaction, significant costs are imposed upon the tax system.[105] The first

99. *See* Hatfield, *supra* note 97, at 856–57.

100. *See* ABA, COMM'N ON PROFESSIONALISM, IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM (1986).

101. *See* Amy R. Mashburn, *Professionalism As Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 661–62 (1994).

102. Hatfield, *supra* note 97, at 856 (citing Rostain, *supra* note 57, at 120 (using the terms "mere consultant or legal information specialists")).

103. *Cf.* Lawrence Zelenak, *Justice Holmes, Ralph Kramden, and the Civic Virtues of a Tax Return Filing Requirement*, 61 TAX L. REV. 53, 59–60 (2007) (discussing the tax return filing process as serving an important ceremonial function of expressing fiscal citizenship).

104. *See generally* Ajay K. Mehrotra, *Reviving Fiscal Citizenship*, 113 MICH. L. REV. 943 (2015) (reviewing LAWRENCE ZELENAK, LEARNING TO LOVE FORM 1040: TWO CHEERS FOR THE RETURN-BASED MASS INCOME TAX (2013)). *Cf.* ANTHONY T. KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 109 (1993) (explaining that professionalism arises from the notions of the lawyer-statesman).

105. *See* Weisbach, *supra* note 1, at 223. Professor Weisbach argues that

> no moral or philosophical basis for the right to tax plan has yet been articulated. There is no constitutional right. There is not even an explicit statutory right. There is, in short, no basis for a right to tax plan other than statements made up out of thin air by a few judges using questionable theories of statutory interpretation.

Id. at 221. He goes on to opine that

and most basic cost involves the lost revenue to the government. To the extent that some taxpayers and tax professionals routinely take aggressive positions, the revenue burden is shifted to other taxpayers, thus undermining the fairness of distribution of the tax burden. Stated differently, these taxpayers and their tax advisers are imposing external costs on other taxpayers in the form of higher taxes, which they do not take into account and which are not reflected in the price system.[106] A second cost of undisclosed aggressive tax positions involves exploitation of gaps and loopholes in the law. If the gaps are not brought to the IRS's attention, the IRS cannot accurately measure the cost of the gap in terms of lost revenue and cannot take action to close the gap when it is contrary to the intent of the drafters of the statutory or regulatory provisions. Moreover, the nondisclosed position prevents the IRS from asserting properly its legal position in a public way so as to discourage others from adopting similar positions. A third cost is the undermining of taxpayer morale from the inconsistent application of the tax law resulting from aggressive tax planning.[107] Inconsistent application of the tax law by taxpayers and tax advisers leads to inconsistent tax liabilities by taxpayers in similar economic circumstances. A properly disclosed and challenged position that leads to a pro-taxpayer decision clarifies the tax law and ensures that similarly situated taxpayers will receive similar treatment.

In this Article, we advance several proposals as part of our view that tax professionals owe a duty to the tax system. The current ethical and regulatory environment is insufficient to prevent tax professionals from undermining the integrity of the tax system by advising clients to adopt aggressive return positions that are not likely to prevail. The view that a tax return is an adversarial proceeding is erroneous and is inconsistent with developments in other areas of federally regulated conduct. Filings with banking and securities regulators are not viewed as adversarial proceedings. Filings with the U.S. Patent Office require a duty of candor. Of course, when tax lawyers represent clients in litigation with the government, their duty of loyalty to the client in an adversarial proceeding involves the same level of zealous lawyering as required of other lawyers in litigation.

A. The Failure of Self-Regulation to Limit Tax Professionals' Misbehavior

The ABA has often resisted efforts to develop ethics rules for specialized areas of practice, including tax law.[108] It firmly embraces the notion that a

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> all tax planning, not just planning associated with traditional notions of shelters, produces nothing of value. Nothing is gained by finding new ways to turn ordinary income into capital gain, to push a gain offshore, or to generate losses.

Id. at 222. He concludes that planning "is almost always positively bad for society." *Id.*

106. *Id.* at 223.

107. *See, e.g.*, Ordower, *supra* note 1, at 111–20.

108. *See, e.g.*, Marvin K. Collie & Thomas P. Marinis, Jr., *Ethical Considerations on Discovery of Error in Tax Returns*, 22 TAX LAW. 455, 460–61 (1969); Durst, *supra* note 5, at 1037–38; Galler, *supra* note 5, at 694.

general model code that includes rules for litigation and nonlitigation lawyers can handle the myriad areas of practice by lawyers. One could view the fact that the ABA has issued three ethics opinions on tax practice over the years as unusual attention devoted to the area of tax practice. Some of the attention devoted to the tax practitioner has come from the fact that elite lawyers who were leaders in the profession engaged in the debate over tax professional standards.[109] The ABA Section of Taxation sought to play an important role in the debate over appropriate ethical standards[110] and represented the ABA's efforts to assert self-regulation over lawyers practicing tax law. One also must acknowledge that the ABA's efforts to address tax practice also could be motivated by anticompetitive concerns about accountants and other qualified professionals who, through federal preemption, have been allowed to practice in the tax law area.[111]

As discussed above, the ABA adopted the "reasonable basis" standard in Opinion 314 and the "realistic possibility of success" standard in Opinion 352.[112] Both opinions were grounded in the explicit assumption that the filing of a tax return is an adversarial proceeding, and therefore the ethical rules of advocacy apply. The ABA could have adopted a different view: that filing a tax return is a transactional representation that creates certain obligations for the tax professional. Trying to fit the filing of a return into a specific category is difficult because this representation does not clearly fit within advocacy or nonlitigation. A taxpayer is legally obligated to self-report income and expenses to the government according to the law. She is not obligated to pay one penny more than what the law requires, but the self-reporting system relies to a great extent upon honesty and forthrightness. Although our self-assessment system is accompanied by an extensive withholding and information reporting system, tax professionals play a crucial role in taxpayer self-assessment.

To equate the filing of a return with the filing of a brief in a tribunal is flawed on many grounds. Litigation presumes an adversarial proceeding before a neutral and impartial judge. Advocacy is accompanied by an extensive system of discovery and cross-examination.[113] Positions adopted by opposing advocates are contested and presented to judges, and sometimes juries, in an effort to arrive at a reasoned decision. Taxpayers file returns in response to tax form queries about income, expenses, transactions, and business relationships. Although taxpayers may assert different characterizations of the facts or the law, the government cannot easily determine those positions unless they are disclosed or uncovered during an audit. At that time, one could view the positions of the taxpayer

109. *See, e.g.*, Caplin, *supra* note 5; Corneel, *supra* note 5; Paul, *supra* note 5.

110. *See* Paul J. Sax, *The Section's Role in Ethics and the Standards of Tax Practice*, 68 TAX LAW. 59 (2014).

111. *See generally* Dzienkowski, *supra* note 29, at 60; Dzienkowski & Peroni, *supra* note 35, at 93–94.

112. *See supra* notes 11–13 and accompanying text.

113. *See generally* Prescott, *supra* note 5 (challenging the adversarial characterization of tax return process).

and government as adversarial and more similar to a dispute involving advocacy.

Once the ABA adopted the view that a tax professional advising a client in a tax return involves an adversarial proceeding, the standards of reasonableness or realistic possibility of success became unworkable in the American tax system. Those standards allowed lawyers to advise clients in the two waves of tax shelters and to discuss the audit lottery with their clients. Ultimately, the legal profession's attempts to define the standards and regulate tax lawyers have failed.[114] State bar disciplinary actions have played a relatively small role in regulating the conduct of tax practitioners.[115] Thus, Congress was forced to enact statutory provisions, and the Treasury and the IRS issued regulations, to help define appropriate conduct in advising taxpayers in our self-assessment system. The two waves of tax shelter abuses pushed the Treasury and the IRS to act swiftly and with resolve to address professionals who were advising clients to adopt very aggressive tax positions that were not disclosed in filed tax returns and who were issuing tax opinions based on unreasonable factual assumptions.

We believe that the primary source of regulation for tax professionals should lie in Circular 230, or a similar pronouncement, and in the penalty provisions directed at professionals in Code provisions such as section 6694. A comprehensive regulatory scheme administered by the IRS for those who practice law or prepare tax returns in the federal tax area is the appropriate mechanism for enforcing federal tax ethics. The federal tax system is a highly specialized national system, and the ethics rules that apply to federal tax practitioners should be uniform across the states and should be developed and administered by the federal administrative agency in charge of the tax system: the IRS. This is an area of professional practice where the federalization of ethics rules is quite appropriate.[116] As discussed below, state bars still would have a supplementary role to play in the ethical rule areas that are best regulated at the state level.

B. The Need for Congressional Clarification of the Treasury and the IRS's Authority to Regulate Tax Practitioners Expansively

As discussed above, self-regulation by national and state bars and accounting organizations has not proven sufficient to regulate effectively the professional conduct of tax advisers. Thus, in addition to such self-

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114. Professor Holmes argues that such tax enforcement system failures arise because of "low audit and detection rates, combined with inadequate penalties, insufficient reputational constraints, and enormous information asymmetries." Rachelle Y. Holmes, *The Tax Lawyer As Gatekeeper*, 49 LOUISVILLE L. REV. 185, 193 (2010).

115. *See, e.g.*, Daniel R. Coquillette & Judith A. McMorrow, *Zacharias's Prophecy: The Federalization of Legal Ethics Through Legislative, Court, and Agency Regulation*, 48 SAN DIEGO L. REV. 123, 139 (2011) ("In this world of tax conduct, there is relatively little discussion of bar *disciplinary* actions.").

116. For the seminal article on the federalization of legal ethics, see Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994). For an updated view on this topic, see Coquillette & McMorrow, *supra* note 115.

regulation, federal regulation of tax professionals by the Treasury and the IRS is crucial to improving the professionalism of tax advisers. Circular 230 is an appropriate vehicle for such regulation, particularly if it is amended along the lines suggested in this Article. However, recent court decisions invalidating the attempted regulation of "tax return preparers" under Circular 230 have cast into substantial question the validity of this system of regulation.[117] Although commentators disagree about the effect of these court decisions on the continuing significance of Circular 230 as applied to tax lawyers and accountants,[118] these judicial opinions raise serious doubt about the scope of the Treasury's and the IRS's authority to regulate tax professionals who advise taxpayers with respect to tax planning matters that result in a return position.

The Treasury and the IRS, as well as some leading tax professionals and commentators, have believed that the government's authority to regulate those who practice before it includes the authority to regulate those who advise clients with respect to tax returns filed with the IRS, as well as those who prepare such returns.[119] We are of this view and believe that it is possible that courts eventually will adopt this view.[120] However, because the three cases decided to date have taken a narrow view of the government's regulatory authority under Circular 230, we believe that it is essential that Congress amend the relevant statutory provision[121] and make it clear that the Treasury and the IRS have the authority to regulate tax return preparers under Circular 230.[122] Without congressional clarification,

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117. *See* Loving v. IRS, 742 F.3d 1013 (D.C. Cir. 2014) (holding that 31 U.S.C. § 330(a) did not give the Treasury and the IRS authority to regulate tax return preparers under Circular 230); Ridgely v. Lew, 55 F. Supp. 3d 89 (D.D.C. 2014) (holding that 31 U.S.C. § 330(a) did not give the Treasury and the IRS authority to regulate under Circular 230 contingent fees charged by a certified public accountant for preparing and filing ordinary refund claims); *see also* Sexton v. Hawkins, No. 2:13-cv-00893, 2014 WL 5503200 (D. Nev. Oct. 30, 2014) (refusing to dismiss plaintiff's suit alleging that the IRS lacks authority to regulate tax return preparers).

118. *See, e.g.*, Dennis B. Drapkin, Loving *and* Ridgely*: Implications for Practitioners*, 148 TAX NOTES 319 (2015) (concluding that these court decisions, if correctly decided, greatly narrow the scope of IRS authority under Circular 230, but that Circular 230 may still have continuing significance for tax practitioners); Amy S. Elliott, *Hawkins Asserts Her Authority to Regulate Lawyers*, 147 TAX NOTES 516 (2015) (noting disagreement between the former head of the Treasury's Office of Professional Responsibility and some leading practitioners about the effect of these decisions on the application of Circular 230 to tax lawyers and accountants).

119. *See, e.g.*, *Loving*, 742 F.3d at 1016–22 (rejecting the government's argument).

120. We believe that one can argue persuasively that the government's statutory authority to administer the tax system carries with it an inherent authority to regulate professionals who practice before it, including tax return preparers. Further development of this argument is beyond the scope of this Article.

121. 31 U.S.C. § 330(a)(1) (2012) (authorizing the Treasury to "regulate the practice of representatives of persons before the Department of the Treasury").

122. Many returns are prepared by unregulated tax return preparers. *See, e.g.*, SIMON, *supra* note 70, at 52 (estimating that 54 percent of preparers are unregulated). Therefore, any effective system of federal regulation that aims to raise the accuracy and legitimacy of taxpayer returns filed by return preparers must apply to them. Among other things, not including such preparers within the regulatory system creates an unfair competitive advantage for them and undermines the regulatory scheme by creating an incentive for

the uncertainty that these decisions engendered will have a chilling effect on IRS application of Circular 230 and will undermine the effectiveness of this system of regulation. As we discuss below, the IRS needs to be more assertive and expansive in its application of Circular 230 to tax practitioners, not less so.

C. Administering a Consistent and Uniform Set of Higher Standards for Tax Professionals

As discussed above, under the current rules in Circular 230 and the preparer penalty rules in section 6694, in non-tax shelter situations, tax professionals' advice to clients must be based upon substantial authority if the clients do not plan to disclose the position in the tax return.[123] If the taxpayers plan to disclose the position, the tax professionals can ground their advice on the "reasonable basis" standard.[124] Special rules apply for tax shelters: tax professionals' positions must be based upon a "more likely than not" standard, regardless of whether the transaction is disclosed in the tax return.[125]

We believe that the "more likely than not" standard should continue to apply to tax professionals with respect to transactions meeting the Treasury's definition of a tax shelter, regardless of whether disclosed in a return. With respect to non-tax shelter return positions, we believe that all tax advice given to taxpayers with respect to the filing of a tax return should satisfy a "more likely than not" standard if the taxpayer does not plan to disclose the position to the IRS.[126] If the position will be disclosed on the tax return, then the tax professional should be able to base the advice upon the "reasonable basis" standard.[127] When a taxpayer completes and files a tax return with the assistance of a professional, the taxpayer has the right to make a choice whether to take a position that is within the mainstream interpretation of the tax law and to rely upon such an undisclosed position in arriving at the taxes owed to the Treasury. However, if a taxpayer seeks to adopt a more aggressive position, the taxpayer should be able to do so

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clients to use them instead of regulated tax advisers. Moreover, the lack of regulation of such preparers leaves client-taxpayers open to exploitation. *Id.* at 52–53.

123. *See* CIRCULAR 230, *supra* note 15, § 10.34(a)(1); I.R.C. § 6694(a) (2012).

124. *See* I.R.C. § 6694(a); CIRCULAR 230, *supra* note 15, § 10.34(a)(1).

125. *See* CIRCULAR 230, *supra* note 15, § 10.34(a)(1); I.R.C. § 6694(a).

126. We acknowledge that in a world of globalized professional practices involving advice given in connection with cross-border transactions, our proposal arguably could create a competitive disadvantage for U.S. tax professionals in connection with tax advice given with respect to the U.S. tax consequences of cross-border transactions because foreign professionals not admitted to practice before the IRS would not be subject to these requirements. However, if, as we strongly urge, the standard for the substantial understatement penalty is also raised in accordance with our proposal, then taxpayers subject to U.S. tax will pressure their advisers to meet the elevated standard in order to provide them with protection from the section 6662 penalty. Moreover, the Treasury and the IRS should work with their counterparts in other countries, through international organizations such as the Organisation for Economic Co-Operation and Development, to elevate the standards applicable to all tax advisers.

127. We would define "reasonable basis" as similar to the definition of "realistic possibility of success," rather than a lower-level, merely nonfrivolous standard.

with the caveat that the position is subject to disclosure to and possibly scrutiny by the IRS. Of course, once a tax return is subject to an audit, administrative appeal, or litigation, the tax professional's advice and positions for a client should be subject to the normal ethical rules that apply in the litigation context, rather than these proposed standards.

We believe that the standard in section 6662 for avoiding the substantial understatement penalty for undisclosed taxpayer return positions also should be raised to the "more likely than not" standard that we propose should apply to tax practitioners. Increasing the standard for tax practitioners in Circular 230 and the preparer penalty in section 6694 while retaining the substantial authority standard in section 6662 creates a conflict of interest between the tax practitioner and client, as well as undesirable tensions between the practitioner and client.

Some have argued that any standard higher than "reasonable basis" for the tax professional is too high and enlists the practitioner as a "quasi-IRS agent."[128] This argument was made in the context of proposed increases in the tax practitioner standard and begins with the assumption that professionals have no control over what positions their clients eventually adopt in returns. Moreover, if the client's return is challenged, the tax professional's advice comes into issue. Opponents argue that when taxpayers' positions are subject to a substantial understatement penalty, and their professionals are subject to a disciplinary penalty, a serious conflict arises that threatens to undermine the client-practitioner relationship and client confidentiality.[129]

We acknowledge that there is a legitimate concern that raising the standard to "more likely than not" for tax professionals and taxpayers may create a tax practitioner-client conflict and may give the IRS improper leverage over the professional, the taxpayer, or both. To deal with these concerns, the IRS should dispose of taxpayer liability and penalties before it undertakes scrutiny of the tax professional's conduct.[130] By completing the taxpayer's case first, the government largely avoids placing the taxpayer's and professional's interests in conflict.

Some have argued that requiring increased disclosure of questionable return positions presents other practical problems. It is argued that requiring disclosure of all positions that do not meet the "more likely than not" standard would inundate the IRS with so much data that it could not efficiently and effectively review the disclosure forms.[131] To deal with this

128. Ventry & Borden, *supra* note 6, at 163.

129. *Id*. at 163–64; *see also* Ordower, *supra* note 1, at 93. These conflicts concerns are reduced if the standards applicable to tax practitioners and to taxpayers are both elevated to the same higher "more likely than not" standard.

130. *See* Ventry & Borden, *supra* note 6, at 178. Congress has made it clear that the IRS must instruct its employees that they cannot threaten to use preparer discipline or preparer penalties during a taxpayer examination or Appeals conference. *See* H.R. REP. NO. 101-247, at 1406 (1989); H.R. CONF. REP. 101-386, at 662–63 (1989).

131. *See* Ventry & Borden, *supra* note 6, at 178; *see also* N.Y. STATE BAR ASS'N TAX SEC., REPORT ON THE DEFINITION OF "TAX RETURN PREPARER" AND OTHER ISSUES UNDER CODE SECTIONS 6694, 6695, and 7701(a)(36), at 2 (2007).

over-disclosure problem, the IRS should design a disclosure form that includes questions that would allow it to assess more easily the impact of the taxpayer's uncertain or questionable return position on the tax liability and to determine the precise nature of the uncertain position.[132] The IRS could then establish a policy of reviewing only those positions that were significant to the government from a revenue loss perspective. The nature of the position disclosed also could give the IRS significant information about areas of the law that need legislative change or further administrative guidance. New transactions may present challenges to taxpayers who apply established legal concepts to determine tax liability. A properly designed disclosure form combined with modern data analytics could provide the government with valuable information about interpretative problems and statutory glitches in these new areas of the law. Modern computer software and systems design should make it easier for the IRS to process and analyze these disclosure forms in an efficient way.

Commentators also argue that increased disclosure requirements will increase taxpayers' costs of compliance with the tax laws and will financially benefit tax professionals by increasing the work needed to prepare a tax return and by engendering changes in the laws and regulations that complicate the law and thereby produce more work for tax professionals.[133] Under our proposal, we acknowledge that when taxpayers choose to implement strategies with less than a "more likely than not" basis, they will need to absorb the cost of documenting and disclosing the position to the government. We also acknowledge that Congress could adopt substantive law changes increasing the scope of tax withholding and information reporting so that gains from transactions would require payment of withholding taxes to the IRS and taxpayers would need to seek refunds of such withheld amounts through tax returns. Such an approach would require affirmative statements from taxpayers and tax professionals to the IRS regarding the tax positions being taken and could significantly reduce the number of nondisclosed aggressive return positions.[134]

D. Creating a Robust Regulatory Structure for Regulating Tax Professionals

The Treasury and the IRS have made significant strides in creating a structure for regulation of tax professionals under the guidance of Circular 230. However, this structure should be continuously reevaluated to

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132. *Cf.* Raskolnikov, *supra* note 1, at 625 n.223 (discussing the appropriate nature of disclosure in the context of the author's innovative penalty proposal). If the return position would have a significant effect on the taxpayer's tax liability, the disclosure form could require that the taxpayer inform the government of exactly what she thinks the *uncertainty* is, the material issues involved in the uncertainty, and the pro and con arguments on each such issue. *Cf. id.*

133. *See* David A. Weisbach, *The Failure of Disclosure As an Approach to Shelters*, 54 SMU L. REV. 73, 78–79 (2001); Weisbach, *supra* note 1, at 226–28.

134. As noted *supra* note 7, any detailed discussion of increased withholding and information reporting obligations as a solution to the tax compliance problem is beyond the scope of this Article.

increase its effectiveness in achieving the regulatory objectives. As discussed below, this Article argues for a reexamination of the role of the Office of Professional Responsibility (OPR or "the Office"), an expansion of the regulation of supervisory professionals and firms, and a more systematic and effective collaboration of the federal regulatory structure with state bar and accounting disciplinary systems.

1. Reexamining the Role of the Office of Professional Responsibility

The Treasury has sought to regulate standards of tax practice since 1922 through a series of pronouncements that were codified into Circular 230 in 1966. This development of codes of tax practice mirrors what occurred in the ABA with the development and evolution of general ethics rules from the original 1906 Canons of Professional Ethics to the more explicit codification in the 1969 Model Code. In theory, Circular 230 was formerly enforced by the Office of the Director of Practice, a small office with limited resources.

In 2004, the Treasury reorganized the enforcement function of tax professionals into a newly formed OPR, with a substantially increased budget and staff. The OPR was given the responsibility for receiving referrals and investigating possible misconduct. The Office was based upon other federal practitioner regulatory systems in securities and banking, and it relied upon a more general cooperation within the entire Treasury.[135]

Under the expanded jurisdiction that it attained under the American Jobs Creation Act of 2004,[136] the OPR clearly viewed its role as an active regulatory agency over tax professionals' conduct in representing taxpayers.[137] It has a similar design to state disciplinary authorities in that it receives referrals from others, including IRS agents, taxpayers, and other tax professionals. An investigating attorney is responsible for making a determination of whether the Office should pursue discipline against a tax professional. Once a decision is made to go forward, formal or informal notice is given to the professional to initiate a proceeding to determine whether discipline will ensue. Unquestionably, the OPR represents a significant improvement in federal regulation of tax professionals' behavior. However, much more work needs to be done to improve its effectiveness.

The OPR began its work by relying upon many basic provisions in Circular 230 that required practitioners to verify information provided to the IRS. These basic provisions were extremely useful in disciplining tax professionals who made false statements or misrepresentations in filings.

135. *See* Kevin E. Thorn, *A Rare Look Inside the IRS's Office of Professional Responsibility*, J. TAX PRAC. & PROC., Apr./May 2006, at 37, 37.

136. *See* Pub. L. No. 108-357, § 822 (2004).

137. *See* Thorn, *supra* note 135. *See generally* Kip Dellinger, *The IRS As Regulator of Federal Tax Practice: Circular 230*, 90 TAXES, Apr. 2012, at 21; Burgess J.W. Raby & William L. Raby, *Confidence Levels, Circular 230, and Practitioner Penalties*, 106 TAX NOTES 187 (2005).

Several waves of Treasury amendments to Circular 230 changed the nature of the OPR's power. In 2004, the OPR was given authority to issue monetary sanctions against entities such as law firms and accounting firms.

Although the promise of effective regulation is evident from the structure of the OPR, the bulk of the cases processed by the Office seem to address bright-line, fundamental wrongs committed by small practitioners as opposed to sanctioning tax professionals in large law or accounting firms who fail to comply with the Circular 230 rules. Some of the shortcomings in this system of regulation are attributable to the reduced funding for the IRS in recent years, which affects all parts of the IRS, including the OPR.[138] Other problems arise from the difficulty of discovering a tax professional's noncompliant behavior in a complaint-based system.

Very few of the cases reported address the advice provided by tax practitioners to client taxpayers with respect to questionable return positions and whether such advice meets the Circular 230 standards. Yet, tax professionals' advice to taxpayers with respect to their tax returns is a fundamental aspect of the self-assessment system. The OPR needs to take seriously its responsibility to examine tax practitioners' behavior in this area.

Another area in need of attention in Circular 230 is the provisions that relate to ethics training of tax practitioners. If we want tax professionals to take ethical considerations more seriously when advising clients regarding their tax obligations and we want to foster improvement in tax professionals' ethical behavior, we need increased emphasis on ethics in the training of tax professionals.[139] There are some studies showing that tax professionals "who discount the importance of ethical and socially responsible conduct are more likely to facilitate aggressive corporate tax avoidance schemes."[140] Thus, requiring tax professionals to undertake properly designed professional ethics training to sensitize them to their ethical obligations as tax professionals and to socially responsible behavior should have some effect in reducing their willingness to engage in overly aggressive tax-avoidance transactions.[141] To be most effective, this training should use specific tax-related case studies that present realistic ethical dilemmas in the work setting.[142] This ethics training should be designed to

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138. IRS ADVISORY COUNCIL, GENERAL REPORT 8–10 (2015), https://www.irs.gov/pub/irs-utl/2015-IRSAC-Full-Report (discussing a 17 percent reduction in IRS funding since fiscal year 2010 and its detrimental effect on the IRS's enforcement and service functions) [https://perma.cc/7J99-VFHF].

139. *See* SIMON, *supra* note 70, at 48–49 (stating that "ethics training is likely to help tax practitioners avoid client pressure to take unwarranted positions").

140. Shafer & Simmons, *supra* note 87, at 710 (studying Hong Kong tax professionals).

141. *See id.* at 711; *see also* Doyle, Hughes & Summers, *supra* note 24, at 335.

142. *See* Doyle, Hughes & Summers, *supra* note 24, at 335 (stating that ethical training for tax practitioners should take into account their low level of moral reasoning in approaching ethical dilemmas in the work context); *see also* Donna D. Bobek & Robin R. Radtke, *An Experiential Investigation of Tax Professionals' Ethical Environments*, 29 J. AM. TAX'N ASS'N, Fall 2007, at 63 (proposing ethics training that uses specific tax-related scenarios); Scott A. Yetmar & Kenneth K. Eastman, *Tax Practitioners' Ethical Sensitivity:*

address the varying ethical issues that arise in different types of tax practice, instead of using a "one size fits all" approach.[143] It should be designed to be pervasive in nature and to improve the ethical climate within the tax practitioner's work setting to one of tax planning that complies with the law and the tax professionals' ethical obligations. Among other things, this ethics training should encompass "discourse ethics," which focuses on the communications between the tax practitioner and the client to arrive at a course of action in an ethically responsible way.[144] Along these lines, Circular 230 could be amended to require periodic, substantial ethics training in order to retain qualification to practice before the Treasury and IRS. The limited two hours of ethics continuing legal education required under current Circular 230[145] is not enough and, in any event, does not seem to require the kind of ethics training that we have in mind.

2. Expanding the Regulation of Supervisory Professionals and Firms

Traditionally, bar authorities and the federal regulatory system focused upon identifying individual tax professionals' misconduct rather than disciplining the firm in which they are employed. The need for federal authority to regulate law and accounting firms that deliver tax advice to clients became evident in the tax shelter scandals.[146] In the second wave of tax shelters, the government used its power to obtain information from accounting and law firms about firm clients, not just the clients of individual professionals that had adopted the tax shelter products. The government imposed fines upon the professional entities and even negotiated a closure of one law firm responsible for marketing abusive

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A Model and Empirical Examination, 26 J. BUS. ETHICS 271 (2000) (opining that ethical sensitivity of tax practitioners is enhanced by increased ethics education).

143. *Cf.* SIMON, *supra* note 70, at 61 (rejecting "one size fits all" ethics training).

144. *See id.* at 13–14 (discussing the need for "discourse ethics" training of tax practitioners); *see also* John Mingers & Geoff Walsham, *Towards Ethical Information Systems: The Contribution of Discourse Ethics*, 34 MIS Q. 833 (2010) (discussing the development of "discourse ethics"); *cf.* Debora L. Liddell, Diane L. Cooper, Margaret A. Healy & Dafina Lazarus Stewart, *Ethical Elders: Campus Role Models for Moral Development*, 15 ABOUT CAMPUS, Mar./Apr. 2010, at 11 (discussing "discourse ethics" in the educational context).

145. CIRCULAR 230, *supra* note 15, § 10.6(e)(2)(iii)(B).

146. Professor Schneyer has argued that state bars should implement regulatory discipline for law firms in the context of the general regulation of lawyers. *See* Ted Schneyer, *Professional Discipline for Law Firms?*, 77 CORNELL L. REV. 1 (1991). In the United States, only New York and New Jersey have adopted this approach in their disciplinary systems. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 1029 (2015–2016 ed.). Professor Schneyer's arguments for firm discipline are given more force when examined in the federal practice context before an administrative agency. Taxpayers use law firms and accounting firms for structuring transactions and for receiving advice on filing tax returns. Such advice is delivered to clients in a team approach. Moreover, clients often rely upon the firm's reputational capital in choosing which tax-minimization strategies to employ. The federal tax area should prove to be a good testing ground for Professor Schneyer's arguments in favor of firm discipline.

shelters in lieu of further prosecution.[147] Such efforts were directed by investigators and prosecutors in examining and prosecuting the professionals and firms that were involved in the tax shelter marketing efforts.

Professors Tanina Rostain and Milton C. Regan, Jr. have aptly noted that inadequate regulatory attention has been given "to the organizational influences that shape the conduct of tax professionals working in firms" and that "the rise of the shelter industry illustrates [that] wrongdoing by professional firms is a product of interactions among its environment, structure, and the cognitive and decision-making dynamics generated by the specialization and diffusion of responsibility."[148] The focus on individual conduct does not give the government sufficient regulatory power over the way in which tax advice is delivered in the modern law and accounting professions. As a result, it fails to provide the incentives necessary to ensure proper compliance with the rules.

In 2004, the Treasury amended Circular 230 to include the possibility of imposing a monetary penalty on an employer, firm, or entity if an individual who is subject to sanction under Circular 230 for improper conduct was acting on behalf of such employer, firm, or entity and the employer, firm, or entity knew or should have known of such conduct.[149] The amount of such penalty cannot "exceed the gross income derived (or to be derived) from the conduct giving rise to the penalty."[150]

The imposition of monetary penalties on law or accounting firms by the Treasury and the IRS can provide a strong incentive for such firms to establish compliance systems for their tax professionals. Such firm-level penalties also have the advantage of providing the Treasury and the IRS with much needed revenue for their compliance functions and of forcing the professional firms engaged in overly aggressive tax schemes to internalize, at least in part, the external costs that they are imposing on society with their failure to ensure compliance by their tax professionals with Circular 230 and other ethical and legal obligations.

If firm-level sanctions imposed on law and accounting firms are announced to the public, as they should be, the sanctions also have the benefit of utilizing shaming as a means to deter future wrongful conduct by these and other firms. Such shaming sanctions used in connection with professional tax services firms may be effective because shaming damages their reputational capital, an important asset for such firms. Regardless of whether shaming sanctions imposed on corporate taxpayers work to deter their participation in abusive tax shelters,[151] shaming sanctions applied to

147. *See, e.g.*, ROSTAIN & REGAN, *supra* note 3, at 310–11 (discussing a large fine imposed on a major public accounting firm); *id.* at 320–24 (discussing the closure of what was once a relatively large law firm).

148. *Id.* at 345.

149. *See* CIRCULAR 230, *supra* note 15, § 10.50(c)(1)(ii).

150. *Id.* § 10.50(c)(2).

151. *See* Joshua D. Blank, *What's Wrong with Shaming Corporate Tax Abuse*, 62 TAX L. REV. 539 (2009) (arguing that shaming sanctions on corporate taxpayers likely would not work in deterring them from investing in abusive tax shelters and could have the effect of

law and accounting firms with respect to their tax work probably will have some effect in encouraging the firms to take reasonable measures to secure future compliance with the ethical rules. Law firms and accounting firms who disregard these shaming sanctions and repeatedly violate the Circular 230 and state bar and accounting ethical rules risk serious loss of business from taxpayers who want to avoid high-risk, overly aggressive tax planning strategies.[152]

In 2014, the Treasury also amended Circular 230 to add possible disciplinary liability for individuals who have principal authority and responsibility for overseeing a firm's federal tax practice delivered to clients.[153] Roughly paralleling the requirements of Model Rule 5.1, the IRS decided to extend its regulatory authority to supervisory professionals. When a tax professional individually or through shared responsibility undertakes a supervisory role in a department that performs federal tax work regulated by Circular 230, that professional must take reasonable steps to see that the firm has adequate procedures in place to ensure that others in the firm follow the Circular 230 rules. This provision imposes disciplinary liability on the principal supervisory professionals in a firm for failing to ensure compliance by others in the firm through "willfulness, recklessness, or gross incompetence."[154] This provision significantly expands the reach of federal regulation of professionals within a firm. To date, it appears that the OPR has not done much to utilize these provisions, and we would urge the IRS to make greater use of them in the future.

The expansion of regulatory authority over law and accounting firms and supervisory lawyers gives the IRS the authority to require large- and medium-sized law and accounting firms to establish internal legal and tax

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weakening tax compliance by other taxpayers). *But see* Linda M. Beale, *Putting SEC Heat on Audit Firms and Corporate Tax Shelters: Responding to Tax Risk with Sunshine, Shame and Strict Liability*, 29 J. CORP. L. 219, 222 (2004) (arguing that shaming sanctions would work in deterring corporate taxpayer participation in abusive tax shelters); Kornhauser, *supra* note 7, at 112; Lavoie, *supra* note 20, at 863; Jay A. Soled & Dennis J. Ventry Jr., *A Little Shame Might Just Deter Tax Cheaters*, USA TODAY, Apr. 10, 2008, at 11A. *See generally* David A. Skeel, Jr., *Shaming in Corporate Law*, 149 U. PA. L. REV. 1811 (2001) (providing a comprehensive analysis of corporate shaming sanctions).

152. As noted earlier, some research suggests that taxpayers generally do not prefer aggressive tax advice and that tax practitioners who market such aggressive tax advice may be doing so independent of their clients' desires. *See* Hite & McGill, *supra* note 47, at 399. Thus, public shaming of tax practice firms who market abusive tax planning strategies may cause such firms to lose some clients. This fact, in turn, could deter other tax practice firms from pursuing such abusive tax planning strategies because they would fear the reputational harm and consequent loss of client business that public shaming could bring about. Of course, such shaming also could undermine tax compliance by bringing the aggressive tax planning strategies to the attention of a larger pool of potential clients and by serving as a positive signal to high-risk clients who will be attracted to the overly aggressive tax planning of the shamed firms. For example, this might be true of many of the corporate clients involved in the corporate tax shelter abuses of the past fifteen years. Such shaming may also harm tax compliance by undermining the morale of compliant taxpayers who will feel that they are fools for not engaging in such tax planning behavior and who thereafter seek to reduce their own tax liability. *Cf.* Blank, *supra* note 151, at 542, 586–87.

153. *See* CIRCULAR 230, *supra* note 15, § 10.36.

154. *Id.* § 10.36(b)(1).

quality and risk management systems that monitor reportable transactions and tax personnel compliance with the tax shelter registration and other requirements of the Code.[155] These procedures can include careful internal review of the issuance of any legal opinions supporting aggressive tax-minimization strategies.[156] In addition, these firms can be required to establish internal procedures that help ensure legal and ethical behavior in their tax practices, including establishing an ethics oversight committee, providing appropriate channels for ethical concerns about firm practices to be raised and handled, and providing for periodic third-party review of its legal and ethical behavior.[157] This form of outsourcing through the use of third-party, private sector monitors to address serious noncompliance problems can help alleviate the substantial resource constraints on both the IRS generally and the OPR in particular.[158] One example of such a regulatory framework is set forth in the 2012 nonprosecution agreement entered into between Ernst & Young and the U.S. Justice Department.[159] Such procedures can be accomplished through "cooperative" regulation by agreements between the large law and accounting firms and the Treasury and the IRS.[160] This regulatory approach, by involving the professional firms in the design of the procedures, has the advantage of incorporating concerns about the firms' duties to their clients as well as their duties to the tax system in such design. It thus offsets, to a significant extent, the substantive biases of the Treasury and the IRS as regulatory agencies.[161]

One alternative would be for the Treasury and the IRS to amend Circular 230 to impose disciplinary liability on law and accounting firms for serious violations of the Circular 230 rules by members and professional employees of the firm in situations where the firm failed to establish firm-level measures for ensuring compliance with the rules.[162] The sanctions for such

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155. *See, e.g.*, Letter from Preet Bharara, U.S. Att'y, S.D.N.Y., U.S. Dep't of Justice, to Lawrence B. Pedowitz, Att'y, Wachtell, Lipton, Rosen & Katz, and David B. Anders, Att'y, Wachtell, Lipton, Rosen & Katz (Feb. 26, 2013) [hereinafter Ernst & Young Nonprosecution Agreement], http://www.justice.gov/usao/nys/pressreleases/March13/EYNPAPR/EY%20NPA.pdf (containing procedures for ensuring legal and ethical compliance in the firm's tax practice) [https://perma.cc/6B9U-RWLR]; *see also* ROSTAIN & REGAN, *supra* note 3, at 346–47.

156. *See* Soled, *supra* note 3, at 269 n.6 (discussing strict governance procedures and internal controls instituted by large law and accounting firms partly out of concern about the risk of potential tax shelter malpractice claims by clients).

157. *See, e.g.*, Ernst & Young Nonprosecution Agreement, *supra* note 155.

158. *See* Lawrence B. Gibbs, *2008 Erwin L. Griswold Lecture Before the American College of Tax Counsel: Constancy and Change in our Federal Tax System*, 61 TAX LAW. 673, 685 (2008).

159. *See, e.g.*, Ernst & Young Nonprosecution Agreement, *supra* note 155.

160. *See, e.g.*, Ted Schneyer, *From Self-Regulation to Bar Corporatism: What the S&L Crisis Means for the Regulation of Lawyers*, 35 S. TEX. L. REV. 639, 670–74 (1994) (labeling such cooperative arrangements between firms and regulatory agencies as "bar corporatism," and discussing such arrangements in the context of federal banking regulators and the savings and loan crisis); Ernst & Young Nonprosecution Agreement, *supra* note 155 (containing procedures for ensuring legal and ethical compliance in the firm's tax practice); *see also* ROSTAIN & REGAN, *supra* note 3, at 346–47.

161. *See* ROSTAIN & REGAN, *supra* note 3, at 344–47.

162. *See id.* at 345.

firm liability could include firm censure, suspension, or, in extreme cases, disbarment from practice before the IRS. These sanctions would be in addition to the monetary penalties that can be imposed on the firm under the current provisions of Circular 230.[163] If, however, the firm had in place measures for ensuring compliance, that would be a defense to the liability claim.[164]

3. Collaboration with State Bar and Accounting Disciplinary Systems

Lawyers and accountants who practice law received their professional designation through their respective licensure authorities. As members of a profession, lawyers and accountants must continue to follow the rules of their profession. However, when professionals appear before other agencies, tribunals, or settings, the rules of practice may vary from their traditional standards in their state of licensure. Thus, professionals who appear before a legislature must follow the legislature's rules, and lawyers who appear before tribunals must follow the tribunals' rules. Similarly, accountants and lawyers who represent clients before the IRS must follow the professional standards that the IRS promulgates for those who practice before it.

In this area of mixed source regulation, greater and more effective coordination among the regulators has many potential benefits. When the OPR discovers that a professional has violated the Circular 230 standards and such violation raises questions about the professional's fitness to practice law or accounting, the OPR should report the professional to the respective state bar or accountancy board. This may require Congress to amend the taxpayer confidentiality statutory provisions to create an exception for such reporting.

Coordinated regulation by the OPR and the relevant state regulatory authorities has the potential for a more efficient and complete regulatory structure for tax professionals. Issues relating to tax advice and positions on the professional's own returns are better regulated by the OPR, while issues relating to conflicts of interest or breaches of confidentiality are probably better regulated by the state bar and accounting professional regulatory arms. State bar and accounting regulators have greater experience and expertise in applying the ethical rules relating to conflicts of interest, client solicitation, and confidentiality, for example, and dealing

163. *See* CIRCULAR 230, *supra* note 15, §§ 10.50(c)(1)(ii), (c)(2) (imposing a penalty of not more than "the gross income derived (or to be derived) from the conduct giving rise to the penalty" on an employer, firm, or entity "if it knew, or reasonably should have known of such conduct"). In any event, the effectiveness of this monetary penalty with respect to a firm or an individual practitioner in deterring ethical violations depends both on how willing the IRS is to assert the penalty and how broadly it interprets the phrase "gross income derived (or to be derived) from the conduct giving rise to the penalty." *Id.* In the case of large-scale tax abuses involving marketed tax-minimization products, we would urge the IRS to make expansive use of this monetary penalty for both the individual tax practitioners and, where appropriate, their firm employers.

164. *See* ROSTAIN & REGAN, *supra* note 3, at 345.

with violations of such rules. The IRS lacks both the resources and expertise to regulate attorney and accountant behavior effectively in those areas. It is a better use of the IRS's scarce resources to regulate the areas of tax professionals' conduct that more directly relate to the agency's core functions of administering the tax system and collecting revenue.

CONCLUSION

Taxes are the price that residents pay for government services in a civilized society. The American self-assessment income tax system is the cornerstone of how we collect taxes currently in the United States. Taxes connect residents to their government, and the tax reporting and payment process is an important annual financial event in the lives of most residents. As a result, tax professionals are integral intermediaries in our revenue collection system who play an important role in advising taxpayers about the proper amount to remit to the government and thereby help the system to function properly. Ensuring that tax practitioners operate in a professionally responsible way is an integral part of tax administration by the IRS. Accordingly, if taxes are what we pay for a civilized society, then effective regulation of tax practitioners by the Treasury and the IRS is what we pay in order to have a properly functioning system to collect those taxes.